Garrard R. Beeney (NY Reg. No. 1656172)
(beeneyg@sullcrom.com)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Brendan P. Cullen (SBN 194057)
(cullenb@sullcrom.com)
Shawn Joe Lichaa (SBN 250902)
(lichaas@sullcrom.com)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

Attorneys for Philips Electronics North America Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

This Document Relates to:
Case No. 11-cv-2591

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

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Master File No. M07-1827 SI

MDL No. 1827

Case No. 11-cv-2591

PHILIPS ELECTRONICS NORTH AMERICA CORPORATION'S JOINDER TO MOTION TO DISMISS T-MOBILE U.S.A., INC.'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: The Hon. Susan Illston
Courtroom: 10, 19th Floor
Hearing Date: October 28, 2011
Hearing Time: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

Philips Electronics North America Corporation ("PENAC") joins in and adopts Defendants' Joint Notice of Motion and Motion to Dismiss T-Mobile USA, Inc.'s ("T-Mobile") Complaint and writes separately to illustrate that T-Mobile's Complaint ("Complaint" or "Compl.") is especially inadequate as to PENAC, and inexcusably so, given that this Court has previously dispensed with allegations *just like these* concerning *these very entities*.[1]

ISSUE TO BE DECIDED

1. Whether T-Mobile's claims against PENAC should be dismissed, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted, where T-Mobile has failed to plead specific allegations that PENAC participated in the alleged price-fixing conspiracy and instead improperly attempts to rely on generalized conclusions and on irrelevant and equally conclusory allegations concerning other entities, such as PENAC's ultimate corporate parent Koninklijke Philips Electronics N.V. ("Royal Philips").

PRELIMINARY STATEMENT

T-Mobile's allegations concerning PENAC are nearly identical to Nokia's allegations which this Court has already rejected as insufficient to state an antitrust claim against PENAC. T-Mobile's Complaint should be dismissed just like Nokia's was.

Like Nokia, T-Mobile has alleged generic and conclusory statements that PENAC participated in the conspiracy through its officers, director and agents. Like Nokia, T-Mobile has failed specifically to connect PENAC to the purported conspiracy. And like Nokia, T-Mobile has attempted to remedy these infirmities by seeking to hold PENAC vicariously responsible for the (equally conclusory)

[1] PENAC does not join in the portion of the Joint Motion arguing that the federal antitrust claims are barred by the statute of limitations. PENAC previously signed a tolling agreement with counsel representing a putative class of direct purchaser plaintiffs. That tolling agreement tolled the statutes of limitation as to the federal antitrust claims because those claims had been "asserted in the consolidated action" prior to the tolling agreement. (Declaration of Shawn Joe Lichaa in support of Joinder, Exh. 1.) PENAC is, however, unaware of any agreement, statute, or legal doctrine that would toll the statutes of limitation applicable to T-Mobile's untimely state-law claims.

alleged conduct of PENAC's ultimate parent company, Royal Philips, and one of its purported joint ventures, now known as LG Display Co., Ltd. ("LG Display"). In dismissing Nokia's virtually identical claims, this Court ruled:

> "There is nothing in paragraph 53 or elsewhere alleging *how PENAC* participated in the conspiracy. Similarly, allegations and assertions about Royal Philips and LG Display are insufficient to state a claim against PENAC *unless the complaint alleges a specific connection between PENAC and the alleged conspiracy*."

(*Nokia Order*, p. 10:14-16) (emphases added).[2] T-Mobile's allegations – which are essentially identical to the allegations to which the Court referred in this holding – are plainly insufficient to state a claim, whether federal or state, and PENAC should be dismissed from this Action.

The only "different" allegation T-Mobile proffers against PENAC is that "[PENAC] participated in meetings or discussions during the Conspiracy Period with at least one other defendant or co-conspirator, which included discussions about prices for LCD Panels and LCD Products." (Compl. ¶ 112.) This unsupported allegation does not attempt in any meaningful way to connect PENAC to the alleged conspiracy – indeed, if one were asked to provide an example of the kind of conclusory and fact-free allegation that no longer passes muster under *Twombly*, one could scarcely do better than this allegation. T-Mobile has failed utterly to meet this Court's clear guidance that "an antitrust plaintiff must specifically plead how each individual defendant joined the alleged price-fixing conspiracy." (*Nokia Order*, p. 10:19-20). T-Mobile has also fallen well short of the Ninth Circuit's pleading standards as set forth in *Kendall*: an antitrust complaint must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *See Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d

[2] As noted in this Court's order dismissing Nokia's Complaint, "[t]he only specific allegations regarding PENAC in the [Nokia] complaint" appeared in paragraph 53, in which Nokia "simply allege[d] PENAC's corporate status, that Nokia purchased LCDs from PENAC or via PENAC's subsidiaries, that PENAC 'manufactured, sold, and/or distributed LCDs to other purchasers through the United States and elsewhere,' and that PENAC 'participated in the conspiracy through the actions of its officers, employees, and representatives acting with actual or apparent authority.'" (See Order Granting Defendants' Joint Motion to Dismiss and Granting Philips Electronics North America Corporation's Motion to Dismiss; Granting Leave to Amend; Case No. M 07-1827 SI; June 29, 2010; Dkt 1824, p. 10:3-10 ("*Nokia Order*") (quoting paragraph 53).) T-Mobile's allegations are no better than Nokia's deficient allegations. (*See* Compl. ¶¶ 55-57.)

1042, 1048 (9th Cir. 2008). Like others who have attempted to plead a case against PENAC, T-Mobile has failed to allege how PENAC joined the conspiracy, let alone do so with specificity.

In short, T-Mobile's Complaint relies on conclusory allegations that do not even approach the pleading standard required to survive a motion to dismiss. Retention of PENAC in this Action, in which the allegations against it are facially insufficient, would result in the types of unwarranted and unfair burden and expense for PENAC against which the Supreme Court cautioned in *Twombly*. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 554, 557-59 (2007).

T-MOBILE'S ALLEGATIONS AGAINST PENAC

The core of T-Mobile's Complaint is the assertion that a group of companies participated in a conspiracy to fix prices for LCD panels and products containing those panels. (*See* Compl. ¶¶ 2-3.) T-Mobile focuses on allegations that some of these defendants — which T-Mobile does not allege included PENAC — effected the conspiracy through such communications as "Crystal Meetings," which T-Mobile describes as "highly organized" meetings among those defendants and alleged co-conspirators to "discuss and reach agreements on LCD Panel prices, price increases, production, and production capacity." (Compl. ¶¶ 95-96.) T-Mobile also relies heavily on the entry of guilty pleas by various defendants and named co-conspirators — again, not alleged to include PENAC or any entity affiliated with PENAC. (*See, e.g.*, Compl. ¶¶ 125-36.)

The only allegations concerning PENAC that appear in T-Mobile's 71-page, 205-paragraph Complaint are found within four paragraphs where T-Mobile alternates between generalized assertions against PENAC and conclusory attributions to PENAC of Royal Philips's purported conduct under an apparent theory of "alter ego" or "agent" liability. In total, as set forth in the Complaint, T-Mobile alleges that:

- "Defendant [PENAC] has its principal place of business at 3000 Minuteman Road, Andover, Massachusetts 01810. [PENAC] is a wholly-owned subsidiary of Philips Holdings USA, Inc., which in turn is a wholly-owned subsidiary of Koninklijke Philips Electronics N.V. ('Royal Philips'). During the Conspiracy Period, Philips manufactured, marketed, sold, and/or distributed LCD Panels incorporated into LCD Products sold in the United States." (Compl. ¶ 55);

- "[PENAC's] ultimate parent company, Royal Philips, entered into a joint venture with its competitor, LG Electronics, Inc. in 1999 to form LG Philips LCD Co., Ltd., now known as LG Display Co., Ltd. LG Display Co., Ltd. was one of the leading manufacturers of LCD Panels during the Conspiracy Period. LG Display has admitted participation in a global conspiracy to fix LCD Panel prices, and Royal Philips, as a player in that global market and a joint-venture owner of LG Display, participated in the conspiracy through LG Display and through other actions hereinafter alleged. LG Display and Royal Philips were co-conspirators in the conspiracy, and [PENAC] was the agent and the sales and marketing representative for Royal Philips and its divisions and subsidiaries in the United States." (Compl. ¶ 56);
- "[PENAC] participated in the conspiracy through the actions of its officers, employees, and representatives acting with actual or apparent authority. Alternatively, [PENAC] was a member of the conspiracy by virtue of its status during the Conspiracy Period as the alter ego or agent of co-conspirator Royal Philips. Royal Philips dominated or controlled [PENAC] regarding conspiracy activities and used that domination or control to charge artificially high prices for LCD Panels incorporated into LCD Products sold in the United States." (Compl. ¶ 57); and
- "Defendant [PENAC] participated in meetings or discussions during the Conspiracy Period with at least one other defendant or co-conspirator, which included discussions about prices for LCD Panels and LCD Products." (Compl. ¶ 112).

ARGUMENT

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted); *see also Ashcroft* v. *Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009); *Moss* v. *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *Pareto* v. *F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998) ("[C]onclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss."). As this Court noted previously, *Twombly*'s "'facial plausibility' standard requires the plaintiff to allege facts that add up to 'more than a sheer possibility that a defendant has acted unlawfully.'" *Nokia Order* at *2 (citing *Ashcroft*, 129 S. Ct. at 1949). Although "courts do not require 'heightened fact pleading of specifics,' a plaintiff must allege facts sufficient to 'raise a right to relief above the speculative level.'" *Id.* (citing *Twombly*, 550 U.S. at

544, 555). The allegations against PENAC in the Complaint do not meet this standard, and as a result T-Mobile's claims against PENAC here must fail.

I. T-MOBILE'S FEDERAL ANTITRUST CLAIMS AGAINST PENAC SHOULD BE DISMISSED BECAUSE THE COMPLAINT FAILS TO ALLEGE WITH THE REQUISITE SPECIFICITY PENAC'S INVOLVEMENT IN ANTICOMPETITIVE ACTIVITY.

As this Court has held, 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." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008) (emphases added). T-Mobile cannot even begin to meet this standard against the entity it actually sued, PENAC. Instead, T-Mobile focuses its (conclusory) allegations on Royal Philips. In doing so, T-Mobile has violated the fundamental teaching of *Twombly* and its progeny that requires allegations supported by "factual content that allows the court to draw the reasonable inference that *the defendant* is liable for the alleged misconduct." *Iqbal*, 129 S. Ct. at 1949 (emphasis added).

A. T-Mobile Has Failed to State a Claim Against PENAC.

Very few of the allegations in T-Mobile's Complaint actually relate specifically to PENAC. Indeed, the Complaint makes clear that even T-Mobile is unsure of the basis on which it seeks to hold PENAC liable or of the who, what, where, when and how of any misconduct by PENAC. *See Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). The crux of T-Mobile's allegations against PENAC is that PENAC "manufactured, sold, and/or distributed LCDs" and that PENAC "participated in the conspiracy through the actions of its officers, employees, and representatives acting with actual or apparent authority." (Compl. ¶¶ 55, 57.) This Court rejected these very allegations when Nokia attempted to plead them against PENAC. (*See Nokia Order*, Dkt. No. 1824, pp. 8-9.)

T-Mobile has proffered only one allegation not previously advanced by Nokia: that "[PENAC] participated in meetings or discussions during the conspiracy with at least one other co-defendant or co-conspirator." (Compl. ¶ 112.) This allegation is almost comically vague and meaningless. Among the questions it raises and fails to answer are: who at PENAC? were these

meetings or were they discussions? with what defendant did whoever it was from PENAC have these meetings or discussions? when? where? about what product or products? did these discussions or meetings result in some sort of agreement? about what? and among what entities? with what effect and duration? This allegation does not meet the standard set forth in *Twombly*, which requires "more than labels and conclusions." *Twombly*, 550 U.S. at 555. It is every bit as shabby as the previously dismissed Nokia allegations and deserves the same fate.

B. T-Mobile's Allegations Concerning Royal Philips Are Insufficient to State a Claim Against PENAC.

Instead of attempting specifically to connect defendant PENAC to the conspiracy, T-Mobile seeks to salvage its claims by imputing liability to PENAC for the purported conduct of Royal Philips. But Nokia tried – and failed – to do the same thing. What this Court said of Nokia's allegations about Royal Philips applies with equal force to T-Mobile's: "allegations and assertions about Royal Philips and LG Display are insufficient to state a claim against PENAC." (*Nokia Order*, p. 9:11-13.)[3]

Because of the lack of allegations against PENAC, T-Mobile's complaint may only survive a motion to dismiss if it has sufficiently alleged that PENAC may be held vicariously liable for the actions of Royal Philips under an "agency" or "alter ego" theory. Yet, T-Mobile's conclusory allegations of "agency" and "control" are, if anything, even *less* substantial than those found wanting just last year. *See Ferrigno* v. *Philips Electronics N. Am. Corp.*, 2010 WL 2219975 at *3-4 (N.D. Cal. June 1, 2010). In that case, Judge Whyte applied California law to conclude that allegations that Royal Philips "promotes" itself and PENAC as a single entity are insufficient to pierce the corporate veil. *Id.* Judge Whyte also rejected the contention that PENAC is Royal Philips's agent, holding that it is fundamental that "in the case of a parent company that is a holding company, the subsidiary is not an agent." *Id.* at *4 (citing *Doe* v. *Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001)).

[3] To the extent that T-Mobile seeks to hold alleged agent PENAC liable for the acts of its alleged principal Royal Philips, T-Mobile has it backwards. Absent allegations that T-Mobile does not make here, an agent is not liable for the actions of its principal. *See Mars* v. *Wedbush Morgan Securities, Inc.*, 231 Cal. App. 3d 1608 (1991) ("Generally, an agent is not held liable for the fraud of a principal, unless the agent knows of or participates in the fraudulent act.").

Although Judge Whyte rooted his opinion in California law, T-Mobile has failed to satisfy the pleading standards of California *and* Delaware law, each of which requires T-Mobile to plead specific factual allegations of agency or alter ego. *See, e.g.*, *Brennan* v. *Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1136 (N.D. Cal. 2005) (motion to dismiss granted under California law where plaintiff made only general allegations of "dominion and control" to support "alter ego" liability theory); *Medi-Tec of Egypt Corp.* v. *Bausch & Lomb Surgical*, 2005 WL 415251, at *4 (Del. Ch. Mar. 4, 2004) ("alter ego" theory insufficiently pleaded under Delaware law where plaintiff alleged no specific abuse of the corporate form); *Trevino* v. *Merscorp, Inc.*, 583 F. Supp. 2d 521, 531 (D. Del. 2008) (applying Delaware law to dismiss parent/subsidiary agency liability claim where plaintiff failed to plead specific facts establishing an agency relationship "between the corporations . . . relevant to the plaintiff's claim of wrongdoing"); *Palomares* v. *Bear Stearns Residential Mortg. Corp.*, 2008 WL 686683, at *4-*5 (S.D. Cal. March 13, 2008) (agency relationship between companies insufficiently pleaded under California law where plaintiff made only generalized allegations of actual and/or apparent authority).[4]

Because Plaintiff has failed to allege any connection between PENAC and the conspiracy or adequately allege why PENAC should be held liable for the actions of Royal Philips, the Court should dismiss the Complaint as to PENAC.

C. T-Mobile's Allegations Concerning Non-Defendant Royal Philips Are Insufficient To State a Claim under the Sherman and Clayton Acts.

Even if T-Mobile's allegations about Royal Philips could be imputed to PENAC, those do not adequately plead an antitrust claim. Specifically, as they appear in the Complaint, T-Mobile's only allegations are that:

- "[PENAC's] ultimate parent company, Royal Philips, entered into a joint venture with its competitor, LG Electronics, Inc. in 1999 to form LG Philips LCD Co.,

[4] PENAC is a Delaware corporation. (Request for Judicial Notice; Exh. A.) Typically, the law of the state of incorporation governs determinations whether to pierce the corporate veil. *See Schlumberger Logelco Inc.* v. *Morgan Equip. Co.*, No. C-94-1776, 1996 WL 251951, at *1 (N.D. Cal. May 3, 1996) ("In the absence of a controlling choice of law provision, the court finds that the law of . . . the state of incorporation, governs plaintiffs' alter ego claim."). As evidenced by these citations, California and Delaware law with respect to "agency" and "alter ego" liability are virtually the same, warranting dismissal under either.

- Ltd., now known as LG Display Co., Ltd. LG Display Co., Ltd. was one of the leading manufacturers of LCD Panels during the Conspiracy Period." (Compl. ¶ 56);
- "LG Display has admitted participation in a global conspiracy to fix LCD Panel prices, and Royal Philips, as a player in that global market and a joint-venture owner of LG Display, participated in the conspiracy through LG Display and through other actions hereinafter alleged." (Compl. ¶ 56);
- "LG Display and Royal Philips were co-conspirators in the conspiracy." (Compl. ¶ 56); and
- "The[] co-conspirators are believed to include . . . Royal Philips Electronics N.V." (Compl. ¶ 75).

T-Mobile's unsubstantiated assertions that Royal Philips was a "co-conspirator[] in the conspiracy," and that the "co-conspirators are believed to include . . . Royal Philips," are just as flimsy as T-Mobile's allegations concerning PENAC, and should fail for the same reasons: among many other things they fail to specify, they allege nothing about the "time, place, or person involved in the alleged conspiracies," as required under *Twombly*, 550 U.S. at 565 n.10.

Further, T-Mobile's bald assertion that "Royal Philips, as a player in that global market and a joint-venture owner of LG Display, participated in the conspiracy through LG Display" does not approach the level of specificity required under *Twombly* and *Kendall*. Moreover, T-Mobile's allegations do not even relate specifically to Royal Philips, the holding company, but, instead, refer to conduct that supposedly was undertaken by some entity purportedly related to Royal Philips, without specifying why liability for that alleged conduct should lie with either Royal Philips or PENAC.[5] (*See*, *e.g.*, Compl. ¶¶ 56, 75.)

II. T-MOBILE'S STATE-LAW CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

In addition to asserting federal antitrust claims, T-Mobile also brings claims under the

[5] Even if *Royal Philips* were liable for the actions of LG Philips, a theory that T-Mobile has not even attempted to factually support, PENAC's status as the subsidiary of Royal Philips is insufficient to impose antitrust liability on PENAC. *See Arnold Chevrolet LLC* v. *Tribune Co.*, 418 F. Supp. 2d 172, 178 (E.D.N.Y. 2006) ("[I]n the antitrust context, courts have held that absent allegations of anticompetitive conduct by the parent, there is no basis for holding a parent liable for the antitrust violation of its subsidiary.").

antitrust and unfair competition laws of California and New York. (Compl. ¶¶ 160-194.) Courts in each of those states have relied upon the federal standard to interpret state antitrust laws generally. *See, e.g.*, *Beech-Nut Nutrition Corp.* v. *Gerber Prods. Co.*, 69 Fed. Appx. 350, 353 (9th Cir. 2003); *Global Reins. Corp. – U.S. Branch* v. *Equitas Ltd.*, 876 N.Y.S.2d 325, 327 (N.Y. Sup. Ct. 2009). As a result, T-Mobile's state-law claims against PENAC fail on the same grounds as do its Sherman Act and Clayton Act claims. Critically, T-Mobile has alleged nothing specific to PENAC in support of any of its state-law claims, including any allegations of sales to T-Mobile in California or New York. For the same reasons that PENAC's alleged conduct cannot serve as a basis for a federal antitrust claim, T-Mobile's state-law claims also necessarily must fail.

CONCLUSION

For the reasons stated above, T-Mobile's claims against PENAC should be dismissed because T-Mobile's allegations regarding PENAC fail to satisfy the minimum applicable pleading requirements.

Dated: September 15, 2011

Respectfully submitted,

/s/ Brendan P. Cullen

Brendan P. Cullen (SBN 194057)
Shawn Joe Lichaa (SBN 250902)
SULLIVAN & CROMWELL LLP
1870 Embarcadero Road
Palo Alto, California 94303
Telephone: (650) 461-5600
Facsimile: (650) 461-5700

Garrard R. Beeney (NY Reg. No. 1656172)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Attorneys for Defendant Philips Electronics North America Corporation