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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 IN PART AMENDED COMPLAINT

Date: February 3, 2012
Time: 9:00 A.M.
Location: Courtroom 10, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 3, 2012, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Susan Illston, 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 partially dismissing the Amended Complaint for Damages and Injunctive Relief ("Amended 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, the complete files and records in this action, argument of counsel, and such other matters as the Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

1. Whether T-Mobile's California state-law claims should be dismissed as untimely.

2. Whether T-Mobile's claims brought under the laws of California and New York must be dismissed under the Due Process Clause of the U.S. Constitution because T-Mobile does not allege that it purchased LCD Products in these States.

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 New York Donnelly Act claims for indirect purchases made prior to December 23, 1998, should be dismissed for lack of standing.

II. INTRODUCTION

On April 18, 2011, T-Mobile filed its original complaint in the United States District Court for the Western District of Washington. *See* Complaint for Damages and Injunctive Relief, No. 3:11-cv-02591, ECF No. 1 (Apr. 18, 2011). The action was transferred to this Court for purposes of coordination of pre-trial proceedings. *See* Conditional Transfer Order, No. 3:11-cv-02591, ECF No. 15 (May 18, 2011). Following the transfer, Defendants filed a motion to dismiss T-Mobile's Complaint and placed T-Mobile on notice of the numerous defects in its original complaint. *See* Defendants' Joint Notice of Motion to Dismiss Complaint, No. 3:11-cv-02591, ECF No. 35 (September 15, 2011). Rather than respond to Defendants' motion, T-Mobile elected to amend its complaint and attempt to cure the defects referred to in Defendants' motion to dismiss. In spite of this, on November 7, 2011, T-Mobile filed an Amended Complaint rife with the same flaws and deficiencies that warranted the dismissal of its original complaint. *See* Amended Complaint for Damages and Injunctive Relief, No. 3:11-cv-02591, ECF No. 55 (November 7, 2011). Specifically, T-Mobile's claims are deficient for the following reasons:

First, the applicable statutes of limitations bar T-Mobile's California state-law claims. These claims are subject to a four-year limitations period, which expired before T-Mobile filed suit on April

18, 2011. These claims are thus time barred, and none of T-Mobile's alleged bases for tolling the statutes of limitations – fraudulent concealment, pending class action lawsuits, and the filing of criminal informations by the United States Department of Justice ("DOJ") – can save them.

Second, T-Mobile's claims under the laws of California and New York should be dismissed on Due Process grounds. To satisfy the requirements of Due Process, T-Mobile must sufficiently 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); *see also In re TFT-LCD (Flat Panel) Antitrust Litig. (Costco)*, No. M 07-1827 SI, ECF No. 4195, at 2 (Nov. 28, 2011) (acknowledging the Court's "longstanding view that the most significant transaction in a price-fixing case 'is the plaintiff's purchase of an allegedly price-fixed good.'"). T-Mobile's Amended 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 federal 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 under federal law to sue for damages arising from indirect purchases of LCD Products, such as those it made from original equipment manufacturers ("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. *See In re TFT-LCD (Flat Panel) Antitrust Litig.* (*Target*), No. C 10-4945 SI, 2011 WL 3738985, at *3 (N.D. Cal. Aug. 24, 2011) (explaining that "[c]ourts have held that the amendment [to the Donnelly Act] was not retroactive"). As a result, the Court should dismiss T-Mobile's Donnelly Act claims based on indirect purchases made before that date.

III. FACTUAL BACKGROUND

On April 18, 2011, well over four years after the investigation by the DOJ into anticompetitive conduct in the LCD panel industry was publicly disclosed and multiple class actions against the Defendants were filed, T-Mobile brought suit alleging a worldwide price-fixing conspiracy among suppliers of "LCD Panels" lasting from January 1, 1996 through December 11, 2006. *See* Am. Compl. ¶¶ 2-3, 17, 21. T-Mobile sues as a purchaser of "LCD Products" – that is, mobile wireless handsets (containing LCD Panels) that T-Mobile purchased for resale, and computer monitors and laptop computers (also containing LCD Panels) that T-Mobile purchased for its own use. *Id.* ¶¶ 1, 4, 8, 19.

A. T-Mobile's Amended Complaint

On November 7, 2011, following Defendants' original motion to dismiss, T-Mobile filed an Amended Complaint. According to the Amended Complaint, T-Mobile made direct purchases of LCD Products from "certain defendants" and "purchased mobile wireless handsets containing LCD Panels from other handset OEMs, which in turn purchased LCD Panels from defendants and their co-conspirators." *Id.* ¶¶ 254, 257. T-Mobile alleges that it also purchased desktop computer monitors and laptops containing LCD Panels, which were manufactured by "computer OEMs" and then sold to T-Mobile for its own use. *Id.* ¶ 259.

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 all of its direct and indirect purchases of mobile wireless handsets, desktop monitors, and notebooks made during the alleged conspiracy period. *Id.* ¶¶ 10-11.

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

In its Amended Complaint, T-Mobile adds no new allegations regarding its purchases of LCD Product. Rather, in support of its California and New York state-law claims, T-Mobile repeats the same allegations included in its original complaint – that it "conducted a substantial volume of business in both California and New York," "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 "maintained in both California and New York inventories of mobile wireless handsets containing LCD Panels manufactured and sold by defendants[.]" Am. Compl. ¶¶ 26, 298-99. T-Mobile

also re-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. Again, however, T-Mobile fails to allege sufficient contacts between these states and the parties and transactions at issue. Specifically, T-Mobile nowhere alleges that it purchased LCD Products in California or New York. Further, T-Mobile does not specify where negotiations for the purchases of LCD Products took place or even specify the location of its distribution centers. The Amended Complaint, at most, only vaguely suggests that its purchases may have occurred in Washington, where T-Mobile's headquarters are located. *See id.* ¶¶ 13, 22.

IV. ARGUMENT

A. T-Mobile's California State-Law Claims Should Be Dismissed As Untimely.

T-Mobile purports to state a claim under California's Cartwright Act, Cal. Bus. & Prof. Code §16750(a), and Unfair Competition Act, Cal. Bus. & Prof. Code § 17200 *et seq.*, which both carry a four-year statute of limitations. Cal. Bus. & Prof. Code §§ 16750.1, 17208. Because T-Mobile did not file its original complaint until April 18, 2011 – more than four years after T-Mobile alleges the conspiracy ended – its claims under California state law are untimely.

Recognizing that its claim is time-barred, T-Mobile contends that the limitations period was tolled due to fraudulent concealment. Am. Compl. ¶ 275. However, under California law, fraudulent concealment "'tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.'" *Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931 (1994) (quoting *Sanchez v. S. Hoover Hosp.*, 18 Cal.3d 93, 99 (1976)). Furthermore, a plaintiff "need not be aware of the specific 'facts' necessary to establish the claim"; a statute of limitations begins to run once plaintiff has a "suspicion of wrongdoing." *Jolly v. Eli Lilly & Co*., 44 Cal.3d 1103, 1111 (1998); *see also Norgart v. The Upjohn Co*., 21 Cal.4th 383, 98 (1999) (holding that plaintiff is deemed to be on notice of a potential claim when it "has reason at least to suspect a factual basis" for its cause of action). Accordingly, even if fraudulent concealment did toll T-Mobile's California state-law claims (which

Defendants dispute), the tolling would have ended no later than December 2006, when T-Mobile acknowledges the alleged conspiracy became public knowledge. *Id.* ¶¶ 174-75; *see also In re TFT-LCD (Flat Panel) Antitrust Litig. (MetroPCS)*, No. M 07-1827 SI, 2011 WL 5104356, at *2 (N.D. Cal. Oct. 26, 2011) (concluding that the statute of limitations on plaintiff's state antitrust claim began to run when "the DOJ disclosed its investigation on December 11, 2006"). Because T-Mobile did not file a complaint alleging claims under the Cartwright Act and Unfair Competition Act until more than four years later, fraudulent concealment cannot salvage its untimely claim.

T-Mobile's assertion that the MDL class actions provide bases for tolling is similarly unavailing. A claim is tolled by the filing of a prior class action only to the extent that claim was included in the prior action. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). The direct purchaser class action did not include a claim under the Cartwright Act or Unfair Competition Act. *See* DPP Third Am. Consol. Compl. ¶¶ 237-43, MDL ECF No. 1407 (filed under seal) (asserting claims under federal law only). Similarly, the indirect purchaser class action was brought only on behalf of those who made indirect purchases of televisions, computer monitors, and laptop computers for their "own use and not for resale." IPP Third Am. Consol. Compl. ¶¶ 250-51, MDL ECF No. 2694. Here, T-Mobile's allegations are premised almost exclusively upon its purchases of mobile handsets for resale. *See* Am. Compl. ¶¶ 1, 4, 257-58. Accordingly, neither the DPP nor the IPP actions tolled T-Mobile's California state-law claims.

The DOJ criminal informations likewise did not toll the statute of limitations for T-Mobile's Cartwright Act claims. T-Mobile presumably seeks to rely on the Clayton Act's tolling provision, 15 U.S.C. § 16(i)[1] – there is no analogue under the Cartwright Act or the Unfair Competition Act. Section 16(i), however, states that when proceedings have been instituted by the United States to address violations of "*the antitrust laws*," the statute of limitations will be tolled for claims "arising under *said laws*." *Id.* (emphasis added). The term "antitrust laws" as used in Section 16(i) is defined in 15 U.S.C. § 12 to encompass a specific list of federal antitrust statutes, and this list has been held to be exclusive.

[1] "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter." 15 U.S.C. § 16(i).

See, e.g., *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958) ("the definition contained in [Section] 1 of the Clayton Act is exclusive"; that a statute not listed therein "may be colloquially described as an 'antitrust' statute" is "of no moment"); *Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1031 n.4 (9th Cir. 2001); *Yamaha Motor Co., Ltd. v. Fed. Trade Comm'n*, 657 F.2d 971, 982 (8th Cir. 1981). The Cartwright Act and the Unfair Competition Act are not one of those enumerated statutes. Moreover, the United States has not instituted proceedings under California law. By its plain language, therefore, Section 16(i) does not toll T-Mobile's Cartwright Act or Unfair Competition Act claims. Consistent with the statutory text, moreover, no court has ruled that this provision tolls the statute of limitations for state-law claims.

Because T-Mobile's California state-law claims accrued more than four years before T-Mobile filed suit, and because none of T-Mobile's alleged bases for tolling applies to these claims, they must be dismissed.

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 relevant 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. 3396, 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, similar to its original complaint, T-Mobile's Amended Complaint contains no allegations that it purchased LCD Products at inflated prices in California and New York. Indeed, T-Mobile's Amended Complaint is drafted evasively, avoiding any explicit reference to the particular location where its purchases were made.[2]

And while T-Mobile alleges a presence in a variety of states, including California and New York, it does not link that presence 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[.]" Am. Compl. ¶¶ 26, 298-99. But nowhere does T-Mobile allege that it purchased or negotiated the purchase of all, or even some, of its LCD Products in California and New York. 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). Further, the fact that T-Mobile conducted a "substantial volume" of business in California and New York is irrelevant if the negotiations over the terms of the purchases and the payments for the products purchased by T-Mobile occurred outside of California and New York. *See Costco*, ECF No. 4195, at 3 ("Although sales of LCD products in California may constitute a significant portion of Costco's business, those products were selected in Washington, the negotiation over the terms of purchase took place in Washington, the

[2] It is probable that T-Mobile's purchases occurred in Washington, where its headquarters are located. Am. Compl. ¶ 22; *see also* ¶ 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, an attempt which should not be countenanced. *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).

invoices were sent to Washington, and payment issued from Costco's Washington headquarters. In the Court's view, these events are all more significant to Costco's claims than the issuance of a purchase order.").

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. Am. Compl. ¶ 291. "[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; *see also Costco*, ECF No. 4195, at 3 ("This Court has repeatedly rejected the argument that the actions defendants took within California warrant invocation of California law."). In short, T-Mobile's state-law claims do not satisfy Due Process requirements 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. *See* Am. Compl. ¶ 285. 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.

Here, T-Mobile concedes that it was an indirect purchaser with respect to most of the transactions at issue in the Amended Complaint, alleging 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." Am. Compl. ¶ 257; *see also id.* ¶ 259 (alleging that T-Mobile also purchased desktop computer monitors and notebook computers from OEMs). 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 co-conspirators. *Id.* ¶¶ 280-286. 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.* ¶ 285 (emphasis added). In essence, T-Mobile's Amended 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.

T-Mobile is only allowed to bring claims under the federal antitrust laws for those LCD Products it purchased *directly* from Defendants. Accordingly, to the extent that the Amended Complaint asserts damages claims under the Sherman and Clayton Acts for indirect purchases, this Court should dismiss those claims. *See In re Refrigerant Compressors Antitrust Litig.*, No. 2:09-MD-02042, 2011 WL 2433392, at *9 (E.D. Mich. June 13, 2011) (dismissing federal claims based on purchases of "refrigerant compressor products" as distinct from purchases of price-fixed compressors themselves).

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

As this Court recently recognized, both federal and New York state courts have held that indirect purchasers lack standing to bring claims under New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340-347, related to purchases that occurred before the effective date of that state's *Illinois Brick* repealer amendment, which was December 23, 1998. *Target*, 2011 WL 3738985, at *3 ("Courts have held that the amendment was not retroactive[.]"); *see also In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1511376, at *5 (D.D.C. Oct. 6, 2000) ("Since retroactive application of § 340(6) raises potential ex post facto and due process concerns by likely causing significant increases in defendants' liability, the Court should interpret the 1998 Amendment to operate prospectively only."); *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.").

In this case, T-Mobile invokes New York's Donnelly Act to bring a claim for indirect purchases of LCD products containing LCD panels manufactured by Defendants. However, T-Mobile fails to allege *when* T-Mobile purchased LCD products in New York, relying instead on an overbroad allegation that Defendants participated in a conspiracy from January 1, 1996 through at least December 11, 2006. Am. Compl. ¶¶ 21, 26, 299. To the extent that the Court permits T-Mobile to proceed with a Donnelly Act claim, as in *Target*, the Court should dismiss any Donnelly Act claims based on purchases made before December 23, 1998.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss (i) T-Mobile's Cartwright Act and Unfair Competition Act claims on statute of limitations grounds, (ii) T-Mobile's state-law claims because T-Mobile has failed to allege that they are based on purchases made in California and New York, (iii) T-Mobile's claims under the Sherman and Clayton Acts based on indirect purchases, and (iv) any New York Donnelly Act claims based on purchases made before the enactment of New York's *Illinois Brick* repealer amendment.

Respectfully submitted,

DATED: December 12, 2011

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Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from the signatories to this document.