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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Document Relates To: *AT&T Mobility LLC, et al. v. AU Optronics Corporation, et al.*, C 09-4997 SI	Case No. M 07-1827 SI MDL No. 1827 **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO CERTIFY UNDER 28 U.S.C. 1292(b)** Date: February 17, 2011 Time: 4:00 p.m. Crtrm.: 10 Judge: Honorable Susan Illston

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INTRODUCTION

This Court dismissed in part the AT&T Plaintiffs' Second Amended Complaint based on its understanding that – notwithstanding detailed allegations that Defendants engaged in anticompetitive conduct within California and had extensive additional contacts with California – the Due Process Clause bars the AT&T Plaintiffs from pursuing price-fixing claims under the Cartwright Act for purchases of LCD Products outside California. That bright-line rule is inconsistent with numerous prior decisions applying the Supreme Court's rule that due process does not prevent the application of one state's laws to purchases or transactions in other states, so long as the forum state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (internal quotation marks omitted).

Defendants argue that the AT&T Plaintiffs' motion to certify that important issue should be denied because the motion (1) was untimely, (2) fails to show that the November 12 Order presents a controlling question of law because it fails to show that "resolution on appeal could materially affect the eventual outcome of this litigation," (3) does not demonstrate substantial grounds for difference of opinion, i.e., "a lack of authority, or a split of authority, on the relevant issue," and (4) fails to show that immediate appeal may materially advance the ultimate termination of the litigation, calling "unsupported" AT&T Plaintiffs' argument "that an immediate appeal might narrow the relevant issues, or clarify the scope of relevant purchases." Opp'n Br. at 1-2.

Defendants' arguments are unpersuasive. *First*, there is no time limit for making a § 1292(b) motion, and Defendants suffer no prejudice from the passage of two months in a case that has been pending for well over a year and that is part of multi-district litigation that has been before this Court for over three years. The AT&T Plaintiffs will not seek a stay during any appeal, and the appeal thus will not slow the litigation. *Second*, the November 12 Order is "controlling" and materially affects the outcome of the litigation because it prevents the application of the Cartwright Act to the vast majority of purchases that were affected by the conspiracy and completely removes from the suit as much as 40 percent of the AT&T Plaintiffs' total purchases.

Third, the Court's bright-line rule barring application of the Cartwright Act to out-of-state purchases – no matter what other contacts the defendants have with California – is at odds with numerous decisions holding that the Constitution does not preclude the application of one state's laws to purchases or transactions in other states. *Fourth*, immediate appeal will narrow the issues in the case as the AT&T Plaintiffs, if successful, will sue for damages for all of their purchases affected by the conspiracy under a single state's law and not under the different laws of 20 states.

Defendants do not question that the issue presented by the November 12 Order takes on particular significance because it affects not only the claims of the AT&T Plaintiffs, but also all the other cases in this MDL proceeding where a plaintiff asserts a claim for indirect purchases of LCD Products. Immediate appellate review would bring needed clarity.

ARGUMENT

I. Plaintiffs' Motion is Timely

There is no time limit in 28 U.S.C. §1292(b) governing when a party may bring a motion to certify an order for immediate appeal; all that is required by 1292(b) is that such a motion be filed within a "reasonable time" after the order for which the party seeks an appeal. *Lopez v. Youngblood*, No. 1 1:07cv0474 DLB, 2009 WL 2062883, at *3 (E.D. Cal. July 15, 2009) (citing *Ahrenholz v. Board of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000)).[1]

Here, the timing of AT&T Plaintiffs' 1292(b) Motion is reasonable. The AT&T Plaintiffs filed their Motion to Certify on January 12, 2011, two months after the Court issued its November 12 Order. Courts have found similar lengths of time to be reasonable. *E.g.*, *Lopez*, No. 1 1:07cv0474 DLB, 2009 WL 2062883 at *3 (certifying a 1292(b) motion filed 52 days after the order it appealed). There is not (and cannot be) any suggestion that the timing of the filing was for

[1] By contrast, once the district court grants such a motion, the statute requires the filing of an application to the Court of Appeals within ten days. *See* 28 U.S.C. § 1292(b). The Federal Rules of Appellate Procedure permit a district court to amend an order to permit an application for interlocutory review at any time, and, "[i]n that event, the time to petition runs from entry of the amended order." Fed. R. App. Proc. 5(a)(3). The statutory scheme thus contemplates that there may be significant delay between the entry of an order and eventual application for leave to appeal.

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any dilatory purpose. Defendants do not claim any prejudice. Nor will the filing affect the schedule of this litigation: the AT&T Plaintiffs' case is in the middle of discovery, dispositive motion filings are still over a year away, and the case will not go to trial until November 2012. Defendants have not taken any action since November 12, 2010, specifically in the AT&T case, that would be undermined by an interlocutory appeal now. And, unlike the defendant in *Spears v. Wash. Mut. Bank FA*, No. C-08-00868 RMW, 2010 WL 54755, at *2 (N.D. Cal. Jan. 8, 2010), the AT&T Plaintiffs are not requesting a stay of the proceedings in this Court while they pursue their 1292(b) appeal. Interlocutory appeal accordingly would do nothing to upset or disrupt the course of this litigation or affect the case schedule.

Defendants also argue that that the AT&T Plaintiffs should have sought interlocutory appeal after the Court issued its June 28 Order dismissing their prior complaint. But the Court expressly allowed the AT&T Plaintiffs to amend their Complaint to plead additional contacts needed to satisfy Due Process. In response, Plaintiffs filed their Second Amended Complaint, which included new, highly detailed allegations of Defendants' anticompetitive and illegal conduct in California, including conduct targeted in part at small LCD panels used in the mobile wireless handsets purchased by Plaintiff AT&T Mobility LLC. 2nd Amend. Compl. ¶¶ 114-123. A 1292(b) motion after the June 28 Order would have been premature in light of the Court's express grant of leave to amend to remedy any deficiencies in the First Amended Complaint's Due Process allegations.

II. The Court's November 12 Order Presents a Controlling Issue of Law

An order presents a controlling issue of law where "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Lakeland Village Homeowners Assoc. v. Great American Ins. Group*, No. 2:10-cv-00604-GEB-GGH, 2010 WL 2891250, at *9 (E.D. Cal. July 22, 2010). The Court's November 12 Order is self-evidently controlling – it dismissed a significant portion of the AT&T Plaintiffs' claims. Because the Court's Order limits the AT&T Plaintiffs' claim to those purchases of LCD Products in the twenty states listed in the Second Amended Complaint that have passed an *Illinois Brick*-repealer statute, Plaintiffs will be unable to pursue claims with respect to purchases in other states – purchases that may amount to

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as much as 40 percent of the total. If the November 12 Order were reversed, the AT&T Plaintiffs would be able to recover damages for their LCD Product purchases under the Cartwright Act, irrespective of where the specific purchase took place. Courts have found issues to be controlling for purposes of 1292(b) where they affect the amount of damages at issue in the case. *E.g.*, *Hollinger International, Inc. v. Hollinger Inc.*, No. 04 C 0698, 2005 WL 327058 at *3 (N.D. Il. Feb. 3, 2005) (finding the "controlling question of law" requirement met where court's order barring plaintiffs from pursuing RICO claims, but not their state law claims, reduced defendants' potential liability by two-thirds). The same is true here.

III. There Are Substantial Grounds for Difference of Opinion on the Issue of Whether Due Process Prohibits the Application of California's Antitrust Laws Solely on the Basis That the Price-Fixed Good Was Sold Outside of California

Defendants argue that there is no substantial difference of opinion here because the cases cited by the AT&T Plaintiffs involved more significant contacts than the AT&T Plaintiffs allege in their Second Amended Complaint. But Defendants can provide no principled distinction between the contacts found sufficient in the cases cited in the AT&T Plaintiffs' motion (*see* Br. 6-9) and the contacts the AT&T Plaintiffs themselves allege. For example, in both *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 272 (N.D. Cal. 1987) and *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986), this Court applied California law to claims based on out-of-state transactions by nonresidents of California where defendants had a business presence in California and engaged in illegal conduct within California. Plaintiffs allege the same kinds of contacts in their Second Amended Complaint.

More fundamentally, the Court's analysis – which treats the location of purchases as controlling irrespective of the other contacts with the forum state and without regard to the forum state's interest – clashes with the nuanced inquiry mandated by Supreme Court precedent and applied by sister courts. Defendants argue that there is still no substantial difference of opinion because there is settled precedent supporting the conclusion that in a price-fixing case, state law may not be applied to out-of-state purchases of price-fixed products. Opp'n Br. at 8. But the only cases Defendants rely on establish no such rule. In *Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976, 984-985 (N.D. Cal. 2009), unlike this case, the plaintiffs alleged no contacts to justify the

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application of state law to the claims of plaintiffs who did not allegedly purchase products in those states. In *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007), the Court expressly held that the plaintiffs failed to plead any plausible price-fixing conduct in California. Neither of these cases resembles this one, where the AT&T Plaintiffs identify specific anticompetitive conduct and other contacts between the Defendants and California.[2]

IV. Immediate Appellate Review Would Facilitate the Resolution of the AT&T Plaintiffs' Claims

The AT&T Plaintiffs have shown that immediate appellate review of the Court's November 12 Order would: (1) streamline the case by narrowing the factual and legal issues in dispute and (2) remove an obstacle to pretrial settlement by resolving the parties' dispute over the volume of LCD Product purchases at issue in this case. Courts have agreed that these factors can satisfy the third element of the 1292(b) standard. *E.g.*, *Hoffman v. Citibank (S. Dakota), N.A.*, Case No. SACV 06-0571 AG, 2007 WL 5659406, at *4 (C.D. Cal. Feb. 15, 2007) (concluding that an interlocutory appeal would materially advance a case by giving the parties the chance to settle without proceeding to final judgment and appeal).

Defendants argue that *Clayworth v. Pfizer*, 49 Cal. 4th 758, 787 (2010), does not eliminate the pass-on defense in this case, and that proceeding under California law exclusively would not narrow the issues in dispute. Defendants' effort to cabin *Clayworth* is unavailing – at most, that case accepted that there might be circumstances where a pass-on defense would be available while holding that, in general, it is not. Indeed, even if Defendants' over-reading of *Clayworth* were proved correct, their examples of the "multiple levels of purchasers" in this case do not prove that the pass-on defense would be available if AT&T Plaintiffs could proceed under California law. In

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[2] The third case relied on by Defendants, *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 277 (D. Mass. 2004) likewise does not settle this issue because unlike this one it did not address any Due Process issue but rather addressed the issue of which state's law applied (under applicable choice-of-law rules) in the context of a motion for class certification. Even assuming, for the sake of argument, that *Relafen* is consistent with his Court's Order, it does not eliminate but only highlights the difference of opinion on this issue, given the many cases cited and discussed in AT&T's opening memorandum - cases that Defendants fail to distinguish in a full-page, single-spaced footnote.

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any event, proceeding exclusively under California law will unquestionably restrict the availability of the pass-on defense and thus streamline the issues in dispute.

Defendants also argue that the Court would still have to address the laws of all 20 states identified in the Second Amended Complaint even if the AT&T Plaintiffs prevail on appeal, because they would be barred from amending their claims after the appellate decision. Defendants' argument is incorrect. The AT&T Plaintiffs pleaded claims in the Second Amended Complaint under the laws of 20 different states because the Court required them to do so. If the Ninth Circuit were to reverse the November 12 Order, the AT&T Plaintiffs could (and would) proceed under the Cartwright Act alone. And it is absolutely routine for plaintiffs to amend complaints after successfully challenging an order dismissing their claims in whole or in part. *See, e.g.*, *Rhodes v. Robinson*, No. 08-16363, 2010 WL 3516342, at *1 (9th Cir. Sept. 8, 2010).

An immediate appeal may also facilitate the resolution of this case by removing an obstacle to a potential pretrial settlement, specifically, a continued dispute between the parties over the volume of purchases of LCD Products at issue in this case – an important threshold issue for any settlement discussions or mediation. Defendants respond only by repeating the argument that the effects of appellate review are speculative. But, as explained above, if the AT&T Plaintiffs prevail on appeal, their claim would include significantly more purchases of price-fixed LCD Products than currently allowed.

The benefits of certification would extend beyond this specific action, because a ruling by the Court of Appeals would provide clarity on this issue for other cases in this MDL involving state law indirect purchaser claims. Defendants will obviously seek to exclude any such purchases from the claims of any other indirect purchaser bringing a direct action suit. An immediate appeal would allow the Ninth Circuit to clarify this issue for all other such cases in this MDL.

CONCLUSION

For all the reasons stated above, the AT&T Plaintiffs have met the requirements for immediate interlocutory appeal under 1292(b), and the Court should grant their motion to certify.

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DATED: February 3, 2011

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