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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

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

Case Nos. 3:11-cv-03763 SI; 3:11-cv-02495 SI; 3:11-cv-02225 SI; 3:11-cv-04119 SI; 3:11-cv-02591 SI

Case No. M 07-md-01827 SI

MDL No. 1827

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

Date: September 7, 2012
Time: 9:00 a.m.
Courtroom: 10
Judge: Honorable Susan Y. Illston

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I. RELEVANT PRIOR ORDERS

Date	MDL Dkt. No.	Order and Holding
4/20/12	5518	*Order Regarding Trial Structure* (Bifurcating the IPP and DPP class action trials into two phases.)
5/25/12	5795	*Order Denying LG Display America, Inc. and LG Display Co., LTD.'s Motion for Leave to Amend* (Denial of motion for leave to amend answers to include duplicative recovery counterclaims and defenses for lack of legal basis.)

II. INTRODUCTION

Instead of confronting the abundant authority precluding duplicative recovery, Plaintiffs avoid it. In their motion to dismiss LG Display's counterclaims and strike LG Display's additional defenses, Plaintiffs argue that the Court need look no further than its prior orders to grant the relief they seek. *See* D.I. 6227 at 1:24-2:2. But those orders dealt with other plaintiffs, the question of leave for amendment, and the question of bifurcation. *See* D.I. 5795; D.I. 5518. Thus, the issues framed by the counterclaims and defenses pled by LG Display have yet to be resolved in these cases.

As illustrated below, LG Display's counterclaims and defenses are well-founded in controlling law, and exceed the low threshold for barring the relief Plaintiffs seek. The Supreme Court has held that defendants have a Due Process right not to face multiple claims for the same injury, absent some mechanism to avoid duplicative judgments. *See Western Union Tel. Co. v. Pa.*, 368 U.S. 71 (1961). Similarly, the Supreme Court has acknowledged that duplicative recovery is a problem—usually addressed through joinder—that exists in the precise circumstances at issue here. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977) (noting that traditionally joinder would be required when multiple levels of purchasers seek recovery for the same alleged overcharge). Further still, the laws of each of the jurisdictions invoked by Plaintiffs—Arizona, Florida, Illinois, Michigan, and New York—all command courts to exclude or otherwise deal with duplicative claims. *See, e.g.*, N.Y. Gen. Bus. Law § 340(6) ("the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions").

Through its counterclaims and defenses, LG Display seeks nothing more than an

opportunity to address squarely the issue of whether the Constitution and/or the laws of Arizona, Florida, Illinois, Michigan, and New York bar or otherwise affect Plaintiffs' claims for duplicative recovery. Because LG Display's counterclaims and defenses are "plausible on [their] face" and the Ninth Circuit is "reluctant to dismiss on the basis of the pleadings [even] when the asserted theory of liability is novel or extreme" this Court should deny Plaintiffs' motions. *Sateriale v. R.J. Reynolds Tobacco Co.*, 2012 WL 2870120, at *2 (9th Cir. July 13, 2012); *Elec. Const. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir. 1985).

III. PROCEDURAL BACKGROUND

As alleged in LG Display's counterclaims (and undisputed by Plaintiffs), each Plaintiff brings claims for overcharges on panels that are duplicative of claims brought by other purchasers. Their claims are duplicative of claims settled in the IPP and DPP class actions, claims brought or settled by other direct action purchasers, and claims brought or settled by several state attorneys general. Defendants originally sought to address this overlap in the IPP class action, moving to structure the trial in a way that would avoid multiple suits by different parties for the same damages. *See* D.I. 5258, 5437. The Court denied defendants' request, instead altering the DPP and IPP trial into a two-phase structure. *See* D.I. 5518. The IPP class settled, and the DPP class proceeded to trial against Toshiba.

Around the same time, LG Display sought leave to amend its answers in several earlier-filed actions in the TFT-LCD (Flat Panel) multi-district litigation (the "MDL") and amended its answers as of right in the above-captioned cases. *See* D.I. 5271, 5619. In the earlier-filed actions, the Court denied leave to amend, holding that LG Display had not "provided legal basis for [its] proposed 'violation of the laws of duplicative recovery' defense or for [its] proposed counterclaims for declaratory judgment regarding the same." *See* D.I. 5795. But in the above-captioned cases, at least one plaintiff has recognized that the amendments at issue here are proper, and has answered LG Display's counterclaims. *See* D.I. 6221. Nonetheless, other plaintiffs, moving parties here, have objected to LG Display's amendments, citing the Court's order denying leave in the earlier, differently-situated cases.

In denying LG Display leave to amend its answers in the earlier-filed cases, the Court

cited language from *In re Flash Memory Antitrust Litigation*, 643 F. Supp. 2d 1133, 1156 (N.D. Cal. 2009), stating "[d]uplicative 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." D.I. 5795 (quoting *In re Dynamic Random Access Memory Antitrust Litigation* ("*DRAM*"), 516 F. Supp. 2d 1072, 1089 (N.D. Cal. 2007)). In their motion, Plaintiffs quote this language as if it supported their substantive assertion that the Constitution does not prohibit duplicative recovery, *see* D.I. 6227 at 7:3-15. LG Display respectfully submits, however, that the quoted language is simply inapplicable in the circumstances now presented by these cases, and in no way precludes the counterclaims and defenses LG Display has pled. To take a sentence out of context and call it conclusive is improper. As explained below, the legal issue presented in *In re Flash* and *DRAM* was a different legal issue from the one LG Display's counterclaims present here.

In *DRAM* and *In re Flash*, the Courts were evaluating antitrust standing under the rubric of *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983), and did not face the *established* threat of duplicative recovery at issue here. Significantly, in *In re Flash Memory*, when deciding that a risk of duplicative recovery was tolerable at the standing stage, the Court noted that the plaintiffs in that action claimed that the overcharges they sought were "distinct and traceable." 643 F. Supp. 2d at 1156. Plaintiffs here make no such claim. Furthermore, in *DRAM*, the Court ultimately *denied* standing, meaning the significance of the dicta regarding the risk of duplicative recovery was eclipsed by other deficiencies in plaintiffs' claims. *See* 516 F. Supp. 2d at 1089-93 (holding that all other *AGC* factors weighed against standing). Thus, in *DRAM*, as in *In re Flash Memory*, the threat of duplicative recovery was not palpable in the way it is here, and the Court was not faced with the question of whether and by what mechanisms the Court should neutralize that threat. As a result, the language drawn from those cases does not control here.[1]

[1] Moreover, neither case applied the state laws prohibiting duplicative recovery that are at issue in these cases. *See infra* at 12-15 (Arizona, Florida, Illinois, Michigan, and New York). As a result, even if *In re Flash Memory* and *DRAM* supported the proposition that permitting overlapping recoveries for claims under the Clayton Act and state law is constitutional—which they do not—

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IV. LEGAL STANDARD

When analyzing a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), courts must accept "all factual allegations in the [counterclaim] as true and construe the pleadings in the light most favorable to the nonmoving party." *U.S. v. Union Auto Sales, Inc.*, 2012 WL 2870333, at *1 (9th Cir. July 13, 2012) (quoting *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029 (9th Cir.2009)). If the claim for relief "is plausible on its face," the motion to dismiss must be denied. *Sateriale* at *2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quote marks omitted). "The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions." *Maeda* at 623.

Similarly, motions to strike brought under Federal Rule of Civil Procedure 12(f)(2) "are generally disfavored" and should be denied "unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." *Griffin v. Gomez*, 2010 WL 4704448, at *3-4 (N.D. Cal. Nov. 12, 2010); *McArdle v. AT & T Mobility LLC*, 657 F. Supp. 2d 1140, 1149-50 (N.D. Cal. 2009) ("Although the Ninth Circuit has not ruled on the proper use of a Rule 12(f) motion to strike an affirmative defense, three other circuits have ruled that the motion is disfavored and should only be granted if the asserted defense is clearly insufficient as a matter of law under any set of facts the defendant might allege." (citations omitted)), *rev'd on other grounds*, 2012 WL 2498838 (9th Cir. June 29, 2012).[2] Accordingly, "a motion to strike which alleges the legal insufficiency of an affirmative defense will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be

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(continued)
those cases do not address the further question of whether overlap among plaintiffs asserting claims under different state laws is permissible (under either the Constitution or applicable state law). Those issues were never reached and thus were not resolved. *See Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) ("Such unstated assumptions on non-litigated issues are not precedential holdings binding future decisions.").

[2] Plaintiffs also object to LG Display's reliance on the "Excessive Fines" clause as an affirmative defense. D.I. 6227 at 7:16-19. LG Display confirms it will not defend against Plaintiffs' damages claims on that basis.

proved in support of the defense." *Griffin v. Gomez*, 2010 WL 4704448, at *3 (citation and internal quotation marks omitted).[3]

V. LG DISPLAY'S COUNTERCLAIMS AND DEFENSES ARE GROUNDED IN CONSTITUTIONAL LAW.

LG Display's constitutional defenses and counterclaims (together "Constitutional Assertions") are grounded in settled Supreme Court precedent precluding duplicative recovery. Simply put, "the law abhors duplicative recoveries." *Bogan v. City of Bos.*, 489 F.3d 417, 425 (1st Cir. 2007) (citations omitted). This is true across sovereigns: "[I]f a federal claim and a state claim arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute double recovery." *Medina v. D.C.*, 643 F.3d 323, 326 (D.C. Cir. 2011) (citations omitted); *cf. Harris v. Balk*, 198 U.S. 215, 226 (1905) ("It ought to be and it is the object of courts to prevent the payment of any debt twice over.").

[3] In a footnote, Plaintiffs argue that LG Display's defenses are "defective." D.I. 6227 at 4 n.3. They contend that LG Display's defenses rely on matters extraneous to the pleadings and therefore should be analyzed as affirmative defenses. *Id.* According to Plaintiffs, affirmative defenses must bar all liability to survive, and since LG Display's defenses only limit damages, those defenses fail as a matter of law. *Id.* Plaintiffs argument fails for two reasons:

One, other authority permits defenses that limit liability (so called "negative defenses"). *See, e.g., Enough for Everyone, Inc. v. Provo Craft & Novelty, Inc.*, 2012 WL 177576, at *3 (C.D. Cal. Jan. 20, 2012) ("Rule 8(b)(1)(A) contemplates pleading all defenses; no limitation as to affirmative or negative defenses is expressed in the text of the rule. Fed. R. Civ. P. 8(b). The technicality raised by Plaintiff does not affect whether it has been put on fair notice of Defendant's defenses."). Even if LG Display was not *required* to plead its duplicative recovery defenses, that does not mean they are not permitted. *See also, Briese v. Amerigas, Inc.*, 2009 WL 4929218, at *6 (D. Mont. Dec. 21, 2009) (quoting 5 Wright & Miller, *Fed. Prac. & Proc.* § 1271 (3d ed.) for the proposition that a defendant "'should 'not be penalized for exercising caution in this fashion [in including negative defenses],' regardless of whether it was necessary for them to affirmatively plead superseding, intervening cause as a defense.").

Two, the authority Plaintiffs cite in support of their argument cuts against them. In *Botell v. U.S.*, 2012 WL 1027270 (E.D. Cal. Mar. 26, 2012), for instance, the court struck the defendant's defenses because the "Defendant offer[ed] no opposition to Plaintiffs' argument other than to state that there is no prejudice for leaving [the] affirmative defenses in[.]" *Id.* at *5 (citations omitted). Here, LG Display opposes Plaintiffs' motion, and does so with authority. While LG Display acknowledges that some judges in this district have expressed their belief that such "negative" defenses should not be pleaded, *see, e.g., Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010), LG Display respectfully suggests that here—where the defenses are brought in conjunction with a proper claim for declaratory relief and are not mere restatements of earlier denials—*Enough for Everyone* is the better reasoned authority.

A. Due Process Requires Assurances Against Duplicative Recovery.

In addition to these general principles, the Supreme Court has specifically held that defendants have a Due Process right not to face multiple claims for the same injury, absent some mechanism to avoid duplicative judgments. In *Western Union*, 368 U.S. 71, the Supreme Court considered whether the State of Pennsylvania could lawfully compel a telephone company to escheat to the state certain money orders that were unclaimed and unpaid. Western Union objected on the ground that it could be subject to multiple liability in subsequent actions, either from senders of money orders who would not be bound by the escheat judgment, or from other states seeking to escheat the same funds. 368 U.S. at 73-74. The Court agreed and held that the escheat action could not proceed absent assurance of protection against double recovery.

The Court first noted that, under its precedents, "the holder of . . . property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Id.* at 75. Applying that principle, the Court held that "there can be *no doubt* that Western Union has been denied Due Process by the Pennsylvania judgment here *unless* the Pennsylvania courts had power to protect Western Union from any other claim[.]" *Id.* (emphasis added). Due Process required, the Court stressed, that "all interested States—along with all other claimants—can be afforded a full hearing and a final, authoritative determination." *Id.* at 80. Because the Pennsylvania court "cannot give such hearings" to all interested parties, the Court held, it "should have dismissed the case" at the outset. *Id*.

Likewise here, LG Display faces multiple claims to recover the same pot of money, the alleged overcharge on TFT-LCD panels. Each Plaintiff is seeking the same awards being sought and recovered in other actions. As a matter of Due Process, LG Display cannot be forced to write a check for the same claimed overcharge twice (or many times more). *See Cities Serv. Co. v. McGrath*, 342 U.S. 330, 334-35 (1952) (holding that the Fifth Amendment required that defendant be allowed to recoup property seized by the U.S. government if future claims from foreign governments "would effect a double recovery against" the defendant). Under *Western Union*, putting LG Display to that risk violates its constitutional rights.

Indeed, when faced with a potential for duplicative recovery, courts have treated an antitrust overcharge as equivalent to a common fund. One need look no further than to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). There, the Supreme Court expressed concern that "potential plaintiffs at each level in the distribution chain are in a position to assert conflicting claims to a *common fund the amount of the alleged overcharge*," which would "support compulsory joinder of absent and potentially adverse claimants" just as in cases involving claims to a particular *res*. 431 U.S. at 737 (emphasis added); *see also Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 789 (2005) ("[t]his Court has made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money") (citations omitted). Likewise, in *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 787 (2010), the California Supreme Court specifically approved the use of interpleader to resolve competing claims to an alleged overcharge, thus treating the overcharge as a common fund.

These decisions demonstrate that there is no relevant legal difference between the unclaimed money orders at issue in *Western Union*, and the antitrust overcharges sought here. The holding in *Western Union* applies to both, and LG Display has a constitutional right to avoid duplicative recovery in and across these cases.

B. Due Process Prohibits Multiple Treble Damage Awards For the Same Injury.

Moreover, Plaintiffs' duplicative claims are subject to additional Due Process constraints not at issue in *Western Union.* Due Process precludes unconstitutionally large punitive damages awards, and thereby precludes duplicative claims that may result in those awards. Because treble antitrust damages serve the same punishment and deterrence goals as punitive damages, Plaintiffs' treble damage awards are subject to the same Due Process constraints.

Treble damages are considered statutory punitive damages for antitrust violations. *See e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages [in antitrust] reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."). Courts in this district have held that "[c]ommon sense dictates that a defendant *should not* be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs." *In re N.*

Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 900 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982). Along the same lines, the Supreme Court has repeatedly held that Due Process "imposes *substantive* limits beyond which penalties may not go." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993) (emphasis added) (internal quotation marks omitted). Because antitrust treble damages are considered akin to punitive damage awards, they are subject to the same substantive limits. As shown below, *multiple* payments of treble damages for the same injury would violate Due Process constraints.

In *State Farm*, the Supreme Court identified three "guideposts" for reviewing punitive awards: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm and the punitive damages award; and (3) the difference between the punitive damages award and civil penalties in comparable cases. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *accord BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996). Each of these guideposts indicates that, based on the harm Plaintiffs' allege, multiple treble damages awards would exceed the limits of Due Process.

First, any finding of liability here would not involve the sort of reprehensibility that the Supreme Court has indicated supports punitive damages. *State Farm*, 538 U.S. at 419. Any harm from the alleged price-fixing conspiracy was economic, not physical; nothing about Defendants' alleged conduct evinces any indifference to or disregard of the health or safety of others, and Plaintiffs are all large corporations, not financially vulnerable individuals.

Second, although the Supreme Court has never set a "bright line ratio which a punitive damages award cannot exceed," it has held that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425. Here, with multiple Plaintiffs seeking treble damages for the same harm, Defendants are at risk of being forced to pay upwards of six times the compensatory award—a ratio in excess of applicable Due Process limits. *See Southern Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (imposing a limit of a 3:1 punitive-to-compensatory ratio where compensatory damages totaled nearly $400,000 for an economic tort).

Third, and most importantly, Congress and state legislatures have fixed the civil penalties

in antitrust cases such that an award of damages shall be three times the actual injury suffered. According to the Supreme Court, this determination deserves "substantial deference." *Gore*, 517 U.S. at 583. Subjecting Defendants to paying repeated treble damage awards to purchasers at every level of the distribution chain for the same underlying conduct would flout these legislative determinations.

Put simply, Plaintiffs' pursuit of multiple claims seeking recovery for the same overcharge threatens LG Display with unconstitutionally large punitive awards. Thus, the constitutional limit on punitive damage awards supports the declaratory relief LG Display seeks.

C. The Authority Plaintiffs Cite Is Inapposite.

In their motion, Plaintiffs nowhere address *Western Union* or the constraints on punitive damages awards. Instead, Plaintiffs blandly assert that "[n]either *ARC America, Illinois Brick*, or *Hanover Shoe*, nor any [ ] 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." D.I. 6227 at 6:17-19. Plaintiffs then go so far as to argue that, to the contrary, these cases demonstrate that duplicative recovery is constitutional. *Id.* at 5-7. Plaintiffs are wrong for the reasons explained above—*Western Union* and the other authorities Plaintiffs fail to confront uniformly condemn duplicative recovery and establish a defendant's constitutional right to avoid the risk of duplicative claims. But equally importantly, Plaintiffs are wrong because *ARC America, Illinois Brick,* and *Hanover Shoe* do not address a defendant's Due Process rights and therefore cannot be said to resolve the issues framed by LG Display's counterclaims for declaratory relief.

1. *ARC America* Did Not Address Due Process and Does Not Resolve LG Display's Constitutional Assertions.

Plaintiffs assert that the Supreme Court's preemption decision in *ARC* resolved the issue of whether Due Process prohibits duplicative recovery in the antitrust context. *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989); D.I. 6227 at 6:5-19. Yet, Plaintiffs acknowledge that *ARC* was about preemption, not Due Process. D.I. 6227 at 6:5-6. The *defendant's* rights were not at issue in *ARC*. Instead, the Court considered the preemption question as it related to the allocation of a

single award amongst the plaintiffs under an existing settlement agreement. The dispute was between direct and indirect purchasers. The words "Due Process" nowhere appear in the opinion, and there is no endorsement of duplicative recovery. The parties' dispute only presented preemption questions. *ARC*, 490 U.S. at 100. By its decision in *ARC*, the Court upheld the indirect purchasers' right to *share* a settlement award with direct purchasers. *See ARC*, 490 U.S. at 105 ("direct purchasers may have to share with indirect purchasers"). The Court never reached the question of whether both parties could *separately* recover duplicative or multiplicative amounts, and in fact, it couldn't. Any possibility of multiple recoveries had been purposefully foreclosed through the settlement at issue in the case.

Put simply, the Due Process issue was neither presented to nor decided by the *ARC* Court. Thus, *ARC* does not control here. *See Sakamoto*, 764 F.2d at 1288 ("Such unstated assumptions on non-litigated issues are not precedential holdings binding future decisions.").[4] By contrast, the Supreme Court precedent that *does* address Due Process and the threat of duplicative recovery directly confirms a defendant's right to the declaration of law that LG Display seeks. *See, e.g.*, *Western Union*, 368 U.S. 71. In other words, absent assurances to protect LG Display from the risk of duplicative recovery, Due Process precludes Plaintiffs' pursuit of duplicative claims.

2. *Hanover Shoe* and *Illinois Brick* Do Not Resolve LG Display's Constitutional Assertions.

Plaintiffs' argument that *Hanover Shoe* and *Illinois Brick* resolve LG Display's Constitutional Assertions also fails. Neither *Illinois Brick* nor *Hanover Shoe* dealt with the Due Process question at issue in *Western Union*. The Court was not faced with multiple existing claims for the same alleged harm, and in fact, the holding in *Illinois Brick* was designed to avoid that scenario.[5] Not only that, but *Hanover Shoe* and *Illinois Brick* were decided in a different era, when direct and indirect purchaser suits for the same harm were infrequent, and the Court was

[4] Further, *ARC* is silent on the effect of state laws precluding duplicative recovery. Thus, *ARC* does not govern whether state law precludes or otherwise affects Plaintiffs' duplicative claims.

[5] In *Illinois Brick* the Court barred indirect purchasers from bringing Clayton Act claims specifically because the Court was "unwilling to open the door to duplicative recoveries[.]" 431 U.S. at 730-31 (citations omitted).

primarily concerned with ensuring that the antitrust laws were sufficiently enforced. *See Hanover Shoe,* 392 U.S. at 494; *Illinois Brick,* 431 U.S. at 745-46. Now, where multiple levels of purchasers routinely bring claims for the same alleged harm under federal and state statutory schemes, insufficient enforcement is not a concern, and the risk of duplicative recovery is manifest.

"In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute." *Northwest Airlines, Inc. v. Transp. Workers Union of America, AFL-CIO*, 451 U.S. 77, 99 n.42 (1981). "Just as the common law adapts to modern understanding and greater experience so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).[6] Present economic conditions put LG Display at risk of paying multiple judgments for a single alleged harm. The relevant Supreme Court jurisprudence condemns this result. Thus, the Court should sustain LG Display's Constitutional Assertions and deny Plaintiffs' motion to dismiss.[7]

VI. A PASS-ON DEFENSE IS INSUFFICIENT TO PREVENT DUPLICATIVE RECOVERY.

Next, Plaintiffs argue that, because the pass-on defense "obviates the risk" of duplicative recovery, the Court need not consider LG Display's state law counterclaims and defenses. *See* D.I. 6227 at 8:17-21. Plaintiffs are incorrect. LG Display fully agrees that each state implicated here recognizes or would recognize a pass-on defense and thus, LG Display's pending motion for summary judgment should be granted. But that is not the end of the analysis. The pass-on defense alone does not eliminate the risk of duplicative recovery.

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[6] Even assuming, *arguendo*, that *Hanover Shoe* or *ARC* can be read to permit duplicative recovery between Clayton Act and state law claimants, Plaintiffs' overlapping state law claims should still be precluded under *Western Union* and the other authority cited herein.

[7] As discussed *supra* at 3, the other cases Plaintiffs cite, *In re Flash Memory* and *DRAM*, addressed duplicative recovery in the standing context and did not reach the Due Process question. Thus, those cases did not resolve the question of whether Plaintiffs' duplicative claims may proceed to judgment. That question is controlled by the authority that LG Display here submits.

When analyzed by multiple juries, the "evidentiary complexities" and the "uncertainties and difficulties in analyzing price and out-put decisions in the real economic world" that are involved in determining the amount of pass-on damages are likely to yield contradictory results. *See Illinois Brick*, 431 U.S. at 732-33. Even the states that expressly permit a pass-on defense acknowledge that the defense alone is insufficient to prevent duplicative recovery, and set forth additional, distinct, statutory provisions establishing a broader obligation of the courts to avoid duplicative recovery. *See, e.g.,* N.Y. Gen. Bus. Law § 340(6) (instructing courts both to avoid duplicative recovery and providing for a pass-on defense to avoid duplicative recovery); Neb. Rev. St. § 59-821.01 (2012) (same). Plaintiffs' argument that the pass-on defense alone resolves LG Display's counterclaims and defenses is therefore misguided and provides no basis for dismissing LG Display's state law defenses and counterclaims.

VII. STATE LAW SUPPORTS LG DISPLAY'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES.

In addition to the federal law set forth above, the laws of each of the states that Plaintiffs invoke preclude duplicative recovery. Plaintiffs concede that Jaco and T-Mobile do not bring state law claims, and that together the remaining Plaintiffs bring claims under the laws of five states: Arizona, Florida, Illinois, Michigan, and New York.[8] *See* D.I. 6227. Yet, again, rather than squarely address the laws of these states that preclude duplicative recoveries, Plaintiffs try to evade them. As a general theme, after acknowledging the existence of a state's laws precluding duplicative recovery, Plaintiffs contend that LG Display cannot bring a defense on that basis because a "defense" is not *explicitly* authorized. *See, e.g.,* D.I. 6227 at 11:9-14 (recognizing that

[8] In their brief, Plaintiffs contend that MARTA and defendants have reached an agreement to dismiss MARTA's Arizona and Illinois claims. D.I. 6227 at 10 n.6 and 12 n.8. Because a stipulation has yet to be filed or granted by the Court, LG Display continues to assert its Arizona and Illinois counterclaims and defenses against MARTA. Plaintiffs P.C. Richard, MARTA, and ABC also concede that they are not pursuing claims under certain state laws. *See* D.I. 6227 at 10 n.6 (P.C. Richard and ABC "do not assert Illinois law claims"); 11 n.7 (MARTA and ABC "have no pending claims under New York law"); 12 n.8 (P.C. Richard and ABC "do not assert Arizona law claims"); 13 n.9 (P.C. Richard and MARTA "have no pending claims under Michigan law"). Thus, LG Display's corresponding state law defenses and counterclaims would, to that degree, be inapplicable to those plaintiffs.

New York's Donnelly Act instructs courts to "take all steps necessary to avoid duplicate liability" but arguing that it "provides neither a counterclaim nor a defense on the grounds LG Display has asserted here").

Plaintiffs' argument fails for four reasons. First, to say that a statute providing for "all" steps must then list all of those steps is to say that every statute must be as long as a phonebook. *Cf. Harrod v. Farmland Mut. Ins. Co*., 346 F.3d 1184, 1187 (8th Cir. 2003) (Arnold, J.) ("If one believes that the sub-terms . . . need to be defined to provide clarity, then the words used in those definitions would also need to be defined. The result would be [a document] the size of a phone book[.]"). That makes no sense. All means all. *Cf. Brem-Air Disposal v. Cohen,* 156 F. 3d 1002, 1004 (9th Cir. 1998) ("'any' means 'any'"). Second, as Plaintiffs at times concede, the state laws at issue here preclude duplicative recovery, and therefore a defense is an appropriate vehicle for effectuating the purpose of those laws. Third, the general equitable principles embraced by each state further support the assertion of defenses to preclude duplicative recoveries. Fourth, and most telling, Plaintiffs offer no authority whatsoever to support their *ipse dixit* assertions that defenses expressly invoking a state's laws to avoid duplicative recovery are in any way improper. As discussed below, existing authority in each of the states invoked by Plaintiffs precludes duplicative recovery. Thus, Plaintiffs' motion to dismiss or strike LG Display's state law counterclaims and defenses should be denied.[9]

Arizona (MARTA): Plaintiffs acknowledge that the Arizona Supreme Court "has identified duplicative recovery as an issue of legitimate and important concern[.]" D.I. 6227 at 12:12-14. Yet because there is no *explicit* duplicative recovery defense in that state, Plaintiffs argue that LG Display may not assert one. In *Bunker's Glass,* the Arizona Supreme Court not only acknowledged that "the risk of multiple liability for Defendants – that is, being subject to a direct purchaser action and also an indirect purchaser state case – is a legitimate and important

[9] As is plain from the state cases cited below, and the federal cases cited at page 5, Plaintiffs' assertion that "there are no federal or state 'laws of duplicative recovery'" is baseless. *See* D.I. 6227 at 14:11-21. LG Display's applicable defense, *see, e.g.*, D.I. 5253 at 52 (Defense No. 20), is well grounded in the law. As with LG Display's other defenses, Plaintiffs' motion to strike this defense should therefore be denied.

concern," the court went on to explain that such risk is not "a problem that [ ] trial courts are incompetent to handle." *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 108 (Ariz. 2003). Put differently, the Arizona Supreme Court holds this Court to the task of determining how to avoid duplicative recoveries in MARTA's case. Because Arizona law bars duplicative recoveries, the Court should deny Plaintiffs' motion to dismiss LG Display's Arizona law counterclaim and defense.

Florida (Interbond ("Brandsmart"), Office Depot): If faced with the question presented in LG Display's counterclaims and defenses, Florida courts would act to preclude duplicative recovery. When *parens patriae* suits are brought by the State, Florida law provides that "[t]he court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief which duplicates amounts which have been awarded for the same injury[.]" Fla. Stat. § 542.22(2)(a). Despite Plaintiffs' protestations, *see* D.I. 6227 at 9 n.5, there is little reason to believe that Florida would *preclude* duplicative recovery when pursued by the State, but *permit* duplicative recovery when pursued by a private party—particularly where Florida, like other jurisdictions in the United States, has expressed a general policy to prevent duplicative recovery. *See Weil v. Vescovi*, 2007 WL 2827697, at *3 (M.D. Fla. Sept. 27, 2007) ("to avoid duplicative recovery, it [was] appropriate to limit [plaintiff's] recovery against [defendant]"). Because Florida law bars duplicative recoveries under the circumstances presented here, the Court should deny Plaintiffs' motion to dismiss LG Display's Florida law counterclaim and defense.

Illinois (MARTA): Illinois law explicitly precludes duplicative recovery, requiring "that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take *all steps* necessary to avoid duplicate liability for the same injury[.]" 740 Ill. Comp. Stat. 10/7(2) (emphasis added). At least one federal district court has interpreted this statute to impose substantive limits on a plaintiff's claims. *See In re Wellbutrin XL Antitrust Litig.*, 756 F. Supp. 2d 670, 677 (E.D. Pa. 2010) ("The Illinois restrictions on indirect purchaser actions are intertwined with Illinois substantive rights and remedies" among other things, "*the restrictions appear to reflect a policy judgment about managing the danger of duplicative recoveries*. . . . [T]herefore Illinois' restrictions on indirect purchaser actions must be

applied in federal court." (emphasis added)). Accordingly, the Illinois legislature's mandate instructing courts to "take all steps necessary to avoid duplicate liability" applies here, and the Court should deny Plaintiffs' motion to dismiss LG Display's Illinois law counterclaim and defense.

Michigan (ABC): Michigan law also precludes duplicative recoveries. As the court emphasized in *In re Vitamins Antitrust Litig.*, 259 F. Supp. 2d 1 (D.D.C. 2003), Michigan courts try "to prevent potential double recovery awards," and Michigan law "[has] always limited a plaintiff's recovery to the amount the plaintiff was actually injured, even where the assessment of that amount may be complex or difficult." *Id.* at 7-8. Going further, the *Vitamins* court explained that, as in most jurisdictions, "Michigan damages principles [ ] generally limit damages to compensation for *actual loss*[.]" *Id.* at 7 (emphasis added). Because Michigan law precludes duplicative recoveries in circumstance like these, the Court should deny Plaintiffs' motion to dismiss LG Display's Michigan law counterclaim and defense.

New York (PC Richard): By statute, New York commands courts to take steps to avoid duplicative recoveries. Under New York General Business Law Section 340(6), "in any action in which claims are asserted against a defendant by both direct and indirect purchasers, *the court shall take all steps necessary to avoid duplicate liability*, including but not limited to the transfer and consolidation of all related actions." (emphasis added). In *Ho v. Visa*, No. 50415(U), slip op. at *3 (N.Y. Sup. Ct. April 21, 2004), the court denied standing to indirect purchasers because, *inter alia*, "any recovery obtained by plaintiffs here is likely to be duplicative, in light of the fact that the retailers have already brought and resolved their claims with respect to the debit cards, and have obtained a multi-billion dollar settlement. Therefore, this is obviously not a situation where the antitrust violators will go unpunished, because the parties who are directly injured will not sue." *Id.* As reflected in its statutes and common law jurisprudence, New York law requires courts to avoid duplicative recovery. Thus, the Court should deny Plaintiffs' motion to dismiss LG Display's New York law counterclaim and defense.

VIII. EMPLOYING REMITTITUR ALONE WILL NOT SATISFY DUE PROCESS OR STATE LAW.

Beyond simply avoiding the constitutional protections and state laws precluding duplicative recovery, Plaintiffs alternatively punt those issues to a later date. They suggest employing remittitur, a post-judgment reduction of damages, as a vehicle for avoiding duplicative claims. *See* D.I. 6227 at 14:22-15:18. But like the pass-on defense, employed remittitur alone is insufficient. Remittitur does not address a defendant's constitutional right to avoid the *risk* of duplicative recoveries. *See Western Union*, 368 U.S. at 80. Put differently, employing remittitur alone tramples the constitutional protections and state laws requiring that steps be taken to *avoid the risk* of duplicative recovery before any judgment may be rendered.

Furthermore, traditional "remittitur" requires the option of a new trial. *See, e.g., Mattel, Inc. v. MGA Entm't*, Inc., 2011 U.S. Dist. Lexis 85928, *56-57 (C.D. Cal. Aug. 4, 2011) ("In light of the Court's remittitur . . . MGA is entitled to a new trial if it does not accept the damages award as remitted."). Resolving the duplicative recovery issue in this way, through "remittitur" on the backend, risks wasting judicial resources on trials and judgments that may ultimately have to be discarded. LG Display has pleaded defenses and counterclaims that seek to avoid such risks, and to broach the duplicative recovery issue now, before significant resources are spent trying claims that are barred as a matter of law. Thus, while useful in appropriate circumstances, the device of remittitur does not resolve the issues presented by LG Display's counterclaims and defenses, and its availability does not justify granting Plaintiffs' motion to dismiss or strike.

IX. CONCLUSION

Plaintiffs' attempt to bury the laws against duplicative recovery in these cases must fail. The Constitution and the state laws at issue here require that LG Display be protected against multiple recoveries for the same alleged harm, and LG Display's counterclaims and defenses properly raise those protections in these cases. Because LG Display's counterclaims and defenses are well-founded in the law, and Plaintiffs have failed to show that they are not plausible on their face, Plaintiffs' motions should be denied.

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Respectfully submitted,

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