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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION No. M 07-1827 SI
_____/ MDL. No. 1827

This Order Relates To:

AT&T MOBILITY LLC, *et al.*, No. C 09-4997 SI; No. C 09-5840 SI

Plaintiffs,

v.

AU OPTRONICS CORP., *et al.*,

ORDER DENYING TATUNG COMPANY OF AMERICA'S MOTIONS TO DISMISS

Defendants.
_____/

MOTOROLA, INC,

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.
_____/

On June 23, 2010, the Court held a hearing on Tatung Company of America's motion to dismiss the complaints in these cases. For the reasons set forth below, the Court DENIES the motions.

BACKGROUND

On October 20, 2009, plaintiff Motorola, Inc. ("Motorola") filed an individual complaint in the Northern District of Illinois against numerous domestic and foreign defendants for violations of state

United States District Court
For the Northern District of California

1 and federal antitrust laws. Pursuant to the Judicial Panel on Multidistrict Litigation’s April 20, 2007
2 transfer order consolidating pretrial proceedings for a number of actions and this Court’s July 3, 2007
3 related case pretrial order #1, the case was designated as related to MDL No. 1827, M 07-1827 and
4 transferred to this Court. Also on October 20, 2009, the AT&T plaintiffs¹ filed an individual complaint
5 in this Court against numerous domestic and foreign defendants for violations of state and federal
6 antitrust laws. Pursuant to the Judicial Panel on Multidistrict Litigation’s April 20, 2007 transfer order
7 consolidating pretrial proceedings for a number of actions and this Court’s July 3, 2007 related case
8 pretrial order #1, the Clerk of this Court designated this case as related to MDL No. 1827, M 07-1827.

9 The Motorola and AT&T complaints allege a global price-fixing conspiracy by suppliers of
10 liquid crystal display (LCD) panels used in a range of electronic products, including mobile wireless
11 handsets, two-way radios, computer monitors, and televisions. Motorola is a provider of mobile
12 wireless telecommunications services and sells mobile wireless devices and two-way radios; both of
13 these products incorporate LCD panels. Motorola Amended Compl. ¶¶ 23, 25. Motorola brings suit
14 based on its own purchases of LCD panels and products, as well as purchases made by a number of
15 Motorola subsidiaries that have assigned their claims to Motorola. *Id.* ¶ 24.

16 Plaintiff AT&T Mobility is a provider of mobile wireless telecommunications services and sells
17 mobile handsets to its customers. AT&T Amended Compl. ¶ 5. Plaintiff AT&T² is a provider of voice
18 and data communications services, including traditional and long-distance services, internet access
19 services, private enterprise network services, and other telecommunications services. *Id.* ¶ 6. The
20 amended complaint alleges that AT&T Mobility purchased more than 300 million mobile wireless
21 handsets for resale to its customers, and that “as a result of defendants’ conspiracy to fix the price of
22 LCD Panels, the prices of these handsets containing LCD Panels were also were artificially inflated.”
23 *Id.* ¶ 5. In addition, the AT&T plaintiffs allege that defendants’ conspiracy raised the price of LCD
24 panels incorporated into products such as desktop computers and notebook computers that AT&T

25 ¹ Plaintiffs are AT&T Mobility LLC; AT&T Corp.; AT&T Services, Inc.; Bellsouth
26 Telecommunications, Inc.; Pacific Bell Telephone Company; AT&T Operations, Inc.; AT&T
27 Datacomm, Inc.; and Southwestern Bell Telephone Company.

28 ² With the exception of AT&T Mobility, the amended complaint refers to all of the other
plaintiffs collectively as “AT&T.” *Id.* ¶ 26.

1 Mobility and AT&T purchased for their own internal use between 1996 and 2006. *Id.* ¶¶ 5-6.

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3 **LEGAL STANDARDS**

4 **I. Federal Rule of Civil Procedure 12(b)(1)**

5 Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court’s jurisdiction
6 over the subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the
7 plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction to
8 grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78
9 (1994) (citation omitted). A complaint will be dismissed if, looking at the complaint as a whole, it
10 appears to lack federal jurisdiction either “facially” or “factually.” *Thornhill Publishing Co., Inc. v.*
11 *General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the complaint is challenged for
12 lack of subject matter jurisdiction on its face, all material allegations in the complaint will be taken as
13 true and construed in the light most favorable to the plaintiff. *NL Indus. v. Kaplan*, 792 F.2d 896, 898
14 (9th Cir. 1986).

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16 **II. Federal Rule of Civil Procedure 12(b)(6)**

17 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it
18 fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss,
19 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
20 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
21 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
22 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading
23 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.”
24 *Twombly*, 550 U.S. at 544, 555.

25 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court
26 must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the
27 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the
28 court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions

1 of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

2 If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The
3 Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no request
4 to amend the pleading was made, unless it determines that the pleading could not possibly be cured by
5 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal
6 quotation marks omitted).

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8 **DISCUSSION**

9 Tatung Company of America (“TUS”) moves to dismiss the complaints filed by AT&T and
10 Motorola on three grounds. First, TUS contends that plaintiffs have failed to allege that they are direct
11 purchasers with respect to TUS, and thus plaintiffs are barred from asserting their Sherman Act claims
12 against TUS. Second, TUS contends that plaintiffs have failed to state a federal antitrust claim against
13 TUS under the federal pleading standard mandated by *Twombly*, 550 U.S. 544 (2007). Third, TUS
14 moves to dismiss the state law claims to the extent those claims are predicated on the federal claims, and
15 because plaintiffs have failed to state a claim under the various state statutes alleged in the complaints.

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18 **I. Federal claims**

19 TUS contends that plaintiffs’ federal antitrust claims are barred under *Illinois Brick Co. v.*
20 *Illinois*, 431 U.S. 720 (1977). TUS argues that it is not an LCD manufacturer, that TUS is itself a direct
21 purchaser of finished products containing LCDs or a direct or an indirect purchaser of LCDs themselves,
22 and thus that TUS’s customers are indirect purchasers who may not sue for damages under *Illinois*
23 *Brick*. In support, TUS relies on the same declarations and evidence submitted in connection with
24 TUS’s motion to dismiss the direct purchaser plaintiffs’ first amended consolidated complaint in the
25 MDL, as well as a new declaration from TUS executive Mr. Chen.³ TUS argues that the evidence it has
26 submitted shows that TUS, Chunghwa Picture Tubes, and Tatung Company of Taiwan are distinct
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³ The declarations are found at Docket Nos. 471, 472, 856 Ex. C, 1560 Ex. A, and 1561 Ex. A).

1 corporate entities, and that there is no factual basis for Sherman Act liability against TUS. TUS's
2 arguments in this regard are largely identical to the arguments previously asserted in connection with
3 its motion to dismiss the direct purchaser consolidated class complaint, as well as TUS's motion for
4 reconsideration. The primary difference between the instant motion and those other motions is the
5 addition of Mr. Chen's most recent declaration, which states that "TUS does not now nor has it ever
6 manufactured handsets or handheld devices containing LCD panels, including cell phones and PDAs,"
7 and "TUS does not now nor has it ever sold handsets or handheld devices containing LCD panels,
8 including cell phones and PDAs." Feb. 19, 2010 Chen Decl. ¶¶ 2-3.

9 In response, plaintiffs argue that TUS and defendant Chunghwa Picture Tubes, Ltd. ("CPT") are
10 considered a single entity for purposes of the antitrust laws in view of their close affiliation and alleged
11 common ownership. Plaintiffs rely on *Royal Printing Company v. Kimberly-Clark Corp.*, 621 F.2d 323
12 (9th Cir. 1980), in which the Ninth Circuit held that "*Illinois Brick* does not bar an indirect purchaser's
13 suit where the direct purchaser is a division or subsidiary of a co-conspirator." *Id.* at 326. The court
14 explained that *Illinois Brick's* rationale of preventing potentially duplicative recoveries from both direct
15 and indirect purchasers does not apply where the direct purchaser is an affiliate of the corporation
16 accused of an antitrust violation. *Id.*; see also *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133,
17 1145-46 (9th Cir. 2003) (applying *Royal Printing* and holding that "indirect purchasers can sue for
18 damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust
19 violation"). Plaintiffs rely on the same evidence and arguments submitted by the direct purchaser class
20 plaintiffs in opposition to TUS's earlier motions raising the same contentions.

21 For the reasons set forth in the Court's March 3, 2009 and March 28, 2010 orders, the Court
22 holds that, at this stage of the litigation, TUS has not shown that it is not a proper defendant under *Royal*
23 *Printing*. The Court recognizes that the factual record is disputed as to the degree of control exercised
24 by Chunghwa and/or Tatung Company of Taiwan over TUS, as well as the nature of the corporate
25 affiliation between Chunghwa and TUS. As stated in the March 28, 2010 order, the Court finds it
26 unnecessary to resolve these factual disputes at this time, as the record is not fully developed and there
27 is a sufficient basis in the record to allow the cases to proceed against TUS. TUS may renew its
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1 arguments upon a fuller factual record in a motion for summary judgment.⁴ With regard to the new
2 declaration by Mr. Chen, even if it is true that TUS has never manufactured or sold handsets or handset
3 devices, TUS could still be liable for purchases made to AT&T for products other than handsets or
4 handset devices, and TUS could still be liable to both sets of plaintiffs based on the complaints’
5 allegations that TUS joined in the LCD price-fixing cartel. *See Paper Sys. Inc. v. Nippon Paper Indus.*
6 *Co.*, 281 F.3d 629, 632 (7th Cir. 2002) (“Nothing in *Illinois Brick* displaces the rule of joint and several
7 liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy’s
8 entire complaint.”).

9 TUS also argues that the complaints’ allegations of a conspiracy involving TUS do not meet the
10 pleading standard set forth by *Twombly*. TUS argues that “other than their conclusory and incorrect
11 allegations of control,” plaintiffs have failed to plausibly allege that TUS joined the alleged conspiracy
12 and played a role in it. The Court disagrees, and finds that the allegations are sufficient under *Twombly*.
13 The complaints allege that TUS sold and distributed LCD products manufactured by Chunghwa
14 throughout the United States; contains allegations about the Tatung corporate family and ownership of
15 Chunghwa and TUS; and alleges that subsidiaries such as TUS “played a significant role in the
16 conspiracy” and were “active, knowing participants in the conspiracy.” *See, e.g.*, AT&T Amended
17 Compl. ¶¶ 43-45, 86-87, 118; Motorola Amended Compl. ¶¶ 10, 38-40, 116. The Court previously held
18 similar allegations in the direct purchaser class complaint adequately alleged TUS’s role in the alleged
19 conspiracy.

21 **II. State law claims**

22 TUS also moves to dismiss plaintiffs’ state law claims on numerous grounds. By orders filed
23 on June 28, 2010, the Court granted defendants’ joint motion to dismiss the state law claims.
24 Accordingly, the Court finds it unnecessary to address the separate arguments raised by TUS with
25 respect to the state law claims. If plaintiffs allege state law claims against TUS in the amended

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27 ⁴ Contrary to TUS’s assertions, plaintiffs have submitted more than marketing statements in
28 support of their allegations regarding the close corporate affiliation between Chunghwa and TUS, and
thus regardless of whether such statements could provide a basis for denying TUS’s jurisdictional
challenge, there is other evidence in support of plaintiffs’ allegations of control.

1 complaints, TUS may renew these contentions.

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CONCLUSION

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Accordingly, for the foregoing reasons, the Court DENIES the motions to dismiss filed by Tatung Company of America. (Docket Nos. 1560 and 1561 in C 07-1827; Docket No. 36 in C 09-4997; and Docket No. 27 in C 09-5840).

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IT IS SO ORDERED.

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Dated: July 19, 2010

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SUSAN ILLSTON
United States District Judge