UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION	MDL Case No. 17-md-02801-JD Case No. 14-cv-03264-JD **SPECIAL MASTER'S REPORT AND RECOMMENDATION**

Introduction

This matter arises from a motion by Class Counsel for the Direct Purchaser Plaintiffs ("DPPs") seeking Court approval of DPPs' proposed settlement allocation. Two members of the DPP class, Cisco Systems, Inc. ("Cisco") and Aptiv Services US, LLC fka Delphi Automotive LLP ("Aptiv") (collectively "Objecting Members") oppose that motion, and filed a separate motion for an order approving their proposed settlement claims. The issues raised by the Objecting Members were presented to the Court on March 21, 2019, and the Court then referred this matter to the Special Master pursuant to Fed. R. Civ. P. 53(a)(1)(C) on April 10, 2019. The parties have since narrowed their arguments, and this Report recommends the following resolution of those issues still in dispute.

Facts and Procedural History

The parties to this dispute are participants in a multidistrict litigation ("MDL") matter which alleges that various capacitor manufacturers artificially raised, fixed, or stabilized the prices of capacitors in violation of U.S. federal antitrust law. Capacitors are a common electronic component that are used to even out the flow of electrical energy, and so are contained in most electrical products.

Two sets of capacitor manufacturers, Hitachi Chemical Co., Ltd., Hitachi AIC, Inc., and Hitachi Chemical Co. America, Ltd. ("Hitachi Chemical defendants" or "Hitachi"); and Soshin Electic Co., Ltd. and Soshin Electronics of America, Inc. ("Soshin defendants" or "Soshin") (collectively, "Settling Defendants") are defendants in this action. Both are Japan-based entities that sold capacitors to DPPs, among others, in the United States. Hitachi and Soshin agreed to settle the civil claims filed by all DPPs in this action against them for $66.9 million ("the Second

Round Settlement").[1] By order dated June 23, 2018, the Court granted approval of that settlement between DPPs and Settling Defendants.[2]

DPPs consist of plaintiffs that purchased capacitors directly from any of the defendants between January 1, 2002, and December 31, 2013, and also met one of two conditions. Either, these plaintiffs were situated inside the U.S. and were billed or invoiced by Settling Defendants for the capacitors, or they were located outside of the U.S., but purchased the capacitors for shipment directly to the U.S. MDL Dkt. No. 249. The Court's order provides that the Settlement Class extends to all such persons "in the United States that purchased Capacitors (including through controlled subsidiaries, agents, affiliates, or joint-ventures) directly from any of the Defendants, their subsidiaries, agents, affiliates or joint ventures from January 1, 2002 through July 22, 2015."[3] MDL Dkt. No. 249, Para. 4; Dkt. No. 1989-2, Para. bb; Dkt. No. 1989-3, Para. Z.

The parties' settlement agreement includes a release, the effect of which is at issue in this proceeding. That release applies to the following claims:

> [A]ny and all manner of claims . . . that [Settlement Class Members], or any one of them, whether directly, representatively, derivatively, or in any other capacity ever had, now have, or hereafter can, shall or may have against [Defendants] alleged in the Action . . . whether such claims are known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen . . . regardless of legal theory . . . , or claims that have been, could have been, or in the future might have in law or equity . . . arising out of, resulting from, or in any way related to any conduct regardless of where it occurred at any time prior to the Effective Date, concerning the purchase, pricing, selling, discounting, marketing, manufacturing, and/or distributing Capacitors in the United States and its territories or for delivery in the United States and its territories. The Released Claims also include, but are not limited to, all claims asserted or which could have been asserted in the Action relating to or arising out of the facts . . . alleged in the Action, including but not limited to, claims arising under federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including without limitation the Sherman Act, 15 U.S.C. Sec. 1, *et seq.*, but excluding . . . (c) claims based on purchases of Capacitors excluded by the Foreign Trade Antitrust Improvement Act, 15 U.S.C. Sec. 6a.

Dkt. No. 1989-2, Para 12; Dkt. No. 1989-3, Para. 14.

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[1] Hitachi had already entered into a plea agreement previously with the U.S. Department of Justice admitting to price-fixing in the sale of their capacitors. *United States v. Hitachi Chemical Co., Ltd.,* No. 16-cr-00180-JD, Dkt. No. 22.

[2] The Court's order approving the settlement relates only to DPPs, as distinct from other classes of plaintiffs in this action. MDL Dkt. No. 249.

[3] The Court's order notes that this definition is for settlement purposes only, and has no binding effect on the Court, the DPPs, or on the Indirect Purchaser Plaintiffs in any other context. The Special Master has therefore applied that definition accordingly.

As required by the Court's order granting approval of the Settlements, Class Counsel completed a notice plan and a process for allocating settlement proceeds among the DPPs. Members of the Settlement Class submitted their claims seeking their requested portion of the Settlement Funds. Class Counsel's designated Claims Administrator thereafter evaluated and processed the submitted claims forms. This process included reviewing all submissions and advising the claimants of any denials or adjustment to the submitted claims. Class Counsel thereafter prepared a proposed allocation and submitted its motion on November 8, 2018, requesting Court approval of that allocation. Under the proposed allocation, after deducting attorneys' fees and costs, there would be $43,485,000 plus accrued interest available for distribution on a pro rata basis. MDL Dkt. No. 381 at 6.

A. Objecting Members' Claims Relating to Incorporated Capacitors

Cisco and Aptiv ("Objecting Members"), are both members of the DPP Class, and filed objections to Class Counsel's motion.

Cisco principally designs, builds, and sells networking equipment which includes many components that contain capacitors. Cisco contends that Class Counsel improperly released and excluded a substantial portion of its claims totaling $191,759,460.10.[4] Specifically, Cisco claims that of the total claims submitted, Class Counsel disallowed $154,050,329.40 in losses.

Aptiv manufactures automotive parts including vehicle electronics and systems that likewise rely on internal capacitors. Aptiv contends that Class Counsel improperly released and excluded portions of its claims totaling $198,910,686.94.[5] Aptiv contends that Class Counsel disallowed $48,567,508.65 in incorporated capacitor losses.

Both Objecting Members base their objections/motions principally on Class Counsel's determination to disallow distribution of settlement funds for alleged losses due to the purchase of so-called "incorporated capacitors." An "incorporated capacitor," simply put, is a foreign-made capacitor that has been incorporated inside a finished product before it is shipped to its original purchaser in the United States.

Aptiv and Cisco have somewhat different claims regarding their application for compensation for incorporated-capacitor purchases.

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[4] Cisco's initial claim in its Opposition was $199,426,277.79. This figure was revised in its Motion. That motion states that the total is $191,759,460.10. MDL Dkt. No. 473 at 11 n. 10. In its Reply Brief, Cisco further reduced the final figure in dispute from $154,050,329.40 to $142,070,717.01 based on its decision to exclude Quanta purchases from its second-round settlement claim. MDL Dkt. No. 496 at 8 n. 3.

[5] Aptiv initially claimed "at least $180,576,936.74" in its Opposition to Class Counsel's motion. MDL Dkt. No. 391, at 7-9. It revised this figure during the course of briefing this matter, and in its final motion for approval of its settlement claims, it claims $146,111,638.53 for foreign purchases, and $2,367,303.69 for additional U.S. Purchases (relating to the NCC/UCC dispute discussed *infra*). MDL Dkt. No. 473 at 13. Combined with its approved claims, Aptiv claims $198,910,686.94 in total qualifying purchases.

Aptiv asserts that all of its claims for incorporated capacitors relate to capacitors that it purchased outside the U.S. from the Settling Defendants which were then shipped to an Aptiv entity outside the U.S. for incorporation into an Aptiv product, before then being shipped to the U.S. for sale.[6]

Cisco claims that some of its incorporated capacitors were acquired in the U.S. in the same way (*i.e.*, through sales to a Cisco entity that incorporated them overseas before final shipment to the U.S.). But Cisco also claims that it purchased some of Defendants' capacitors through contracts with third parties who incorporated them into their products for shipment to Cisco in the U.S. for sale in the U.S. Tr. at 54:13-55:12. Cisco contends that regarding this latter set of purchases, all of them are "direct purchases" because Cisco stands in the shoes of the third parties who incorporated the capacitors for sale in the U.S. Specifically, Cisco relies on its assignments from these third parties, and asserts that these parties granted Cisco assignments because they had acquired the capacitors at Cisco's direction for ultimate shipment to Cisco in the United States. Accordingly, Cisco claims its position with respect to this latter category is indistinguishable from a Cisco entity acting as an intermediary, because Cisco both directed the purchase of capacitors and stands in the shoes of these third-party entities. *Id.*

B. Related Proceedings Involving Flextronics

The genesis of the parties' dispute over the status of incorporated capacitors stems – at least in part – from similar claims in a prior round of settlements, and from a related set of Orders issued to resolve motions by another party to the MDL proceedings, Flextronics. Because the parties disagree about the holding and relevance of the Flextronics proceedings, those proceedings are addressed here.

Prior to the current settlements with Soshin and Hitachi, DPPs – including Aptiv and Cisco – entered into a settlement agreement with different defendants ("First Round Settlement"). While the allocation process was moving forward in the First Round Settlement process, Aptiv and Cisco presented claims to recover settlement funds relating to incorporated-capacitor purchases from those First Round Defendants. Aptiv and Cisco initially requested that – to the extent they could not reach agreement with Class Counsel on those claims – funds be held back for resolution of those claims later.

While those First Round Settlement discussions were ongoing, the Court issued an initial order ("FTAIA I Order") regarding claims by an opt-out plaintiff, Flextronics, regarding Flextronics' own claims for incorporated capacitor purchases, which appear to have influenced the parties' resolution of the First Round Settlement.

The principal issues in Flextronics' motion were: (1) whether certain sales of incorporated capacitors qualified as "import trade or commerce" and are therefore actionable under the

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[6] Transcript of May 31, 2019 Hearing before the Special Master ("Transcript" or "Tr."), at 53:17-20: "[A]ll 190 million at issue from Aptiv are coming directly to Aptiv. There is no third-party manufacturer at issue at all for all of Aptiv's purchases. Full Stop."

Sherman Act; and (2) whether, even if such sales were deemed to involve non-import trade or commerce, they nonetheless produce actual and reasonably foreseeable domestic effects on U.S. commerce to qualify for an exception to the bar on non-import commerce in the Foreign Trade Antitrust Improvements Act ("FTAIA").

In its FTAIA I Order, the Court rejected Flextronics' theory for claiming that its incorporated capacitor purchases were actionable. However, it found that such claims were not necessarily barred as a matter of law, and the Court reserved the issue of whether Flextronics' incorporated capacitors claims were potentially actionable under the Sherman Act and/or FTAIA. Specifically, the Court ruled that plaintiff's initial theory of liability (which was based on a global pricing model), was insufficient to state a cause of action. The Court, however, invited Flextronics to present facts in the second round of proceedings on that motion that would establish liability. In doing so, the Court thus left the door open for Flextronics to pursue its claims under a different theory.

Following the FTAIA I Order, Cisco and Aptiv withdrew their request for First Round Settlement funds to be held back. Instead, they entered into a First Round Settlement and release that did not include compensation for their incorporated capacitor claims. In doing so, however, Objecting Members expressly reserved the right to pursue such claims against other Defendants.

After the First Round Settlement was completed, the Court issued its second order on Flextronics' incorporated capacitor claims ("FTAIA II Order"), which were presented on motion for summary judgment. In that proceeding, Flextronics offered a new theory by which it claimed that its purchases of capacitors for units built outside the U.S. for sale in the U.S. were actionable under the Sherman Antitrust Act and were not precluded by the FTAIA. On September 20, 2018, the Court issued its FTAIA II Order, finding that Flextronics had, in fact, made a colorable claim that its incorporated capacitor purchases were actionable, and survived summary judgment.

Although the FTAIA II Order was expressly limited to the facts presented by Flextronics in that case, Aptiv and Cisco claimed that those facts were sufficiently analogous to their own incorporated capacitor claims that they too should be entitled to compensation through the Second Round Settlement. After extensive discussion and debate, Class Counsel and Objecting Members were unable to reach an agreement on this dispute, and it was thereafter presented to the Court for resolution.

C. Issues Resolved and Those Still in Dispute

Although the Objecting Members take issue with various aspects of Class Counsel's allocation motion, their principal contention is that Class Counsel's proposed allocation improperly excludes a large set of valid claims for incorporated capacitors that they timely presented, documented, and released as part of the settlement. The specifics of this dispute have evolved somewhat over the past year, and narrowed in the most recent filings and oral arguments.

1. Resolved Disputes

Accuracy of Claims and Fairness of Claims Review Process: In their respective pleadings, Class Counsel disputed the accuracy of Objecting Members' showing regarding actual incorporated capacitor purchases, while Objecting Members complained that Class Counsel's requirements of proof were unduly onerous. Class Counsel's Motion to approve the Second Round Settlement Allocation noted that some parties had unresolved disputes relating to claims that had been disallowed as inadequately substantiated. Originally, Class Counsel proposed that the Special Master be appointed to address these claims on a case-by-case basis and that Objecting Members with unresolved issues be given an opportunity to present proof of qualifying purchases to the Special Master. MDL Dkt. No. 381 at 3:5-7.[7] Class Counsel also contended that claims of assignments were inadequate, but that those assignments should be disregarded for purposes of allocation, regardless of their adequacy.[8]

In their written objections to the Class Counsel's motion, Objecting Members claimed they had submitted raw purchase data at that time adequately supporting over $531.39 million (MDL Dkt. No. 391 at 1), which included $199.43 million in incorporated capacitor claims by Cisco and $180.58 million in such claims by Aptiv.[9] Objecting Members also argued that Class Counsel's standard of proof of claims was unduly onerous and "betrays the purpose of a fair claims process." MDL Dkt. No. 391 at 11. Class Counsel objected that Cisco failed to support its claims that it received assignments. MDL Dkt. No. 396 at 5-9. Class Counsel further claimed that Cisco and Aptiv failed to provide sufficient back-up documentation. *Id*. at 9-10.

Mercifully, the parties have agreed to certain stipulations that will spare the Special Master from reviewing – and determining the adequacy of – each and every submission for an incorporated capacitor claim, or the fairness of the process by which the Claims Administrator considered and rejected certain methods of proof. Specifically, the parties agreed in January "that the data included in the spreadsheets that [Objecting Members] submitted are accurate" for their Second Round claims. On that basis, Objecting Members assert that the Special Master need not adjudicate the accuracy of their claims, and they also no longer press the claim that Class Counsel's administrative process was unduly exacting, or uniquely disadvantaged them as DPPs. Tr. at 107.

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[7] Class Counsel also requested that the Court proceed with allocation relating to all other non-objecting parties and reserve a "Hold Back Fund" for unresolved claims by potential objecting parties. MDL Dkt. No. 381 at 3:14-16.

[8] Specifically, Class Counsel argued that if an "indirect purchaser" held assignments from a direct purchaser, those should not be held back for payment, but should be resolved separately by the assignor and assignee. MDL Dkt. No. 381 at 7:26-28. Class Counsel proposed that the funds be distributed based on each claimant's pro rata share of capacitors directly purchased from Defendants during the relevant time period. *Id*. at 4:10-14.

[9] Class Counsel correctly observed that these figures changed substantially between the time of Objecting Members' filing of objections to Class Counsel's Allocation Motion, and Objecting Members' own motion to approve their Second Round claims. Class Counsel in both its pleadings and at oral argument refer to this disparity as further proof of the lack of certainty and reliability in Objecting Members' submissions.

At oral argument, Class Counsel raised the issue whether the Objecting Members voided the stipulation by reducing their actual claims significantly in their post-stipulation briefing. Tr. at 45. Although the Special Master appreciates that the scope of the claims has varied significantly over time, the argument lacks merit. Certainly, if Objecting Members had sought to add *new* claims, those additional claims would not be subject to a prior stipulation. But they would not void that prior stipulation either. In this case, Objecting Members have not even included new claims. Instead, they have chosen to pursue only a subset of the total claims at issue as a matter of law, thereby reducing their total claims. Their shift in position therefore does not go to the accuracy of the data to which the parties stipulated, but only to Objecting Members' litigation judgment about which claims they can successfully establish as a matter of law.

The stipulation is not, however, comprehensive. Based on the (notably contentious) correspondence between counsel, there appears never to have been an agreement about what, if any, portion of Aptiv's claims relating to Nippon Chemi-Con ("NCC") were duplicative of United Chemi-Con ("UCC") data. Class Counsel claims that Aptiv is effectively demanding $2,307,540 in duplicative claims. MDL Dkt. No. 489 at 15. Aptiv contends that there was no double-counting. Accordingly, this one issue is not determined to be subject to the stipulation and, depending on the outcome of other issues, would require separate review to determine the accuracy of these claims.

Adequacy of Class Counsel: In their Opposition to Class Counsel's motion and in their subsequent motions, Objecting Members appeared to contend that Class Counsel had failed to adequately represent their interests as members of the DPP class. In their Opposition to Class Counsel's motion, Objecting Members claimed that Class Counsel had failed to "meet their fiduciary duty of candor owed to Aptiv as a member of the class" (MDL Dkt. No. 391 at 2 n. 1), suggested Class Counsel had "inherent conflicts . . . in resolving intra-class disputes about claims that may be in and out of a class" (*id.* at 4 n.2), and contended that in light of the FTAIA II Order, "as a fiduciary to Objecting Members, Class Counsel have an obligation to ensure and fight for the inclusion of these [FTAIA] claims." *Id.* at 6. In their own motion, Objecting Members asserted that "[t]he instant dispute demonstrates an intra-class conflict . . . because Class Counsel inadequately represents Objecting Members and similarly situated class members." MDL Dkt. No. 473 at 6 n.7. At oral argument, Objecting Members did not assert that Class Counsel had behaved in a manner that had uniquely prejudiced them (Tr. 27-28), or that there was an irreconcilable conflict in Class Counsel's continued representation, nor did they request any particular relief with respect to Class Counsel's continued representation going forward. Tr. at 104-07. Again, the Special Master is grateful to the parties for limiting their claims such that these issues are not presented to the Court.

Prior Admissions, Representations, and Reliance:

In their respective pleadings and at oral argument, the parties cast various aspersions on one another for past statements. Class Counsel initially claimed Objecting Members had previously acknowledged that incorporated capacitors did not qualify for compensation in the DPP proceedings during the First-Round Settlements. MDL Dkt. No. 396 at 10-12. Class Counsel has since acknowledged that positions taken in the First Round Settlements do not bind the

parties in this round. Tr. at 102 (Mr. Williams: "[T]he first round sort of stood on its own, and it's over, and we're now in the second round, and they have the right to bring the arguments they're bringing, and that's why we're here, to try to resolve them."). Objecting Members claimed that Class Counsel had misleadingly caused them to believe it would pursue incorporated capacitor claims and had acknowledged their legitimacy. MDL Dkt. No. 391 at 1 ("Class Counsel improperly deny portions of Objecting Members' claims for capacitors incorporated into finished products sold in the US . . . in spite of . . . Class Counsel's own assertions that such claims are recoverable."). Objecting Members now acknowledge this is not one of their contentions. Tr. at 75 ("Mr. Sasse: We're not resting on any representation made by class counsel directly to Cisco and Aptiv. And that may be a full stop answer to your question.").

2. Issues As Yet Unresolved

The issues now in dispute have reduced to four discrete issues.

First, whether the claims for incorporated capacitors were actually released as part of the settlement such that they need to be compensated if viable.

Second, whether based on the Court's FTAIA decisions and other precedents, Objecting Members have stated a sufficiently viable claim for relief for incorporated capacitor claims under the Sherman Act or the FTAIA to warrant compensating these claims in the allocation process.

Third, whether this class-wide allocation process is an inappropriate mechanism for resolving claims for the incorporated capacitor purchases at issue because it does not allow for a proper individualized showing, and whether Cisco and Aptiv's claims should be denied for their failure either to object to the settlement or to opt out and pursue a remedy as Flextronics has.

And fourth, whether – even if such claims theoretically warrant compensation and are appropriate for this proceeding – Objecting Members have failed to provide the Court or Class Counsel with proof of particular elements to support such a claim. This includes, for example, failure to establish that the Settling Defendants in this action knew or should have known that the capacitor sales at issue were intended for a U.S. market at the time of sale.

Special Masters' Findings of Fact and Conclusions of Law

A. Release Language

The parties agree that a foundational question concerns whether incorporated capacitor claims are even included in the Settlement's release provisions with Hitachi and Soshin. Class Counsel asserts that regardless of whether the Objecting Members' incorporated capacitor claims would be legally viable, those claims were not included in the settlement or release, and thus Objecting Members are not prejudiced by the proposed allocation in this proceeding. The scope of the

release is ultimately a question of contract interpretation and requires addressing each aspect of the disagreement over the meaning of the release language.[10]

Class Counsel argues that the plain language of the release[11] demonstrates that incorporated capacitors are not covered because that language refers only to: (1) "capacitors" (rather than "incorporated capacitors"); (2) "directly shipped to or billed to the United States" (rather than non-U.S. purchases); and (3) sold in a manner not excluded from liability by the FTAIA. Class Counsel contends that none of these three requirements applies to Objecting Members' incorporated capacitor claims. Class Counsel also contends that the Objecting Members' contemporaneous conduct further demonstrates that Objecting Members did not believe the release covered incorporated capacitor claims.

1. "Capacitors" versus "Incorporated Capacitors"

The first point of disagreement is whether the term "capacitors" in the settlement agreement refers only to raw capacitors billed or shipped to the U.S. or whether it may encompass capacitors that were purchased for delivery to the U.S. once they were incorporated into another product.

Class Counsel contends that the plain language of the release makes clear that it refers only to raw capacitors. The release, it points out, refers to "capacitors" but contains no reference to "incorporated capacitors." Tr. at 32:11-33:8. Class Counsel argues this is because the parties only contemplated releasing claims associated with the sale of raw or unincorporated capacitors. Accordingly, Class Counsel argues that as a matter of contract interpretation, the Court should not insert the word "incorporated" where it does not belong.

Objecting Members respond that the language of the release and their course of dealings shows just the opposite. They note that the release is extremely broad and does not expressly or implicitly exclude their claims related to incorporated capacitors. Objecting Members argue that incorporated capacitors are still "capacitors"; they were purchased in their original state for ultimate shipment to the U.S. Accordingly, they maintain, the settlement agreement does not need to refer to incorporated versus non-incorporated capacitors, because that distinction does not bear on whether a claim exists, or to whom the capacitor is shipped or billed at the time of its original purchase.

On this issue, the Objecting Members' position is more persuasive. If the release, for example, referred only to "unincorporated" or "raw" capacitors, that would be dispositive for Class Counsel. But the release refers only to the purchase of "capacitors," and does not draw a

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[10] The Special Master notes that the district court in a separate MDL action recently recognized the obligation of counsel to ensure that class members not release their claims without compensation in the context of a settlement. *See In re Cathode Ray Tube (CRT) Antitrust Litigation,* MDL No. 1917, Case No. 3:07-cv-05944-JST ("CRT"), Dkt. No. 5362 (Order Denying IPPs' Mot. Pursuant to Fed. R. Civ. Proc. 62.1) at 1 (N.D. Cal. Nov. 8, 2018).

[11] Although there are separate releases in this matter, the operative language for these parties is identical.

distinction beyond that. Because the term is not modified in some way, in the context of a broad release, the natural reading is that it applies to any and all sales of these defendants' aluminum, tantalum, or film capacitors. Indeed, it seems unlikely, that having submitted such claims in the First Round, and having expressly reserved their right to make claims for incorporated capacitors in this subsequent round, Objecting Members would deliberately omit those claims from the release and undermine their basis for receiving compensation for them in the Second Round settlement. At the very least, one would expect the parties to use more specific language if their intention was indeed to exclude these claims from the release.

2. <u>"Shipped To" or "Billed To" the United States</u>

Class Counsel argues next that the release is expressly limited to capacitors "shipped to" or "billed to" the U.S., and therefore capacitors acquired by foreign agents of Cisco and Aptiv on behalf of Cisco and Aptiv outside the U.S. for incorporation into finished U.S. products do not qualify. Tr. at 73:24-74:5. Class Counsel notes that the release specifically refers to acts "concerning the purchase, pricing, selling, discounting marketing manufacturing and/or distributing of Capacitors in the United States and its territories or for delivery in the United States and its territories." MDL Dkt. No. 489 at 4 (quoting Hitachi release at para. 14). Class Counsel maintains that incorporated capacitor sales do not meet this requirement because – by definition – they are not sold directly into the United States, but are sold and shipped to an entity outside the U.S. to be incorporated into a finished good.

Objecting Members argue that Class Counsel simply misreads the releases and thus the scope of compensable claims. In their view, the releases expressly encompass their incorporated capacitor purchases. Specifically, they contend the release extends to acts "concerning the **purchase, pricing,** selling, discounting, **marketing,** manufacturing **and/or distributing of Capacitors in the United States** and its territories **or for delivery in the United States** and its territories." MDL Dkt. No. 473 (quoting Dkt. No. 1989-2, Para. 2; Dkt. No. 1989-3, Para. 14) (emphasis added). Objecting members contend that they priced and marketed all of their purchases of capacitors in their U.S. headquarters, including capacitors that were incorporated into products for import into the United States.

The plain language of the release better supports Objecting Members' interpretation. The settlement and release encompass capacitors negotiated for purchase from the U.S. or for delivery to the U.S. in the manner that Objecting Members allege for incorporated capacitors. As noted, Objecting Members claim they negotiated the price and sale of the Settling Defendants' capacitors from the United States, and that they also arranged for distribution and delivery of these products into the U.S. in finished goods. The natural reading of this provision does not preclude claims for a capacitor that was sold to a U.S. entity to be incorporated into a finished product on its way to the U.S. In addition, this comports with other rulings already issued by the Court in this matter. As the Court has already found in its FTAIA II Order, incorporated capacitor purchases can be a form of transaction that qualifies as import trade or import commerce under the Sherman Act, or that satisfies the domestic effects exception to the FTAIA. Accordingly, Class Counsel's arguments are not persuasive on this point.

3. Exception for Claims Excluded by the FTAIA

Alternatively, Class Counsel relies on Section C of the release, which specifically excludes any claims based on purchases of capacitors that are not allowed under the FTAIA. The language upon which Class Counsel relies is as follows:

> The Released Claims also include, but are not limited to, all claims asserted or which could have been asserted in the Action relating to or arising out of the facts . . . alleged in the Action, including but not limited to, claims arising under federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including without limitation the Sherman Act, 15 U.S.C. Sec. 1, *et seq.*, **but excluding . . . (c) claims based on purchases of Capacitors excluded by the Foreign Trade Antitrust Improvement Act, 15 U.S.C. Sec. 6a.**

Dkt No. 1989-2, Para 12; Dkt. No. 1989-3, Para. 14 (emphasis added).

Class Counsel contends that Objecting Members did not release their claims for incorporated capacitors without compensation, because such claims are excluded by the FTAIA, and thus excluded from the release. Class Counsel suggests that Section C should also be read in light of the provisions limiting the released claims to purchases and deliveries in the United States.

Objecting Members argue that Class Counsel's argument about the FTAIA proves too much. At the time of this settlement, the FTAIA I Order had left open the possibility that incorporated capacitor cases *could* be viable under the FTAIA (albeit not under a global pricing theory). Objecting Members had, in fact, reserved all of their claims for the Second Round and submitted claims for incorporated capacitors. Tr. at 38. This would suggest that there was no agreement that their incorporated capacitor claims were excluded under the FTAIA. Objecting Members moreover contend that their purchases were functionally indistinguishable from the transactions alleged by Flextronics in the FTAIA proceedings. Aptiv asserts that its method of purchasing incorporated capacitors was not different from that of Flextronics – *i.e.*, like Flextronics, its overseas subsidiary capacitors bought on Aptiv's behalf that it incorporated into a finished product for shipment to Aptiv in the U.S. to sell. Likewise, Cisco claims its subsidiaries either operated in that same way through Cisco subsidiaries, or that Cisco acquired assignments from other parties (including Flextronics) that it engaged outside the U.S. who operated as their subsidiaries would. Thus, Objecting Members contend that the parties' conduct and this Court's decisions demonstrate that the claims presented here do not fall under Section C's exception to the release, and are thus released.

Objecting Members have the better argument in this instance, as well. At the time the release language was negotiated, the parties were aware of the dispute about whether incorporated capacitor claims were barred by the FTAIA. Objecting Members had reserved those claims for the Second Round, and the Court in its FTAIA I Order had acknowledged the potential viability of some incorporated capacitor claims depending on the facts. Thus, it would be reasonable to assume that Objecting Members believed that the release encompassed actions that relied upon

FTAIA claims, and that Section C would not exclude from release their incorporated capacitor claims which were viable under the FTAIA.[12]

4. Course of Dealings

Lastly, in support of their interpretation of the release, Class Counsel looks to the course of dealings between the parties, and their understanding at the time the release was signed. Class Counsel emphasizes that the notice and claim form negotiated with the Settling Defendants by DPPs did not refer to incorporated capacitors. Moreover, as of July 2018 when the release was executed, there had been no determination that Objecting Members' claims for incorporated capacitors would be allowed under the FTAIA and no indication that Class Counsel would pursue them. Moreover, Class Counsel claims the Court itself had raised concerns in proceedings with the Indirect Product Purchaser (IPP) class, about the workability of including incorporated capacitor claims in a class context. Tr. at 34. If anything, the FTAIA I Order that had been issued at this time emphasized the individualized nature of these claims, and suggested they had a limited prospect for success in any case. Class Counsel contends that until the FTAIA II Order came out two months later, in September, Objecting Members did nothing to suggest they believed their incorporated capacitor claims were genuinely DPP class claims eligible for compensation in the Second Round Settlement and subject to its release. Thus, Class Counsel argues that Objecting Members had no reasonable expectation that these claims were at issue and could be resolved in this settlement, and thus never objected to, opted out of, or raised concerns about the release's application to incorporated capacitors claims at the time the release was negotiated and executed.

Class Counsel makes a valid point that Objecting Members' attitude regarding their incorporated capacitor claims appears to have changed significantly after the FTAIA II Order was issued. As Class Counsel notes, if Objecting Members had been committed to ensuring that they would be compensated for such claims at the time of the settlement and release, they had several options available to them to express that expectation. They could have opted out of the settlement to pursue these claims; they could have negotiated for language that expressly included incorporated capacitor claims in the settlement and release; or – in Cisco's case – they could have pursued compensation through separate negotiations or proceedings with their third-party contractors. However, while Class Counsel's arguments may go to the appropriateness of the approach Objecting Members have selected to resolve their claims, it does not prove that they understood their claims to be outside the scope of the settlement. There are a number of strategic and tactical reasons why Objecting Members might not take the actions Class Counsel suggests

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[12] The parties devote substantial briefing to the application of the "identical factual predicate" doctrine articulated in *Hesse v. Sprint Corp.,* 598 F.3d 581, 590 (9th Cir. 2010). Objecting Members urge that since their incorporated capacitor claims arise from the same factual predicate – *i.e.*, price-fixing by Settling Defendants in their capacitor sales to Objecting Members – then their claim would be interpreted as released even if they had not presented the claim and even if it were not presentable in a class action. Class Counsel urges a more narrow reading of the doctrine that would exclude claims that lack a "common interest" with the other class members. The Special Master need not resolve this dispute because it finds that the release does in fact encompass incorporated capacitor claims.

that have nothing to do with their assumptions about the scope of the settlement and release. Moreover, the Court's FTAIA I Order – while expressing skepticism about incorporated capacitor claims – did not foreclose DPPs from pursuing such claims. Rather, it found them sufficiently meritorious to allow Flextronics to bring forward facts and new legal theories in support of those claims in the FTAIA II proceeding. It therefore seems unlikely that – again – Objecting Members would abandon that claim without doing so expressly or with some clear strategic reason for doing so. Accordingly, the Special Master is not persuaded by the parties' course of conduct that the release reflects the parties' intention to exclude incorporated capacitor claims from the scope of the release.

Accordingly, the Special Master finds that incorporated capacitor claims were encompassed within the Second Round Settlement Release agreement.

B. Viability of an Incorporated Capacitor Claim

Objecting Members urge that the Court's FTAIA II Order defines qualifying capacitor purchases in a manner that requires that they receive compensation for their incorporated capacitor purchases. MDL Dkt. No. 391 at 4; MDL Dkt. No. 473 at 8-10. They further contend that these claims must be compensated in this proceeding not only because the Second Round Settlement Release includes incorporated capacitor claims, but also because the FTAIA II Order demonstrates that these are viable claims. MDL Dkt. No. 391 at 5-7. They have refined these arguments further in their Motion for an Order Approving their Second Round Settlement Claims.

Objecting Members observe that the Court's FTAIA I Order held that DPPs' claims for incorporated capacitors were not barred as a matter of law, and that the FTAIA II Order found that incorporated capacitors "may be subject to the Sherman Act as 'import trade or commerce' . . . [and] might also come within the FTAIA's domestic effects exception." MDL Dkt. No. 472 at 7 (quoting FTAIA II Order at 7-9).[13] Objecting Members argue that their claims are functionally indistinguishable from those presented by Flextronics in the FTAIA proceedings, and thus are no less viable in these proceedings. They note that like Flextronics, they make claims for incorporated capacitors where the defendants knew a substantial portion of the capacitors purchased on their behalf would be sold in the United States. Their fact pattern is thus substantially similar to that of Flextronics, in that: (1) the Objecting Members negotiated prices directly with the Settling Defendants; (2) the Objecting Members either purchased or directed the purchase of capacitors based on these prices; and (3) Defendants knew or should have known that a substantial share of the capacitors being purchased were destined for finished products that would be sold in the U.S. MDL Dkt. No. 329.

Class Counsel argues that the FTAIA Orders do not support Objecting Members' claims, and if anything, demonstrate the inappropriateness of this procedure for resolving their claims. First, Class Counsel notes that the Court based its decision in the FTAIA II Order on a specific factual

[13] Like the Court, Objecting Members rely on various Ninth Circuit authorities that reach similar conclusions, including *United States v. Hsiung,* 778 F.3d 738, 748-58 (9th Cir. 2015), and five district court decisions in this Circuit. MDL Dkt. No. 473 at 7.

showing in the context of a summary judgment hearing. The Court's decision reveals how this type of claim is inherently fact-specific and not readily susceptible to class-treatment. Tr. at 15. Class Counsel further argues that the Court itself emphasized to Objecting Members at a prior hearing that the FTAIA decision was fact-based and limited to Flextronics.[14] Indeed, Class Counsel explains that it is precisely this fact-bound nature of such claims that make them inappropriate for class treatment, and why Class Counsel chose not to pursue such claims on behalf of the DPPs. Class Counsel explains that in light of the FTAIA I Order, it deliberately limited the class to parties who purchased capacitors "shipped to" and "billed to" the U.S. precisely to avoid these sorts of factual differences. MDL Dkt. No. 489 at 12. Class Counsel further relies on the Court's own order certifying the DPP class as commending Class Counsel's determination to "accept the Court's prior FTAIA ruling and to limit their case only to those categories of transactions the Court ruled were properly in the case." *Id*. at 12 (citing MDL Dkt. No. 385 at 6-7).

While the Special Master is sympathetic to Class Counsel's arguments that the Objecting Members have not at this juncture provided evidence comparable to that offered by Flextronics, that Flextronics itself might not prevail at trial (it merely survived summary judgment), and that Objecting Members may have an even weaker case than Flextronics (or for that matter other DPPs who did not present claims for incorporated capacitors), these issues go to the value of the claims, not their viability. Class Counsel has discretion to evaluate claims in a manner that recognizes that some categories of claims are more compelling than others, and to treat them accordingly. However, in the context of a class settlement, class members need not prove they would prevail at trial – a point on which both parties ultimately agreed at the hearing on this matter. Tr. at 19-20. Rather, the claim need only be viable. Accordingly, Class Counsel may choose to apply a lower recovery rate to these sorts of claims based on their value relative to other categories of claims, but this is different from determining that the claims are not viable at all.

Likewise, Class Counsel's contention that this category of claim is too fact-specific to be subject to class-wide relief goes to the appropriateness of the process Objecting Members pursued rather than the viability of the claim. The FTAIA II Order establishes that incorporated capacitor claims of the type alleged here are potentially viable. The Court's order granting class certification did not expressly foreclose incorporated capacitor claims and indeed those claims were made by class members in both the first and second settlement rounds following certification. Accordingly, while the process that Objecting Members have selected to vindicate their claims may diminish the value of those claims, it does not bear on whether those claims are ultimately viable as a matter of law for DPPs.

Accordingly, without judging their merits, the Special Master finds that incorporated capacitor claims alleged by Objecting Members that are sufficiently analogous to those that survived

[14] Tr. at 23 (quoting the Court): "I held for Flextronics, not you or anyone else, that they were entitled to do that set of claims. . . . I did not articulate a general principle that was based on what I did for Flextronics on its evidentiary showing. So I'm not sure why you think this is a broad proposition that applies to every potential claimant."

summary judgment in the FTAIA II proceeding, are viable. The Special Master addresses separately the effect of the procedural posture on those claims.

C. Appropriateness of Procedural Posture

Class Counsel makes a compelling argument that even if Objecting Members (and some other DPPs) have potentially viable incorporated capacitor claims and even if those claims are released in this settlement, it is Class Counsel's prerogative not to pursue them, if doing so would be damaging to the Class as a whole.

Class Counsel argues that Objecting Members chose the wrong process by which to address their incorporated capacitor claims, and that Class Counsel is within its discretion not to pursue them in future rounds or to allocate funds to them now to the detriment of the class as a whole. Class Counsel suggests that other DPPs may have incorporated capacitor claims that they did not bring because they were too individualized, and that they sacrificed those claims for the advantages of gaining class-wide relief. Class Counsel commends Flextronics as having made an appropriate choice that was equally available to the Objecting Members to opt out from the class and make a particularized showing to establish that the transaction affected import commerce and/or had a domestic effect in the United States. Objecting Members, Class Counsel complains, want to have it both ways. If they wished to pursue these claims, they should either have objected to the settlement or opted out so that they could make their showing to the Court as Flextronics did.

Class Counsel also condemns Cisco's approach of seeking to recover claims on behalf of Foxconn, Jabil, Celestica, and Flextronics based on assignments obtained post-litigation. Class Counsel notes that how Cisco and these companies wish to divvy up any settlements is a separate matter for them, and that Cisco is needlessly complicating this proceeding by demanding that it receive other parties' allocation in the first instance.

Objecting Members respond, essentially, that the approach they've pursued is the least worst option among a number of imperfect choices. Given their millions of dollars in "raw" capacitor claims and the uncertainty of the Court's treatment of incorporated capacitor claims, no option was ideal. Objecting Members point out that they have been consistent. They brought incorporated capacitor claims in the First Round, they preserved their right to do so in the Second Round, and they appropriately pressed those claims after receiving the Court's FTAIA II Order. Accordingly, their actions are neither incompatible with participation in the class nor a surprise to Class Counsel. They contend that they did not have to object to the settlement because, by its terms, the settlement did not exclude incorporated capacitor claims; if anything, they read the release to encompass such claims. Likewise, they maintain that they should not be forced to opt out of the class to pursue those claims. They urge that it would be unfair to deny them the efficiencies of class treatment merely because they have an additional sub-category of direct purchase claims that – while distinct – are still claims for capacitors that were ultimately shipped to the United States. Finally, they contend it is irrelevant whether they pursued these claims when other class members did not. Other class members were free to bring such claims in this round or pursue them in future rounds, and their decisions going forward will likely depend on the quality of those claims, their resources, and other such factors. Out of a sense of fairness,

they have suggested procedures by which other DPPs would be able to make Second Round claims for incorporated capacitors as well.[15]

Finally, with respect to assignments, Cisco contends that its approach is neither inefficient nor improper. It notes that as the holder of assignments from Foxconn, Celestica, Jabil, and Flextronics, Cisco stands in their shoes and so is the appropriate party to obtain relief for losses they incurred. Paying these claims directly to Cisco is thus appropriate and more efficient than Class Counsel's approach of paying the wrong party and then requiring Cisco to obtain those funds through a private process.

While there is merit in both parties' positions, this simply confirms that – in fact – this issue requires a choice among various imperfect processes for resolving these claims. There is obviously some tension in having incorporated capacitor claims brought in the DPP class because the volume of these claims may swamp the recovery of plaintiffs who do not have such claims. But incorporated capacitor claims are not inherently antagonistic to those of other class members. The volume of both types of claims may vary by plaintiff. To the extent that incorporated capacitors are a subcategory of DPP claims, any member of the class is equally capable of pursuing them. Requiring them to either opt out to preserve those claims, or remain in the class and forego those claims, does not seem necessary. And, to the extent that there was any ambiguity about the scope of the release or the availability of such claims in this proceeding, all plaintiffs were equally capable of pursuing them as Objecting Members did, or to object earlier to demand greater clarity.

Moreover, the choice that Objecting Members made is not cost-free. As noted, had Objecting Members chosen a different path, they would have been entitled to seek full recovery of their claims (rather than a portion of a settlement) and they would not be subject to Class Counsel's discretion in allocating settlement proceeds towards those claims. As noted, Class Counsel has discretion to take into account the percentage of recovery for categories of claims where the law is well-settled versus those where the merits are more iffy and attenuated.

Accordingly, the Special Master finds that Objecting Members' incorporated capacitor claims may proceed with these claims through the settlement allocation process.

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[15] To prevent prejudice to other Second Round claimants with significant incorporated capacitor claims, Objecting Members have proposed that the Court direct that the claim deadline for the Second Round be reopened and merged with the upcoming Third Round for the Nichicon and Rubycon settlements. MDL Dkt. No. 473 at 15 n. 14. They propose sending updated information to all Second and Third Round claimants advising them of the opportunity to include incorporated capacitor claims. *Id.* Because the Third Round claims are not before the Special Master and this is a matter of Court administration for the Court and the parties, the Special Master defers on this suggestion.

D. Sufficiency of Objecting Members' Showing

Having determined that incorporated capacitor claims are encompassed in the settlement release, that – with one exception[16] – the accuracy of Objecting Members' incorporated capacitor claims are not in dispute, that such claims are legally viable, and that they may be pursued through the settlement allocation process, issues nonetheless remain regarding Objecting Members' showing with respect to the appropriateness of a pro rata allocation of these claims from the settlement proceeds.

Under the stipulation, Class Counsel may have agreed to accept the extent of damages claimed (excluding the NCC/UCC claims), but as Class Counsel noted at hearing, that does not equate to agreeing that the Objecting Members have made a sufficient showing that they would have a reasonable chance of prevailing on such a claim. In fact, Class Counsel argues that Objecting Members have as yet failed to provide essential information demonstrating at least one key element of their claim. Specifically, Class Counsel contends Objecting Members would need to establish that these Settling Defendants were actually aware that Objecting Members intended the capacitors they purchased through Aptiv's non-U.S. entities, Cisco's non-U.S. entities, or Jabril, Celestica, Foxconn, or Flextronics were for finished products to be delivered to the United States. Class Counsel also suggests that while the parties may have stipulated to the Objecting Members' calculation of the losses they sustained from over-priced capacitors, Class Counsel has not stipulated to the percentage of sales that Settling Defendants *reasonably anticipated would go to the United States*. This concern raises two separate issues – the applicable legal standard regarding Defendants' state of knowledge, and the quality of evidence required to establish what the Defendants did or should have known about the percentage of sales that would be shipped to the United States.

The parties disagree about the law regarding an FTAIA defendant's state of mind. Class Counsel argues that the evidence provided to it by Cisco does not demonstrate that anyone other than Cisco and Aptiv was aware of where these items would ultimately be delivered. Tr. at 67. Class Counsel states that "the test of the FTAIA is whether it would be expected by that defendant that [the sale] would have an impact [in the U.S.]. I don't see anything in . . . the November 12, 2018 [declaration] that says why any defendant would have any expectation about anything. . . . There isn't anything that supports any intent of what the defendants would have been anticipating in terms of an impact in the U.S." Tr. at 67. Although Objecting Members provided records of large volumes of incorporated capacitor products acquired by Cisco and Aptiv (or their agents) being shipped to the U.S., those records do not concern the state of knowledge of defendants at the time of sale. In response, Objecting Members' position at the hearing was simply, "[T]here's no mens rea requirement under the FTAIA. Full stop." Tr. at 72.

On the issue of the relevant legal standard, the Special Master finds that Class Counsel is essentially correct. As the Court noted in the FTAIA II decision, "the domestic effects exception states that conduct involving non-import trade or commerce with foreign nations is subject to the Sherman Act only if . . . the conduct had a 'direct, substantial *and reasonably foreseeable effect*'

[16] Namely, the dispute about duplicative claims for NCC and UCC is the exception.

on U.S. domestic commerce. FTAIA II Order at 10 (quoting 15 U.S.C. Sec. 6a(1) (2012)) (emphasis added).

The exact type of knowledge possessed by, or attributed to, a defendant required by the FTAIA is not well-settled (like many other aspects of the FTAIA). *See, e.g.,* Comment, *From Sea to Shining Sea: A New Approach to Interpreting the Foreign Trade Antitrust Improvements Act*, 64 Emory L.J., 869, 897-905 (2015). The FTAIA was a legislative response designed largely to codify *United States v. Aluminum Co. of America (Alcoa),* 148 F.2d 416, 444 (2d Cir. 1945). The U.S. Supreme Court in *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 774-76 (1993), appeared to adopt the intent standard established in *Alcoa*, that Sherman Act liability "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796. Other lower courts have subsequently adopted this standard as well. *See, e.g., Carrier Corp. v. Outokumpu Oyj,* 673 F.3d 430, 438 (6th Cir. 2012). Other courts however have applied an objective standard to the knowledge requirement in the FTAIA, observing that this element is satisfied only if a direct and substantial effect on U.S. commerce would have been foreseeable to a reasonable person. In *Animal Science Products, Inc. v. China Minmetals Corp.,* 654 F.3d 462, 471 (3rd Cir. 2011), the Third Circuit vacated and remanded a case that had dismissed an FTAIA action based on lack of evidence of defendants' intent, holding that the standard for "reasonably foreseeable" was "whether the alleged domestic effect would have been evident to a reasonable person making practical business judgments."

While the Court need not resolve this issue in the settlement context, it is clear that Objecting Members need to come forward with at least *some* showing in order to establish the scope of Settling Defendants' liability, and hence the reasonable value of their claims. Notably, in the Court's FTAIA II decision, the plaintiff Flextronics "presented evidence that defendants sold capacitors to Flex Affiliates knowing that the capacitors would be incorporated into goods that were intended to be (and were) shipped to the U.S." FTAIA II Order at 8 (quoting Dkt. No. 1722-3 at 20 n.20).[17] Accordingly, there is a *mens rea* requirement under the FTAIA in that, at the very least, it must be reasonably foreseeable to a defendant that its sale of goods at artificially inflated prices will be shipped to the United States where it will have an effect on U.S. commerce.

Objecting Members may be able to make a fair argument based on existing evidence that – given the massive volume of capacitor purchases for eventual delivery into the United States presented here – it should have been reasonably foreseeable that some percentage of sales were destined to the U.S. At the hearing, Objecting Members argued that Cisco's business partners would certainly know what's in the public record about the percentage of Cisco's business that comes into the United States, and stated that – if necessary – Cisco could make a showing as strong as Flextronics did in the FTAIA II summary judgment proceeding. Tr. at 67-68.

[17] The *Hsiung* case from the Ninth Circuit, on which the Court relies, cites with approval other cases noting that *defendants'* conduct must be "'directed at a U.S. import market,' even if the defendants did not engage in importation of products into the United States." *Hsiung*, 778 F.3d at 755 n.8 (quoting *Animal Sci. Prods., Inc. v. China Minmetals Corp*., 654 F.3d 462, 471 & n. 11 (3rd Cir. 2011)).

In this respect, Objecting Members have an imperfect vehicle for resolving this dispute, but it is the vehicle they chose. While Objecting Members could likely establish that Settling Defendants knew that some percentage of capacitor sales to Cisco, Aptiv, Flextronics, Jabil, Celestica, and Foxconn were probably destined for the United States market, what percentage was reasonably foreseeable is likely harder to prove and is subject to an uncertain standard. Objecting Members argue that Settling Defendants had constructive notice that establishes subjective intent because of various indicia that a product was intended for shipment to the U.S., including the voltage, certain NHTSA requirements, or the PPAP test. Tr. at 56-57. Even if this is so, Class Counsel generally should not be put to the burden of conducting a summary judgment-like proceeding. Here, Class Counsel would be required to consider Objecting Members' evidence of the state of mind of Defendants concerning the percentage of their sales that were likely to be shipped to the U.S., because that percentage bears upon the amount to which Objecting Members would ultimately be entitled.

The evidentiary challenge here is not insignificant. It is not in the record – let alone established – that all capacitors in products shipped to the U.S. are differentiated based on whether a product will be subject to NHTSA requirements, the PPAP test, U.S. voltage requirements, or some other unique signature feature. Moreover, past dealings may be relevant even under an objective standard. For example, if the percentage of purchases that went to the United States varied substantially from year to year, the Settling Defendants may not be in a position to reasonably estimate the impact of their sales outside the United States that would ultimately have a direct effect on U.S. commerce. In short, that may not be reasonably foreseeable to a Settling Defendant such that Class Counsel would deem the claim viable.

Class Counsel has an obligation to the class not to simply accept a ballpark guess as to the actual dimensions of Objecting Members' adequately documented claims for incorporated capacitors. Although Class Counsel has stipulated to the accuracy of the numbers presented by Objecting Members for final sales of incorporated capacitors, it is also fair to acknowledge that this number has jumped around quite a bit during the course of these proceedings. As Class Counsel correctly recounted, Cisco's incorporated capacitor claims alone jumped from $81 million in July 2017, to $429 million in October 2017, to $488 million in February 2018, to $493 million in April 2018, to $199 million in November 2018, to $142 million in March 2019. In fact, the Special Master notes that while Cisco's opening brief on its Motion originally sought $154,050,329.40 in supplemental commerce for incorporated capacitors, it reduced that figure to $142,070,717.01 in its Reply Brief. MDL Dkt. No. 496 at 8 n.3. This drop of over $12 million between February 8, 2019 and March 1, 2019 in the same pleading does not afford Class Counsel much confidence in the reliability of the figures regarding what Settling Defendants reasonably should or should not have known about the ultimate destination of various capacitor sales. Those numbers matter, however, because any overpayment to Objecting Members would come at the expense of compensating other DPP class members.

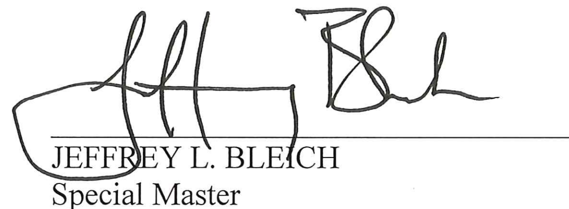
Based on these circumstances and the preceding rulings, the Special Master recommends that Objecting Members be allowed – within 20 days of any final order by the Court approving this Report – to present their best evidence to Class Counsel of the percentage of their respective incorporated capacitor claims that Settling Defendants either knew or should reasonably have foreseen being shipped to the United States. Class Counsel may then determine in the interest of

the entire class whether the evidence is sufficient, which may include disallowing some percentage of that claim, or applying a uniform discount to this category of claims, or some other method to account for the uncertain value of this category of claims relative to claims for unincorporated capacitors. If the Court determines that this is in the interest of judicial efficiency, any hearing on the reasonableness of this final figure would be subject to the Special Master's review.

Conclusion

The Objecting Members' incorporated capacitor claims are deemed to be subject to the Second Round settlement and release, and are viable, and compensable through the allocation process. The amount of those claims is subject to proof regarding the scope of such claims that were reasonably foreseeable to the Settling Defendants, and may be further discounted based on their relative viability and in the interest of fairness to the class as a whole. Issues of reopening any claims dates in this round is referred back to the Court. The Objecting Members should provide the further information required in the Findings of Fact and Conclusions of Law set forth above, including any adjustments based on the NCC/UCC dispute, to Class Counsel within 20 days of a Court order approving this Report. The Special Master is available to resolve any further disputes regarding that process if they arise and at the discretion of the Court.

Dated: 7/30/19



JEFFREY L. BLEICH
Special Master