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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

Master File No. C M:07-01827 SI
MDL NO. 1827

This Document Relates to:

Interbond Corporation of America v. AU Optronics Corporation, et al., Case No. 3:11-cv-03763 SI

Jaco Electronics, Inc. v. AU Optronics Corporation, et al., Case No. 3:11-cv-02495 SI,

Office Depot, Inc. v. AU Optronics Corporation, et al., Case No. 3:11-cv-02225 SI

P.C. Richard & Son Long Island Corporation, et al. v. AU Optronics Corporation, et al., Case No. 3:11-cv-04119 SI

T-Mobile U.S.A., Inc. v. AU Optronics Corporation, et al., Case No 3:11-cv-02591 SI

DIRECT ACTION PLAINTIFFS' NOTICE OF MOTION AND MOTION TO DISMISS DEFENDANTS LG DISPLAY AMERICA, INC. AND LG DISPLAY CO., LTD.'S COUNTERCLAIMS AND STRIKE THEIR DEFENSES CONCERNING DUPLICATIVE RECOVERY

Date: September 7, 2012
Time: 9:00 AM
Location: Courtroom 10, 19th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

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PRIOR RELEVANT ORDERS

Pursuant to this Court's Order of April 9, 2012 (Dkt. No. 5430), the following prior orders entered in this multidistrict litigation proceeding address "substantially similar arguments as those raised in [this] brief."

Date	MDL Dkt. No.	Individual Case & Dkt. Nos.	Plaintiff(s)	Issue(s) Addressed
4/20/2012	5518	*In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, MDL No. 1827	All Direct and Indirect Purchaser Plaintiff Class Actions	Structure of trials in the MDL.
5/25/2012	5795	*Best Buy Co., Inc., et al. v. AU Optronics Corp., et al.*, No. 10-cv-04572-SI	Best Buy Co., Inc.; Best Buy Purchasing LLC; Best Buy Enterprise Services, Inc.; Best Buy Stores, L.P.; Magnolia Hi-Fi, Inc.; Bestbuy.com, L.L.C.	Futility of counterclaims and defenses to avoid potential duplicative recovery.
		Electrograph Sys., Inc. et al. v. Epson Imaging Devices Corp., et al., No. 10-cv-00117 SI	Electrograph Systems, Inc.; Electrograph Technologies Corp.; Douglas C. Giordan	
		Target Corp., et al. v. AU Optronics Corp., et al., No. 10-cv-04945 SI	Target Corp.; Sears, Roebuck & Co.; Kmart Corp.; Old Comp, Inc.; Good Guys, Inc.; Radioshack Corp.; Newegg, Inc.	
		Siegel v. AU Optronics Corp., et al., No. 10-cv-05625 SI	Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust	
		SB Liquidation Trust v. AU Optronics Corp., et al., No. 10-cv-05458 SI	SB Liquidation Trust	

Date	MDL Dkt. No.	Individual Case & Dkt. Nos.	Plaintiff(s)	Issue(s) Addressed
5/25/2012		*TracFone Wireless, Inc. v. AU Optronics Corp., et al.*, No. 10-cv-03205 SI	TracFone Wireless, Inc.	Futility of counterclaims and defenses to avoid potential duplicative recovery.
		Missouri, et al. v. AU Optronics Corp., et al., No. 10-cv-03619 SI	State of Missouri, ex rel. Chris Koster, Attorney General; State of Arkansas, ex rel. Dustin McDaniel, Attorney General; State of Michigan, ex rel. Michael A. Cox, Attorney General; State of West Virginia, ex rel Darrell McGraw, Attorney General; State of Wisconsin, ex rel. J.B. Van Hollen, Attorney General; Indirect Purchaser Plaintiffs	
		Florida v. AU Optronics Corp., et al., No. 10-cv-03517 SI	State of Florida, Office of the Attorney General, Department of Legal Affairs; Indirect Purchaser Plaintiffs	
		Oregon v. AU Optronics Corp., et al., No. 10-cv-4346 SI	State of Oregon, ex rel. John Kroger, Attorney General	
		Costco Wholesale Corp. v. AU Optronics Corp., et al., No. 11-cv-00058 SI	Costco Wholesale Corp.	

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 7, 2012, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Susan Illston, Plaintiffs ABC Appliance, Inc., Interbond Corporation of America, d/b/a BrandsMart USA, Jaco Electronics, Inc., MARTA Cooperative of America, Inc., Office Depot, Inc., P.C. Richard & Son Long Island Corporation, and T-Mobile U.S.A., Inc. will and hereby do move the Court, pursuant to Rules 12(b)(6) and 12(f)(2) of the Federal Rules of Civil Procedure, for an Order dismissing the counterclaims for declaratory judgment and striking the defenses concerning duplicative recovery filed by Defendants LG Display America, Inc. and LG Display Co., Ltd. (together, "LG Display") on the grounds that there is no cognizable legal basis on which LG Display may assert such counterclaims and defenses.

This motion is based upon this Notice of Motion, the following Memorandum of Points and Authorities, the accompanying Declaration of Jason C. Rubinstein, the complete files and records in this action, argument of counsel, and such other matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs ABC Appliance, Inc. ("ABC"), Interbond Corporation of America, d/b/a BrandsMart USA ("BrandsMart"), Jaco Electronics, Inc. ("Jaco"), MARTA Cooperative of America, Inc. ("MARTA"), Office Depot, Inc. ("Office Depot"), P.C. Richard & Son Long Island Corporation ("P.C. Richard"), and T-Mobile U.S.A., Inc. ("T-Mobile," and together with the aforementioned plaintiffs, the "Moving DAPs") respectfully submit this memorandum of law in support of their motion to dismiss defendants LG Display America, Inc. and LG Display Co., Ltd.'s (together, "LG Display") counterclaims and strike their defenses concerning duplicative recovery.

STATEMENT OF ISSUES TO BE DECIDED

Issue 1: Whether LG Display's counterclaims to avoid duplicative recovery should be dismissed pursuant to FED. R. CIV. P. 12(b)(6) given that the Court previously rejected LG Display's efforts to amend its answers in a number of the DAP cases to include such counterclaims.

Issue 2: Whether LG Display's defenses to avoid duplicative recovery should be stricken under FED. R. CIV. P. 12(f)(2) given that the Court previously rejected LG Display's efforts to amend its answers in a number of the DAP cases to include such defenses.

INTRODUCTION

In March 2012, LG Display sought leave of Court to amend its answers in a number of DAP cases to assert counterclaims and affirmative defenses seeking to prohibit the plaintiffs from obtaining what LG Display terms "duplicative recovery" purportedly in violation of the U.S. Constitution and various state laws. The Court rejected LG Display's request, ruling that the defendants had failed to provide any "legal basis" on which to base such counterclaims and affirmative defenses. The purpose of this Motion is to strike those same counterclaims and affirmative defenses, which LG Display has asserted in the Moving DAPs' cases. Despite the

Court's clear rejection of these counterclaims and defenses, LG Display has refused to voluntarily withdraw them, thus necessitating this Motion.

BACKGROUND

A. LG Display's Amended Answers

This Motion arises from LG Display's answers filed in the Moving DAPs' cases,[1] in particular LG Display's recent amendment of those answers to assert new counterclaims and defenses based on the erroneous contention that any recovery by any DAP that is duplicative of any other award of damages recovered by any other claimant would be unconstitutional and prohibited by various state laws. Specifically, LG Display's counterclaims allege that any recovery by any DAP that is "duplicative of any other award of damages to any other claimant" would be an unconstitutional violation of substantive due process under both the Fifth and Fourteenth Amendments as well as prohibited by various state laws. (*See, e.g.*, Dkt. No. 5253 (Am. Ans. to T-Mobile) ¶¶ 351-58.)[2] Similarly, LG Display asserts defenses predicated on the theory that any duplicative recovery would offend principles of "unconstitutional multiplicity," substantive due process pursuant to the Fifth and Fourteenth Amendments, Equal Protection under the Fourteenth Amendment, the Excessive Fines Clause of the Eighth Amendment, various state laws, as well as the "laws of duplicative recovery." (*See, e.g.*, *id.* Defenses Nos. 13-20.)

[1] *See* Dkt. Nos. 5247 & 5248 (Am. Ans. to Office Depot); 5250 & 5251 (Am. Ans. to BrandsMart); 5252 & 5253 (Am. Ans. to T-Mobile); 5254 & 5255 (Am. Ans. to ABC, MARTA, and P.C. Richard); 5302 & 5303 (Am. Ans. to Jaco). Both LG Display entities (*i.e.*, LG Display America, Inc. and LG Display Co.) filed separate amended answers and counterclaims to each of the Moving DAPs' complaints, stating substantively identical counterclaims and defenses with respect to each DAP.

Unless otherwise noted, all "Dkt. No." references concern filings made in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, Master File No. C M:07-01827 SI.

[2] As noted, LG Display's "duplicative recovery" counterclaims and defenses are largely uniform across Moving DAPs. Thus, for purposes of economy, the Moving DAPs will cite only to LG Display America, Inc.'s Amended Answer to T-Mobile's Complaint (Dkt. No. 5253) when addressing portions of LG Display's pleadings common to all Moving DAPs.

B. The Court Has Rejected LG Display's Counterclaims And Defenses

The Court has already considered and rejected LG Display's efforts to assert defenses based on "duplicative recovery" *twice* before. *First*, on April 20, 2012, the Court denied Defendants' Motion Regarding Trial Structure and For Relief to Avoid Duplicative Damages (*see* Dkt. No. 5518), in which LG Display and other defendants "urge[d] the Court . . . to prevent duplicative treble damage awards for the same alleged overcharges on TFT-LCD panels." (Dkt. No. 5258 at 2.) *Second*, on May 25, 2012, the Court denied as futile LG Display's motion for leave to amend its answers to complaints filed by other direct action plaintiffs in this MDL where, once again, LG Display sought to assert substantially the same counterclaims and defenses as it asserts here. (Dkt. No. 5795.)

In denying LG Display's motion for leave to amend, the Court ruled that:

> Defendants' moving papers set out arguments very similar to those made in Defendants' Motion Regarding Trial Structure and For Relief to Avoid Duplicative Damages. *The Court found then and finds now that Defendants have not provided legal basis for their proposed "violation of laws of duplicative recovery" defense or for their proposed counterclaims for declaratory [judgment] regarding the same.*

(Dkt. No. 5795 at 1 (internal citations omitted; emphasis added).)

C. LG Display Has Refused To Voluntarily Withdraw Its Counterclaims And Defenses

After the Court issued its Order denying LG Display's motion for leave to amend, counsel for the Moving DAPs requested that LG Display voluntarily dismiss its rejected counterclaims and affirmative defenses from the Moving DAPs' cases. (*See* Declaration of Jason C. Rubinstein, July 19, 2012, ¶ 2.) LG Display refused to do so, stating that it wished to preserve for appeal its arguments regarding the propriety of these claims and defenses. (*Id.* ¶ 3.)

ARGUMENT

There is no real dispute that LG Display's "duplicative recovery" counterclaims and defenses should be dismissed. Indeed, the Court has already rejected the exact same claims and defenses that are the subject of this Motion, and during the parties' meet and confer efforts, LG Display offered no reason why the Court should rule any differently here. Simply put, there is absolutely no basis for LG Display to assert the counterclaims and defenses that are the subject of this Motion. They should be dismissed with prejudice.

Under Federal Rule of Civil Procedure 12(b)(6), courts should dismiss counterclaims that "'lack . . . a cognizable legal theory . . . .'" *Weiner v. McCoon*, No. 06-CV-1328, 2007 WL 2782843, at *6 (S.D. Cal. Sept. 24, 2007) (dismissing counterclaim where "Defendant does not refer to any statutory or common law basis for" it); *see also Behjou v. Bank of Am. Group Benefits Program*, No. C 10-03982 SBA, 2011 WL 4388320, at *2 (N.D. Cal. Sept. 20, 2011) (state law cause of action not viable where federal law preempted such claim). To survive a motion to dismiss, a counterclaim must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Likewise, Federal Rule of Civil Procedure 12(f)(2), which governs the Moving DAPs' motion to strike LG Display's defenses, requires courts to strike "insufficient defense[s]" from a pleading, including when they are predicated on a spurious or deficient legal theory. *See, e.g., J & J Sports Prods., Inc. v. Mendoza-Govan*, No. C 10-05123, 2011 WL 1544886, at *5, 6 (N.D. Cal. Apr. 25, 2011) (striking ignorance of law affirmative defense because it "is not a defense to liability"); *see also J & J Sports Prods., Inc. v. Terry Trang Nguye*n, No. C 11-05433, 2012 WL 1030067, at *3 (N.D. Cal. Mar. 22, 2012) (striking purported affirmative defenses that were mere denials of the plaintiffs' claims and allegations).[3]

[3] Even if there were legal support for LG Display's assertion that the U.S. Constitution or state antitrust laws categorically bar duplicative recovery – and there is not – LG Display's defenses would be defective. LG Display relies on matters extraneous to the Moving DAPs' pleadings in asserting its "duplicative recovery" defenses – *e.g.*, alleging that "multiple actions pending in multiple courts applying multiple laws to the same series of circumstances

I. DUPLICATIVE RECOVERY IS CONSTITUTIONAL

LG Display's counterclaims and defenses, based on "unconstitutional multiplicity," substantive due process, equal protection, and the Eighth Amendment's prohibition on excessive fines, necessarily fail because LG Display does not have a constitutional right to be free from multiple liability for price-fixing. LG Display therefore cannot state a viable cause of action for a judgment declaring such a right, or assert a viable defense premised on its right to be free from the risk of duplicative recovery.

As one group of direct action plaintiffs previously demonstrated in their Response to Defendants' Motion Regarding Trial Structure and Duplicative Recovery (Dkt. No. 5414 at 4-6), and as a different set of direct action plaintiffs *again* demonstrated in their Joint Opposition to LG Display's Motion for Leave to Amend (Dkt. No. 5557 at 4-6), the Supreme Court's precedent makes clear that there is no duplicative recovery issue between the federal and state plaintiffs in this MDL. *Hanover Shoe* first established that a federal antitrust plaintiff is entitled to 100% of any overcharge that it paid, regardless of whether some of that overcharge was

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and transactions" expose it to the "risk of being held liable for multiple awards of damages . . . ." (Dkt. No. 5253 ¶ 317.) LG Display's "defenses" should therefore be analyzed as affirmative defenses. *See Botell v. U.S.*, No. 2:11-CV-01545, 2012 WL 1027270, at *4 (E.D. Cal. Mar. 26, 2012) ("Affirmative defenses plead matters extraneous to the plaintiff's prima facie case . . . .") (citations and punctuation omitted).

As a matter of law, a valid affirmative defense operates to bar liability *entirely*. LG Display's purported affirmative defenses would not immunize it from liability, but would instead limit the extent of its damages. Accordingly, they must be stricken. *Cf. Taylor v. U.S.*, 821 F.2d 1428, 1433 (9th Cir. 1987) (ruling that the government did not waive protection afforded by CAL. CIV. CODE § 3333.2 by failing to plead it as a defense because it "limits, but does not bar recovery for noneconomic damages . . . . [T]he Federal Rules do not consider limitations of damages affirmative defenses . . . . "). *See also Botell*, 2012 WL 1027270, at *5 (striking eight affirmative defenses that sought to limit Plaintiffs' damages because they did not constitute affirmative defenses); *Joe Hand Promotions, Inc. v. Estrada*, No. 1:10-cv-02165, 2011 WL 2413257, at *3, 4 (E.D. Cal. June 8, 2011) (striking defense of duplicative recovery, noting that "Defendant is free to raise this as a defense during the litigation, but it is not accurately characterized as an affirmative defense," and also striking excessive damages defense noting that it "does not prevent Plaintiff from recovering and, thus, does not constitute an affirmative defense"); *Kiswani v. Phoenix Sec. Agency, Inc.*, No. 05 C 4559, 2006 WL 463383, at *5 (N.D. Ill. Feb. 22, 2006) ("Assertions that punitive damages are not recoverable or constitutional do not constitute affirmative defenses under Section 8(c)."); *Greiff v. T.I.C. Enters., L.L.C.*, No. Civ. 03-882, 2004 WL 115553, at *3 (D. Del. Jan. 9, 2004) (striking plaintiffs' affirmative defenses alleging that excessive punitive damages would violate due process, reasoning that such "averments do not constitute affirmative defenses because they will not defeat defendants' counterclaims if proven," noting "it is clear that the concept of damages serves a purpose far different from an affirmative defense—damages are intended to redress injuries incurred by a plaintiff after liability has been established, not as a means to shield liability in the first instance").

passed on to indirect purchasers. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). Next, in *Illinois Brick*, the Court reaffirmed its holding in *Hanover Shoe* that "in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff . . . ." *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 726 (1977).

Finally, in *ARC America*, the Court held that federal antitrust laws do not preempt state law causes of action by indirect purchaser plaintiffs. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). The Court stated that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *Id.* at 102. It rejected the argument that any "express federal policy condemning multiple liability" compelled a different result. *Id.* at 105 (citations and punctuation omitted). The Court made clear that direct purchasers may recover under federal antitrust law at the same time that indirect purchasers may recover under state antitrust law: "[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." *Id.* at 103.

ARC America thus established that a defendant can be held liable for one hundred percent of the overcharge damages, trebled, to the direct purchaser under federal law and also be liable to the indirect purchaser under state law. Neither *ARC America*, *Illinois Brick*, or *Hanover Shoe* nor any that of the cases cited by LG Display in its previous submissions on this question indicates that the Supreme Court thought such multiple liability would violate the Constitution. Nor did the Supreme Court require that damages be allocated between direct purchaser federal plaintiffs and indirect purchaser state plaintiffs. Rather, the Court strongly indicated the opposite: "[T]hese state statutes cannot and do not purport to affect remedies available under federal law." *ARC America*, 490 U.S. at 103. This leaves federal and state law plaintiffs free to pursue their different claims without allocation between each other, because under the federal

antitrust laws, the Supreme Court has not identified any "policy against States imposing liability in addition to that imposed by federal law." *Id.* at 105.

The fact that antitrust defendants may be dually liable to the direct purchaser under federal law and to indirect purchasers under state law for the same overcharge is a "necessary consequence" of the Supreme Court's decision in *ARC America* and of the *Illinois Brick* repealer statutes enacted by state legislatures:

> States . . . which have repealed *Illinois Brick* and allowed indirect purchasers to sue for antitrust violations, have necessarily made the policy decision that duplicative recovery may permissibly occur. Duplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery.

In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1156 (N.D. Cal. 2009) (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1089 (N.D. Cal. 2007)). These cases establish that there is no constitutional prohibition against the potential duplicative recovery that LG Display seeks to avoid.

Finally, the Eighth Amendment's prohibition on excessive fines does not apply to awards of punitive damages in cases between private parties, and therefore LG Display's defenses based on the Eighth Amendment necessarily fail. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264, 275 (1989).

Accordingly, the Court should dismiss LG Display's counterclaims based on substantive due process under the Fifth and Fourteenth Amendments, and strike its defenses based on substantive due process, "Unconstitutional Multiplicity," Equal Protection pursuant to the Fourteenth Amendment, and the Excessive Fines Clause of the Eighth Amendment.

II. LG DISPLAY'S STATE LAW DEFENSES AND COUNTERCLAIMS ARE DEVOID OF ANY LEGAL BASIS

LG Display's allegation, embedded in its counterclaims and defenses, that any DAP's recovery of damages "duplicative of any other award of damages to any other claimant" would "constitute a violation of [state law]" (*see, e.g.*, Dkt. No. 5253 ¶¶ 351-52 & Defense No. 18 (alleging violations of California law), ¶¶ 353-54 & Defense No. 19 (alleging violations of New York)) is also without merit. Leaving aside the fact that two of the Moving DAPs – T-Mobile and Jaco – have no pending state law antitrust claims against LG Display (*see* Dkt. No. 4786 at 3 (dismissing T-Mobile's state law indirect purchaser claims); Dkt. No. 3086 (asserting no state law indirect purchaser claims on behalf of Jaco)), the state statutes at issue, and the decisional authority interpreting them, do not support LG Display's "duplicative recovery" counterclaims and defenses.

Indeed, as detailed below, the plain language of these statutes runs counter to the theory underlying LG Display's counterclaims and defenses. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, [the] analysis begins with the 'language of the statute.' . . . [W]here the statutory language provides a clear answer, [the analysis] ends there as well."). Further, LG Display's attempt to seek relief not contemplated by any state's laws is particularly inappropriate in view of the fact that it already asserts pass-on defenses to the Moving DAPs' state-law claims, and has thereby obviated the risk that any DAP will recover damages on an indirect purchaser claim for overcharges ultimately incurred by some other claimant. (*See, e.g.*, Dkt. No. 5253 (Am. Ans. to T-Mobile) Defense No. 10).) Accordingly, LG Display's purported state law counterclaims should be dismissed and its corresponding defenses should be stricken.

A. Florida Law Does Not Support LG Display's Counterclaims Against the Moving DAPs, or a Defense to Their Claims[4]

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") does not provide a duplicative recovery defense to the Moving DAPs' claims, nor does it serve as a basis for counterclaims against them. The FDUTPA allows indirect purchasers to sue for any actual damages sustained as a result of an unfair or deceptive practice. *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100, 107-08 (Fla. Dist. Ct. App. 1996) (permitting indirect purchaser suits under FDUTPA, and stating that "subsections 501.202(2), 501.211(2) and 501.204(1) of the Florida DTPA [is] a clear statement of legislative policy to protect consumers through the authorization of such indirect purchaser actions"); *see also In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *1, 10-15, 19 (Fla. Cir. Ct. Aug. 26, 2002) (certifying class of indirect purchasers under FDUTPA, and discussing the application of a pass-on defense). The Moving DAPs seek their actual damages. There is nothing under Florida law that would limit the remedies available to the Moving DAPs based on other damages awarded to other injured parties.[5] Furthermore, LG Display has already asserted a pass-on defense, rendering its newly-added counterclaims and defenses redundant. Therefore, Florida law provides no basis for LG Display's counterclaims and defenses.

[4] BrandsMart and Office Depot assert claims under Florida law. (Dkt. No. 4073 (BrandsMart Am. Cpl.) ¶¶ 278-85; Dkt. No. 3619 (Office Depot Am. Cpl.) ¶¶ 281-87.) LG Display, in turn, asserts "duplicative recovery" counterclaims and defenses based on Florida law. (Dkt. No. 5251 (Am. Ans. to BrandsMart) ¶¶ 367-68 & Defense No. 18; Dkt. No. 5247 (Am. Ans. to Office Depot) ¶¶ 389-90 & Defense No. 18.)

[5] Moreover, the Florida Antitrust Act (FLA. STAT. § 542.22 (2)(a)) regarding duplicative recovery under *parens patriae* suits is irrelevant because both BrandsMart and Office Depot pursue only their own damages and neither are pursuing claims under the Florida Antitrust Act.

B. Illinois Law Does Not Support LG Display's Counterclaims Against the Moving DAPs, or a Defense to Their Claims [6]

The Illinois Antitrust Act also does not support a duplicative recovery defense to the Moving DAPs' claims, or provide a basis for LG Display's counterclaims. The Illinois Antitrust Act provides for an indirect purchaser cause of action for individual claimants, *see* 740 ILL. COMP. STAT. 10/7(2) ("No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages."), but requires indirect purchaser class suits to be brought by the Illinois Attorney General. *Id.* ("[N]o person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action *parens patriae* as provided in this subsection."). If the defendant is faced with claims by both direct and indirect purchasers, the Act provides that "the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." *Id.*

But on its face, this statute does not provide a counterclaim or defense to LG Display. Instead, it permits the court to take procedural steps to avoid duplicative liability. Accordingly, LG Display fails to state a viable counterclaim under Illinois law, and its related defense is defective.

[6] MARTA asserted claims under Illinois law. (Dkt. No. 4075 (P.C. Richard, et al., Am. Cpl.) ¶ 290.) LG, in turn, has asserted counterclaims and defenses based on Illinois law. (Dkt. No. 5255 (Am. Ans. to P.C. Richard, et al.) ¶¶ 390-91 & Defense No. 19.) MARTA and Defendants have reached an agreement in principle to dismiss MARTA's claims under Illinois law, and a stipulation to that effect will be filed with the Court. Accordingly, this Court should dismiss and strike these counterclaims and defenses to the extent they are asserted against any of the plaintiffs in the *P.C. Richard, et al.* action, because they do not assert Illinois law claims.

C. New York Law Does Not Support LG Display's Counterclaims Against the Moving DAPs, or a Defense to Their Claims[7]

New York's Donnelly Act also does not provide a duplicative recovery defense to the Moving DAPs' claims, or a basis for LG Display's counterclaims. The Donnelly Act, like the other state law *Illinois Brick* repealer statutes at issue here, provides for an indirect purchaser cause of action. *See* N.Y. GEN. BUS. LAW § 340(6) ("In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery . . . ."). It further provides that, in actions where both direct and indirect purchasers have asserted claims against a defendant, "the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions." *Id.*

However, this provision of the Donnelly Act provides neither a counterclaim nor a defense on the grounds LG Display has asserted here. Rather, it permits a defendant "to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages." That is, the only defense to "duplicative recovery" supported by N.Y. GEN. BUS. LAW § 340(6) is a pass-on defense. The Donnelly Act affords LG Display no further relief. Therefore, this Court should dismiss LG Display's counterclaims and strike the related defenses premised on New York law.

[7] P.C. Richard asserts claims under New York law. (Dkt. No. 4075 (P.C. Richard, et al., Am. Cpl.) ¶ 292.) And LG Display, in turn, asserts counterclaims and defenses based on New York law. (Dkt. No. 5255 (Am. Ans. to P.C. Richard, et al.) ¶¶ 394-95 & Defense No. 21.) Regardless of their merits as to P.C. Richard, this Court should dismiss and strike these counterclaims and defenses to the extent they are asserted against the remaining plaintiffs in the *P.C. Richard, et al.* action, because they have no pending claims under New York law. For the same reason, it should dismiss and strike these counterclaims and defenses to the extent LG Display asserts them against T-Mobile, whose claims under New York law have been dismissed. (Dkt. No. 4786 at 3.)

D. Arizona Law Does Not Support LG Display's Counterclaims Against the Moving DAPs, or a Defense to Their Claims[8]

The Arizona Antitrust Act (the "AAA") does not support a counterclaim or defense to the Moving DAPs' claims based on LG Display's theory of duplicative recovery. Under ARIZ. REV. STAT. ANN. § 44-1408, indirect purchasers may recover damages pursuant to Arizona's antitrust laws. *See Bunker's Glass Co. v. Pilkington PLC, 206 Ariz.* 9, 11 (2003) ("We conclude that Defendants' interpretation [of § 44-1408 (*i.e.*, that such statute does *not* permit indirect purchasers to bring suit)] contravenes the language of the statute, the goals of antitrust regulation expressed in the Arizona Constitution, and sound policy."). The AAA – which was enacted prior to *Illinois Brick* – is silent on the issue of multiple recoveries. *See id.* at 12, 18. Therefore, LG Display's Arizona law counterclaims and defenses have no statutory basis.

Nor do they have any basis in decisional law. Indeed, although the Arizona Supreme Court has identified "duplicative recovery" as an issue of "legitimate and important concern," *id.* at 18, it did not hold that defendants may assert "duplicative recovery" counterclaims or defenses. Rather, the court suggested that trial courts have broad procedural discretion to deal with duplicative recovery. *Id.* at 18 (Duplicative recovery "is not, however, a problem that our trial courts are incompetent to handle. Indeed, most of the *Illinois Brick* repealer statutes leave the solution to the double-recovery problem to the courts."). Moreover, the Arizona Supreme Court suggested that defendants may invoke a pass-on defense to indirect purchaser claims. *See id.* at 17-18 (discussing the pass-on defense). Once again, LG Display has already asserted such a defense, which renders redundant any additional counterclaims and defenses based on duplicative recovery. Consequently, LG Display fails to state a viable

[8] MARTA asserted claims under Arizona law. (Dkt. No. 4075 (P.C. Richard, et al., Am. Cpl.) ¶ 289.) LG, in turn, has asserted counterclaims and defenses based on Arizona law. (Dkt. No. 5255 (Am. Ans. to P.C. Richard, et al.) ¶¶ 388-89 & Defense No. 18.) MARTA and Defendants have reached an agreement in principle to dismiss MARTA's claims under Arizona law, and a stipulation to that effect will be filed with the Court. Accordingly, this Court should dismiss and strike these counterclaims and defenses to the extent they are asserted against any of the plaintiffs in the *P.C. Richard, et al.* action, because they do not assert Arizona law claims.

counterclaim based on duplicative recovery under Arizona law, and its related defense is insufficient.

E. Michigan Law Does Not Support LG Display's Counterclaims Against the Moving DAPs, or a Defense to Their Claims[9]

The Michigan Antitrust Reform Act ("MARA"), which provides for an indirect purchaser cause of action, *see* MICH. COMP. LAWS ANN. § 445.778(2) ("Any . . . person . . . injured . . . *indirectly* in his or her business or property by a violation of this act may bring an action . . . ."") (emphasis added), is completely silent on the issue of duplicative recovery. But it notably does not create an affirmative cause of action sounding in duplicative recovery, nor does it recognize such a defense. As a result, MARA does not support LG Display's counterclaims or defenses based on Michigan law.

Moreover, under Michigan law, plaintiffs asserting indirect purchaser claims have the burden of proving "actual damages," and therefore must show that overcharges were passed on to them. *See A & M Supply Co. v. Microsoft Corp.*, 654 N.W.2d 572, 575 (Mich. App. 2002) ("proving overcharge *and pass-on* are essential to succeeding in an indirect purchaser suit under MARA") (emphasis added). As mentioned above, LG Display has already asserted a pass-on defense, rendering redundant any additional duplicative recovery causes of action and defenses. Thus, LG Display's Michigan law counterclaims fail to state a claim, and its corresponding defenses should be stricken.

[9] ABC asserted claims under Michigan law. (Dkt. No. 4075 (P.C. Richard, et al., Am. Cpl.) ¶ 291.) LG, in turn, has asserted counterclaims and asserts defenses based on Michigan law. (Dkt. No. 5255 (Am. Ans. to P.C. Richard, et al.) ¶¶ 392-93 & Defense No. 20.) Regardless of their merits as to ABC, this Court should dismiss and strike these counterclaims and defenses to the extent they are asserted against the remaining plaintiffs in the *P.C. Richard, et al.* action, because they have no pending claims under Michigan law.

F. LG Display's Counterclaims and Defenses Based On California Law Should Be Dismissed Because the Moving DAPs Have No Pending California Claims

Although California's Cartwright Act and Unfair Competition Act provide no support to LG Display's "duplicative recovery" counterclaims and defenses, the Court need not reach that question. LG Display's California law counterclaims and defenses (*see* Dkt. No. 5247 (Am. Ans. to Office Depot) ¶¶ 391-92 & Defense No. 19; Dkt. No. 5253 (Am. Ans. to T-Mobile) ¶¶ 351-52 & Defense No. 18) should be dismissed and stricken, respectively, because none of the Moving DAPs has any pending claims under California law. Indeed, the Court has already dismissed the only California law claims asserted by any of the Moving DAPS. (*See* Dkt. No. 4592 (Office Depot) at 3; Dkt. No. 4786 (T-Mobile) at 3.)

III. LG DISPLAY'S DEFENSE BASED ON THE "LAWS OF DUPLICATIVE RECOVERY" HAS NO LEGAL BASIS

LG Display asserts a defense to the Moving DAPs' claims based on "violation of laws of duplicative recovery":

> To the extent that Plaintiff[s] seeks recovery of damages or is awarded damages which are duplicative of any other award of damages to any other claimant, then such duplicative damages sought by or awarded to Plaintiff[s] constitute a violation of law, and cannot be awarded and/or are void.

(Dkt. No. 5253, Defense No. 20.) LG Display cites no legal authority in support of its apparent assertion that the prospect of a "duplicative recovery" is inherently offensive to some nebulous body of general legal principles. And as set forth in detail above, there are no federal or state "laws of duplicative recovery." Accordingly, LG Display's defense should be stricken.

IV. POST-TRIAL REMITTITUR, AND NOT THE ASSERTION OF CLAIMS AND DEFENSES, IS THE APPROPRIATE VEHICLE THROUGH WHICH TO CHALLENGE MULTIPLE PUNITIVE AWARDS

LG Display has already asserted a pass-on defense to the Moving DAPs' claims. (*See, e.g.*, Dkt. No. 5253, Defense No. 10). Its "duplicative recovery" counterclaims and

defenses are therefore redundant. They are also unnecessary to address LG Display's concerns about duplicative recovery where, as here, courts already have a procedural mechanism for limiting excessive damages awards – post-trial remittitur.

Courts routinely employ post-trial remittitur to limit punitive damages awards. *See, e.g., Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009) ("[W]e will vacate the award and remand the case to the district court for an order of remittitur that will set the punitive damages in an amount that it determines is compatible with due process . . . ."); *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1187 (2005) (stating that remittitur is a proper way to address excessive punitive damages). Remittitur is also a proper vehicle to address concerns about duplicative recovery. *See, e.g., Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9049, 2011 U.S. Dist. LEXIS 85928, at *56-57 (C.D. Cal. Aug. 4, 2011) (deeming remittitur proper where jury returned duplicative damages award); *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1080 (10th Cir. 2008) (same); *Eccleston v. N.Y. City Health & Hosps. Corp.*, 266 A.D.2d 426, 428 (N.Y. App. Div. 2d Dep't 1999) (reducing judgment to the extent it represented a duplicative recovery). Because the issue of duplicative recovery can be raised in the context of post-trial remittitur proceedings, if and when LG Display's duplicative damages concerns materialize, LG Display's assertion of legally defective counterclaims and defenses should be rejected.

CONCLUSION

For the reasons stated above, the Moving DAPs respectfully submit that their motion to dismiss LG Display's counterclaims and strike its defenses concerning duplicative recovery should be granted, with prejudice.

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Respectfully submitted,

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