

1 under seal).³ Defendants oppose Best Buy's objection, and argue
2 the Court should deny the objection and affirm the Special Master's
3 order. ECF No. 2685 ("Response"). Although Best Buy requests the
4 Court order a hearing and set a briefing schedule as permitted by
5 Local Rule 72-2, the Court finds neither is necessary. See Civ.
6 L.R. 72-2 ("Unless otherwise ordered by the assigned District
7 Judge, no response need be filed and no hearing will be held
8 concerning the motion. The District Judge may deny the motion by
9 written order at any time"). As a result, Best Buy's
10 objection is ripe for disposition without oral argument. Civ. L.R.
11 7-1(b). As set forth below, the Court AFFIRMS the Special Master
12 and DENIES the objection.

13

14 **II. BACKGROUND**

15 The parties are familiar with the factual and procedural
16 background of the case, so an exhaustive review is unnecessary.
17 The facts relevant to the motion are set forth below. Defendants
18 are allegedly manufacturers of cathode ray tubes ("CRTs") and, in
19 some cases, of finished products as well. Best Buy, along with the
20 other DAPs, alleges that Defendants conspired to fix prices for
21 CRTs. The DAPs do not allege that Defendants conspired to fix the

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23 ³ Best Buy previously filed an objection to the Special Master's
24 order that exceeded the five page limit under Civil Local Rule 72-
25 2. ECF No. 2677. After Defendants pointed out the issue, Best Buy
26 filed an amended version. ECF No. 2689. The Court's order
27 appointing the discovery master sets forth the procedure for
28 objections to the Special Master's orders and incorporates the
procedures (including page limits) contained in Civil Local Rule
72-2. ECF No. 2272, at 4-5. Accordingly, Best Buy's earlier
objection is STRICKEN except for the accompanying Declaration of
David Martinez and exhibits containing the record necessary for the
Court's review of the Special Master's order. ECF No. 2677-1
(filed under seal).

1 prices of products containing CRTs. Each DAP alleges that it
2 bought at least one CRT product from a defendant or an entity owned
3 or operated by a defendant.

4 On May 16, 2014, Best Buy filed a motion for a protective
5 order barring discovery into Best Buy's competitive intelligence
6 practices before the Special Master. ECF No. 2677-1 ("Martinez
7 Decl.") Ex. 1 ("Mot.") at 1 (filed under seal). The competitive
8 intelligence practices are a part of Best Buy's broader price match
9 guarantee program, by which Best Buy agrees to match any lower
10 prices offered by their competitors. Mot. at 2. These practices
11 amount to: (1) contacting competitors to confirm customers'
12 pricing, (2) monitoring competitor advertisements and other records
13 publicly displaying pricing information, and (3) subscribing to
14 industry analyst reports and attending analyst calls. Id.

15 Defendants seek two forms of discovery into Best Buy's
16 competitive intelligence practices. First, they seek to depose
17 Best Buy's Rule 30(b)(6) designee regarding Best Buy's:

18 [P]ractices, policies and procedures concerning Your
19 market monitoring activities for CRT Finished Products
20 including, but not limited to the following: (a) Your
21 competitive intelligence activities; (b) Your use of
22 third-party data sources and market share/data analyses;
23 and (c) Your knowledge, use and tracking of Your
24 competitor's [sic] pricing for CRT Finished Products
25 during the Relevant Time Period

26 Objection at 2-3. Second, Defendants propounded two
27 interrogatories also seeking information regarding the competitive
28 intelligence practices, including (1) the participation of Best
Buy's executives in the competitive intelligence practices or other
market monitoring activities, and (2) Best Buy's "executives",

1 employees', or agents' participation in any meetings with [Best
2 Buy's] competitors." Id. at 3.

3 In the briefing before the Special Master, Best Buy argued
4 that the information sought in these requests was irrelevant under
5 Supreme Court precedent and subsequent case law, and, even if
6 relevant, the burden of ordering discovery outweighed any potential
7 benefit. Mot. at 4-9. Defendants disagreed, arguing that the
8 information sought was both relevant and discoverable. Martinez
9 Decl. Ex. 2 ("Opp'n") at 2 (filed under seal). After a telephone
10 conference on June 23, 2014 at which both Best Buy and Defendants'
11 counsel were heard, the Special Master issued an order denying Best
12 Buy's motion as to the Rule 30(b)(6) deposition and granting a
13 protective order as to the interrogatories. On July 7, 2014, Best
14 Buy filed an objection with the Court seeking review of the Special
15 Master's order. ECF No. 2677.

16
17 **III. LEGAL STANDARDS**

18 **A. Review of Orders by the Special Master**

19 The Court reviews the Special Master's factual findings for
20 clear error, his legal conclusions de novo, and his procedural
21 decisions for abuse of discretion. Fed. R. Civ. P. 53(f)(3)-(5);
22 ECF No. 302 (appointing the initial special master).

23 **B. Motion for Protective Order**

24 Federal Rule of Civil Procedure 26(c) permits the Court, upon
25 a showing of good cause, to "issue an order to protect a party or
26 person from annoyance, embarrassment, oppression, or undue burden
27 or expense." The Court must undertake a two-step inquiry in
28 deciding whether the information sought is discoverable. First,

1 the Court must determine if the material sought is "relevant to any
2 party's claim or defense." Id. at (b)(1). Such evidence need not
3 be clearly admissible at trial so long as the request is
4 "reasonably calculated to lead to the discovery of admissible
5 evidence." Id. Second, the Court must weigh the burden of the
6 discovery sought against its likely benefit. Id. at
7 (b)(2)(C)(iii).

8
9 **IV. DISCUSSION**

10 While Best Buy's objection dices the issues differently, their
11 objection challenges the Special Master's answers to two key
12 questions. First, is evidence of how Best Buy's competitive
13 intelligence practices function relevant, particularly given the
14 Supreme Court's decision in Kiefer-Stewart Co. v. Joseph E. Seagram
15 & Sons, Inc., 340 U.S. 211 (1951) and subsequent case law? Second,
16 if such evidence is relevant, does the burden of discovery outweigh
17 its likely benefit? The Court reviews the Special Master's
18 decisions on both questions de novo.

19 **A. Relevance of the Competitive Intelligence Program**

20 First, Best Buy argues, citing the Supreme Court's decision in
21 Kiefer-Stewart and subsequent cases, that the evidence sought is
22 irrelevant because "[i]t is black letter law that evidence of an
23 antitrust plaintiff's own conduct is irrelevant and cannot excuse
24 the defendants' conspiratorial conduct." Mot. at 5 (citing Perma
25 Life Mufflers v. Int'l Parts Corp., 392 U.S. 134, 139-40 (1968);
26 Kiefer-Stewart, 340 U.S. at 214, overruled on other grounds,
27 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 781-82
28 (1984); Memorex Corp. v. IBM Corp., 555 F.2d 1379, 1381-82 (9th

1 Cir. 1977); Wilk v. Am. Med. Ass'n, 719 F.2d 207, 232 (7th Cir.
2 1983)). Anticipating some of Defendants' arguments in opposition,
3 Best Buy cites cases from other district courts rejecting several
4 arguments as to the relevance of a plaintiff's communications with
5 third parties or sales practices. See, e.g., In re Polyester
6 Staple Antitrust Litig., No. 3:03CV1516, 2005 WL 6457181, at *4
7 (W.D.N.C. May 9, 2005) (rejecting relevance argument based on the
8 need to "rebut any inference that communication amongst competitors
9 necessarily means the parties are engaging in an illegal
10 conspiracy"); In re Auto. Refinishing Paint Antitrust Litig., No.
11 MDL 1426, 2006 WL 1479819, at *8 (E.D. Pa. May 26, 2006) (casting
12 aside the contention that discovery might show, inter alia, the
13 highly competitive nature of the relevant industry, and the prices
14 that "Defendants may have charged in a 'but for' world"); In re
15 Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 WL 2275528,
16 at *4 (E.D. Pa. Apr. 8, 2008) (denying a motion to compel as to
17 plaintiffs' communications with third parties despite the argument
18 such communications were relevant to show "buying power, market
19 position and demand elasticity"). Finally, Best Buy argues that
20 the policy concerns underlying the antitrust laws would be
21 undermined by permitting discovery into downstream activities.
22 Mot. at 7 (citing Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431,
23 433-34 (N.D. Cal. 2008)).

24 In opposition, Defendants offer three reasons why the
25 discovery they seek is relevant. First, Defendants argue that
26 discovery into the competitive intelligence program is relevant
27 because it shows how Best Buy and their competitors priced their
28 products. Opp'n at 2. This is likely to lead to the discovery of

1 admissible evidence here, Defendants contend, because the indirect
2 purchaser plaintiffs ("IPPs") claim that Best Buy and other
3 retailers passed on 100 percent of the conspiratorial CRT
4 overcharges and because Best Buy is likely to be an important
5 third-party witness in the IPPs' case. Id. Second, Defendants
6 claim that discovery into the competitive intelligence program is
7 relevant to Best Buy's ability to show injury-in-fact. Id. at 10-
8 11. Finally, Defendants contend that the discovery sought is
9 relevant as it will enable them to rebut charges by Best Buy (or
10 other plaintiffs) that competitor contacts and price monitoring is
11 indicative of a conspiracy. Id. at 11-13. In support of these
12 arguments Defendants rely principally on two cases. First, they
13 cite to Judge Illston's orders, also involving Best Buy's
14 competitive intelligence practices, in the In re TFT-LCD Flat Panel
15 Antitrust Litigation, No. 07-MD-1827 (N.D. Cal.). In the TFT
16 cases, Best Buy submitted to discovery on their competitive
17 intelligence practices, the Court denied a motion in limine to
18 exclude evidence obtained regarding those practices, and the
19 evidence was admitted in both the direct purchaser trial and
20 individual opt-out trials. Opp'n at 11-12, n.38 (citing 07-MD-1827
21 (N.D. Cal.) ECF Nos. 5776, 8298). Second, Defendants argue that In
22 re Urethane Antitrust Litigation, No. 04-MD-1616-JWL, 2010 WL
23 5287675 (D. Kan. Dec. 17, 2010) is "precisely on point." Opp'n at
24 12. In Urethane, the Magistrate Judge granted a motion to compel
25 responses to discovery requests seeking information related to
26 plaintiffs' communications with competitors, finding that the
27 information sought was potentially relevant to "refute plaintiffs'
28 claims that similar conduct by defendants is indicative of

1 collusion." Id. at *5; see also In re Urethane Antitrust Litig.,
2 No. 04-1616-JWL, 2011 WL 1327988, at *5-6 (D. Kan. Apr. 5, 2011)
3 (affirming the Magistrate's decision).

4 In his order, the Special Master rejected Best Buy's argument
5 that the discovery sought was irrelevant. Specifically, the
6 Special Master found that:

7 Discovery directed to the settling of prices for finished
8 products charged by Best Buy and other retailers could
9 well lead to discovery of relevant evidence concerning
10 the extent to which, if at all, alleged overcharges were
11 passed on by Best Buy and/or by entities above Best Buy
12 in the distribution channels for products containing CRTs
13 as well as both the fact of damages and their amounts, if
14 any.

15 Order at 1. In doing so, the Special Master disagreed with Best
16 Buy's reliance on Kiefer-Stewart and other cases discussing
17 discovery into an antitrust plaintiff's practices and competitor
18 contacts. Id. Nonetheless, the Special Master did remark that
19 subpart (g) of Interrogatory No. 16, which requests Best Buy
20 identify its "executives", employees' and agents' participation in
21 any meetings with" competitors, "seems foreclosed by the Keifer-
22 Stewart line of cases." Id. at 2.

23 The Court agrees with the Special Master in every relevant
24 respect.⁴ Here, the discovery sought is relevant for three

25 _____
26 ⁴ The Court does question the Special Master's conclusion that the
27 type of inquiry in Interrogatory No. 16(g) would be barred by the
28 Kiefer-Stewart line of cases. The Court would agree with this view
were it to find, as it seems the Special Master did, that discovery
into Best Buy's competitive intelligence practices is relevant only
as to the issues of pass-through and damages. However the Court
goes a step further than the Special Master and finds that the
discovery sought by Defendants is also relevant to rebut any
charges that competitive contacts and price monitoring are
circumstantial evidence of an illegal conspiracy. See Urethane,
2011 WL 1327988, at *6. Nonetheless, as discussed infra, the Court
concurrs with the Special Master's weighing of the burdens and
benefits of Defendant's interrogatories. Therefore, the Special

1 reasons.

2 First, the Court concurs with the Special Master's conclusion
3 that Kiefer-Stewart and its progeny do not bar all discovery into
4 an antitrust plaintiff's activities. Specifically, Kiefer-Stewart
5 concluded that antitrust violations by a plaintiff cannot immunize
6 defendants from liability for their own violations. 340 U.S. at
7 214. While the subsequent cases cited by Best Buy apply various
8 aspects of that principle to the discovery context, Best Buy has
9 not offered any support for the blanket contention that an
10 antitrust plaintiff's activities are always irrelevant and outside
11 the scope of discovery. To the contrary, as one of Best Buy's
12 cases concluded, information about plaintiffs' activities is
13 relevant in cases, such as this one, where the amount of any pass-
14 through to indirect purchasers is likely to be an issue. See,
15 e.g., Polyester Staple, 2005 WL 6457181, at *4-5 (concluding that
16 discovery into downstream activities by plaintiffs was potentially
17 relevant to the amount of any pass-through). Simply because
18 Defendants cannot claim that Best Buy's activities immunize them
19 from liability does not mean the information sought cannot be
20 relevant for other purposes.

21 Second, and relatedly, Best Buy's argument that "the policy
22 precluding discovery into an antitrust plaintiff's conduct bars
23 Defendants' discovery irrespective of any relevance" also fails.
24 Objection at 4. It may be true that the policy underlying the
25 antitrust laws militates against permitting broad discovery against
26 antitrust plaintiffs where, for instance, the discovery sought

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28 Master's decision granting in part and denying in part the motion
need not be disturbed.

1 would simply enable the defendant to shift attention away from an
2 otherwise illegal and actionable scheme or assert an improper pass-
3 on defense. However such a policy is not implicated in this case.
4 Unlike the situation at issue in the cases cited by Best Buy, here
5 discovery about the downstream pricing activities of Best Buy is
6 not being sought to allege a price fixing conspiracy by Best Buy.
7 Accordingly, permitting discovery here does not run the risk of
8 chilling private enforcement of the antitrust laws, as in the cases
9 offered by Best Buy. See, e.g., Perma Life Mufflers, 392 U.S. at
10 139-40; Meijer, 251 F.R.D. at 433-34. Instead, Defendants are
11 seeking the instant discovery because it is directly relevant to
12 the question of how, and in what amount, any potential overcharges
13 were passed through to other plaintiffs.

14 Best Buy dedicates much of its reply brief and objection to
15 two remaining points. First, Best Buy contends that discovery into
16 the results of the competitive intelligence practices, which they
17 concede might be relevant, would simply be duplicative given the
18 extent of previous discovery on pass-through. Second, Best Buy
19 argues that the court should distinguish between this allegedly
20 completed discovery on pass-through and discovery into "how Best
21 Buy obtained competitor information," which they argue is wholly
22 irrelevant. The Court is unmoved. First, Best Buy's complaints
23 about having already submitted to discovery into its pricing
24 practices and their relevance to the pass-through issue go to the
25 Court's weighing of the benefits and burdens of discovery -- not to
26 the relevance issue. Second, even if the distinction between the
27 pass-through itself and "how" the competitive intelligence program
28 works were a meaningful one, that distinction would only undermine

1 Defendants' arguments as to pass-through and damages. Evidence of
2 how the competitive intelligence program operates might still be
3 admissible (or at least lead to the discovery of admissible
4 evidence) at trial to rebut allegations that competitor contacts
5 and price monitoring are indicative of the existence of a
6 conspiracy as they were in TFT. See also Urethane, 2011 WL
7 1327988, at *6.

8 As a result the Court concurs with the Special Master's
9 findings as to the relevance of the discovery sought here. The
10 discovery sought by Defendants is relevant to the issues of pass-
11 through, injury, and to rebut any argument that competitor
12 communications and price monitoring are indicative of an improper
13 conspiracy.

14 **B. Weighing the Burdens and Benefits of Discovery**

15 Next, the Court must weigh the burden of discovery against its
16 likely benefits. Fed. R. Civ. P. 26(b)(2)(C)(iii). In doing so,
17 the Court considers "the needs of the case, the amount in
18 controversy, the parties' resources, the importance of the issues
19 at stake in the action, and the importance of discovery in
20 resolving those issues." Id.

21 In Best Buy's briefing before the Special Master, it argued
22 that because it has already submitted to prior discovery on the
23 issue of pass-through and competitive contacts, the burden of
24 discovery is greater than its likely benefit. Specifically, Best
25 Buy points to a 2012 document production and prior 30(b)(6)
26 deposition involving information relevant to Best Buy's pricing and
27 "the competitive landscape," as rendering the current requests
28 duplicative and burdensome. Mot. at 2-3. Further, they complain

1 that the 30(b)(6) deposition at issue involves 26 topics, including
2 "dozens of sub-topics." Id. at 9. Defendants counter, noting the
3 enormous financial stakes in this case, and contending that Best
4 Buy mischaracterized the extent of discovery already taken in this
5 case. Opp'n at 2-3, 14. Specifically, they note that "[t]here is
6 nothing extraordinary or burdensome about requiring a corporate
7 plaintiff to submit to a deposition, even if it involves multiple
8 days or deponents, particularly where, as here, a discovery
9 protocol explicitly allows just such a scenario." Id. at 14.
10 Furthermore, Best Buy complains that in the time since the Special
11 Master's order, Defendants have noticed four more depositions which
12 they apparently intend to take between now and September 5, 2014.
13 Objection at 3.

14 The Special Master concluded that while the burden of
15 responding to Defendants' interrogatories outweighed the benefits,
16 the same was not true with regard to the 30(b)(6) deposition. The
17 Court agrees. First, and most importantly, as the Court has
18 already concluded, the discovery sought here is relevant and
19 important not just to parties' claims or defenses, but to one of
20 the most central remaining issues in the litigation -- the question
21 of pass-through. Given the centrality of this issue to the case,
22 the Court is loath to deny discovery on the issue to any party.
23 Second, as mentioned above, the amount in controversy in this case
24 is enormous, and, as in any complex multidistrict litigation, the
25 parties have all submitted to and propounded extensive discovery.
26 Third, the parties are all sophisticated, well-advised by able (and
27 expensive) lawyers, and certainly not lacking in resources.

28 Finally, additional factors convince the Court that the

1 Special Master appropriately weighed the burden of discovery.
2 First, the objected deposition topic on the competitive
3 intelligence program is only one of 26 topics to be covered at the
4 30(b)(6) deposition -- the remainder of which Best Buy does not
5 object to. Furthermore, as Defendants state (and Best Buy does not
6 dispute), the parties understood that Defendants would take further
7 30(b)(6) deposition testimony once Best Buy completed document
8 discovery. Particularly when compared to the level of detail
9 required by Interrogatories Nos. 16 and 17, examination on this
10 issue in a 30(b)(6) deposition would entail significantly less
11 expenditure of time, money, and effort. Further militating in
12 favor of the deposition and against the interrogatories, the Court
13 shares the Special Master's concern that requiring answers to the
14 interrogatories may require Best Buy to go through a lengthy and
15 expensive process of reviewing its competitive intelligence
16 program's records to identify what may well be a large number of
17 individuals who participated in the program. It seems unlikely
18 that this inquiry, if completed would lead to the discovery of
19 significant evidence above that gained in the 30(b)(6) deposition.

20 **IV. CONCLUSION**

21 As a result, the Court AFFIRMS the Special Master's order
22 granting in part and denying in part Best Buy's motion for a
23 protective order and DENIES Best Buy's objection.

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25 IT IS SO ORDERED.

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27 Dated: July 28, 2014



UNITED STATES DISTRICT JUDGE

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