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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:

ALL INDIRECT PURCHASER CLASS ACTIONS

Case No. 3: 07-md-1827 SI
MDL No. 1827

INDIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT LG DISPLAY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON WITHDRAWAL

Date: September 23, 2011
Time: 9:00 a.m.
Dept.: Courtroom 10, 19th Floor
Judge: The Hon. Susan Illston

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I. STATEMENT OF ISSUE

1. Whether on this record the Court should hold as a matter of law that LG Display withdrew from an admitted conspiracy after July 13, 2006, and ceased engaging in a contract, combination, and conspiracy to fix prices for TFT-LCD panels in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, and various state antitrust laws.

2. Whether withdrawal from a conspiracy may be accomplished when a defendant does not give notice of withdrawal to the other co-conspirators and takes no affirmative acts to disrupt the conspiracy or discontinue its participation.

II. INTRODUCTION AND SUMMARY

The evidence adduced in this case overwhelmingly shows that movant LG Display, a self-confessed, convicted felon and price-fixer, combined and conspired, along with other defendants, to fix, raise, and stabilize prices for TFT-LCD panels. (ECF No. 749-2, Dec. 8, 2008) (LG Display Guilty Plea). As the guilty plea reflected, LG Display executives were present at price-fixing meetings, exchanged information at those meetings, and otherwise entered into agreements to fix prices for TFT-LCD panels. LG Display now moves for partial summary judgment finding that it withdrew from this conspiracy in July, 2006, and that its liability for damages caused by the conspiracy ends as of the date of its withdrawal. Neither the evidence nor the law supports such a finding.

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Display either changed its pricing after July 2006, or that its co-conspirators changed their conduct because of what LG Display did or did not do. As Plaintiffs demonstrate through the accompanying Declaration of economist Dr. Janet S. Netz, Ph.D., who has studied the underlying economic data in this case for years, LG Display did **not** change its pricing behavior **after** July 2006 and continued to act in a manner consistent with membership in the cartel. All LG Display

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can offer to dispute that it was not price-fixing after July, 2006, is unsupported and inadmissible hearsay and speculation in the Bang Soo Lee Declaration, which opines that unidentified individuals in "senior management" would not "permit" unidentified employees to reach agreements at the price-fixing meetings that LG Display continued to attend after July 2006. *Lee Decl.* ¶ 3. Significantly, the affidavit does not deny that LG Display employees continued to enter into such illegal agreements. Under Rule 56, the Court of course cannot consider such inadmissible evidence, and LG Display has therefore wholly failed to establish either the absence of material issues of fact or its right to judgment as a matter of law.

III. FACTUAL BACKGROUND

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With clear evidence that the conspiracy and its involvement continued, LG Display implausibly argues that it did not engage in price-fixing after July, 2006. The sole evidentiary

[1] *See* Exhs. A-C. These exhibits reflect the decision to send lower level employees was made and implemented in mid 2005, and LG Display admits the meetings continued after July 13, 2006.

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basis on which LG Display relies is a skeletal, vague, and conclusory declaration, which on its face lacks any showing of first-hand knowledge, necessarily based on inadmissibly hearsay, and concluding with impermissible speculation, from an officer in the "Business Support Center." *See, generally, Lee Decl.*[2]

. Whatever he has to say about the conspiracy and LG Display's role in it both lacks foundation and must be entirely hearsay. He also provides no foundation for his "opinion," which is nothing more than sheer speculation and conjecture, that "senior management and legal counsel" would not "permit" price-fixing. There is no statement in his declaration that his purported evidence and conclusions are based on first-hand knowledge and anything other than hearsay. *Lee Decl.*, ¶3. Finally, he does not deny that LG Display continued to enter into price-fixing agreements after July, 2006. There is no other evidence before the Court to support LG Display's motion.

Mr. Lee's unsupported speculation that unspecified "senior management" of LG Display would not "permit" price-fixing after July, 2006, is not only inadmissible, but also contradicted by the economic evidence in the record.

IV. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment may only be entered if there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). Further, the Court may grant summary judgment whenever "the pleadings, depositions,... and admissions on

[2] Plaintiffs have not deposed Mr. Lee but have asked LG Display to produce him for deposition. The parties are still negotiating.

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file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). Because summary judgment is a "drastic device," the moving party bears a "heavy burden" of demonstrating the absence of any triable issue of material fact. *Real v. Driscoll Strawberry Associates*, 603 F.2d 748, 753 (9th Cir. 1979); *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2d Cir. 1999).

In determining whether summary judgment should be granted, the facts and inferences therefore must be viewed in the light most favorable to the non-moving party. *Driscoll*, 603 F.3d at 753. A disputed material fact is not "genuine" unless a reasonable jury could return a verdict for the non-moving party on the basis of deciding that fact in favor of the non-moving party. That is, the determination must be "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail is a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

On a motion for summary judgment, the moving party bears the burden of "showing -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986).

Although it is not enough for the party opposing a properly supported Motion for Summary Judgment to "rest on mere allegations or denial of his pleadings," all evidence, and all inference that may reasonably be drawn from the evidence, must be viewed in the light most favorable to the non-moving party. *Anderson, supra*, 477 U.S. at 256. If any genuine issue of material fact appears to the trial court, it is not the function of the trial court to weigh evidence on that issue. Even if the weight or believability of the evidence is clearly in favor of one party, the other party is entitled to a trial by jury to determine the facts. *Id.*

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B. IN ORDER TO WITHDRAW FROM A CONSPIRACY A CONSPIRATOR MUST NOTIFY THE OTHER CONSPIRATORS

It is well-established law that antitrust co-conspirators are gentle jointly and severally liable for all damages caused by the conspiracy. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981) ("[J]oint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants."); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1053 (9th Cir. 1981), *cert. denied*, 459 U.S. 825, 74 L. Ed. 2d 61 (1982). It is also well settled that "an accused conspirator's participation in a criminal conspiracy is presumed to continue until all the objects of the conspiracy had been accomplished or until the last overt act is committed by any of the conspirators." *United States v. Finestone* 816 F.2d 583, 588 (9th Cir. 1987), *citing inter alia*, *Hyde v. United States*, 225 U.S. 347, 369 (1912). A conspiracy is a partnership in crime, and each member of the conspiracy is liable for the actions of their co-conspirators. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 253-54 (1940). As an admitted member of a price-fixing conspiracy, LG Display is unquestionably jointly and severally liable for the actions of its co-conspirators.

Since *Hyde, supra.*, 225 U.S. 347, the Supreme Court has set forth "rigorous requirements" to show withdrawal from an illegal conspiracy. Thus, "the burden of establishing withdrawal lies on the defendant." *United States v. Borelli*, 336 F.2d 376, 388 (7th Cir. 1964).

A leading modern case on withdrawal from an antitrust conspiracy is *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). In that case, the Supreme Court considered, *inter alia*, what constitutes withdrawal from a price-fixing conspiracy. The Court concluded, "Affirmative acts inconsistent with the object of the conspiracy *and communicated in a manner reasonably calculated to reach co-conspirators* have generally been regarded as sufficient to establish withdrawal or abandonment." *Id.*, 438 U.S. at 464-65 (emphasis added); *accord, Marino v. United States*, 91 F.2d 691, 695 (9th Cir. 1937) ("...a conspirator may avoid guilt by withdrawing from the conspiracy prior to the commission of an overt act. In this connection, however, affirmative action on the part of the accused is required, to show withdrawal from the conspiracy, for a conspiracy once established is to presumed to continue until the contrary is

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established"); *United States v Mayes*, 512 F.2d 637, 642-43 (6th Cir. 1975) ("where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn").

withdrawal from the conspiracy.

LG Display cites a number of cases in support of the notion that because they spoke to the government, as a matter of law they must be free of civil liability. These cases do not so hold. In *Borelli*, the Seventh Circuit considered the statute of limitations in the context of the withdrawal defense and reiterated the test that: "...until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. Mere cessation activity is not enough to start the running of the statute; there must be also be affirmative action either the making of a clean breast to the authorities or... communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *Borelli*, 336 F.2d at 388.

United States v. Lothian, 976 F.2d 1257 (9th Cir. 1992), which Defendant also cites, involved a mail fraud conviction where the Plainitff Government chose not to rebut a *prima face* showing of withdrawal. There was no private plaintiff in a civil case as there is here. In that case, the standard of prove was beyond a reasonable boubt. While not factually similar, it is instructive because it makes clear that withdrawl will not shield a defendant from liability from the inevitable consequences of the actions the defendant took what was participating in the conspiracy. *Id.*, 976 F.2d at 1263. Further, the case makes clear that the issue of withdrawal is a factual matter.

> Because withdrawal from a conspiracy is closely akin to withdrawal from a mail or wire fraud scheme, we begin with the withdrawal defense as it applies to a charge of conspiracy. To withdraw from a conspiracy a defendant must either disavow the unlawful goal of the conspiracy, affirmatively act to defeat the purpose of the

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> conspiracy, or take "'definite, decisive, and positive' steps to show that the [defendant's] disassociation from the conspiracy is sufficient." *United States v. Loya*, 807 F.2d 1483, 1493 (9th Cir. 1987) (*quoting United States v. Smith*, 623 F.2d 627, 631 (9th Cir. 1980)). The crime of conspiracy consists of two elements: the defendant's agreement to accomplish an illegal objective and an overt act on the part of some member of the conspiracy toward achieving that objective. *Id.* Withdrawal negates the element of agreement to the conspiracy's unlawful objective because it "marks [the] conspirator's disavowal or abandonment of the conspiratorial agreement."

United States v. Read, 658 F.2d 1225, 1232 (7th Cir. 1981).

Defendants also cite *Krause v. Perryman*, 827 F.2d 346 (8th Cir. 1987) but in that case, the defendant had already withdrawn from the conspiracy prior to the events that cause the plaintiff's injury. 827 F.2d at 351. Since the plaintiff did not disprove that the defendants had withdrawn prior to the injury, there was no tribal issue of fact and summary judgment was affirmed in favor of the defendant. These facts are inapplicable here. The moving party also relies on another criminal case outside the circuit, *United States v. Greenfield*, 44 F.3d 1141 (2d Cir. 1995) where the defendant plotted with a longtime friend to use American Express cards fraudulently and building a fraudulent ATM. The ATM scam was uncovered and the defendant Greenfield surrendered to authorities soon thereafter. A third defendant, Lyons, was arrested later in all three defendants were charged on an indictment concerning bank fraud. Lyons argued on appeal that the District Court's sentencing calculations were in error and he should not have been held responsible for the value of the equipment fraudulently obtained by co-conspirators and that the court should not have rejected his withdrawal from the conspiracy. This Second Circuit case provides no assistance for the defendants because siding with the Government, that Court held that the claim of withdrawal was incorrect. (The Court did remand the case for factual consideration in connection with calculating the sentence). More importantly, this case once again affirms that "cessation" — which plaintiffs here dispute even occurred — is not enough; the law generally requires the taking some "affirmative action," citing *Borelli,su pra.*, 336 F.2d at 388. In considering the reasons for this, the Second Circuit explained that "affirmative evidence," including "the communication of the abandonment in a manner reasonably calculated to reach co-conspirators," is a critical component that assures that the purported withdrawal is not being created *ex post.*

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Under the law, LG Display has failed to meet its summary judgment burden. LG Display admits that it did not tell any the co-conspirators LG Display did not even tell its own employees to stop exchanging information or participation in the conspiracy; they continued to attend the meetings. LG Display's pricing remained unchanged. *Netz Decl.* at ¶ 8. At the very least, there are issues of fact precluding partial summary judgment on the issue of LG Display's withdrawal.

C. THE LEE DECLARATION IS INADMISSIBLE AND MAY NOT BE CONSIDERED IN SUPPORT OF LG'S MOTION

The declaration of Lee Declaration is the only evidence on which LG relies for its assertion that, after July 13, 2006, it merely continued meeting with its co-conspirators but did not actually reach any agreements. *Lee Decl.* at ¶ 3. This so-called evidence gets LG nowhere because it is inadmissible. Mr. Lee has no foundation for his statements, and everything he avers is hearsay or speculation. For these reasons Paragraph 3 of the Lee Declaration should be stricken from the record and not considered on LG's motion. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (precluding the use of "sham" affidavit testimony during summary judgment).

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (citations omitted). "At the summary judgment stage, [the court] do[es] not focus on the admissibility of the evidence's form. [The court] instead focus[es] on the admissibility of its contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citation omitted) (finding contents of plaintiff's diary admissible for summary judgment purposes, even though diary itself was inadmissible, because the diary's contents were "mere recitations of events within [plaintiff's] personal

[3] Ex. A-C to the *Howard Decl.*; *Lee Decl.* at ¶¶ 1-2.

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knowledge"). LG bears the burden of showing that Mr. Lee has first-hand knowledge of the assertions in Paragraph three of the Lee Declaration. *See Cermetek Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir. 1978) (offering party must show that affiant is competent to testify about matters in the declaration). LG cannot meet its burden.

Rule 56(c) sets out the requirements for declarations made in support of summary judgment:

> An affidavit or declaration used to support or oppose a motion must be made on **personal knowledge,** set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Fed.R.Civ.P. 56(c)(4) (emphasis added); *accord. Boyd v. City of Oakland*, 458 F.Supp.2d 1015, 1023 (N.D. Cal. 2006) ("[t]he matters **must be known to the declarant personally**, as distinguished from matters of opinion or hearsay") (emphasis added).

It is plain from the Lee Declaration that Mr. Lee does not have personal knowledge of the supposed facts in Paragraph 3. In fact, Mr. Lee asserts "knowledge," but not personal knowledge. *Lee Decl.* at ¶ 1. Nowhere does he even attempt to show how he has the knowledge of the facts he asserts. How does Mr. Lee know, for example, that LG "did not instruct its employees to stop communications with competitors?" *Id.* at ¶ 3. How does he know that "senior management and the legal department were then aware of both the earlier competitor communications and the DOJ investigation?" *Id.* How does he know that "they would not permit any employees' communication with a competitor to result in a price-fixing agreement by LG Display?" *Id.* Presumably, Mr. Lee is not including himself among the unnamed "they." And his use of a third-person pronoun in this regard is telling. Clearly, Mr. Lee has no personal knowledge.

Not only is it apparent that Mr. Lee does not have personal knowledge of the assertions in Paragraph 3, but it also appears from the Declaration that he does not know of any person with personal knowledge. He identifies no one at LG that purportedly made any of the decisions or took any of the actions he asserts. Instead, he "identifies" only "LG Display," "employees," and "senior management and the legal department." *Id.* Foundation is not laid by a third person's assertion that nameless, faceless other persons have personal knowledge.

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Since Mr. Lee has no personal knowledge of his assertions in Paragraph 3, he is either speculating (reinforcing his lack of foundation), or he was told the information by some other person or persons. If he was told the information, his statements are hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Orr*, 285 F.3d at 778 (citation and quotation omitted). Hearsay is inadmissible unless it is defined as non-hearsay by Rule 801(d) or meets a hearsay exception set out in Rules 803, 804, or 807. *See Id.* The ultimate issue where, as here, hearsay evidence is offered as a basis for summary judgment, is "whether the hearsay evidence offered [] is reliable." *See Till v. American Family Mutual Ins. Co.*, 06-CV-1376-BR; 2007 U.S. Dist. LEXIS 50715, * 14 (D. Or. June 26, 2007), *citing* 2 McCormick On Evidence 253 (6th ed.) (other citation omitted).

Clearly, LG offers Paragraph 3 of the Lee Declaration for the truth of the matter asserted; namely that, even though its employees continued to communicate with its co-conspirators, LG did not fix any prices during those communications. It is equally clear that Mr. Lee has no personal knowledge of the matter asserted. He is regurgitating what he was told. This is rank hearsay. *See, e.g., Stockdale v. Hartley*, CV 09-236-RGK (PJW), 2010 U.S. Dist. LEXIS 94122, * 13-14 (C.D. Cal. June 4, 2010) (witnesses' "account of what happened was based on what someone told them, rendering it rank hearsay and inadmissible"); *Stowers v. Evans*, CIV S-05-2067 MCE GGH P, 2008 U.S. Dist. LEXIS 38514, * 27 (E.D. Cal. May 12, 2008) ("defense investigator[']s recitation of what [witness] supposedly said to him was rank hearsay …").

Paragraph 3 of the Lee Declaration is inadmissible both in form and in substance. Mr. Lee lacks personal knowledge of the matters stated; and whatever he states is either hearsay or his own unsubstantiated speculation — all of which makes the declaration inadmissible. Because this paragraph is the only purported proof that LG did not fix prices after July 13, 2006, LG has no admissible evidence of this asserted fact, and its motion for partial summary judgment must therefore be denied.

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V. CONCLUSION

For the foregoing reasons, the Court should deny the Motion for Partial Summary Judgment.

Dated: August 5, 2011

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