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10 Attorneys for SANYO Consumer Electronics Co., Ltd.

11  
 12 IN THE UNITED STATES DISTRICT COURT  
 13 THE NORTHERN DISTRICT OF CALIFORNIA  
 14  
 15 SAN FRANCISCO DIVISION

16 IN RE: TFT-LCD (FLAT PANEL) ANTITRUST ) Master Docket No. 3:07-md-1827 SI  
 LITIGATION )  
 17 ) (Case No. 3:11-cv-02591 SI)  
 \_\_\_\_\_ )  
 18 This Document Relates To: )  
 Individual Case No. 3:11-CV-02591 SI ) SANYO CONSUMER ELECTRONICS,  
 19 ) CO., LTD.’S JOINDER TO  
 T-MOBILE U.S.A., INC., ) DEFENDANTS’ JOINT NOTICE OF  
 20 ) MOTION AND MOTION TO DISMISS  
 Plaintiff, ) T-MOBILE’S AMENDED  
 21 ) COMPLAINT  
 v. )  
 22 AU OPTRONICS CORPORATION; et al., )  
 Defendants. ) Date: February 3, 2012  
 23 ) Time: 9:00 a.m.  
 ) Courtroom: 10, 19<sup>th</sup> Floor  
 24 ) Judge: Hon. Susan Illston

25 SANYO Consumer Electronics Co., Ltd. (“SANYO Consumer Electronics”) respectfully  
 26 joins in Defendants’ Joint Notice of Motion and Motion to Dismiss Plaintiff T-Mobile U.S.A.,  
 27 Inc.’s (“T-Mobile”) Amended Complaint (“Complaint”) and additionally moves pursuant to  
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1 12(b)(6) of the Federal Rules of Civil Procedure (“FRCP”) for dismissal of T-Mobile’s claims  
2 against SANYO Consumer Electronics for failure to state a claim upon which relief can be  
3 granted.

4 **I. THE COMPLAINT DOES NOT ALLEGE SUFFICIENT**  
5 **ANTICOMPETITIVE CONDUCT BY SANYO CONSUMER**  
6 **ELECTRONICS TO STATE A CLAIM**

7 Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim  
8 upon which relief can be granted. Defendant prevails on a motion if the plaintiff fails to allege  
9 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,  
10 550 U.S. 544, 570 (2007). The “facial plausibility” standard requires the plaintiff to allege facts  
11 that add up to “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v.*  
12 *Iqbal*, 129 S. Ct. 1937, 1949 (2009). A plaintiff must allege facts sufficient to “raise a right to  
13 relief above the speculative level.” *Twombly*, 550 U.S. at 555; *In re TFT-LCD Antitrust Litig.*  
14 *(Costco)*, No. M 07-1827 SI, No. C 11-0058 SI, 2011 U.S. Dist. LEXIS 96741, at \*8 (N.D. Cal.,  
15 Aug. 29, 2011); *In re TFT-LCD Antitrust Litig. (Nokia)*, No. M 07-1827 SI, No. C 09-5609 SI,  
16 2010 U.S. Dist. LEXIS 64930, at \*8-9 (N.D. Cal., 2010).

17 “[T]he tenet that a court must accept as true all of the allegations contained in a complaint  
18 is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action,  
19 supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949 (citing  
20 *Twombly*, 550 U.S. at 555). “[A] Section 1 claim ‘requires a complaint with enough factual matter  
21 (taken as true) to suggest that an agreement was made.’” *In re Transpacific Passenger Air*  
22 *Transportation Antitrust Litigation*, No. C 07-05634 CRB, 2011 U.S. Dist. LEXIS 49853 at \*39  
23 (N.D. Cal., May 9, 2011) (citing *Twombly*, 550 U.S. at 556).

24 Numerous cases make clear that a complaint must allege facts establishing *each*  
25 *defendant’s* participation in the alleged conspiracy in order to satisfy *Twombly*. See, e.g. *Total*  
26 *Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F. 3d 430, 436 (6<sup>th</sup> Cir.  
27 2008) (“Generic pleading, alleging misconduct against defendants without specifics as to the role  
28 each played in the alleged conspiracy, was specifically rejected by *Twombly*.”); *Lubic v. Fid. Nat.*

1 *Fin., Inc.*, No. C08-0401 MJP, 2009 U.S. Dist. LEXIS 62092, \*15 (W.D. Wash. July 20, 2009)  
 2 \*15 (“A complaint must allege that each individual defendant joined the conspiracy and played  
 3 some role in it because, at the heart of an antitrust conspiracy is an agreement and a conscious  
 4 decision by each defendant to join it.”) (citations omitted). T-Mobile’s allegations relating to  
 5 SANYO Consumer Electronics fail completely in this regard.

6 *Twombly* requires specific pleading of anticompetitive conduct because it recognizes that  
 7 “proceeding to antitrust discovery can be expensive.” *Twombly*, 550 U.S. at 558. Only by  
 8 requiring “allegations that reach the level suggesting conspiracy” can the Court “hope to avoid the  
 9 potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the  
 10 [discovery] process will reveal relevant evidence.’” *Id.* at 559 (internal quotations omitted). The  
 11 Court in *Twombly* therefore was concerned about “sending the parties into discovery when there is  
 12 no reasonable likelihood that the plaintiffs can construct a claim from the events related in the  
 13 complaint.” *Id.* at 558 (internal quotations omitted).

14 The sparse allegations actually mentioning SANYO Consumer Electronics are contained in  
 15 just a few paragraphs out of the nearly 300-paragraph Complaint. Compl. ¶¶ 70, 71, 107, 108,  
 16 125, 126, 159. None of these allegations pass muster under *Twombly* and *Iqbal* and none are  
 17 sufficient to support T-Mobile’s conclusion that SANYO Consumer Electronics was part of “the  
 18 Conspiracy.”

19 First, paragraph 70 merely alleges that SANYO Consumer Electronics is a Japanese  
 20 company that previously operated as a subsidiary of SANYO Electric Co., Ltd. (“SANYO  
 21 Electric”) and sold and distributed LCD Products. Compl. ¶ 70.<sup>1</sup>

22 <sup>1</sup> T-Mobile alleges that SANYO Consumer Electronics and SANYO Electric were co-  
 23 conspirators. Compl. ¶ 71. But SANYO Consumer Electronics is not liable for the actions of its  
 24 affiliates. *See, e.g., Gering v. Fraunhofer USA, Inc.*, No. 05-73458, 2009 WL 2877414, at \*3-4  
 25 (E.D. Mich. Sept. 3, 2009) (attempts to hold a subsidiary liable for actions of a parent was a  
 26 “novel” legal theory for which the court found no support); *Transition Healthcare Assocs., Inc. v.*  
 27 *Tri-State Health Investors, LLC*, 306 F. App’x 273, 280 (6th Cir. 2009). And T-Mobile’s  
 28 conclusory statement that the parties were “closely affiliated, commonly owned, controlled and  
 dominated” and “functioned as a single enterprise and/or alter egos” is not sufficient to overcome  
 this. Compl. ¶ 71. *See, e.g., Manila Indus. V. Ondova Ltd. Co.*, 334 Fed Appx. 821, 823 (9th Cir.  
 2009) (alter ego allegations deemed conclusory and claims dismissed); *Nordberg v. Trilegiant*  
*Corp.*, 445 F. Supp. 2d 1082, 1102-03 (N.D. Cal. 2006) (Patel, J.) (conclusory “alter ego claims”  
 support motion to dismiss), abrogated on other grounds by *Odom v. Microsoft Corp.*, 486 F. 3d  
 541 (9th Cir. 2007); *Katzir’s Floor & Home Design, Inc. v. M-MLS.com*, 394 F. 3d 1143, 1149

1 Paragraph 107 refers to hearsay testimony [REDACTED]  
 2 [REDACTED]:

3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]

7 Compl. ¶ 107. Notably lacking from this allegation is any contention that [REDACTED] – a  
 8 definition which includes five different entities under ¶ 69 – and SANYO Consumer Electronics  
 9 took any action with regard to the alleged [REDACTED]. Nor is  
 10 there any allegation of what LCD panels were the subject [REDACTED], or the purchaser or  
 11 purchasers. The rest of the paragraph contains a conclusory statement that [REDACTED]  
 12 [REDACTED] – nothing specific as to  
 13 what the [REDACTED] contained. There is nothing else [REDACTED] in the  
 14 paragraph. The allegation provides no information that would support a finding that the  
 15 [REDACTED] was unlawful or anticompetitive. The allegation is conclusory and wholly  
 16 deficient.

17 Paragraph 108 states that [REDACTED]  
 18 [REDACTED] – an entity which is presumably distinct from SANYO Consumer Electronics and  
 19 its alleged co-conspirator SANYO Electric:

20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]

23 Compl. ¶ 108. There are no facts to indicate who, or what company or what the topic of the  
 24 [REDACTED] was [REDACTED] This paragraph could  
 25 also be interpreted as legitimate, legal conduct similar to attendance at industry trade shows

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26 (9th Cir. 2004); *Lubic v. Fid. Nat. Fin., Inc.*, No. C08-0401 MJP, 2009 U.S. Dist. LEXIS 62092, at  
 27 \*15 (W.D. Wash. July 20, 2009); *United States ex rel. Pilecki-Simko v. Chubb Inst.*, No. 06-3562,  
 2010 U.S. Dist. LEXIS 27187, at \*42-43 (D.N.J. March 22, 2010); *In re Welding Fume Prods.*  
 28 *Liab. Litig.*, No. 1:03-CV-17000, 2010 U.S. Dist. LEXIS 57859, at \*47 (N.D. Ohio June 11,  
 2010).

1 because it merely alleges that [REDACTED]  
2 [REDACTED] See *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp.  
3 2d 1011, 1023 (N.D. Cal. 2007) (“[a]ttendance at industry trade shows and events is presumed  
4 legitimate and is not a basis from which to infer a conspiracy, without more.”). This allegation is  
5 insufficient.

6 Paragraph 125, notably, is the only allegation that explicitly states that [REDACTED]  
7 [REDACTED]. However, it fails due to its  
8 vague and conclusory nature:

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 Compl. ¶ 125. This allegation states in conclusory fashion that [REDACTED]  
13 [REDACTED] This is a legal conclusion clearly in violation of  
14 *Iqbal*. Moreover, there is no allegation of who these [REDACTED] were, and certainly no  
15 suggestion that T-Mobile was one of them.

16 Although this paragraph alleges that [REDACTED]  
17 [REDACTED] it is in the context of [REDACTED]  
18 [REDACTED]. Courts, moreover, have recognized that this can be a legitimate, legal practice. *In*  
19 *re Travel Agent Comm’n Antitrust Litig.*, MDL Docket No. 1561, 2007 U.S. Dist. LEXIS 79918,  
20 at \*35 (N.D. Ohio Oct. 29, 2007) (“[T]he exchange of price data and other information among  
21 competitors does not invariably have anticompetitive effects; indeed such practices can in  
22 certain circumstances increase economic efficiency and render markets more, rather than less,  
23 competitive’); *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (finding no evidence of  
24 conspiracy despite competitor communications and meetings); *Amey, Inc. v. Gulf Abstract & Title,*  
25 *Inc.*, 758 F.2d 1486, 1505 (11th Cir. 1985) (finding that “there is nothing unlawful about  
26 competitors meeting and exchanging price information”); *Krehl v. Baskin-Robbins Ice Cream*  
27 *Co.*, 664 F.2d 1348, 1357-58 (9th Cir. 1982) (finding that 12 communications over seven years  
28 concerning prices was “idle shop talk” and did not establish an unlawful conspiracy).

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Finally, paragraph 126 [REDACTED]

[REDACTED]:

[REDACTED]

Compl. ¶ 126. Even setting aside the fact that [REDACTED]

[REDACTED]

[REDACTED], the allegation is insufficient. This paragraph provides no details

regarding what [REDACTED]

[REDACTED]. It is clearly not sufficient to support any

claim against SANYO Consumer Electronics, the defendant in this case.

Paragraph 159 alleges [REDACTED]

[REDACTED]. This paragraph then makes a cursory reference

to [REDACTED]

[REDACTED]

[REDACTED]

Compl. ¶ 159 (emphasis added). The allegation that [REDACTED] is an ambiguous

phrase, since there is clearly nothing anticompetitive about [REDACTED]

1 Accordingly, the allegation does not support any claim of illegal activity by SANYO Consumer  
2 Electronics, the named defendant.

3 On the whole, T-Mobile's allegations against SANYO Consumer Electronics fail due to  
4 their lack of specificity concerning SANYO Consumer Electronics' alleged actions, the time,  
5 place, and persons involved in the allegedly illicit "bilateral meetings" and nature of the  
6 agreements with other competitors. Courts have routinely rejected these types of allegations. *See,*  
7 *e.g., In re Travel Agent Comm'n Antitrust Litig.*, 583 F. 3d 896, 905 (6th Cir. Ohio 2009)  
8 ("[P]laintiffs use the word 'agreement,' . . . [which] is nothing more than a legal conclusion  
9 'masquerading' as a factual allegation."); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*,  
10 647 F. Supp. 2d at 1256-1257 (recognizing that "a distinguishing factor" in an antitrust  
11 complaint's viability analyzed under *Twombly* "has been the inclusion of specific allegations  
12 concerning time, place, and person versus general allusions to 'secret meetings,'  
13 'communications,' or 'agreements'" (citations omitted); *In re Elevator* 502 F. 3d 47, 50-51 (2d  
14 Cir. 2007) (concluding complaint was "nothing more than a list of theoretical possibilities, which  
15 one could postulate without knowing any facts whatever" and that "[s]uch conclusory allegations  
16 of agreement at some unidentified point do[] not supply facts adequate to show illegality");  
17 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9<sup>th</sup> Cir. 2008) (an antitrust complaint must  
18 "answer the basic questions: who, did what, to whom (or with whom), where, and when?").

19 Even considering the Complaint as a whole, T-Mobile's allegations as to SANYO  
20 Consumer Electronics must fail. Much of the Complaint is directed to defendants' guilty pleas  
21 and allegations of involvement in crystal meetings, "early conspiracy," and trade associations. *Id.*  
22 However, T-Mobile's Complaint notably contains no allegations that SANYO Consumer  
23 Electronics was part of the conspiracy's "early years" (*see* Compl. ¶ 101), took part in the "crystal  
24 meetings" (*id.* ¶¶ 113) or participated in any other meeting or gathering of the so-called  
25 "conspirators." Further, SANYO Consumer Electronics was never indicted and has never entered  
26 into any plea agreement. *Id.* ¶¶ 174-190. SANYO Consumer Electronics, additionally, is not  
27 specifically alleged to be a member of, or present as part of, the Japanese trade associations. *Id.* ¶  
28 231-244.

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**CONCLUSION**

T-Mobile has not met its burden in providing specifics as to the role that SANYO Consumer Electronics played in the alleged conspiracy. And because “proceeding to antitrust discovery can be expensive,” granting SANYO Consumer Electronics’ motion here will serve the policy goals behind *Twombly*. *Twombly*, 550 U.S. at 558. T-Mobile’s Complaint should be dismissed.

DATED: December 12, 2011

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By:           /s/ Allison A. Davis            
Allison A. Davis

Attorneys for SANYO Consumer Electronics Co., Ltd