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[additional defendants on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

THIS DOCUMENT RELATES TO:

3:11-CV-02591 SI

T-MOBILE U.S.A., INC.,

Plaintiff,

vs.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Case No. 3:11-cv-02591 SI

MDL NO. 3:07-MD-1827 SI

DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT

Date: October 28, 2011
Time: 9:00 A.M.
Location: Courtroom 10, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 28, 2011 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, the defendants listed in the signature blocks below ("Defendants") will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing the Complaint for Damages and Injunctive Relief ("Complaint") filed by Plaintiff T-Mobile U.S.A., Inc. ("T-Mobile").

This motion is based upon this Notice of Motion, the following Memorandum of Points and Authorities, argument of counsel, and such other matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether T-Mobile's claims are time-barred because they are brought more than four years after T-Mobile alleges it discovered the alleged TFT-LCD panel price-fixing conspiracy.

2. Whether T-Mobile's claims brought under the laws of California and New York should be dismissed because T-Mobile does not allege facts sufficient to establish those States' interests in this action consistent with the Due Process Clause of the U.S. Constitution.

3. Whether T-Mobile's Sherman Act claims based upon indirect purchases of LCD Products should be dismissed for lack of standing under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

4. Whether T-Mobile's Donnelly Act claims for indirect purchases made prior to December 23, 1998, should be dismissed for lack of standing.

5. Whether T-Mobile's claims for purchases of LCD Products other than TFT-LCD Products should be dismissed for failure to allege sufficient facts to support any alleged conspiracy as to those non-TFT LCD Products.

6. Whether T-Mobile's claims for purchases of mobile LCD Products should be dismissed for failure to allege sufficient facts supporting a conspiracy to fix the prices of LCD panels used in mobile handsets.

7. Whether all claims asserted by T-Mobile should be dismissed because T-Mobile fails to allege sufficient facts regarding the involvement of each defendant in the alleged price-fixing conspiracy.

II. INTRODUCTION

T-Mobile's Complaint lacks critical allegations to support its scattershot claims and is rife with flaws and deficiencies that warrant dismissal of T-Mobile's claims under Federal Rule of Civil Procedure 12(b)(6).

First, T-Mobile brings its claims after the expiration of the statutes of limitations applicable to its federal and state-law claims, respectively. T-Mobile fails to allege in its Complaint that any tolling is applicable to its claims. Therefore, all of its claims are time-barred and should be dismissed.

Second, T-Mobile's claims under the laws of California and New York should be dismissed on Due Process grounds. To satisfy Due Process, T-Mobile must plead the location of its purchases. In fact, this Court has repeatedly held that "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation' – plaintiffs' purchases of allegedly price-fixed goods – occurred in the various states." *In re TFT-LCD (Flat Panel) Antitrust Litig. (AT&T Mobility)*, No. M 07-1827 SI, 2010 WL 2609434, at *2-3 (N.D. Cal. June 28, 2010). T-Mobile's Complaint, however, is conspicuously vague as to where T-Mobile made the purchases that give rise to its claims.

Third, at least some of T-Mobile's claims are impermissibly based upon indirect purchases of LCD Products, rather than any direct dealings with Defendants. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), T-Mobile does not have standing to sue for damages arising from indirect purchases of LCD Products, such as those it made from original equipment manufacturers ("OEMs"), even if the LCD Products it purchased contained LCD panels manufactured by Defendants and sold to the OEMs. Accordingly, any Sherman Act and Clayton Act claims for damages based on such indirect purchases should be dismissed for lack of standing under *Illinois Brick*.

Fourth, as this Court recently recognized, New York's Donnelly Act does not authorize recovery for claims based on indirect purchases made before December 23, 1998. As a result, T-Mobile's Donnelly Act claims based on indirect purchases made before that date should be dismissed for lack of standing. *In re TFT-LCD (Flat Panel) Antitrust Litig. (Target)*, No. M 07-1827 SI, ECF No. 3362, at 5 (N.D. Cal. Aug. 24, 2011).

Fifth and sixth, T-Mobile's attempt to expand its claims beyond an alleged conspiracy to price-fix particular TFT-LCD panels should not be allowed. T-Mobile summarily concludes that any collusion with respect to certain large-sized TFT-LCD panels also encompassed the market for STN-LCD panels and small-size LCD panels used in mobile handsets. Such bootstrap allegations, however, do not constitute "evidentiary facts which if true, will prove" a conspiracy to fix the prices of STN-LCD panels or small-size LCD panels. *Kendall v. Visa U.S.A. Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Further, to the extent T-Mobile seeks to allege the existence of separate conspiracies as to these panels, it has not done so: T-Mobile's Complaint fails to answer the "basic questions: who, did what, to whom (or with whom), where, and when," required in pleading a claim for an antitrust violation. *Id.*

Finally, the Complaint fails to sufficiently allege each defendant's involvement in the alleged price-fixing conspiracy. The Complaint groups corporate family members together as single entities and fails to differentiate among the members. Instead of alleging specific conduct as to each defendant, as required under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), T-Mobile impermissibly relies on group pleading to generically allege the conduct of thirty-three separate entities. But mere conclusory allegations of agency between and among corporate family members are insufficient to state a claim against individual entities. Therefore, T-Mobile's state and federal claims as to all Defendants should be dismissed.

III. FACTUAL BACKGROUND

T-Mobile alleges a price-fixing conspiracy among suppliers of "LCD Products," a term it defines to include both LCD panels and finished products containing LCD panels as components. *See* Compl. ¶ 19. The price-fixing conspiracy among manufacturers of "LCD Products" allegedly lasted from January 1, 1996 through December 11, 2006. *Id.* ¶ 21. The Complaint alleges that Defendants concealed their

conspiracy and that T-Mobile did not discover the existence of the alleged conspiracy until December 2006, when the Department of Justice's investigation became public. *Id.* ¶¶ 175, 184.

T-Mobile brings federal antitrust claims under the Sherman Act and state-law claims under California's Cartwright Act, California's Unfair Competition Law, and New York's Donnelly Act for its direct and indirect purchases of mobile wireless handsets, desktop monitors, and notebooks during the alleged conspiracy period. *Id.* ¶¶ 10-11, 169.

A. T-Mobile's Allegations Regarding Its Purchases of LCD Products

T-Mobile alleges that it made direct purchases of LCD Products from "certain defendants" and that it "purchased mobile wireless handsets containing LCD Panels from other handset OEMs, which in turn purchased LCD Panels from defendants and their co-conspirators." *Id.* ¶¶ 10, 169, 172. T-Mobile further alleges that it purchased desktop computer monitors and laptops containing LCD Panels, which were manufactured by OEMs and then sold to T-Mobile for its own use. *Id.* ¶ 174.

T-Mobile fails to allege where any of these purchases occurred. T-Mobile generally alleges that it "maintained, in each of the states where it operated company-owned retail stores and sold to authorized sales agents, inventories of mobile wireless handsets that it purchased and received from the handset vendors at its distribution centers." *Id.* ¶ 25. T-Mobile also alleges that "all of T-Mobile's negotiations for the purchase of mobile wireless handsets and other LCD Products took place in the United States and were controlled by procurement organizations based in the United States" and that "all T-Mobile purchase orders for mobile wireless handsets and other LCD Products were issued from the United States and all invoices were sent to T-Mobile in the United States." *Id.* ¶ 28. Notably, nowhere does T-Mobile allege *where* in the United States these transactions took place. To the extent it says anything, the Complaint only vaguely suggests that its purchases may have occurred in Washington, where T-Mobile's headquarters are located. *See id.* ¶¶ 13, 22 ("Defendants and their co-conspirators knew that price-fixed LCD Panels and Products containing price-fixed LCD Panels would be sold and shipped into [the Western District of Washington]."). More importantly, T-Mobile nowhere alleges that it purchased LCD Products in California and New York – the states under whose laws it now seeks to make claims.

B. Allegations that Defendants' Conspiracy Included STN-LCD Panels

T-Mobile also glides over distinctions among products and the companies that manufacture them. At the beginning of the Complaint, T-Mobile defines "LCD Panels" to include panels which it acknowledges use distinct types of technology: TFT-LCD panels, CSTN-LCD panels, and MSTN-LCD panels.[1] *Id.* ¶¶ 3, 18. According to T-Mobile, while only *certain* Defendants "manufactured both TFT-LCD Panels and STN-LCD Panels," *id.* ¶ 156, *all* Defendants collectively entered a single conspiracy involving "both TFT-LCD and STN-LCD Panels," *id.* ¶ 3. The Complaint also alleges in wholly conclusory fashion that the same individuals who attended Crystal Meetings and bilateral meetings about TFT-LCD panels "also had pricing responsibilities for STN-LCD Panels." *Id.* ¶ 156. According to T-Mobile, certain Defendants engaged in bilateral discussions during which they shared pricing information, which unspecified individuals or corporations then took into account in determining the price of STN-LCD panels. *Id.* ¶ 158. Thus, T-Mobile argues, Defendants' alleged price-fixing may be presumed to have "inflated" prices for STN-LCD panels, as well as TFT-LCD panels. *Id.* ¶ 159.

C. Allegations that Defendants' Conspiracy Included Small-Size LCD Panels

T-Mobile speculates that all Defendants "conspired" to fix the prices for small-size LCD panels used in mobile wireless handsets. *Id.* ¶ 121. The Complaint does not define either "large" or "small" size LCD panels. In support of its speculation, T-Mobile asserts that Defendants entered into bilateral agreements and that Sharp and Epson have pleaded guilty to fixing the price of small-size LCD panels sold to Motorola. *Id.* ¶¶ 94, 121-22, 134, 136. The Complaint, however, does not contain any factual allegations beyond the plea agreements of *two* Defendants with respect to one particular customer. T-Mobile does not allege more than ultimate facts and conclusions, or attempt to allege how Defendants participated in a conspiracy to fix the prices of small-size LCD panels. As set forth below, T-Mobile's broad brush-strokes fall far short of the applicable pleading standards.

D. T-Mobile's Allegations as to the Involvement of Defendants and Their Entire Corporate Families

The Complaint names thirty-three distinct corporate entities in eleven corporate families as "Defendants." *Id.* ¶¶ 29-72. The Complaint groups these entities into corporate families and refers to

[1] The Complaint refers to LCD panels that use CSTN and MSTN technologies together as STN-LCD panels. *Id.*

these defined groups collectively. Rather than allege facts and conduct specific to each named Defendant, the Complaint summarily presumes that each Defendant is responsible its affiliates' conduct and concludes that "all entities within the corporate families were active, knowing participants in the alleged conspiracy." *Id.* ¶ 139. The boilerplate language further concludes that each entity participated in all conspiratorial contacts so long as a corporate affiliate participated. *Id.* Moreover, each Defendant is alleged to be the agent or joint venturer of every other Defendant, even if no corporate affiliation exists. *Id.* ¶ 74, 77.

IV. LEGAL STANDARD

A complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570); *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009) (a plaintiff's complaint must "contain sufficient factual allegations 'to raise a right to relief above the speculative level.'"). A plaintiff must "provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Hutson v. Am. Home Mortg. Servicing, Inc.*, No. C 09-1951, 2009 WL 3353312, at *7 (N.D. Cal. Oct. 16, 2009) (citing *Twombly*, 550 U.S. at 555). Specifically, with respect to claims under Section 1 of the Sherman Act "claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which if true, will prove" a conspiracy. *Kendall*, 518 F.3d at 1047.

When faced with a motion to dismiss, a court "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 129 S. Ct. at 1950. Only "when there are well-pleaded factual allegations, a court should assume their veracity." *Id.* Even then, the court must "determine whether [the factual allegations] plausibly give rise to an entitlement to relief." *Id.* "[T]he court is not required to accept as true 'allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.'" *In re TFT-LCD (Flat Panel) Antitrust Litig. (Nokia)*, No. M 07-1827 SI, 2010 WL 2629728, at *2 (N.D. Cal. June 29, 2010) (quoting *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)).

V. ARGUMENT

A. Because T-Mobile Filed Its Complaint More Than Four Years After the Investigation into the Alleged Conspiracy was Publicly Disclosed, the Statutes of Limitations Bar this Action.

The laws under which T-Mobile brings its claims each carry a four-year statute of limitations. *See* 15 U.S.C. § 15(b) (Sherman Act claims); Cal. Bus. & Prof. Code §§ 16750.1, 17208 (California claims); N.Y. Gen. Bus. Law § 340(5) (New York claims). In its Complaint, T-Mobile alleges that "the conspiracy" began at least as early as January 1, 1996, and that it ended by December 2006. Compl. ¶ 21. T-Mobile admits that the investigation of LG Display by foreign antitrust authorities, as well as the U.S. Department of Justice, was publicly disclosed on December 11, 2006. *Id.* ¶ 123. T-Mobile further admits that on December 12, 2006, "news reports indicated that in addition to LG Display, defendants Samsung, Sharp, and AU Optronics were also under investigation." *Id.* ¶ 124. Indeed, T-Mobile acknowledges that any alleged fraudulent concealment on the part of Defendants had ended at the time of these announcements. *Id.* ¶ 184. Yet T-Mobile waited until April 18, 2011 to file its Complaint, more than four years after the date that the investigations became public. T-Mobile does not allege any grounds for tolling the statutes of limitations after December 2006. Thus, T-Mobile has filed its Complaint after the expiration of the statutes of limitations of both its federal and state law claims, and its Complaint should be dismissed in its entirety. *See Ice Cream Distribs., LLC v. Dreyer's Grand Ice*, No. 09-5815, 2010 WL 2198200, at *9-10 (N.D. Cal. May 28,2010) (dismissing part of plaintiff's Unfair Competition claims because they were barred by the statute of limitations); *In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d 984, 1000-02 (N.D. Cal. 2009) (dismissing Sherman Act claims that were brought after the statute of limitations had elapsed); *Thome v. Alexander & Louisa Calder Found.*, 70 A.D. 3d 88, 112 (N.Y. App. Div. 2009) (affirming dismissal of plaintiff's Donnelly Act claim because claim was untimely).

B. T-Mobile's Complaint Fails to Allege that T-Mobile Purchased the Products at Issue in California and New York.

In order to bring a state-law claim consistent with the Due Process Clause of the United States Constitution, a plaintiff must allege that the State has significant contacts with both the parties and the transactions at issue. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). Indeed, this Court has repeatedly held in related cases that "Due

Process requires a plaintiff seeking to bring claims under a state's antitrust law to demonstrate that the purchases giving rise to those claims occurred within that state." *In re TFT-LCD (Flat Panel) Antitrust Litig. (State of Fl.)*, No. M 07–1827 SI, 2011 WL 1100133, at *5 (N.D. Cal. Mar. 24, 2011); *see also In re TFT-LCD (Flat Panel) Antitrust Litig. (Costco)*, No. M 07-1827 SI, ECF No. 45, at 3-5 (N.D. Cal. Aug. 29, 2011) (dismissing plaintiff's state law claims because it did not allege that it purchased the allegedly price-fixed products in those states); *AT&T Mobility*, 2010 WL 2609434, at *2-3 (holding that "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation' – plaintiffs' purchases of allegedly price-fixed goods – occurred in the various states"); *Nokia*, 2010 WL 2629728, at *3-4 (same); *In re TFT-LCD (Flat Panel) Antitrust Litig. (Motorola)*, No. M 07-1827 SI, 2010 WL 2610641, at *8-9 (N.D. Cal. June 28, 2010) (same); *Pecover v. Elecs. Arts. Inc.*, 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007).

Here, T-Mobile brings state-law claims under the laws of California and New York but fails to allege any facts that would provide a sufficient basis upon which to apply the laws of those states. For instance, there are no factual allegations in the Complaint that T-Mobile purchased allegedly price-fixed products in California and New York. Indeed, T-Mobile's Complaint is drafted evasively, avoiding any explicit reference to the particular location where its purchases were made.[2]

Additionally, although T-Mobile alleges a presence in a variety of states – including California and New York – it does not link its presence in those states to any of its claims. For instance, T-Mobile alleges that it "conducted a substantial volume of business in both California and New York," that it "provided wireless services and sold mobile wireless handsets containing LCD panels to customers in California and New York through its corporate-owned retail stores," and that it "maintained in both California and New York inventories of mobile wireless handsets containing LCD Panels manufactured and sold by defendants[.]" Compl. ¶¶ 26, 195, 205. But nowhere does T-Mobile allege that its claims

[2] T-Mobile's headquarters are located in Washington. Compl. ¶ 22. Therefore, it is probable that T-Mobile's purchases also occurred in that State. *See id.* ¶ 13 ("Defendants and their co-conspirators knew that price-fixed LCD Panels and Products containing price-fixed LCD Panels would be sold and shipped into [the Western District of Washington]."). If true, T-Mobile's claims are a naked attempt to shoehorn its way into state laws that allow indirect purchaser claims so as to avoid the application of Washington law. *See Blewett v. Abbott Labs., Inc.*, 86 Wash. App. 782, 783-84 (1997) (holding that indirect purchasers lack standing to sue under Washington's antitrust statute).

arose from those sales. As this Court has cautioned, "***presence in the various states does not establish a link between plaintiffs' antitrust claims and the States***." *AT&T Mobility*, 2010 WL 2609434, at *3 (emphasis added).

T-Mobile also alleges that certain Defendants admitted in plea agreements that they sold relevant products to customers in California "in furtherance" of the alleged conspiracy. Compl. ¶ 197. "[T]he fact that some defendants have admitted to selling price-fixed goods to customers in this District does not [, however,] establish the requisite connection with California because those plea agreements do not state, nor have plaintiffs alleged, that any defendants sold products to [T-Mobile] in California." *AT&T Mobility*, 2010 WL 2609434, at *3. In short, T-Mobile's state-law claims offend Due Process and should be dismissed.

C. T-Mobile Lacks Standing to Assert Sherman Act and Clayton Act Claims for Damages Based on Indirect Purchases from OEMs.

T-Mobile seemingly seeks to recover damages under federal antitrust laws for all of its purchases of "LCD Products," including purchases made from OEMs who are not alleged participants in the alleged conspiracy. In *Illinois Brick*, however, the Supreme Court held that indirect purchasers lack standing to sue for civil damages for alleged violations of the Sherman Act. In doing so, the Court recognized the "evidentiary complexities and uncertainties" that are involved in the use of a pass-on theory "by a plaintiff several steps removed from the defendant in the chain of distribution" and "elevat[ed] direct purchasers to a preferred position[,] . . . den[ying] recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Illinois Brick*, 431 U.S. at 732, 746.

T-Mobile's Complaint alleges that T-Mobile purchased LCD Products, containing LCD panels manufactured by Defendants, both directly from some, but not all, Defendants and from Original Equipment Manufacturers ("OEMs"). Compl. ¶¶ 169, 172, 174. As to the latter instances, the OEMs (not T-Mobile) are the direct purchasers of LCD panels with standing to assert a damages claim under Section 4 of the Clayton Act, and T-Mobile, as their customer, is merely an indirect purchaser barred from recovery.

Even though T-Mobile acknowledges that not all of its purchases of LCD Products were made directly from Defendants, its Sherman Act Section 1 claim does not differentiate between purchases

allegedly made directly from Defendants or co-conspirators and purchases allegedly made from OEMs not named as defendants or conspirators. Compl. ¶¶ 186-192. Rather, its claim for relief under the Sherman Act seeks damages for T-Mobile's "purchases of LCD Products containing LCD Panels sold by defendants, their coconspirators, and *others*." *Id.* ¶ 191 (emphasis added). T-Mobile's Complaint tries to circumvent *Illinois Brick* by seeking damages for all of T-Mobile's purchases of LCD Products, regardless of whether such LCD Products were purchased directly from one of the Defendants, one of the alleged co-conspirators, or, in fact, from an OEM. To the extent that T-Mobile's federal antitrust damages claims are based upon purchases of finished products that were neither made from named Defendants nor alleged co-conspirators (such as OEMs), this Court should dismiss those claims and only allow T-Mobile to bring claims under the federal antitrust laws for those LCD Products T-Mobile purchased *directly* from Defendants. *See In re Refrigerant Compressors Antritrust Litig.*, No. 2:09-md-02042, 2011 U.S. Dist. LEXIS 63297, at *42-43 (E.D. Mich. June 13, 2011) (dismissing federal claims based on purchases of "refrigerant compressor products" as distinct from purchases of price-fixed compressor themselves).

D. T-Mobile Cannot Maintain Donnelly Act Claims for Indirect Purchases Made Prior to December 23, 1998.

T-Mobile claims damages from an alleged conspiracy between January 1, 1996 and December 11, 2006. Compl. ¶ 21. T-Mobile invokes New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347, to seek damages based on purchases made during this period. The Donnelly Act provides a cause of action against conspiracies that "unlawfully interfer[e] with the free exercise of any activity in the conduct of any business, trade or commerce." *Id.* § 340(1). On December 23, 1998, an amendment to the Donnelly Act became effective that stated that the fact that a plaintiff "has not dealt directly with the defendant shall not bar or otherwise limit recovery." *Id.* § 340(6). Prior to this, New York courts construed the Donnelly Act in accordance with *Illinois Brick*, barring recovery of damages for indirect purchases. *Russo & Dubin v. Allied Maint. Corp.*, 407 N.Y.S.2d 617, 621 (Sup. Ct. 1978).

As this Court recently recognized, both federal and New York state courts have held that the 1998 amendment to the Donnelly Act does not apply retroactively to indirect purchases made before the enactment of the amendment. *Target*, ECF No. 3362, at 5 ("Courts have held that the amendment was

not retroactive[.]"); *see also In re Vitamins Antitrust Litig.*, No. 99-197, 2000 U.S. Dist. LEXIS 15109, at *36 (D.D.C. Oct. 6, 2000); *Lennon v. Philip Morris Cos.*, 734 N.Y.S.2d 374, 382 (Sup. Ct. 2001) ("[C]ourts interpreting provisions of the General Business Law have rejected retroactive application of amendments creating new private rights of action. . . . Without allegations of events that postdate the 1998 amendment, the plaintiffs' complaint fails to sufficiently state a claim."). Accordingly, T-Mobile's claims under New York law for purchases made before December 23, 1998, should be dismissed.

E. The Complaint Fails to Allege Sufficient Facts to Support a Conspiracy as to STN-LCD Panels.

T-Mobile's claims of a conspiracy involving STN-LCD panels cannot survive a motion to dismiss. Throughout the course of the LCD price-fixing litigation, this Court has time and again dismissed speculative allegations about a conspiracy regarding STN-LCD panels. *Nokia*, 2010 WL 2629728, at *5-6 ("[T]he Court cannot infer the existence of such an expanded conspiracy based solely on allegations of price-fixing in the TFT-LCD market[.]"); *AT&T Mobility*, 2010 WL 2609434, at *4-5 (same); *Motorola*, 2010 WL 2610641, at *9-10 (same).

As in those cases, the Complaint here does not allege sufficient facts to show Defendants' involvement in the alleged price-fixing of STN-LCD panels. Just as in the complaints this Court has rejected, T-Mobile broadly defines the term "LCD Panels" in the Complaint to include both TFT-LCD panels and STN-LCD panels. *Compare* Compl. ¶ 18, *with AT&T Mobility*, 2010 WL 2609434, at *1 n.2. Through this pleading tactic, T-Mobile, in effect, alleges that the *same* price-fixing conspiracy encompassed both TFT-LCD and STN-LCD panels. *See, e.g.*, Compl. ¶ 97 ("The purpose and effect of these [Crystal] meetings was to stabilize or raise prices.").

Furthermore, the Complaint alleges that the government investigations resulted in guilty pleas for fixing the prices of "LCD Panels," *see id.* ¶¶ 123-39, which T-Mobile defines to include STN-LCD panels, even though none of the pleas involved STN-LCD panels and the government's investigation addressed only TFT-LCD panels. *Nokia*, 2010 WL 2629728, at *5-6. Allegations regarding government investigations and certain Defendants' guilty pleas involving TFT-LCD panels do not constitute "evidentiary facts which if true, will prove" a conspiracy regarding STN-LCD panels. *Kendall*, 518 F.3d at 1047; *see also Nokia*, 2010 WL 2629728, at *6 ("'To state a claim under Section 1 of the Sherman Act, . . . claimants must plead not just ultimate facts (such as a conspiracy), but

evidentiary facts which if true, will prove' a conspiracy. Here, the amended complaint does not contain any specific factual allegations that defendants conspired to fix prices of STN-LCD panels, and the Court cannot infer the existence of such an expanded conspiracy based solely on allegations of price-fixing in the TFT-LCD market, or any other non-STN market." (quoting *Kendall*, 518 F.3d at 1047)).

To the extent that T-Mobile attempts to allege a smaller or different price fixing conspiracy involving only bilateral discussions, those claims also fall short, because the Complaint fails to identify which of the thirty-three Defendants manufactured STN-LCD panels, which of the thirty-three Defendants engaged in bilateral discussions and with whom, and where such discussions supposedly took place. *See Nicholson v. Kovach*, No. C 04-01789, 2005 U.S. Dist. LEXIS 7181, at *5 (N.D. Cal. Apr. 18, 2005) ("[A] complaint that is replete with detail but that fails to concisely and clearly identify 'whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.'" (quoting *McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996))). Thus, with respect to any alleged conspiracy to fix the prices of STN-LCD panels, the Complaint once again fails to answer the "basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall*, 518 F.3d at 1048.

Having alleged "the conspiracy," T-Mobile cannot escape the consequences of its generic, over-inclusive allegations – and the holdings of *Nokia* and *Kendall* – by offering speculation as to other implied or presumed "conspiracies."

F. T-Mobile Fails to Allege Sufficient Facts to Support Its Claim of a Conspiracy to Fix Prices of Small-size LCD Panels.

Similarly, T-Mobile fails to allege facts sufficient to support its sweeping allegations regarding the type of panels involved in the alleged conspiracy. The Complaint alleges that Defendants conspired to fix the prices of LCD panels, including "LCD panels included in mobile wireless handsets," Compl. ¶ 2, and then attempts to connect all Defendants to this purported conspiracy with a hodgepodge of allegations concerning (1) bilateral communications between some, but not all, of the Defendants; and (2) two distinct plea agreements relating to a single customer. *Id.* ¶¶ 94, 121-122, 134, 136. But these allegations are "no more than conclusions . . . not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950.

As the Ninth Circuit has cautioned, antitrust plaintiffs must "allege facts such as a 'specific time, place or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall*, 518 F.3d at 1047. T-Mobile cannot simply rely on conclusory statements that Defendants conspired to fix the price of small-size LCD panels. Instead, it "must allege that *each individual defendant* joined the conspiracy and played some role in it because at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *Nokia*, 2010 WL 2629728, at *7 (emphasis added). T-Mobile's failure to make allegations regarding *each* Defendant's participation in the alleged conduct or conspiracy related to small LCD panels requires dismissal of its claims.

Allegations Regarding Bilateral Communications. T-Mobile has, at best, made only limited allegations regarding isolated bilateral discussions by only some of the Defendants related to the price-fixing of small panels. *See* Compl. ¶¶ 94, 121-122. T-Mobile asserts that Sharp and Epson settled criminal proceedings related to allegations of fixing the "price of LCD Panels sold to Motorola (including panels to be incorporated in Motorola's Razr handsets)," *id.* ¶¶ 134, 136, but alleges no facts to support its assertion that each of the remaining Defendants entered into any agreement related to these small panels. *See Kendall*, 518 F.3d at 1047. Instead, in an attempt to bridge the gap between bilateral communications regarding small LCD panels and the Crystal Meeting conspiracy alleged in the rest of the Complaint, T-Mobile simply states that all Defendants conspired to fix the prices of LCD panels, including LCD panels used in mobile handsets. Compl. ¶ 2. That assertion is nothing more than a legal conclusion. T-Mobile "must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove" a conspiracy to fix the prices of LCD panels used in mobile handsets. *Kendall*, 518 F.3d at 1047; *see also Twombly*, 550 U.S. at 555.

Allegations Regarding Plea Agreements. The existence of an alleged decade-long conspiracy involving thirty-three Defendants to fix the prices of small-size LCD panels also cannot be inferred from allegations that *two* Defendants have settled charges alleging bilateral agreements for a specific customer during a span of less than one year. *See* Compl. ¶¶ 134, 136 (acknowledging that Sharp and Epson's guilty pleas were limited to TFT-LCD panels sold to Motorola during the fall of 2005 to the middle of 2006). Further, these Defendants' guilty pleas included only TFT-LCD panels, not all "LCD

Panels" as defined by T-Mobile. If anything, the Complaint's reliance on the plea agreements compounds the confusion and lack of specificity, because Sharp and Epson – the two Defendants whose pleas are alleged to have covered bilateral agreements involving small LCD panels, *id.* – are not alleged to have pleaded guilty to participating in the multilateral "Crystal Meeting" conspiracy. Likewise, no allegation is made regarding the alleged Crystal Meeting conspirators and any bilateral small panel guilty pleas.[3]

Accordingly, T-Mobile fails to plead "specific factual allegations" to support any plausible claim that *each* of the Defendants conspired to fix the prices of small-size LCD panels used in mobile handsets, and its claims should therefore be dismissed. *See Twombly*, 550 U.S. at 556 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

G. The Complaint Does Not Allege Sufficient Facts Particular to Each Defendant.

As this Court has explained, an antitrust plaintiff "must allege that each individual defendant joined the conspiracy and played some role in it because at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it." *Nokia*, 2010 WL 2629728, at *7 (dismissing claims where the complaint failed to allege "*how* [the subsidiary] participated in the conspiracy") (internal quotations omitted). A plaintiff cannot merely "alleg[e] that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations." *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004).

T-Mobile has ignored these notice pleading requirements and, instead, lumps together over two dozen corporate parents, subsidiaries, and affiliates, using the label "defendants" to refer to all of them as an undifferentiated mass. T-Mobile alleges that "defendants and others shipped during the Conspiracy Period more than 400 million LCD Panels, including those incorporated into LCD Products, into the United States . . . ." Compl. ¶ 161. T-Mobile also alleges that "defendants conduct business

[3] Given the utter lack of allegations in any way linking the limited plea agreements to the broader allegations, the Court need not address at this juncture whether the plea agreements even constitute the type of "evidentiary facts" required by the Ninth Circuit under *Kendall*. Settlement agreements involving other parties, other products, and different allegations, however, are plainly inadmissible and therefore not "evidentiary facts."

throughout the United States" and that "defendants' activities have had a direct, substantial and foreseeable effect on [interstate] commerce." *Id.* ¶ 13. Nowhere, however, does T-Mobile allege which particular Defendant sold LCD Panels in what locations, or how any particular Defendant's "activities" substantially affected interstate commerce, much less how these unspecified "activities" caused any antitrust injury.

Moreover, the Complaint makes conclusory allegations regarding entire corporate families without specifying the acts or involvement of any particular entity. *Id.* ¶ 139 ("all entities within the corporate families were active, knowing participants in the alleged conspiracy"). In its remaining allegations, T-Mobile does not even attempt to specifically tie affiliates or subsidiaries to a single factual allegation in the Complaint. After first introducing each Defendant in the "Parties" section of the Complaint, T-Mobile ceases any individualized allegations against Defendants. Its remaining allegations against Defendants use one label to sweep in members of each corporate family. For example, the Complaint alleges that "[i]n the early years of the conspiracy, beginning in at least 1996, representatives of the Japanese-based conspirators, such as Sharp and Toshiba, met and agreed to fix the prices for LCD Panels generally[.]" *Id.* ¶ 92. It is impossible to tell from the face of the Complaint which Toshiba entity this allegation references.

The law does not allow these vague and conclusory shortcuts. Under *Twombly* and *Iqbal*, T-Mobile cannot bring an entire corporate family into the case as one amalgamated defendant.[4] *See Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1103 (N.D. Cal. 2006) (holding that mere conclusory allegations of agency between corporate family members are insufficient to state a claim against individual entities), *abrogated on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007); *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-CV-42, 2011 U.S. Dist. LEXIS 51330, at *54 (E.D.N.Y. Jan. 4, 2011) ("The argument that the grouped defendants joined

[4] Defendants acknowledge that this Court has recently analyzed group pleading allegations and that its reasoning in these cases may apply here, either to the Complaint or potentially more specific allegations in an amended complaint. *In re TFT-LCD (Flat Panel) Antitrust Litig. (Kodak)*, No. M 07-1827 SI, ECF No. 3346, at 3-4; *In re TFT-LCD (Flat Panel) Antitrust Litig. (Target)*, No. M 07-1827 SI, ECF No. 3362, at 3-4; *In re TFT-LCD (Flat Panel) Antitrust Litig. (Best Buy)*, No. M 07-1827 SI, ECF No. 3359, at 7-8. In any event, Defendants wish to preserve the group pleading argument for appeal, as Defendants believe that this Complaint's failure to state how each defendant joined and participated in the putative conspiracy is insufficient to withstand a motion to dismiss under *Twombly* and *Kendall*.

the alleged conspiracies through their corporate affiliation is precisely the sort of 'legal conclusion couched as a factual allegation' that *Twombly* and *Iqbal* deemed insufficient to state a claim."); *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2009 U.S. Dist. LEXIS 83199, at *55-56 (N.D. Cal. Sept. 4, 2009) (dismissing complaint where plaintiffs "merely lump[ed] together allegations against [a] holding company and its subsidiary"); *In re Sagent Tech., Inc.*, *Deriv. Litig.*, 278 F. Supp. 2d 1079, 1094-95 (N.D. Cal. 2003) (complaint insufficient where it "lumps together" 13 separate defendants). Indeed, under well-established law, distinct corporate family members are presumed to act separately and independently. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998).

T-Mobile's generic allegations of agency and joint-venturing are similarly unavailing. *See* Compl. ¶¶ 74, 77 ("Each defendant acted as the agent or joint venturer of or for the other defendants with respect to the acts, violations and common course of conduct alleged herein."). The Complaint contains no evidentiary facts to support T-Mobile's conclusion that each of the thirty-three Defendants was an agent or joint-venturer for or of other Defendants, or that each of the subsidiaries and other non-parent-company corporate family members was an agent for its respective parent company. In addition, T-Mobile cannot plausibly allege that unrelated Defendants are agents of each other for purposes of a conspiracy merely because some of them participated in joint-ventures. If this were so, every legitimate joint-venture partner would be subject to an antitrust complaint. *See Twombly*, 555 U.S. at 556-57 (finding allegation of parallel conduct plus allegation of conspiracy insufficient). Further, courts have held that bare allegations of agency or joint-venturing between corporate family members, such as these, are insufficient to survive a motion to dismiss. *Nordberg*, 445 F. Supp. 2d at 1103.

In short, T-Mobile's Complaint should be dismissed because it fails to allege the requisite facts about *each* Defendant's supposed participation in the alleged conspiracy. *See Kendall*, 518 F.3d at 1048 (antitrust plaintiffs must allege the "basic questions: who, did what, to whom (or with whom), where, and when"); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir. 2008) ("[G]eneric pleading, alleging misconduct against defendants without specifics as to the role *each* played in the alleged conspiracy, was specifically rejected by *Twombly*[.]" (emphasis added)); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-51 (2d Cir. 2007) (conclusory allegations of

conspiracy are inadequate where complaint alleges conspiratorial activity "without any specification of any particular activities by any particular defendant").

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this motion in its entirety and dismiss T-Mobile's Complaint.

Respectfully submitted,

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