UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Appeal Nos. 20-15697, 20-15704 and 20-16081

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*In Re: Cathode Tube Ray (CRT) Antitrust Litigation*

*INDIRECT PURCHASER PLAINTIFFS, et al.*
Plaintiff - Appellees,

v.

*TOSHIBA CORPORATION, et al.*
Defendants – Appellees

v.

*Anthony Gianasca, et al.,*
Movants - Appellants

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On Appeal from the United States District Court
For the Northern District of California, Oakland Division
The Honorable Jon S. Tigar
Case No. 4:07-cv-5944-JST
MDL No. 1917

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# APPELLANTS' OPENING BRIEF

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## INTRODUCTION

The Omitted Repealer State ("ORS") Appellant Plaintiffs (the "ORS Plaintiffs") are indirect purchaser victims ("IPPs") of an antitrust conspiracy who were denied their right to due process and disparately treated from fellow class members holding legally and factually indistinguishable claims. This denial of due process resulted in their arbitrary omission from a $577 million-dollar settlement and set off the pursuit of appellate relief. Certain ORS Plaintiffs originally appeared before this Court in 2016 advancing claims that (1) they had been denied due process due to their inadequate representation by Lead IPP Class Counsel and his named class representatives; (2) the district court had failed to carry out its duties as a fiduciary, serving as a guardian of the rights of absent class members; and (3) the award of attorney fees was improper.

On March 7, 2019, this Appellate Court remanded the case. That remand followed an indicative ruling by the district court concluding it had erred in entering the orders. This Court instructed the district court "to reconsider its order on class certification and settlement approval" and explicitly noted that the failure to secure a recovery for the ORS class members "necessarily affects" the adequacy of representation provided to them under Federal Rule of Civil Procedure 23(a)(4) as well as the attorneys' fees awarded to Lead Counsel, who had at all times been

acting as their appointed representative. ER313-314 (9th Cir. Appeal No. 16-16373, Dkt. 252).

The district court has now denied the ORS Plaintiffs' attempts to intervene and join the MDL proceedings. In a novel expansion of 28 U.S.C. § 1407 (the "MDL Statute"), the court concluded that it lacks jurisdiction as an MDL transferee court to permit the intervention as of right otherwise available to the ORS Plaintiffs under Federal Rule of Civil Procedure 24 to act as representatives for the absent ORS class members or to allow an amended pleading to be filed that includes the damages claims of the ORS who were, admittedly, denied due process. This ruling was otherwise in error because it failed to take into consideration that one ORS Appellant was previously named as a putative class representative in two consolidated MDL complaints and that two pending cases that form part of the MDL -- one of which was filed by Lead IPP Class Counsel -- were filed by two of the ORS Appellants and asserted ORS claims.

The district court's interpretation of the MDL Statute – supported by two wholly distinguishable district court opinions – as creating such a jurisdictional limitation was erroneous. The district court factually misconstrued the ORS Plaintiffs' intervention request as limited to the MDL proceeding, rather than as into the underlying pending IPP actions before it and its holding conflicts with direct Ninth Circuit precedent establishing that an MDL judge inherits the pretrial

jurisdiction of the transferor judge. Even further, sustaining that order would impermissibly negate the ability of an MDL court to fulfill the duties of a class action tribunal to unnamed class members under Rule 23 and constitutional due process, which include preventing prejudice of their interests and claims by the representative parties as a result of a class action's pendency.[1]

## STATEMENT OF JURISDICTION

The district court entered three orders denying motions by Appellants seeking intervention (the "Orders"). ER9-23.[2] "[T]he denial of a motion to intervene is a final order and is thus immediately appealable." *Prete v. Bradbury*, 438 F.3d 949, 959 n.14 (9th Cir. 2006). Appellants filed a Notice of Appeal of the Orders on May 7, 2020 (Dkt. 5719) and a Notice of Appeal correcting the prior ECF filing event on June 1, 2020 (Dkt. 5733). ER1-8. This Court has appellate jurisdiction to review the foregoing Orders under 28 U.S.C. § 1291. Appellees concede jurisdiction over the appeal of those Orders. *See* Appeal No. 20-15704, Dkt. 18.

[1] Pursuant to this Court's consolidation order (App. No. 20-16081, Dkt. 10), the undersigned sought to coordinate with the other appellants to file a single brief to the extent practicable, yet received no response from one appellant and the others declined. Nevertheless, in the interests of economy, Appellants here join in their separate briefing regarding commonly applicable arguments not asserted herein.

[2] "ER" refers to excerpts of record being filed with this Opening Brief. Briefs in the underlying matter have been included as necessary to establish conduct at issue and arguments made, and not made, by Lead IPP Class Counsel below.

## STATEMENT OF ISSUES

**(1) Intervention under Federal Rule of Civil Procedure 24 by Absent, Disparately Treated Subclass Members.** Did the district court err in failing to reach and to grant the ORS Plaintiffs' request to intervene as named plaintiffs and as class representatives and to file an amended complaint including their ORS claims?

**(2) Nature of Intervention by Unnamed Class Members into Class Actions that Have Been Consolidated into an MDL.** Did the district court err in misconstruing the ORS Plaintiffs' motions to intervene as directed to the MDL proceeding alone, rather in their proper context as seeking intervention into all pending class actions comprising it, two of which were brought by ORS Plaintiffs Caldwell and Gianasca as named plaintiffs?

**(3) Amendment of Pleadings to Protect Interests and Claims of Subclassed Absent Class Members Inadequately Represented by the Named Representatives and Controlled by Lead Class Counsel.** Did the district court err in finding the ORS class members are precluded from intervening and filing an amended pleading that names putative ORS class representatives advancing the claims that conflicted Lead Counsel had wrongfully cut to serve his own interests?

**(4) Abrogation of Inadequately Represented Absent Class Members' Right to Intervene in Class Actions Consolidated into an MDL.** Did the district

court err when finding that the MDL Statute, 28 U.S.C. § 1407, abrogates the constitutional right of the unnamed ORS class members to intervene into pending class actions consolidated for MDL pretrial proceedings in which their interests are inadequately protected by Lead IPP Class Counsel and where no named representative shares their interests?

**(5) Duty of the District Court to Protect the Interests of Absent Members of the Omitted Repealer States from Prejudice.** Did the district court err when it failed to reach and grant the ORS Plaintiffs' intervention request and prevent prejudice of their long-encompassed, yet inadequately represented, interests and claims in violation of Federal Rule of Civil Procedure 23?

## STATEMENT OF THE CASE

This multidistrict litigation arises from an alleged international conspiracy to fix the price of cathode ray tubes ("CRTs") worldwide during the period March 1, 1995 through November 25, 2007. ER877. Various nationwide putative class actions were filed in federal courts across the country beginning in 2007 by its victims. ER1431-38. Two such actions were filed by Appellants Barbara Caldwell and Anthony Gianasca, both Massachusetts IPP residents, in the Northern District of California on December 13, 2007 and March 21, 2008, respectively.[3] ER1397-1430, 1439-1458.

[3] Ms. Caldwell's appeal is being pursued through her estate.

In February 2008, the Judicial Panel on Multidistrict Litigation (the "JPML") established MLD 1917 in the Northern District of California. ER1431-38. Each then-pending action and all subsequently-filed tag along actions were transferred to or coordinated under that MDL court for consolidated pretrial proceedings, including Ms. Caldwell's and Mr. Gianasca's actions which were advanced on behalf of absent class members from the ORS of Massachusetts. The JPML's transmittal letter to that specifically stated that pending cases are subject to remand at the conclusion of the MDL's pretrial proceedings. ER1434. It further stated that it would consider remand of "each transferred action or any separable claim . . . at or before the conclusion of coordinated or consolidated pretrial proceedings on … suggestion of the transferee district court." *Id.*

In May 2008, the district court appointed Mario Alioto as Interim Lead IPP Class Counsel ("Lead Class Counsel") to represent all IPPs in the United States in connection with the actions consolidated before it. ER1383-89. Attorney Alioto had filed multiple pre-MDL class actions based upon the CRT conspiracy alleging both federal and state law IPP claims, including the action he filed on behalf of Mr. Gianasca as his vetted, named representative for the Massachusetts ORS claims. ER1397-1430.

In that court-appointed capacity for over a decade, Lead Class Counsel has possessed and exercised exclusive control over the claims and associated interests

of each indirect purchaser of a CRT-containing product. ER59, 338-74. IPP Lead Class Counsel used this control to

1. bring the claims of the ORS into MDL 1917, limit the ORS class members' level of activity, negotiate the ORS claims and release their rights;
2. drop the claims of Massachusetts because he failed to send out the pre-suit letter two (2) times and chose to avoid sanctions for that failure by stipulating to their release (ER1088-91, 1257-82);
3. veto defense counsel's invitation to add the ORS into the settlement with the other similarly situated repealer states (ER435);
4. reject the requests of qualified and vetted putative class representatives from New Hampshire and Missouri from serving as putative class Representatives during the pendency of the litigation (ER500-02, 507-15);
5. veto the intervention of the Omitted Repealer States (ER22); and
6. refuse to include any aligned named ORS representatives or the ORS claims in his recently filed Fifth Consolidated Amended Complaint, despite the appointment of ORS class counsel and creation of the ORS subclass due to his deficient representation (ER127-225).

From 2011 to 2015, Lead Class Counsel reached settlements with eight sets

of Defendants (the "Settling Defendants") in exchange for approximately $577 million. ER338-74, 764-68, 978-84. While agreeing to release all IPP class members' claims, Lead IPP Counsel agreed to limit allocation of the money received to a limited set of IPPs within the subgroup of consumers whose state laws allow for the recovery of monetary damages for antitrust violations ("Repealer States"). ER338-74.

On July 7, 2016, the district court entered a final order certifying the requested settlement class, granting final approval and approving the allocation. ER338-74. Thereafter, on August 3, 2016, the district court issued an attorneys' fee order, awarding approximately $159 million in class counsel attorneys' fees. ER318-37.

In August 2016, various groups of objectors whose rights Lead Class Counsel agreed to waive without compensation, including certain Repealer States that were arbitrarily omitted from the economic recovery, appealed those Orders. ER315-16. On February 13, 2019, after the district court issued an indicative ruling stating that, with the benefit of hindsight, it had erred in approving the settlements, the Ninth Circuit remanded the case "to reconsider its order on class certification and settlement approval." ER314-15.

Upon remand, on July 3, 2019, the district court appointed the undersigned as Interim Co-Lead ORS Counsel to represent a subclass comprised of the ORS

class members.[4] ER295-96. The Court also appointed counsel to represent a subclass of IPPs with claims in Non-Repealer States. *Id.* The Court also reversed the stipulated order that effectively dismissed the claims of the Massachusetts and other ORS absent class members and thus revitalized their claims. *Id.* However, the court did not appoint a named class representative, setting aside concerns about "the ability of the existing class representatives to adequately represent [the ORS]," stating adequacy of representation inquiry must await a motion for class certification. *Id.*

The ORS Plaintiffs, through appointed counsel, filed multiple motions seeking to elevate themselves as named plaintiffs and to file an amended complaint through which to assert their previously inadequately represented ORS claims against the Settling Defendants. After denying an initial motion to intervene by the ORS Plaintiffs, accompanied by a proposed Fifth Consolidated Amended Complaint that included their claims, for failure to include a separated pleading, the district court went on to reject a second renewed motion with that pleading on February 4, 2020 on the new ground that the ORS class members could not intervene directly into the MDL or file an amended complaint therein. ER15-23. It affirmed that holding on reconsideration on April 9, 2020. ER9-14. Lead IPP

[4] The ORS subclass created by the court includes the states of Arkansas, Massachusetts, Missouri, Montana, New Hampshire, Oregon, Rhode Island, South Carolina, and Utah (the "ORS Subclass"). ER295.

Class Counsel has refused post-remand to amend the consolidated MDL complaint -- which he alone controls -- to include a named representatives for the ORS Subclass or the ORS claims.

In the meantime, IPP Lead Counsel and the same Settling Defendant agreed to repackage their settlement with amendments which preserved the settlement pot, shifted $20 million from the attorneys' fee award to that pot, and reduced the Settling Defendants' payments by that same amount (the "Amended Settlements"). ER107-126. The district court preliminarily approved the Amended Settlements on March 11, 2020. *Id.*

On May 7, 2020, the ORS Objectors appealed the intervention orders. ER1-8. On July 13, 2020, the district court finally approved the Amended Settlements and entered judgment dismissing the Settling Defendants with prejudice on July 29, 2020. ER73-106. On July 28, 2020, the district court denied the ORS Plaintiffs' attempt to intervene in the MDL proceedings for the purpose of appealing the denial of their objections to the Amended Settlements. ER. They filed their timely Notice of Appeal of order on August 28, 2020, which has recently been docketed. *See* Appeal No. 20-16691.

## STATEMENT OF FACTS

### A. Legal Context

Indirect purchaser plaintiffs who are victims of a price-fixing conspiracy have no standing to sue for damages under federal law for antitrust violations under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Certain states have rejected the *Illinois Brick* doctrine by either enacting repealer statutes or interpreting their existing state law as allowing IPPs to pursue damage claims from antitrust violators. Within the context of the MDL settlements at issue here, the Repealer States have been deemed to include thirty states and the District of Columbia.[5] Of those, nine Repealer States (the "Omitted Repealer States") were arbitrarily excluded from the economic recovery shared by the remaining Repealer States by Lead Class Counsel.[6] The remaining twenty states who have not yet tested their existing law or have and interpreted it to be consistent with *Illinois*

[5] The following thirty states and the District of Columbia have been deemed as Repealer States for the Included Repealer State and Other Repealer State Subclasses relating to the Settling Defendants: Arizona, Arkansas, California, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin. *See* ER. ER295-96, 338-74.

[6] As stated above, the ORS Subclass consists of Arkansas, Massachusetts, Missouri, Montana, New Hampshire, Oregon, Rhode Island, South Carolina, and Utah. ER295-96.

*Brick* are referred to as "Non-Repealer States" or "NRS" and have separately appealed. *Id.*

**B. The MDL Procedures**

Established in February 2008, MDL 1917 was formed to efficiently manage all nationwide pre-trial proceedings for its cases and was intended to address the rights of all victims of the alleged CRT price-fixing conspiracy. ER1431-38. The MDL court's Pretrial Order No. 1 separated its pending cases into two categories: direct purchaser actions and indirect purchaser actions. ER1390-96. A master docket (Case No. C-07-5944 SC, MDL No. 1917) was created. PTO 1 further stated that "[w]hen a pleading or paper is intended to be applicable to all indirect purchaser actions, the words 'All Indirect Purchaser Actions' shall appear in the caption." ER1392. Lead Class Counsel was given absolute authority to control the litigation, subject only to the responsibility of the district court to serve in a fiduciary capacity for absent class members.

Upon its institution in 2008, the MDL was comprised of at least 26 separately filed IPP actions. ER1431. In addition to the cases already pending in the Northern District of California, the transferee courts included eight districts. *Id.* (listing transferee courts as S.D.N.Y; D.S.C.; D. Vt.; D. Ariz.; N.D. Ohio; W.D. Ark.; and E.D. Tenn.). As a result of regular and usual places of business, and

business activities, the Defendants were otherwise subject to jurisdiction in California.

The separate pre-MDL complaints filed by Lead IPP Class Counsel as well as each of his MDL consolidated complaint advanced a nationwide IPP class bringing both federal antitrust claims and claims based upon state antitrust and consumer protection statutes and common law unjust enrichment and disgorgement of profits theories. ER127-225, 874-977, 985-1087, 1151-1256, 1283-1382, 1397-1430, 1439-58. Those claims were also asserted on behalf of statewide indirect purchaser consumer classes. *Id*.

### C. The Lack of Adequate Representation of the ORS Class Members' Interests and Claims Throughout the Consolidated Proceedings

After his appointment in May 2008, Lead Counsel represented and controlled the claims of all nationwide putative IPP class members in MDL 1917 and assumed full control of the litigation, including the pursuit (or non-pursuit) of the ORS Plaintiff Appellants' state law claims.[7] ER338-74, 1383-89. In that capacity, Lead Class Counsel arbitrarily dropped the state law claims asserted by five Repealer States, Massachusetts, New Hampshire, Arkansas, Montana and

[7] Lead IPP Counsel firmly rejected the commonly preferred option of a Plaintiffs' Interim Executive committee to advise him and kept total and complete control to himself.

Rhode Island and never advanced claims for the remaining five Repealer States.[8] ER ER127-225, 874-977, 985-1087, 1151-1256, 1283-1382. By contrast, he aggressively pursued the state law damages claims of a subset of Repealer State class members, which included Massachusetts consumers initially, as part of the litigated claims and settlement negotiations. *Id.*

Prior to settlement with the Settling Defendants, four MDL 1917 consolidated amended complaints were filed by Lead Counsel. *Id*. With respect to Massachusetts, ORS Plaintiff and Appellant Barbara Caldwell was Lead IPP Counsel's named plaintiff in his first two consolidated amended complaints as a class representative (the "CAC" and the "Second CAC," respectively) and her Massachusetts state law claims asserted therein. ER1283-1382(CAC); 1151-1256 (SCAC). Ms. Caldwell was a Massachusetts resident who had filed a pre-MDL action (*Caldwell v. Matsushita Electric Industrial Co., Ltd., et al.*, Case No. 4:04-cv-06306) in the Northern District of California on December 17, 2019 that was transferred to the MDL. ER1439-58. Despite Lead IPP Counsel's assumed control over her claims, he nevertheless deficiently represented them.

As basic hornbook law, Massachusetts General Law c.93A requires a pre-suit demand letter to be sent thirty days prior to suit. *See* M.G.L c. 93A, § 9. The

[8] Nevertheless, Lead Counsel is presenting representing and asserting claims on behalf of those same ORS class members in a complaint filed against other non-settling Defendants in the MDL. ER667-763.

statute is simply written and designed to be easily complied with by even the most unsophisticated consumers. Basically, the letter must set out the wrongful conduct and a demand, and be sent thirty days before suit is filed. The purpose is to provide a wrongdoer with thirty days to make a reasonable offer of settlement. Lead Class Counsel failed to follow the pre-suit letter requirement two times. ER1257-1282, 1092-1106. Specifically, the first time, Lead IPP Counsel did not send a letter at all prior to filing a complaint, and the second time he filed a complaint prior to the expiration of the 30-day wait period. ER1092-1106, 1107-12, 1257-82. As a result, Ms. Caldwell claims were dismissed. ER1088-91, 1092-1106. The later dismissal, which occurred in 2010, was particularly egregious because Lead Counsel stipulated to it to avoid facing the consequences of his error and also because he engaged in horse trading – dropping Massachusetts claims in exchange for the much less damage-rich state of Maine. ER1088-91. Through that stipulation, IPP Lead Counsel also agreed to forfeit the rights of every class member except in the twenty-two Included Repealer States by agreeing not to add any new state claims without providing notice to them. *Id*. That Stipulation was vacated by the district court on remand in 2019, eliminating any barrier to their request to intervene – the very issue on appeal here.[9] ER295-96.

[9] Also, the undersigned has already issued the presuit demand letters that Lead Counsel failed to send for the Massachusetts' ORS Plaintiffs Gianasca and Cutlip. ER226-92.

Lead IPP Counsel's disregard for the Massachusetts consumers' claims also extended to his representation of ORS Plaintiff-Appellant Anthony Gianasca. Prior to becoming appointed Lead IPP Counsel, he filed a complaint on Mr. Gianasca's behalf in the Northern District of California on March 21, 2008 (*Terry, et al. v. LG Electronics, et al.*, Case No. 3:08-cv-01559), as the representative of the Massachusetts class of IPPs. ER1397-1430. Mr. Gianasca also advanced repealer state law claims for the certain other Repealer States, including ORS of New Hampshire, Arkansas and Rhode Island. *Id*. Mr. Gianasca's action is a pending action before the MDL district court. Nevertheless, Lead Class Counsel dropped Mr. Gianasca's claims from the consolidated complaints he filed. ER1283-1382. He did not provide any notice to Mr. Gianasca. ER524-27.

In the end, no subclasses for the ORS were created to represent them and no representatives who held their state damages claims were named to represent them. ER338-74. By contrast, in each of his MDL complaints, to varying degrees, new named plaintiffs were added as representatives of the IRS state law damages subclass members. ER127-225, 874-977, 985-1087, 1151-1256, 12831382.

On October 1, 2012, Lead Counsel moved for certification of subclasses to represent the twenty-two Included Repealer States and the appointment of named representatives for each (the "Named Representatives" or the "Economic Recovery Class Representatives"). ER769-91. Despite his continued appointment as the

ORS class members' legal representative, he included them as bargaining chips in his negotiations even though causes of action for damages were clearly available for residents of their states that he simply did not pursue, stipulated away, or lost due to avoidable procedural missteps. ER338-74.

Lead Counsel eventually reached settlement agreements disposing of all claims for all IPPs nationwide. ER338-74, 764-68, 978-84. The settlement classes remained the same in relevant part and none of the Named Class Representatives held ORS claims or aligned interests. ER338-74. Certain of the ORS Plaintiffs objected on multiple occasions to approval of the settlements, bringing the exclusion of their claims and the lack of representation to the district court's attention. ER646-52, 653-62, 567-88.

### D. The Erroneous Settlement Class Certification and Approval of the Original Settlements and the Attorneys' Fees Order, Appeal and Remand

In July and August, 2015, the district court certified a nationwide injunctive relief settlement class that the court found offered only "worthless relief", certified the twenty-two IRS Subclasses as a settlement class, gave final approval to the Settlement Agreements and the MDL Settlements' allocation plan and awarded Lead Class Counsel a massive fee. ER338-74, 318-37. The lack of any named plaintiff representing the ORS class members' interests and claims received abbreviated consideration, as did their representation – or lack thereof – by Lead

IPP Counsel. ER338-74.

As noted above, certain Appellants and other ORS objectors appealed those decisions to this Court, objecting to their denial of due process, the failure of the Court to act as a fiduciary and the inadequate representation of their interests and Repealer State claims by the named plaintiffs (all IRS consumers) and their appointed Class Counsel. At the April 10, 2018 oral argument, Judge Clifton of the assigned Ninth Circuit Panel made plain his concern over the lack of representation given to the ORS consumers.[10]

On November 8, 2019, the district court issued an Indicative Ruling stating that, with the benefit of hindsight, it had erred in approving the Settlements which "should have provided recovery to class members" in the ORS. ER315-17.

On February 13, 2019, this Court found that the lower court's finding that the settlements should have provided a recovery to the ORS class members "necessarily affects the remaining issues on appeal: 1) the adequacy of representation under Federal Rules of Civil Procedure 23(a)(4); and 2) the attorneys' fees awarded to Lead Counsel." ER303-14. It remanded "to the District Court to reconsider its order on class certification and settlement approval." ER314.

[10] *See* https://www.ca9.uscourts.gov/media/view.php?pk_id=0000032294, Audio: 33:56–34:15 (Tr. 27:23-25; 28:1-11) (characterizing them as not "hav[ing] anybody at the table speaking for them.").

### E. The ORS Plaintiffs' Unsuccessful Efforts on Remand to Protect and Litigate The Wrongfully Abandoned Repealer State Claims and Remedy their Due Process-Violative Inadequate Representation

Although appointing interim lead co-counsel for the nine ORS as well as the subclass of non-repealer states ("NRS") on July 3, 2019 (ER295), the court refused on remand to analyze Lead IPP Class Counsel's adequacy in connection with his decades-long representation of those class members. ER59, 70 (stating at April 9, 2019 case management conference, "I don't intend to appoint new lead counsel or appoint new class counsel" and "I don't feel the need to issue an order saying that anybody had a conflict of interest"). This had the effect of leaving the fox in control of the hen house. With over $150 million dollars in fees in the balance, it did not take IPP Lead Class Counsel long to work a deal that cuts out the absent class members he abandoned an otherwise acted in conflict, by refusing to allow them to intervene and then – adding insult to injury – entering into a new settlement that again intentionally excludes them from the economic recovery received by the remaining similarly situated Repealer states. ER80-106.

The district court further failed to meet its fiduciary responsibility by simply dismissing the lack of a named plaintiff representing the ORS class members. Specifically, the Court expressly stated in its appointment order that the ability of the existing named class representatives (all Lead IPP Counsel's IRS class members) to adequate represent the ORS "must await a motion for class

certification." ER296.

In response and in order to litigate their claims (which had been represented by Lead IPP Counsel for over a decade), the ORS Plaintiffs quickly took action to add named plaintiffs and class representatives to the action and to pursue their claims through their newly appointed counsel. After entry of an order scheduling the filing of a motion to intervene and amend on August 23, 2019 (ER293-94), the ORS Plaintiffs moved to intervene as named plaintiffs and to amend the operative consolidated complaint to add them as named plaintiffs and putative class representatives. ER21-23. Both the Defendants and IPP Lead Counsel opposed. *Id.*

On October 17, 2019, the district court denied the intervention motion, holding, despite the fact that Gianasca and Caldwell had been previously named and the absent class members from the Omitted Repealer and Non Repealer states had been included in prior iterations of the MDL 1917 CAC, that the ORS Plaintiffs could not amend the indirect purchaser consolidated amended complaint because they were "attempting to amend someone else's complaint." ER23. The court stated that its denial was "without prejudice to a renewed motion accompanied by a separate pleading." *Id.*

On November 12, 2019, the ORS Plaintiffs filed that renewed motion to intervene, accompanied by the proposed separate complaint ordered by the district court. ER15-20. Nevertheless, on February 4, 2020, the court denied that motion

for lack of jurisdiction, finding that 28 U.S.C. Section 1407, "the MDL statute[,] does not permit movants' direct intervention into the MDL proceedings, whether by filing separate complaints or amending IPP Plaintiffs' complaint." ER17. It held that "the proper course for proposed 'new plaintiffs in this MDL litigation is to file their claims in the appropriate forums and to permit the MDL consolidation process to operate as intended." ER18. In support of that novel, expansive reading of the MDL statute, the court relied upon two obscure, and inapposite, district court cases. ER17-18. On April 9, 2020, the district court denied the ORS Plaintiffs Rule 59(e) motion for reconsideration of that order. ER9-14.

To date, and despite numerous attempts, ORS putative class representatives and Plaintiffs Caldwell and Gianasca have been denied re-entry into the litigation. There still are no named plaintiffs or representatives from the ORS that have been permitted participation in the consolidated pretrial proceedings to protect and pursue their claims against the Settling Defendants. ER127-225. Nevertheless, Lead Class Counsel continues to represent those unnamed class members in another action that forms part of the MDL consolidated proceedings as against another Defendants. For example, Lead IPP Counsel filed *Lusher, et al. v. Mitsubishi Electric Corporation*, Master File No. 4:07-cv-5944, Case No. 17-cv-4067 (N.D. Cal.), on June 11, 2015, and included each of the nine ORS and identified named plaintiff representatives for each, despite his refusal to "amend"

the MDL complaint against the Settling Defendants to include them. ER663-763.

### F. The Culmination of the Repeated Due Process Violations upon the ORS Interests and Claims.

While the ORS Plaintiffs sought to claim full representation of their interests in the consolidated pretrial proceedings after remand, Lead IPP Class Counsel aggressively sought to protect the settlements he had obtained during his deficient, conflicted representation of their claims. Lead Class Counsel entered into amended settlements with the Settling Defendants on behalf of his arbitrarily preferred IRS class members and sought their abbreviated approval by filing a "Motion Pursuant to Ninth Circuit Mandate to Reconsider and Amend Final Approval Order, Judgment and Fee Order." ER112. Those settlements were repackaged versions of the original 2016 settlements that retained all compensation for the IRS class members by shifting $20 million from the attorneys' fee award to the settlement pot and reducing the Settling Defendants payments accordingly. ER80-106.

The ORS Plaintiffs objected to that Motion and the amended settlements. ER112. The district court construed the motion as seeking preliminary approval, granted it and struck the ORS Plaintiffs' objections on the grounds that they lacked standing as non-members of the settlement class. ER113. On July 13, 2020, the district court granted final approval to the settlements. ER80-106.

Notably, the amended settlements also provided for the filing of another

amended consolidated complaint by Lead IPP Class Counsel. In that Fifth Consolidated Amended Complaint filed September 19, 2019, Lead Class Counsel named several new plaintiffs as substituted class representatives for the putative nationwide class and the IRS state subclasses named therein. ER134-138. Despite the continued inclusion of a nationwide class, the named plaintiffs added by Lead IPP Counsel once again were all only IRS class members. *Id*.

In short, to secure settlement class certification, approval of the Amended Settlements and a massive attorneys' fee award, the similarly situated ORS claimants have been disparately treated, peeled off without a named plaintiff or representative and without any control over the content of the complaint that had been used to corral their interests for over a decade. To be clear, that subclass is not based upon any difference in legal theories or factual distinctions among Repealer States but upon the refusal and failures of their decades-long Class Counsel to protect or pursue their interests.

## SUMMARY OF THE ARGUMENT

The district court did not rule upon the merits of the ORS Plaintiffs' requests to intervene. Rather, the Court held that "the MDL statute does not permit [the ORS movants'] direct intervention into the MDL proceedings, whether by filing separate complaints or amending IPP Plaintiffs' operative complaint. ER17. That ruling was erroneous, both factually and legally. To advance the litigation, this

Court has the power to order it be allowed and request is made that this Court do so.

Factually, the ORS Plaintiffs did not seek to intervene "into the MDL proceedings," but rather into each of the underlying indirect purchaser actions pending before it as part of the consolidated proceedings. The captions of each of their motions stated the filing related to "All Indirect Purchaser Actions." Indeed, two of the actions encompassed in its MDL pretrial proceedings were filed by ORS Plaintiffs Caldwell and Gianasca in that very court. Thus, regardless of whether direct intervention into an MDL is permitted under the MDL Statute, the district court erred because intervention into each of the individual actions was proper and sought.

Second, the district court's legal conclusion that the MDL Statute renders intervention by inadequately represented, unnamed class members pursuant to Federal Rule of Civil Procedure 24 impossible after the coordination of actions into an MDL was clearly erroneous. Neither the two distinguishable cases upon which the district court based its novel holding nor the plethora of class action and MDL jurisprudence allowing Rule 24 intervention by unnamed class members into MDL -coordinated actions support such an abrogation. Indeed, the right of unnamed ORS class members – who have been subjected to inadequate and conflicted representation by Lead Class Counsel and their named IRS

representatives for over twelve years -- to intervene into an action to protect their interests and claims from prejudice as a consequence of the class action device is constitutionally protected. Removal of those rights would therefore render the MDL Statute constitutionally infirm.

Finally, because the extended record in this case, including that presented to this Court on the first appeal, establishes that the only legally permissible result that comports with Rule 23 and constitutional due process is allowance of intervention by the ORS Plaintiffs, this Court should reach the merits, grant the relief requested, and afford the unnamed ORS Plaintiffs the aligned, unconflicted representation to which they are entitled.

## STANDARD OF REVIEW

A district court's denial of a motion to intervene as of right on grounds other than its timeliness is reviewed *de novo*. *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 853–54 (9th Cir. 2016). Permissive intervention motions, as well as timeliness determinations are evaluated under an abuse of discretion standard. *See id.*; *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 397 (9th Cir. 2002). "A court abuses its discretion when it fails to apply the correct legal standard or bases its decision on unreasonable findings of fact." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011).

The Ninth Circuit "accord[s] the decisions of district courts no deference when reviewing their determinations of questions of law." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). Findings of fact are reviewed for clear error. *Id.*

## ARGUMENT

## I.

## THE DISTRICT COURT ERRED WHEN DENYING THE INADEQUATELY REPRESENTED ORS CLASS MEMBERS THEIR RIGHT TO INTERVENE AS PART OF THE CONSOLIDATED MDL PRETRIAL PROCEEDINGS FOR THE PENDING IPP ACTIONS

The district court committed multiple reversible errors in rejecting the ORS Plaintiffs' efforts to intervene, all grounded in a misapplication of a narrow portion of the MDL Statute. The bottom line, however, is that the deprivation of due process inflicted upon millions of absent class members in the context of a class action setting should never be reversed engineered into a "gotcha Catch 22." The effect of the treatment given to the absent ORS class members here will serve as a road map for fee-focused plaintiff's counsel and leave them open to less-than-zealous representation. It is a given that defendants will seek to get out of litigation and have no interest in preventing manipulation of the class-action system.

The MDL Statute, with the italicized language at issue in the district court's Orders, states that

> [w]hen civil actions involving one or more common questions of fact *are pending in different districts*, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

28 U.S.C. § 1407(a) (emphasis added). That language does not bar the ORS Plaintiffs' intervention. The court's contrary holding violated their constitutional due process rights embodied in Federal Rule of Civil Procedure 23 and the connected right to intervene under Rule 24.

Consolidation of pending actions as an MDL is explicitly conditioned on the finding that it "will promote the just and efficient conduct of such actions." *Id.* When a pending action is not terminated in the course of the MDL pretrial proceedings, the Statute further provides for its remand at such proceedings' conclusion to its transferee district court. *Id.* A post-MDL remand is an extraordinarily rare occurrence, with most cases being either settled or dismissed. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399, 400-01 (2014) ("As of 2010, the Panel remanded only 3.425% of cases to their original districts. That number dwindled to 3.1% in 2012, and to a scant 2.9% in 2013.") (citations omitted).

The MDL Statute entrusts the conduct of its proceedings to "a judge or judges to whom such actions are assigned by the [JPML]." 28 U.S.C. § 1407(b). This Circuit has made explicit that "[a] district judge exercising authority over cases transferred for pretrial proceedings inherits the entire pretrial jurisdiction that

the transferor district judge would have exercised if the transfer had not occurred." *See In re Korean Air Lines Co.*, 642 F.3d 685, 699 (9th Cir. 2011)) (citation omitted).

As applied by the district court, transfer and/or consolidation of a class action under the MDL Statute acts as a complete barrier to intervention by unnamed class members to gain participation as named plaintiffs and to seek inclusion of claims inadequately represented – whether through amendment of the existing complaint or the filing of a severed complaint in intervention -- otherwise available under Federal Rules of Civil Procedure 23 and 24 as of right. That abrogation is legally untenable.[11] The ORS Plaintiffs further respectfully submit that in denying intervention the district court did not satisfy the duties owed as an MDL court to protect unnamed, transferee class members. *See In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig.*, 434 F. Supp. 2d 729, 730 (D. Minn. 2006) ("[T]his case is a complex matter, having been lodged before the undersigned by the Multi–District Litigation Panel. A transferee judge in such a

[11] For all of the reasons that denial of intervention does not pass *de novo* muster as an error of law, the district court's refusal to reconsider its denial was improper. ER9-14. Reconsideration is appropriate "when (1) the court committed manifest errors of law or fact, (2) the court is presented with newly discovered or previously unavailable evidence, (3) the decision was manifestly unjust, or (4) there is an intervening change in the controlling law." *Rishor v. Ferguson*, 822 F.3d 482, 491-92 (9th Cir. 2016). The denial of intervention was not only incorrect as an error of law, but was manifestly unjust under the circumstances of this case.

case bears a particularly heavy burden to protect the transferee plaintiffs."); *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir.) ("the district court acts as a fiduciary, serving as a guardian of the rights of the ... class members"), *cert. denied*, 546 U.S. 822 (2005); *Pigford v. Johanns*, 416 F.3d 12, 25 (D.C. Cir. 2005) (the court has a duty to protect class members), *cert. denied*, 547 U.S. 1035 (2006); Manual for Complex Litigation, Fourth § 10.224 (2004).

### A. The District Court Erred by Denying Intervention "Directly" into the MDL by the ORS Plaintiffs as Unauthorized by the MDL Statute.

Finding that the MDL Statute does not authorize either the filing of a separate complaint in intervention or amendment of the consolidated complaint "direct[ly] in the MDL proceedings" by the ORS Plaintiffs, the district court denied intervention and identified the initiation of a new action outside the MDL as an appropriate course to pursue their claims. ER17, 20. That denial ignored two critical facts, both of which place the ORS Plaintiffs' request plainly within the MDL Statute and the authority of the MDL court.

First, the ORS Plaintiffs already are subjects of actions pending in district courts as well as the MDL pretrial proceeding as members of the nationwide classes alleged in their complaints.[12] ER127-225, 1151-1256, 1283-1382, 1397-

[12] The district court's observation in its first order denying intervention and directing the filing of an entirely separate complaint that the ORS Plaintiffs are

1430, 1439-58. Also, as described above, both Ms. Caldwell and Mr. Gianasca were vetted, advanced and named as putative class representatives for ORS in two pending actions consolidated as part of MDL 1917 by the JPML, in which complaints they assert various ORS claims. ER1397-1430, 1439-58. Thus, contrary to the district court's conclusion, there are multiple cases already "pending in different districts" that satisfy the MDL Statute. That MDL court has the entire pretrial jurisdiction of their transferor district judges to permit intervention.

Second, the invention request was not merely filed "direct[ly] into the MDL proceedings," but was in fact filed as part of each already pending indirect purchaser action comprising the MDL. The ORS Plaintiffs invoked the method explicitly ordered by the district court in PTO No. 1 to indicate "a pleading or paper is intended to be applicable to all indirect purchaser actions" when entitling each intervention motion as relating to "All Indirect Purchaser Actions." ER1390-1396. Indeed, as part of the court's administrative establishment of the "Master

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"attempting to amend someone else's complaint" fails to recognize the fact that as class members, the MDL complaint is indeed their complaint. ER23. Moreover, the court's further equation of the ORS Plaintiffs' acknowledgement that their interests diverged from the Included Repealer State Plaintiffs to a concession that a separate complaint was needed was misplaced. *Id.* The ORS Plaintiffs were merely noting the divergence of interests as it related to Lead Counsel's inadequacy in representing their interests, not as any concession of differences in the legal or factual bases of their claims.

Docket and File" for MDL, PTO No. 1 further provides that "[a]ll pleadings and submission in these actions shall be e-filed in both the master docket and in the individual dockets." ER1391-92. Therefore, under the district court's own procedures for MDL 1917, it is impossible to make any filing in the MDL as isolated from the underlying pending action.

Applying those corrected facts, the district court's supportive rationale for denial -- that no "home federal court" exists to receive the ORS' claims in the unlikely event of a post-MDL remand -- evaporates, as does any resemblance to the facts of the two obscure cases relied upon to reject the ORS plaintiffs' requests. *See* ER17-18, *citing In re Mortgage Elec. Registration Sys. (MERS) Litig.*, No. MD-09-02119-PHX-JAT, 2016 WL 3931820 (D. Az. July 21, 2016); *In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig.*, MDL 33-1439, 2008 WL 4763029 (D. Or. Oct. 28, 2008). Unlike in both *MERS* and *Farmers*, the ORS Plaintiffs have always been at least putative class members – and in some instances even named class members - within the class actions for which intervention is sought, and each such forum therefore exists as a "home federal court." In addition, as also unlike in both *MERS* and *Farmers* where the plaintiff(s) had "never filed his own case or had his case transferred to the court by the Judicial Panel," ORS Plaintiffs Gianasca and Caldwell both filed their own cases alleging ORS damages claims that were then assigned to the MDL court.

An MDL court does not operate as a monolith separate from the actions that were either filed in or transferred to this forum. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 414 (2015); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 930 (C.D. Cal. 2011) ("an MDL proceeding … is merely a collection of individual cases, combined to achieve efficiencies in pretrial proceedings."). As this Court has made clear, its jurisdiction is as broad as that of the transferee courts. The district court's erroneous holding that the ORS Plaintiffs' intervention attempts were unauthorized under the MDL Statute requires reversal.

## B. THE DISTRICT COURT ERRED BY INTERPRETATING THE MDL STATUTE AS ABROGATING THE INTERVENTION RIGHTS OF THE INADEQUATELY REPRESENTED ORS CLASS MEMBERS.

The district court committed a reversible error of law when concluding that the MDL Statute abrogated the intervention rights of the inadequately represented ORS Plaintiffs under Federal Rules of Civil Procedure 23 and 24. Such an interpretation of the MDL Statute would render it constitutionally infirm and is not supported by the law.

Unnamed class members have the right to intervene if their interests or claims are inadequately represented by the existing parties in a class action proceeding. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 594 (2013); ), *citing* 5 A. Conte & H. Newberg, Class Actions § 16:7, p. 154 (4th ed. 2002)

("[M]embers of a class have a right to intervene if their interests are not adequately represented by existing parties"); *Diaz v. Tr. Territory of Pac. Islands*, 876 F.2d 1401, 1405 n.1 (9th Cir. 1989).

That is because the right to adequate representation by both named representatives and counsel during the course of a class action's pendency is a constitutionally protected element of Rule 23 proceedings. *See* Fed. R. Civ. P. 23; *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) ("absent class members must be afforded adequate representation") (citation omitted). Adequacy requires "the named plaintiffs and their counsel" to "prosecute the action vigorously on behalf of the class" and to be free of conflicts.[13] *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000); *see also Hesse*, 598 F.3d at 588-89; *Wal-Mart*, 564 U.S. at 348-49; *In re Literary Works in Elec. Database Copyright Litig.*, 654 F.3d 242, 249 (2d Cir. 2011) (named representative "must have an interest in vigorously pursuing the claims of the class").

[13] This right predates certification of a class including those absent parties, in recognition of the potential for prejudice to putative class members' rights. *See Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 2004) ("Insofar as the individual claims are concerned, putative class members should be entitled to rely on a class action as long as it is pending."); *In re Morgan Stanley Mortg. Pass-Through Certs. Litig.*, 810 F. Supp.2d 650, 670 (S.D.N.Y. 2011), *vacated on other grounds*, 23 F. Supp. 203 (S.D.N.Y. 2014) ("putative class members 'are *expected and encouraged*' to remain passive during the early stages of the class action") (emphasis in original).

Indeed, motions to intervene to add unnamed class members are permitted throughout the course of a class action proceeding. 15 Charles Alan Wright & Arthur M. Miller, Fed. Prac. & Proc. § 3866 (4th ed. 2020) ("[a]dditional parties may be added to any of the consolidated actions [in an MDL] if they would be subject to personal jurisdiction in the transferor court.") (citing *Allegheny Airlines, Inc. v. LeMay*, 448 F.2d 1341, 1342 (7th Cir. 1971)); *Ubaldi v. SLM Corp.*, No. C-11-01320 EDL, 2014 WL 12639952, at *4 (N.D. Cal. June 13, 2014) ("a motion to intervene is a proper procedure to follow for a class member who wishes to join a lawsuit as a representative plaintiff"). By extension, the right of such parties to file a complaint in intervention or severed complaint, and thereby obtain the litigation of their claims, if deemed to be needed by the court, should be granted as integral to remediating the inadequate representation of interests and claims within a class action.[14]

[14] The district court's ruling that a separate pleading was required to be filed by the ORS Plaintiffs as a precondition of intervention in its first denial Order (ER23) was in any event incorrect. *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009) ("the failure to comply with the Rule 24(c) requirement for a pleading is a 'purely technical' defect which does not result in the "disregard of any substantial right.") (citation omitted). The Ninth Circuit has "approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir.), *cert. denied*, 506 U.S. 868 (1992). The proposed Fifth Consolidated Amended Complaint included with the ORS Plaintiffs' motion, as well as their briefing, more than adequately apprised the court of the claims and parties to be added.

The due process-protected right to adequate representation do not evaporate when a class action becomes part of a consolidated MDL. As such -- and as the district court recognized when creating Rule 23 subclasses here -- the procedural and structural due process protections available during the pretrial proceedings developed to protect absent class members in a lone class action are equally available in a consolidated MDL. *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir. 1995), *cert. denied*, 516 U.S. 914 (1995) (In the MDL context, where lead counsel controls the litigation and even named plaintiffs' involvement can be limited, the importance of lead counsel's performance of his or her duties is at its utmost ); *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 177 (C.D. Cal. 1976) ("The 'pending' clause of s 1407 describes a limitation on the power to transfer actions under the statute. It does not affect the power of the transferee court to fashion pretrial procedures in accordance with the Federal Rules of Civil Procedure once transfer is complete."); *see also In re Asbestos Litig.*, 963 F. Supp. 247, 251 (S.D.N.Y. 1997) (MDL court's "power includes amendment of a complaint to add parties or claims."). Interpretation of the MDL Statute as foreclosing an MDL court's ability to employ them would render class action treatment unattainable. *Conflict subclasses and their requirements*, 3 Newberg on Class Actions § 7:31 (5th ed. Dec. 2019) (Rule 23(a)(4) "prohibits a court from certifying a class unless it is adequately represented.").

Moreover, such an interpretation of the MDL Statute would be irreconcilable with that court's duty to ensure the presence of the adequate representation for unnamed class members, particularly in the settlement context, as here. *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992) ("courts have a duty to protect the interests of absent class members"); *In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166, 192 (D. Mass. 2005) ("Both the United States Supreme Court and the Courts of Appeals have repeatedly emphasized the important duties and responsibilities that devolve upon a district court pursuant to Rule 23(e) prior to final adjudication and settlement of a class action suit."); *Doucette v. Ives*, 947 F.2d 21, 30 (1st Cir. 1991) ("During the period between the commencement of a suit as a class action and the court's determination that it may be so maintained, the suit should be treated as a class action."); *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) ("district judge in the settlement phase of a class action suit [is] a fiduciary of the class"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("undiluted, even heightened, attention" to the adequacy of representation is necessary in a settlement context).

Also, the district court's constitutionally infirm limitation on MDL jurisdiction is contrary to the law. As described above, this Circuit has made unequivocally explicit that an MDL court does not inherent limited jurisdiction from its transferee courts, but rather the full extent of their powers. *In re Korean*

*Air Lines Co.*, 642 F.3d 685, 699 (9th Cir. 2011). To state the obvious, those powers include the ability to apply the Federal Rules of Civil Procedure applicable to pretrial proceedings, to execute the fiduciary duties of a putative class action court faced with settlement class requests, and to grant the available structural and representative protections prerequisite to the use of the Rule 23 class action device. *See Id.; Amchem*, 521 U.S. at 627 (1997) (subclassing); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857 (1999) (same); *see also Asbestos Litig.*, 963 F. Supp. at 251. Thus, the district court's holding that it was foreclosed from exercising those powers within an MDL was incorrect.

Finally, there is nothing in the language of the MDL Statute that abrogates the applicability of Rule 24 or any other Rule of Civil Procedure to actions that are coordinated or transferred for pretrial proceedings. To the contrary, Section 1407(f) states that "[t]he Panel may prescribe rules for the conduct of its business *not inconsistent with* . . . the Federal Rules of Civil Procedure." (Emphasis added.)

The district court's holding has the effect of banishing the previously named as well as the unnamed absent class members from not only the MDL, but also each of the underlying, original complaints comprising it. The potentially claim-extinguishing effects of that banishment are plain, as Defendants have predictably

seized upon here.[15] None of those results can be squared with Rule 23 or constitutional due process.

As a result of the district court's error, there exists a Rule 23 subclass of CRT IPPs with separate appointed legal counsel within MDL 1917 without meaning. Those subclassed ORS consumers lack any aligned, non-conflicted representative and the ability to pursue the inadequately represented claims which mandated subclassing. Lead IPP Class Counsel, who controls the consolidated complaint and its named plaintiffs, has refused, and even opposed, inclusion of named ORS representatives and their claims. *See In re Northwest Airlines Corp. Antitrust Litig.*, 221 F.R.D. 593 (E.D. Mich. 2004) (after determining subclasses needed, court "instruct[ed] Plaintiffs' counsel to promptly identify representatives for each of these subclasses"); *Campbell v. Hope Community Credit U.*, No. 10–2649–STA, 2012 WL 2395180, at *7 (W.D. Tenn. June 25, 2012) (when subclass representative needed, "[i]t will fall to Plaintiff and class counsel to identify class members who are able and willing to act as class representatives); Manual for

[15] The ORS Plaintiffs do not concede to any degree the validity of the Settling Defendants' statute of limitations arguments. However, their assertion highlights the potential for impermissible prejudice to the ORS class members rights if they are forced outside of the MDL. *Munoz v. PHH Corp.*, 1:08-CV-0759-AWI-BAM, 2013 WL 3935054, at *12 (E.D. Cal. July 29, 2013) (allowing intervention where denial of "leave to intervene and forcing her to start her own suit will impair the interests of Ms. Villalon and the class members she seeks to represent"). Properly granted intervention will obviate any such concerns.

Complex Litigation (Third) § 30.16 at 222 (noting that if replacement of class representative is required, "[t]o protect the interests of the class, class counsel should make reasonable efforts to recruit a new representative"). As co-lead counsel for IPP members, the ORS Plaintiffs' counsel should not be excluded from controlling the content of the MDL pleadings. The Orders should therefore be reversed, and the ORS Plaintiffs, who stand willing to assume those absent class representative roles and to vigorous pursue the rights of all ORS class members, should be afforded their right to intervene to do so.

## II.

## GRANTING THE ORS PLAINTIFFS INTERVENTION AS OF RIGHT IS PROPER HERE

The district court did not reach the merits of the ORS Plaintiffs' intervention request. Nevertheless, because there are no factual issues outstanding as to that motion, this Court has the power to consider and grant their request rather than remand. *Fed. Deposit Ins. Corp. v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990) (remand unnecessary where "the record permits only one resolution of the ... issue) (citation omitted). Such relief is particularly appropriate in light of the recent district court order denying the ORS Plaintiffs motion to intervene for the purpose of appealing its final approval of the Amended Settlements and dismissal of the Settling Defendants with prejudice.

The ORS Plaintiffs are entitled to intervene as a matter of right to protect and assert their inadequately represented interests and claims under Rule 24(a). The four following factors apply to determine the propriety of such intervention:

> (1) that the prospective intervenor's motion is "timely"; (2) that the would-be intervenor has "a 'significantly protectable' interest relating to ... the subject of the action," (3) that the intervenor is "so situated that the disposition of the action may as a practical matter impair or impede [the intervenor's] ability to protect that interest"; and (4) that such interest is "inadequately represented by the parties to the action."

*Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 853 (9th Cir. 2016) (quoting *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011)). "In evaluating motions to intervene, 'courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention.'" *Natural Res. Def. Council v. McCarthy*, 16-CV-02184-JST, 2016 WL 6520170, at *3 (N.D. Cal. Nov. 3, 2016) (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)).

Satisfaction of the later three elements is easily met here. "In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry are satisfied by the very nature of Rule 23 representative litigation." *Miller v. Ghirardelli Chocolate Co.*, C 12-04936 LB, 2013 WL 6776191, at *8 (N.D. Cal. Dec. 20, 2013) (quoting *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005)); *In re Bear Stearns Companies, Inc. Sec., Derivative, & ERISA Litig.*,

297 F.R.D. 90, 97 (S.D.N.Y. 2013); *In re Intuniv Antitrust Litig.*, 1:16-CV-12653-ADB, 2020 WL 4274507, at *3 (D. Mass. July 24, 2020).

With respect to the fourth element, the inadequate representation of the ORS unnamed class members as part of the MDL proceedings led to their subclassing and the appointment of the co-lead ORS counsel as authorized by Rule 23(c)(5) and Supreme Court precedent. *See Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 857. In doing so, the district court recognized the ORS class members received conflicted and unaligned representation by both IPP Lead Counsel and their fellow Repealer State named class representatives. However, the district court left a glaring gap in representation which still exists: the lack of a named plaintiff to act as their non-conflicted, aligned class representative within the pretrial proceedings with the ability to pursue their claims. The solution to that problem, as permitted by multiple class action courts, is Rule 24 intervention as of right. *See supra*.

With respect to the first element, "[t]imeliness is a flexible concept." *Alisal Water*, 370 F.3d at 921 (citation omitted). "Courts weigh three factors in determining whether a motion to intervene is timely: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *Id.* (citation omitted). Courts evaluate the "totality of the circumstances facing would be intervenors," and not merely the lapse of time between the motion for intervention and the

initiation of the action. *Smith*, 830 F.3d at 854. Thus, "[w]here a change of circumstances occurs, and that change is the 'major reason' for the motion to intervene, the stage of proceedings factor should be analyzed by reference to the change in circumstances, and not the commencement of the litigation." *Id.*; *see also California Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1120 (9th Cir. 2002) ("[T]he length of time that has passed since a suit was filed is not, in and of itself, determinative of timeliness."), *cert. dismissed*, 539 U.S. 911 (2003). Under these standard, the ORS Plaintiffs' request to intervene is timely.

Since the district court's creation of the ORS subclass on remand and appointment of counsel in July 2019 (a drastic change of circumstances), the ORS Plaintiffs have diligently sought to gain entry into the pretrial proceedings as named representatives of that class. They have further sought to amend the operative pleadings to name them as class representatives and to assert their Repealer State claims. They adapted their initial attempt at amendment of the consolidated MDL complaint presented in their first motion to intervene to the district court's direction that they must file a separate pleading, which they presented as part of their renewed motion. At each turn they were rebuffed by the district court. Operating within these changed circumstances, which provide ample

reason for any delay deemed present, the ORS Plaintiffs' efforts at intervention were timely.

There similarly is no prejudice to the parties. The Ninth Circuit has repeatedly emphasized "that the only 'prejudice' that is relevant under this factor is that which flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented—and not from the fact that including another party in the case might make resolution more 'difficult[ ].'" *Smith*, 830 F.3d at 857 (citation omitted); *see also Kamahaki v. American Soc'y for Reprod. Med.*, No. 11-cv-01781-JCS, 2015 WL 1926312, at *4 (N.D. Cal. Apr. 27, 2015) (prejudice consideration results from "timing of intervention" rather than "from the mere fact of intervention").

As described above, intervention to represent the ORS subclass and assert their claims was sought shortly after the district court's creation of that subclass. Plainly, the ORS Plaintiffs could not seek to intervene to represent it until it was formed. Moreover, the Settling Defendants have been on notice since the case's inception that it concerned antitrust claims based on a uniform and industry-wide price-fixing conspiracy, seeking declaratory and injunctive relief on behalf of indirect purchasers in all 50 states, including the ORS Plaintiffs. Assuming the case was properly prepared for trial, there will be minimal (if any) need for further

liability discovery in this case because the facts and evidence are the same for the ORS as they are for the 22 Included Repealer States.

Intervention under Rule 24(a) as of right is not only proper here, but required to comport with the due process rights of unnamed, absent class members subject to the Rule 23 class action device. In the alternative, this Court may also grant the ORS Plaintiffs' request to intervene through permissive intervention under Rule 24(b). Under Rule 24(b)(1)(B), the Court may permit "anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24. As described above, the ORS Plaintiffs' state law damages claims predominantly overlap with those of their fellow IRS class members, which have already been substantially prepared for trial. Any differences are relatively minor and do not override their common nucleus of fact as grounded in the CRT price-fixing conspiracy. It is also timely for the reasons stated above.

Should this Court deem resolution of intervention to be inappropriate, this case should be remanded to allow the district court to assess their request under the standards for intervention established by Rule 24 and the relevant Rule 23 due process criteria. *See United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 404 (9th Cir. 2002).

## CONCLUSION

For all of the foregoing reasons, the district court's Orders should be reversed and intervention by the ORS Plaintiffs as ORS subclass representatives and allowance of their filed amended complaint in intervention allowed.

Dated: September 8, 2020

Respectfully Submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants state that they are aware of the following cases pending before this Court, in which other class members appeal the district court's orders relating to the Intervention Orders:

- Appeal No. 20-15697, Appellants Tyler Ayres, Mike Bratcher, Nikki Crawley, Jay Erickson, Harry Garavanian, John Heenan, Hope Hitchcock, D. Bruce Johnson, Jeff Johnson, Kerry Murphy, Chris Seufert, Robert Stephenson, Gary Talewsky and William Trentham
- Appeal No. 20-15704, Appellant Eleanor Lewis

Dated: September 8, 2020

/s/ *Robert J. Bonsignore*
Robert J. Bonsignore (NH No. 21241)

## FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 29-2(C)(2) AND (3), 32-2 OR 32-41

I certify that this brief contains 10,415 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I further certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: September 8, 2020

/s/ *Robert J. Bonsignore*
Robert J. Bonsignore (NH No. 21241)

## CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed ***Appellants' Opening Brief*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the cases who are registered users will be served by the appellate CM/ECF system.

Dated: September 8, 2020

/s/ *Robert J. Bonsignore*
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