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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

REPLY MEMORANDUM OF LAW IN SUPPORT OF DIRECT ACTION PLAINTIFFS' 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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INTRODUCTION

LG Display's opposition to the dismissal of its "duplicative recovery" counterclaims and defenses is "déjà vu all over again." For the reasons explained in the Moving DAPs' opening papers,[1] LG Display's arguments under the U.S. Constitution and federal law are not only without merit, but have also been rejected by this Court on two occasions. The same is true of its arguments purportedly based on state law.

For starters, there is no basis whatsoever for LG Display's apparent position that it offends Due Process to require a price-fixing conspirator to compensate direct purchasers for the full amount they were injured, trebled, while subjecting the conspirator to claims by indirect purchasers under state law. The inescapable teaching of the Supreme Court authority discussed in the Moving DAPs' opening papers is that federal and state antitrust laws authorize different purchasers, at different levels of the distribution chain, to simultaneously recover against the same conspirator for their antitrust injuries (including overcharges), even when those injuries result from the same course of misconduct. As this Court has expressly recognized, price-fixing conspirators may therefore find themselves defending separate claims by, and subject to separate awards to, direct and indirect purchasers. None of this presents a Due Process problem. Indeed, there is nothing extraordinary about the framework crafted by *ARC America* and its predecessors. Multiple tort victims, each having sustained unique injuries, frequently recover against the same defendant for the same tortious act.

LG Display's objection to this framework raises the question of what it hopes to accomplish by asserting the counterclaims and defenses at issue in this Motion – a point LG

[1] Undefined and abbreviated terms used herein have the same meaning as in the Direct Action Plaintiff's 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, dated July 19, 2012, Dkt. No. 6227 ("DAP Mem."). 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, dated August 16, 2012, Dkt. No. 6474, is referred to herein as "LGD Opp."

Display never deigns to address. Taken at face value, LG Display's argument that direct and indirect purchasers should not be permitted, as a matter of Due Process, to recover for the same overcharge suggests that it would be entitled to offset any amounts it pays in settlement or judgment to indirect purchasers from a later award obtained by direct purchasers. If adopted, LG Display's thesis would dramatically reshape the antitrust landscape and, through the back door, allow a pass-on defense to direct purchaser claims expressly rejected by the Supreme Court decades ago. LG Display's suggestion that there may be circumstances in which it would be unconstitutional for a court to award direct purchasers damages for the full amount of their injuries, trebled, is unsustainable.

LG Display's arguments under the U.S. Constitution and federal law are defective in at least two other respects. *First*, LG Display asserts, incorrectly, that awards to direct and indirect purchasers should be viewed as competing for the same common fund of overcharges. To the contrary, price-fixing conspiracies may result in injuries apart from overcharges, including lost sales or damage to going concern value. Thus, awards to both direct and indirect purchasers would not necessarily relate to the same injury. Moreover, even if antitrust damages were limited to overcharges, LG Display fails to identify any apposite authority suggesting that direct purchasers pursuing claims under federal law and indirect purchasers pursuing claims under state law are necessarily asserting conflicting claims to a "common fund," let alone holding that multiple claims on such a "fund" should be subjected to Due Process scrutiny.

Second, even if "duplicative recovery" by direct and indirect purchasers offended Due Process – and it does not – the purported injury LG Display seeks to redress through its counterclaims and defenses has not yet, and may never, accrue. LG Display characterizes "duplicative recovery" as an "established threat" in the above-captioned actions (LGD Opp. at 3), but it is by no means clear that LG Display will ever be subject to a duplicative award. In its opposition, LG Display does not specify a single instance in which a recovery against it by any

Moving DAP would be duplicative of a recovery by any other plaintiff. Instead, it focuses on its exposure to "multiple *claims* for the same injury" (*id.* at 1), its alleged "Due Process right not to face multiple *claims*" (*id.* at 6), and the fact that "Defendants are at *risk* of [duplicative awards]" (*id.* at 8). But LG Display's apparent assertion – that the hypothetical risk that it might one day be called upon to satisfy a duplicative award triggers Due Process concerns – lacks any legal support. In fact, it is contradicted by LG Display's own authorities, all of which concern circumstances in which a party is actually subject to a duplicative award, not just multiple claims that carry with them the risk of such an award. LG Display's attempt to liken antitrust damages to punitive damages does nothing to alter this analysis. Antitrust damages are not subject to the same Due Process constraints as punitive damages and, even if they were, LG Display does not face the imminent prospect of multiple awards.

LG Display's state law counterclaims and defenses, allegedly premised on the laws of Arizona, Florida, Illinois, Michigan, and New York, are equally without merit. While the laws of these states may differ modestly in some respects, the notion that any of them provides a legal defense (or basis for declaratory relief) against "duplicative recovery," let alone the mere risk of duplicative recovery, is unsupported by any authority, and clearly mistaken.

Having litigated the subject of duplicative recovery on two prior occasions in this MDL, LG Display's failure to support its arguments on this Motion with apposite authority is telling. For all of the time and expense it has devoted to briefing this point, the fact remains that LG Display seeks to assert counterclaims and defenses to avoid a purported injury that is not legally cognizable, and that may never occur. As this Court explicitly recognized in its May 25 Order, in which it declined to allow LG Display to amend its answers in related cases to assert duplicative recovery defenses and claims, the risk of facing multiple claims does not support a cause of action. And even if the subject of duplicative awards were a matter of legitimate concern – and, as stated above, duplicative antitrust awards do not offend the Due Process

Clause or federal antitrust law – it is not one that should be addressed in the abstract. Rather, if a situation entailing actual duplicative recoveries should come to pass in which some allocation is required, the Court has already explained how it can, and should, be addressed: "Should defendants wish to challenge any allocation of damages, they are free to do so post-trial." (Dkt. No. 5795 at 2.)

For all these reasons, and those set forth in the Moving DAPs' opening papers, LG Display's counterclaims should be dismissed pursuant to FED. R. CIV. P. 12(b)(6), and its defenses should be stricken pursuant to FED. R. CIV. P. 12(f)(2), in both cases with prejudice.

ARGUMENT

I. THE COURT HAS REJECTED LG DISPLAY'S COUNTERCLAIMS AND DEFENSES TWICE BEFORE

As shown in the Moving DAPs' opening papers, this Court has resolved the legal questions raised by this Motion twice before, ruling against LG Display on both occasions. (DAP Mem. at 3.) Nevertheless, LG Display contends that this Motion raises a novel legal issue, never addressed by this Court, and that its "duplicative recovery" counterclaims and defenses therefore merit careful consideration. (LGD Opp. at 1-2.) LG Display further insists that the Court's previous orders on this subject "dealt with other plaintiffs, the question of leave for amendment, and the question of bifurcation." (*Id.* at 1.) In other words, LG Display suggests that extraneous factors – such as the identity of the direct action plaintiff before it or whether an issue arises on a motion to dismiss or a motion for leave to file an amended complaint – should lead the Court to resolve the core legal questions addressed by this Motion inconsistently with its previous rulings. LG Display's suggestion is meritless.

LG Display concedes – as it must – that this Court denied as legally insufficient LG Display's motion for leave to amend its answers to complaints filed by other direct action plaintiffs in this MDL, where LG Display sought to assert substantively the same counterclaims

and defenses it asserts here: "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.'" (LGD Opp. at 2 (internal punctuation omitted).) And yet, LG Display offers no explanation for why, in the Moving DAPs' cases, this Court should uphold the validity of counterclaims and defenses it has already rejected as legally insufficient. To the contrary, there is no reason for this Court to depart from its prior rulings.

II. DUPLICATIVE RECOVERY BY DIRECT AND INDIRECT PURCHASERS IS CONSTITUTIONAL

A. The Pendency of Indirect Purchaser Claims Does Not Limit Direct Purchasers' Right to the Full Amount of Their Overcharges, Trebled

There is simply no basis in statutory or decisional authority to support LG Display's apparent argument that Due Process limits a direct purchaser's right under federal law to recover for the full amount of its overcharges, trebled, even where indirect purchasers simultaneously recover or seek to recover for the same overcharge. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), makes clear that, consistent with Due Process, an antitrust defendant can, at a minimum, be required to pay three times the full amount of the overcharge resulting from the conspiracy in which it was involved, without any right of contribution from other conspirators. Further, the Supreme Court's precedent expressly permits direct purchasers to recover 100% of their antitrust overcharges, trebled, without regard to whether (i) those overcharges are passed on, or (ii) indirect purchasers assert claims relating to the same overcharge. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 726 (1977); *Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101-02 (1989).[2]

[2] Both *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1156 (N.D. Cal. 2009), and *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1093 (N.D. Cal. 2007) ("*DRAM*"), acknowledge that duplicative recoveries may be the "necessary consequence" of cases alleging a nationwide

For precisely these reasons, this Court has rejected LG Display's arguments under the U.S. Constitution and federal law twice. (*See* DAP Mem. at 3.)

Disregarding the fact that *ARC America*, *Illinois Brick*, and *Hanover Shoe* erected a framework in which direct purchasers could recover for the full amount of their injuries under federal law, while indirect purchasers could assert claims under state law relating to the same course of conduct, LG Display responds that those decisions do not address whether Due Process prohibits exposing an antitrust defendant to duplicative recovery. (LGD Opp. at 9-11.) And yet, LG Display, which largely relies here on the same cases it cited in connection with its previous, unsuccessful attempts to litigate the question of "duplicative recovery," fails to identify a single authority suggesting that the pendency of state law indirect purchaser claims should impose any Due Process limitations on a direct purchaser's ability to obtain damages based on the full amount it was overcharged, or *vice versa*.

In support of its contention that defendants have a Due Process right not to face direct and indirect purchaser claims for the same injury, LG Display relies primarily on *Western Union Tel. Co. v. Pa.*, 368 U.S. 71 (1961). Its only possible basis for invoking *Western Union* is its incorrect assumption that direct and indirect purchasers are in competition to recover against a defined common fund. *Western Union* addressed circumstances in which there were certain unclaimed funds that Western Union was obligated to pay to Pennsylvania, which had obtained a judgment to escheat them, and to New York, which had already escheated some of the funds subject to the Pennsylvania judgment. *Id.* at 73-74. On these facts, where there was *already a*

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conspiracy with both direct and indirect purchaser classes – a scenario contemplated by the Supreme Court's decision in *ARC America*. LG Display contends that both *In re Flash* and *DRAM* are distinguishable on the grounds that they were concerned with antitrust standing and did not address the "*established* threat of duplicative recovery at issue here." (LGD Opp. at 3 (emphasis in original).) LG Display's attempted distinction is irrelevant, as well as inaccurate. Regardless of the context in which they were decided, both decisions clearly indicate that "duplicative recoveries" by direct and indirect purchasers do not violate Due Process or federal antitrust law. Moreover, LG Display's arguments about duplicative recovery are entirely hypothetical, and no more "established" here than in *In re Flash* or *DRAM*. LG Display does not – and cannot – point to a single concrete instance in this MDL in which it has been subject to a duplicative award.

judgment for the entire amount in the fund, the Court understandably held that Western Union, which had no interest in the unclaimed monies, could not be compelled to pay out the amount in the fund to one state without assurance that it would not be required to relinquish the exact same property to another state, or be liable for failing to do so. *See id.* at 76-77.

Western Union is wholly inapposite to the questions presented by this Motion. Critically, *Western Union* does not concern antitrust liability, let alone provide support to LG Display's sweeping constitutional argument concerning antitrust damages. Rather, it addresses two states' competing assertions of their *in rem* jurisdiction to seize property. *Western Union* is also inapposite because Western Union, unlike LG Display, was not a wrongdoer, but was merely holding funds that others had voluntarily entrusted to it, and the case was not concerned with compensating those who had suffered injury but, instead, with whether two states could obtain a windfall from seizing money that they never had and never lost. Equally important, there was an actual, specific pot of money that Western Union was holding, not a set of disparate liabilities to different plaintiffs based on the laws of different sovereigns. And whereas the situation in *Western Union* involved specific funds that were going to be recovered in full from Western Union, and the only issue was who was going to be entitled to *those funds*, LG Display's counterclaims and defenses are premised on the thesis that it is entitled to avoid being required to face allegedly overlapping "claims," regardless of whether any plaintiff ever recovers the full amount of damages (trebled) caused by the LCD conspiracy. Those two situations are entirely different, and neither *Western Union*, nor any other case of which the Moving DAPs are aware, supports LG Display's argument that the latter implicates Due Process concerns.

In further contrast to Western Union, even if LG Display faced multiple awards, not just multiple claims, it would not be burdened by multiple obligations to distribute the same pot of money. (*See* LGD Opp. at 6 ("LG Display faces multiple claims to recover the same pot of money").) LG Display ignores that the harm caused by a price fixing conspiracy is not a fixed

pot of money since multiple parties can be harmed by the same wrong both in the form of overcharges and because the harm caused by an antitrust offense is not limited to overcharges. As the Supreme Court recognized in *Hanover Shoe*, pricing-fixing conspiracies may cause different injuries at different levels of the distribution chain – overcharges to direct customers, passed-on overcharges to indirect customers, lost sales or profits, or lost market share. 392 U.S. at 489-94; *see also* 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 392b (3d ed. 2007) ("There are various ways of measuring the damages: lost profits, overcharges, reduction in going-concern value, among others."). Thus, recoveries by both direct and indirect purchasers against LG Display, based on the same underlying conduct, may not necessarily relate to the same class of injury.

Finally, even if antitrust damages under federal and state law were limited to overcharges, LG Display inappropriately relies on *dicta* from *Illinois Brick*, quoted out of context, to support its contention that direct purchasers pursuing claims under federal law and indirect purchasers pursuing claims under state law are necessarily competing to recover from a common fund. (LGD Opp. at 7.) *Illinois Brick* concerned whether indirect purchasers had standing to pursue claims under federal law. It neither addressed the Due Process implications of simultaneous recoveries by direct purchasers under federal law and indirect purchasers under state law nor suggested that such claims should be deemed to be in conflict. Indeed, for the reasons set forth in the Moving DAPs' opening papers and above, they should not.

B. LG Display's Due Process Arguments Are Inherently Speculative and Provide No Basis for a Counterclaim or Defense

Even if *Western Union* had any relevance to the antitrust context (it does not), that decision concerned *actual* or *imminent* duplicative recoveries against a common fund. Here, LG Display's fears about double recovery are entirely speculative – a point underscored by LG Display's pleadings and opposition papers, which fail to identify with any precision which

claims of which plaintiffs should be precluded as impermissibly overlapping and duplicative. If, as a matter of law, a damages award to a given DAP in one trial would limit the amount that could be recovered against LG Display by another DAP at a later trial, the sensible way to address that concern is in the context in which it arises. Once there has been an actual judgment and recovery in the prior case, the Court and parties can know exactly what the duplicative recovery is, assuming one exists at all.

Strikingly, every authority on which LG Display relies (LGD Opp. at 5-7) supports that approach, and undercuts LG Display's argument that the theoretical risks that it might face multiple liability for the same injury violates the Due Process Clause. LG Display's own authorities make clear that, to the extent Due Process is ever implicated, it is only after it becomes certain that the defendant will be forced to satisfy duplicative awards.[3] For example, in *Harris v. Balk*, 198 U.S. 215 (1905), the Court held that *if* a debtor had *actually paid* a valid judgment against him for the debt, he could not be legally compelled to pay the same debt a second time. *See id.* at 226 (referring to the "*payment* of any debt twice over") (emphasis added). In *Cities Serv. Co. v. McGrath*, 342 U.S. 330 (1952), the Supreme Court held that the federal government's seizure, pursuant to the Trading With the Enemy Act, of debentures owned by enemy aliens would offend the Fifth Amendment's taking clause unless the obligor on the debentures had a remedy against the United States in the event a foreign court held it liable to a holder in due course of the debentures, but noted that "[s]uch cause of action will accrue *when, as, and if*" a foreign court so acted. *Id.*at 331, 334-35 (emphasis added).[4]

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[3] *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), is not to the contrary. That decision addresses whether domestic abuse victims have a "property interest" in police enforcement of protective orders (they do not). *Id.* at 768. Neither the majority opinion in *Castle Rock*, nor the dissent, from which LG Display quotes without noting its reliance on a dissenting opinion, mentions the subject of duplicative recovery.

[4] The other authorities on which LG Display relies, *Bogan v. City of Bos.*, 489 F.3d 417, 425-26 (1st Cir. 2007), and *Medina v. D.C.*, 643 F.3d 323, 325, 328 (D.C. Cir. 2011), are distinguishable for similar reasons. Both held that a plaintiff who recovered under a federal cause of action could not then recover under state or local law for the same underlying injury. Like *Western Union*, and in contrast to this case, both *Medina* and *Bogan* concern situations in which the defendant faced actual and unavoidable, not simply threatened, duplicative recovery. *See, e.g.*, *Medina*,

In short, even if "duplicative recovery" were a concern in the antitrust context, any counterclaim or defense LG Display might one day assert alleging that, in violation of the Due Process Clause, it is subject to a duplicative award has not yet accrued. Until LG Display is in the position of actually having to pay an award duplicative of an earlier award, there is no possible Due Process question for this Court to resolve.[5]

C. Due Process Limitations on Punitive Damages Do Not Support LG Display's Counterclaims or Defenses

As an adjunct to its argument that the threat of duplicative recovery offends Due Process, LG Display asserts that the treble damages recoverable by direct purchasers under the Clayton Act and by indirect purchasers under state statutes should be analyzed as punitive damages and subject to Due Process constraints on punitive damages. (LGD Opp. at 7-9.) LG Display's argument is completely mistaken.

To begin with, *Radcliff Materials* does not, as LG Display erroneously asserts, hold that "[t]reble damages are considered statutory punitive damages for antitrust violations." (LGD Opp. at 7.) Indeed, the Supreme Court never uses the term "punitive damages" in that

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643 F.3d at 326 ("[A]n *award* of damages under both theories will constitute double recovery") (internal punctuation omitted; emphasis added). Both decisions are also distinguishable on the grounds that they do not concern multiple plaintiffs seeking to recover for separate injuries, but instead address circumstances in which the same plaintiff seeks to recover twice for the same injury. Here, no Moving DAP seeks to recover twice, under different legal theories, for the same injury. To the extent any individual Moving DAP is pursuing claims under both federal and state antitrust laws (and as LG Display concedes, T-Mobile and Jaco are not (LGD Opp. at 12)) it asserts such claims to recover damages for overcharges incurred in separate commerce. Simply put, overcharges incurred by a Moving DAP on its direct purchases of certain LCD Panels or Products from LG Display are distinct from overcharges incurred by that Moving DAP on its indirect purchases of other LCD Panels or Products from LG Display.

[5] Contrary to LG Display's apparent assertion (LGD Opp. at 7), *Illinois Brick*'s observation that the "compulsory joinder of absent and potentially adverse claimants" might be appropriate to mitigate the risk of a duplicative recovery, 431 U.S. at 737-38, does not support the inference that LG Display's counterclaims or defenses are legally cognizable or that such counterclaims or defenses have accrued. Nor does the California Supreme Court's approval of interpleader to resolve competing claims to an alleged overcharge support this conclusion. *See Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 787 (2010). It is a *non sequitur* to suggest that, because courts have discretion to structure proceedings to redress questions of duplicative recovery, if and when they arise, exposing LG Display to the mere prospect of one day being subject to a duplicative recovery violates the Due Process Clause.

decision. As noted, *Radcliff* held that a price-fixing conspirator did not have the right to contribution from other members of the conspiracy with which it was jointly and severally liable, and cannot plausibly be read as endorsing Due Process restrictions on awards against price-fixers. *See Radcliff*, 451 U.S. at 646. Nor do any of the other authorities cited by LG Display so much as suggest that antitrust damages should be viewed as punitive damages. *See In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 893, 900 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982) (discussing punitive damages recoverable on claims sounding in negligence, products liability, breach of warranty, conspiracy, and fraud); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (rejecting claim that award of punitive damages in common law slander case violated the Due Process Clause).

Because antitrust damages are not analyzed as punitive damages, LG Display's reliance on *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), which articulate Due Process limitations on punitive damages, is unavailing. Indeed, even if antitrust damages were considered punitive damages – and they are not – neither decision would support LG Display's assertion of duplicative recovery counterclaims and defenses. *State Farm* dealt with constitutional limits on unfettered jury awards of punitive damages, not the ascertainment of actual damages by a jury in an antitrust case that are automatically trebled by statute. 538 U.S. at 416-17. Also, both *State Farm* and *BMW* were concerned with punitive damages awards based on conduct that was lawful in many of the states in which it occurred, not situations where, as here, the jury will be asked to award actual damages based on price fixing activities that are uniformly illegal throughout the United States. *See State Farm*, 538 U.S. at 421-23; *BMW*, 517 U.S. at 572-73.

Finally, as discussed above, LG Display has not cited to a single case holding that a Due Process issue arises before a defendant has been ordered to pay an amount that exceeds what Due Process will allow. No case even involves (let alone accepts) the proposition that a

defendant could assert a Due Process violation because it has harmed multiple plaintiffs and *may* in the future owe each of them punitive damages based on its conduct vis-à-vis those plaintiffs. Similarly, if a defendant's conduct violates the laws of multiple states, surely each state judicial system could assess punitive damages for conduct in that state without regard to what the defendant has been required to pay for its violations elsewhere.[6]

Accordingly, LG Display's counterclaims and defenses alleging that the threat of "duplicative recovery" violates Due Process should be rejected.[7]

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

For the reasons explained previously, LG Display's arguments under the Constitution and federal law not only have been rejected by this Court previously, but are without merit. The same is true of its arguments ostensibly predicated on the laws of five states – Arizona, Florida, New York, Illinois, and Michigan. (DAP Mem. at 8-14.) Indeed, as LG

[6] In addition, a Due Process violation is specific to a given defendant. Thus, if AUO and Sharp had been forced to pay out an aggregate of $2 billion by reason of treble damage awards against them, but Chi Mei paid only $100 million because of its wisdom in reaching settlements, or otherwise, Chi Mei scarcely could claim that *its* Due Process rights were violated if it were found liable for $2 billion in some later case based upon the earlier $2 billion judgment against its co-defendants, AUO and Sharp. In short, to the extent that "duplicative recovery" implicates Due Process considerations at all, it would be only on a defendant-by-defendant basis and subject to the legal principles establishing joint and several liability for antitrust offenders and prohibiting claims for contribution or indemnity among them.

[7] As demonstrated in the Moving DAPs' opening papers, LG Display's duplicative recovery defenses, which rely on matters from outside the pleadings, should also be stricken because they seek to limit the extent of damages instead of barring liability entirely. LG Display argues that these defenses are "negative defenses" and points the Court to decisional law holding that such defenses are permissible. (LGD Opp. at 5 n.3.) But LG Display ignores the wider body of law in this Circuit that makes clear that defenses operating only to limit the defendant's damages should be stricken, and makes no attempt to distinguish four of the five cases the Moving DAPs cite on this point. (*See* DAP Mem. at 4-5 n.3.) Moreover, LG Display's attempt to distinguish one of these decisions, *Botell v. U.S.*, No. 2:11-cv-01545-GEB-GGH, 2012 WL 1027270 (E.D. Cal. Mar. 26, 2012), is ineffective. LG Display disregards the actual analysis in *Botell*, and argues that it may be distinguished on the grounds that "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[.]'" (LGD Opp. at 5 n.3.) The *Botell* court struck the defenses at issue because they were improperly asserted, as made abundantly clear by that court's citation to *Joe Hand Promotions, Inc. v. Estradda*, No. 1:10-cv-02165-OWW-SKO, 2011 WL 2413257, at *6 (E.D. Cal. June 8, 2011), which struck the defendant's "ignorance of the law" defense on the grounds that it was not a defense to liability, but rather a basis for reducing damages.

Display implicitly concedes (LGD Opp. at 12-13), it has not identified a single authority suggesting that these states would recognize a counterclaim or defense to preclude the possibility of duplicative recovery.[8] In fact, as the Track One DAPs demonstrated in their opposition to defendants' downstream pass-on motion (Dkt. No. 6494), LG Display has failed to identify any concrete basis to conclude that duplicative recovery is likely, and LG Display has likewise failed to demonstrate that any of the state laws at issue here would recognize a pass-on defense in the circumstances presented by this case.

In any event, under the laws of all of these states, the appropriate approach for managing the issue of "duplicative recovery" – if this issue were to arise in the future – is not the assertion of a defense or counterclaim, but a post-trial motion for a credit or order of remittitur in the event of any actual "award" of "duplicative" damages for the "same injury." (*See generally* LGD Opp. at 16 (conceding the availability of remittitur).) Thus, for example, take the law in Florida. LG Display asserts in its opposition that there is "little reason to believe that Florida would . . . *permit* duplicative recovery" in private treble damage actions when its state *parens patriae* statute provides that any monetary relief "awarded" in such suits "shall exclude . . . any amount of monetary relief which duplicates amounts which have been awarded for the same injury[.]" (*Id.* at 14 (citing FLA. STAT. §542.22(2)(a)).) Far from proving LG Display's point, this statute provides no more than that a defendant is entitled to a "credit" for amounts previously paid "for the same injury" – in effect, a form of limited remittitur. As the Moving DAPs stated in their opening brief, and as set forth in the Track One DAPs' recently-filed oppositions to defendants' so-called "pass on" motion for partial summary judgment (Dkt. Nos. 6487, 6494),

[8] Some of LG Display's authorities do not even address the risk that overlapping direct and indirect purchaser claims might result in duplicative damages awards. *See Weil v. Vescovi*, No. 6:05-cv-319-Orl-22KRS, 2007 WL 2827697, at *3 (M.D. Fla. Sept. 27, 2007) (declining to award plaintiff all of the overtime compensation, all of the liquidated damages, and a portion of the attorneys' fees that would otherwise be due under the federal Fair Labor Standards Act where plaintiff had already recovered such amounts); *Ho v. Visa U.S.A., Inc.*, No. 112316/00, 2004 WL 1118534, at *3 (N.Y. Sup. Ct., N.Y. County, Apr. 21, 2004) (concerning standing under the Donnelly Act).

"post-trial remittitur, and not the assertion of claims and defenses" is the appropriate way to address the issue raised by LG Display. (DAP Mem. at 14; *see also* Dkt. No. 6494 at 10-11, 13 & n.20; Dkt. No. 6487 at 13 (discussing "credit" and "remittitur").)

The same approach is wholly consistent with the Arizona Supreme Court's decision in *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99 (Ariz. 2003), which entrusted to "trial courts" the appropriate mechanisms for addressing any duplicative recovery issues under state law. An equivalently flexible approach is taken by New York law, which, as LG Display's brief itself asserts, merely "commands courts to take steps to avoid duplicative *recoveries*" (not claims). (See LGD Opp. at 15 (emphasis added).) The same is also true in Michigan and Illinois which, as LG Display's own citations once again show, recognize no prohibition against duplicative "claims" for recovery, as opposed to actual duplicative "liability" (Illinois) or "double recovery awards" (Michigan).

Finally, as noted above, the Court previously endorsed exactly this approach in its May 25 Order, and stated that the way to handle the issue of duplicative recovery, should it arise, is through post-trial allocation procedures in the nature of credits or remittitur. (*See* Dkt. No. 5795 at 2 ("Should defendant wish to challenge any allocation of damages, they are free to do so post-trial").)[9]

Accordingly, LG Display's state law counterclaims should be dismissed and its defenses stricken.

[9] As pointed out in the Moving DAPs' opening papers (DAP Mem. at 14), none of the Moving DAPs has any pending claim under California antitrust law and, thus, the Court has no occasion to address that state's law here. But because LG Display references the California Supreme Court's decision in *Clayworth v. Pfizer, Inc.* 49 Cal. 4th 758 (2010), the Moving DAPs note that the situation under California law is, if anything, even clearer than under the laws of the states discussed above. The issue of duplicative recovery under the Cartwright Act is discussed at length in the Track One DAPs' opposition to defendants' "pass-on" motion. (*See* Dkt. No. 6494 at 7-13.)

CONCLUSION

For the reasons stated above and in their moving papers, 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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