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United States District Court
For the Northern District of California

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

Case No. 10-1064 SI

This Order Relates to:

*Dell Inc. et al. v. AU Optronics
Corporation, et al., C 10-1064 SI*

**ORDER DENYING DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT DISMISSING DELL'S PRE-
DECEMBER 2002 CLAIMS AS TIME-
BARRED AND FOR PARTIAL
SUMMARY JUDGMENT OF DELL'S
FAILURE TO MITIGATE DAMAGES**

On November 30, 2012, the Court held a hearing on defendants' motion for partial summary judgment dismissing Dell's pre-December 2002 claims as time-barred and for partial summary judgment of Dell's failure to mitigate damages. For the reasons set forth in this order, the Court DENIES defendants' motion. Docket Nos. 5847 & 5886.

DISCUSSION

1. Fraudulent concealment

Defendants contend that Dell's claims relating to conduct occurring before December 12, 2002, are barred by the applicable four-year statute of limitations because the evidence shows that Dell had

1 knowledge of the facts underlying its claims before December 12, 2002.¹ Defendants argue that Dell
2 employees had suspicions of “cartel” activity among TFT-LCD suppliers as early as 1998, and that Dell
3 employees frequently referred to defendants as a “cartel” in e-mails and other documents. Defendants
4 also contend that as early as 2001, Dell had actual knowledge of price-fixing meetings among TFT-LCD
5 suppliers. Defendants have submitted evidence showing that in 2001, Eric Korman, Dell’s Director of
6 Engineering and Supplier Development Director on Dell’s TFT-LCD procurement team, learned directly
7 from Samsung and LG that TFT-LCD suppliers were meeting to exchange market information and set
8 prices of TFT-LCD panels. Defendants have submitted Mr. Korman’s declaration in which he states,
9 *inter alia*, that he reported this information to his supervisors on numerous occasions. Defendants argue
10 that, at a minimum, the record shows that Dell had constructive knowledge of the facts underlying its
11 claims, and that Dell did nothing to investigate its claims prior to December 2002.

12 Dell contends that summary judgment is not appropriate because there are genuine issues of
13 material fact as to whether defendants fraudulently concealed the alleged conspiracy such that Dell did
14 not know of its existence. Dell contends that while certain Dell employees were suspicious about
15 defendants’ behavior, no one at Dell had actual knowledge of Dell’s claims. Dell argues that “the mere
16 use of the word ‘cartel’ in some Dell documents” does not show that Dell knew that its suppliers were
17 reaching agreements to fix prices to Dell. Docket No. 6127 at 7:16. Instead, according to Dell, the
18 evidence shows that employees used the term “cartel” loosely to refer to the fact that a heavy
19 concentration of LCD business resided with a handful of companies. Dell attacks Mr. Korman’s
20 credibility, arguing that Mr. Korman is biased, that his declaration is inconsistent with his own
21 deposition testimony, and that his testimony is contradicted by testimony from other Dell employees and
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26 ¹ Dell alleges only direct purchaser price-fixing claims under Section One of the Sherman Act.
27 The direct purchaser plaintiff class action lawsuit, filed on December 12, 2006, tolled Dell’s claims.
28 Dell has alleged that its claims relating to conduct occurring before December 12, 2002, are timely
because defendants fraudulently concealed the alleged price-fixing conspiracy, and Dell did not discover
and could not have discovered through the exercise of reasonable diligence the existence of the
conspiracy until December 2006.

1 defense witnesses.² Dell also asserts that the record demonstrates that its employees took various steps
2 to investigate suspicions of price-fixing, and that those investigations were reasonable under the
3 circumstances.

4 To toll the statute of limitations under a theory of fraudulent concealment, Dell must prove that
5 defendants “fraudulently concealed the existence of the cause of action so that [Dell], acting as a
6 reasonable person, did not know of its existence.” *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858
7 F.2d 499, 502 (9th Cir. 1988). Summary judgment is appropriate “if uncontroverted evidence
8 ‘irrefutably demonstrates that a plaintiff discovered or should have discovered [the cause of action] but
9 failed to file a timely complaint.’” *Id.* (quoting *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th
10 Cir. 1987)).

11 While defendants have submitted powerful evidence suggesting that Dell knew about
12 defendants’ alleged price-fixing activities prior to December 2002, the Court concludes that summary
13 judgment is not appropriate because the parties have submitted conflicting evidence regarding what Dell
14 employees knew and when they knew it. Further, assuming Dell did not have actual knowledge of the
15 alleged conspiracy, there are disputes of fact regarding whether Dell took reasonable steps to investigate
16 suspicions of cartel activity.

17 Accordingly, the Court DENIES defendants’ motion for partial summary judgment dismissing
18 Dell’s pre-December 2002 claims as time-barred.

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20 **II. Mitigation**

21 Defendants separately move for summary judgment on Dell’s claims relating to conduct after
22 December 2002 on the ground that Dell failed to mitigate its damages. Defendants contend that Dell
23 had an affirmative obligation to take reasonable steps to avoid damages, and that the evidence discussed
24 *supra* shows that “Dell failed to take reasonable steps that could have eliminated its damages entirely

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26 ² Dell has filed a motion for sanctions against defendants, in which Dell contends that
27 defendants engaged in misconduct in securing Mr. Korman’s deposition. Dell requests as sanctions,
28 *inter alia*, that the Court bar the use of Mr. Korman’s testimony in motion practice or trial and that the
Court strike defendants’ statute of limitations defense on the basis of fraudulent concealment. The
sanctions motion is currently pending before the Special Master. In ruling on the current motion, the
Court assumes that Mr. Korman’s testimony is generally admissible.

1 and instead knowingly allowed alleged treble damages to accumulate for five years.” Docket No. 5847
2 at 1:21-23. Defendants argue that Dell could have mitigated its damages by complaining to the
3 Department of Justice and/or filing suit against defendants.

4 In response, plaintiffs contend that mitigation is not a defense to horizontal price-fixing.
5 Plaintiffs argue that the authorities cited by defendants “are decades-old cases holding, unremarkably,
6 that the duty to mitigate may exist in cases where the plaintiff is seeking lost profits or damages for a
7 concerted refusal to deal.” Docket No. 6127 at 17:22-23. Plaintiffs also assert that allowing a
8 mitigation defense to a horizontal price-fixing conspiracy would eviscerate the statute of limitations by
9 requiring plaintiffs to take immediate action in order to preserve their legal rights.

10 The Court agrees with Dell that the cases cited by defendants are inapposite because none of
11 those cases involved horizontal price-fixing. *See e.g., Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (5th
12 Cir. 1985) (vertical price-fixing); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983)
13 (monopolization, attempt to monopolize, conspiracy to monopolize, and conspiracy in restraint of trade);
14 *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983) (monopolization); *Borger v. Yamaha Intern.*
15 *Corp.*, 625 F.2d 390 (2d Cir. 1980) (refusal to deal); *Hanover Shoe, Inc. v. United Shoe Machinery*
16 *Corp.*, 185 F. Supp. 826 (D.C. Pa. 1960) (unlawful overcharges). Defendants also cite the ABA Model
17 Jury Instructions in Civil Antitrust Cases, Instruction 14 titled “Mitigation.” *See* ABA Section of
18 Antitrust Law, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Ed. (2005) at
19 F-47. However, the cases cited in the “Notes” as support for a mitigation instruction involved predatory
20 pricing and/or a refusal to deal, not horizontal price-fixing. *See id.* (citing *Malcolm v. Marathon Oil*
21 *Co.*, 642 F.2d 845 (5th Cir. 1981); *Golf City, Inc. v. Wilson Sporting Goods, Co., Inc.*, 555 F.2d 426 (5th
22 Cir. 1977)).

23 In the absence of any on-point authority, the Court declines to hold that defendants may assert
24 mitigation as a defense to Dell’s horizontal price-fixing claim. While an antitrust plaintiff alleging a
25 refusal to deal or vertical price-fixing could reasonably be expected to mitigate damages by finding
26 another supplier, a victim of horizontal price-fixing does not have this option. The Court also finds that
27 the monopolization cases against AT&T, which arose in the context of singular, complex and heavily
28 regulated framework, do not shed any light on whether mitigation is a defense to a horizontal price-

1 fixing claim. *See MCI Communications Corp. v. AT&T*, 708 F.2d at 1207 (quoting lower court jury
2 instructions which stated, *inter alia*, “AT&T contends that the FCC had the power to resolve many of
3 the alleged unlawful acts of which MCI complains and that if MCI had filed complaints with the FCC,
4 or formally objected to tariffs of AT & T, the FCC could have resolved any disputes over FX, CCSA,
5 local distribution areas, the terms and conditions of furnishing local distribution facilities, and multipoint
6 service. MCI denies this contention and argues that AT & T encouraged it to continue negotiating rather
7 than resorting to the FCC.”); *Litton Systems, Inc.*, 700 F.2d at 820 n.47 (noting AT&T’s argument that
8 “Litton should have mitigated its damages by removing the interface devices as soon as the tariff
9 requiring them was invalidated”).

10 Accordingly, the Court DENIES defendants’ motion seeking summary judgment as to Dell’s
11 post-December 2002 claims for failure to mitigate damages.

12
13 **CONCLUSION**

14 For the reasons set forth above, defendants’ motion is DENIED.

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16 **IT IS SO ORDERED.**

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18 Dated: November 30, 2012



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SUSAN ILLSTON
United States District Judge