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UNITED STATES DISTRICT COURT

FOR THE 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

LG DISPLAY'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON WITHDRAWAL

Date: September 22, 2011
Time: 9:00 a.m.
Dept.: Courtroom 10, 19th Floor
Judge: Hon. Susan Illston

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I. INTRODUCTION

In July 2006, LG Display self reported to the government and began cooperating with the [redacted] Plaintiffs argue, despite unambiguous case law to the contrary, that to effectuate the withdrawal, LG Display must also inform its alleged coconspirators of its decision to withdraw from the conspiracy, [redacted] But plaintiffs' own Opposition includes citations and even quotations affirming that self-reporting to the authorities is an "affirmative act" establishing withdrawal. And plaintiffs have failed to present any facts to contradict LG Display's evidence that it self-reported to the authorities. Therefore, the Court should affirm that the "making of a clean breast to the authorities" constitutes an effective withdrawal and enter summary judgment in LG Display's favor.

II. ARGUMENT

A. Self-Reporting to Authorities Is an Affirmative Act of Withdrawal.

Under Ninth Circuit law, the "making of a clean breast to the authorities" is a legally sufficient affirmative act of withdrawal. *United States v. Koonin*, 361 F.3d 1250, 1253 (9th Cir. 2004) (citing *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert denied*, 379 U.S. 960 (1965)), *vacated and remanded on other grounds to consider intervening authority*, 544 U.S. 945 (2005), *aff'd in light of intervening authority*, 234 F. App'x 761 (2007), *cert denied*, 552 U.S. 1186 (2008). But plaintiffs deny that self-reporting to the authorities constitutes an affirmative act inconsistent with the objects of the conspiracy. Indirect Purchaser Pls.' Mem. in Opp'n 8-9, ECF No. 3236 ("Opposition"). Plaintiffs argue that LG Display's case law "does not so hold." Opp'n at 8. In so asserting, plaintiffs quote *Borelli* (which they incorrectly attribute to the Seventh Circuit): "'[T]here must be [*sic*] also be affirmative action [*sic*] either the making of a clean breast to the authorities or [*sic*] . . . communication of the abandonment in a manner reasonably calculated to reach co-conspirators.'" Opp'n at 8 (quoting *Borelli*, 336 F.2d at 388). As is apparent, *Borelli* contradicts the very proposition for which plaintiffs quote it.

Plaintiffs cite approvingly and rely on other decisions that confirm that self-reporting to the authorities can be an effective withdrawal. *See Hyde v. United States*, 225 U.S. 347, 371-72 (1912) (affirming that one defendant's disclosure of the illegal scheme to authorities could constitute effective withdrawal from the conspiracy), *discussed in* LG Display's Motion for Partial Summary Judgment on Withdrawal ("Motion") at 6-7 *and* Opp'n at 7; *see also United States v. U. S. Gypsum Co.*, 438 U.S. 422, 463-65 (1978) (confirming that disclosure to the authorities constitutes a sufficient, if not necessary, act constituting effective withdrawal), *discussed in* Motion at 7 *and* Opp'n at 7-8; *United States v. Finestone*, 816 F.2d 583, 589 (11th Cir. 1987) (explaining that to establish withdrawal, defendant must prove he took affirmative steps inconsistent with the objects of the conspiracy such as "either communicat[ing] those acts in a manner reasonably calculated to reach his co-conspirators or disclos[ing] the illegal scheme to law enforcement authorities."), *cited in* Motion at 5 *and* Opp'n at 7.

B. Affirmative Acts Inconsistent with the Objectives of the Conspiracy Are Sufficient to Establish Withdrawal; Notice to Coconspirators is Not a Separate Requirement.

Relatedly, or possibly in the alternative, plaintiffs argue that an effective withdrawal also requires defendants to notify coconspirators of withdrawal, whether or not some other affirmative act is taken. Opp'n at 8. But again, plaintiffs' own quotations and citations contradict their conclusion. *Borelli* and *Finestone* both state that a defendant may withdraw by *either* notifying coconspirators *or* self-reporting to the authorities. *Borelli*, 336 F.2d at 388, *quoted in* Opp'n at 8; *Finestone*, 816 F.2d at 589, *cited in* Opp'n at 7. Furthermore, *Gypsum*, which plaintiffs rely on heavily as a "leading modern case on withdrawal from an antitrust conspiracy," Opp'n at 7, held that instructions limiting a jury's consideration to only two, independent methods of demonstrating withdrawal – notifying coconspirators *or* self-reporting to the authorities – was reversible error. *U.S. Gypsum Co.*, 438 U.S. at 464-65. The Court explained that the judge should not have placed such "confining blinders" on the jury and that the jury should have been allowed to consider evidence of other affirmative acts

inconsistent with the objectives of the conspiracy, including the "[r]esumption of competitive behavior, such as intensified price cutting or price wars." *Id.* at 464. Despite plaintiffs' assertion to the contrary, Opp'n at 8, *Gypsum* does not require a defendant to notify coconspirators in order to withdraw effectively. Instead, *Gypsum* affirms that notification of coconspirators is just one of any number of independent and sufficient methods of withdrawal.[1] And in some cases, notification of coconspirators is even incompatible with other independent and sufficient methods of withdrawal. *See id.* at 464 n.37 (noting notifying coconspirators might not always be a manageable task, such as when other members of the conspiracy are not identifiable); *see also United States v. Pratt*, 239 F.3d 640, 644 (4th Cir. 2001) (noting that a "strict adherence to the communication requirement would, in this case, destroy the value of" defendant's cooperation with the government's investigation).

C. Plaintiffs' Cases Establish that Withdrawal Severs Liability.

Plaintiffs similarly misconstrue *United States v. Lothian*, which they nevertheless declare as "instructive," incorrectly concluding that it "makes clear that withdrawl [*sic*] will not shield a defendant from liability from the inevitable consequences of the actions the defendant took what [*sic*] was participating in the conspiracy." Opp'n at 8 (citing *U.S. v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992), *cited in* Motion at 5-6). In fact, *Lothian* makes clear the exact opposite, stating that "a defendant cannot be held liable for substantive offenses committed before joining or after withdrawing from a conspiracy." 976 F.2d at 1262 (citing *Levine v. United States*, 383 U.S. 265, 266 (1966)); *see also In re Brand Name Prescription*

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1 *Gypsum* demonstrates that cutting prices, notifying coconspirators, or informing the authorities are all sufficient, but not necessary, methods of withdrawal. 438 U.S. at 464-65. As a result, Dr. Netz's declaration, submitted with the Opposition, fails to even address, much less undermine, the factual issue of concern, which is whether LG Display reported to the government its participation in anticompetitive conduct in the TFT-LCD industry. *See generally* Declaration of Janet S. Netz in Support of Opposition, Aug. 4, 2011 ("Netz Declaration"). In any case, the Court should strike this new Netz Declaration because it includes entirely new analysis submitted outside the schedule for submitting expert reports. *See* Order Re: Pretrial and Trial Schedule, at 2, Nov. 23, 2010, ECF No. 2165 (ordering May 25, 2011 as the deadline for "Service of opening expert reports for plaintiffs").

Drugs Antitrust Litig., 123 F.3d 599, 616 (7th Cir. 1997) (citing *Gypsum* and affirming that a defendant "terminate[s its] liability for the continuing illegal acts of a conspiracy that [it] had joined" by effectively withdrawing, either through "report[ing] the conspiracy to the authorities or announc[ing] [its] withdrawal to [its] coconspirators"); *Hyde*, 225 U.S. at 371 (agreeing with jury instruction, which instructed in part that if defendant had "disclosed all he knew about the matter [to the authorities] … nothing that could have been done by the others after that could affect him at all").[2]

As has been detailed in the sections above, cases cited, quoted, and relied upon by both plaintiffs and LG Display already establish that (1) the self-reporting to authorities constitutes an affirmative act of withdrawal; (2) affirmative acts – such as self-reporting to authorities or notifying coconspirators – are alternative methods of withdrawal – notifying coconspirators is not an independent requirement; and (3) withdrawal severs a defendant's liability for the continuing illegal acts of a conspiracy.

D. LG Display's Evidence that It Self-Reported to the Authorities and Withdrew Is Uncontradicted

Plaintiffs have not offered any evidence that LG Display did not self-report its participation in anticompetitive behavior to the authorities. The only rebuttal evidence offered are three documents submitted as exhibits to the Declaration of Derek G. Howard in Support of Opposition, ECF No. 3236-1 ("Howard Declaration"), *cited in* Opp'n at 10 n.3, but these documents do not contradict or undermine LG Display's claim that it self-reported to the authorities on July 13, 2006. The date of the most recent document, Howard Declaration, Exhibit A, is September 9, 2005; none of the documents speak to whether LG Display reported

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2 The Court also explains that cooperating with the government and following its instructions after self-disclosure is only a continuation of the initial affirmative act that constitutes withdrawal. *See Hyde*, 225 U.S. at 371, *discussed in* Motion at 7 n.2. As a result, plaintiffs' complaints that [redacted]

its participation in alleged anticompetitive behavior to the Department of Justice (the "DOJ") on July 13, 2006. One of the documents, Howard Declaration, Exhibit B, dates from 2003 and is irrelevant to any issue before the Court on these proceedings.[3]

In the alternative, plaintiffs try to disqualify as hearsay some of LG Display's affirmative evidence that it self-reported to the authorities. With its Motion, LG Display submitted a [redacted]. *See* Decl. of Michael R. Lazerwitz in Supp. of LG Display's Mot., ECF No. 3171 ("Lazerwitz Motion Declaration"), Ex. A. Plaintiffs assert in a conclusory parenthetical that [redacted] – is hearsay. [redacted].[4]

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3 In addition, both Exhibits B and C of the Howard Declaration are inadmissible because they include translations that contravene on their face the Special Master's Order Re Defendants' Motion for Entry of a Protocol Regarding the Use of Translations, Dec. 27, 2010, ECF No. 2248 ("Translation Protocol"). Both Exhibits fail to provide certifications for the translations, as required, and Exhibit B provides a new translation when an existing translation of the same document has already been affirmed under the Translation Protocol. LG Display has met and conferred with plaintiffs about this matter, and plaintiffs have agreed to withdraw the inadmissible exhibits and to submit translations conforming to the Translation Protocol in a supplemental filing. LG Display reserves the right provided by the Translation Protocol to review and object to any newly offered translations.

4 Plaintiffs also make much of the fact that the [redacted] Lazerwitz Motion Declaration, Ex. A. The legal implications of that fact are for the Court to decide, and [redacted]

Plaintiffs also claim that the Declaration of Bang Soo Lee ("Lee Declaration"), Lazerwitz Motion Declaration, Exhibit B, is inadmissible as hearsay. [redacted]

But as plaintiffs themselves note, "'[a]t the summary judgment stage, [the court] do[es] not focus on the admissibility of the evidence's form' but on the 'admissibility of its contents.'" Opp'n at 10 (quoting *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003)). The context shows that Mr. Lee has personal knowledge of the facts attested in the Lee Declaration. To avoid any ambiguity on the matter, LG Display submits with this Reply a Supplemental Declaration of Bang Soo Lee Regarding LG Display's Report to the Authorities ("Supplemental Lee Declaration"), Lazerwitz Reply Declaration, Exhibit A, explicitly confirming Mr. Lee's personal knowledge of the facts attested to in Mr. Lee's original declaration. The Supplemental Lee Declaration resolves plaintiffs' hearsay concerns.[5]

[5] Even if the Lee Declaration is deemed inadmissible, [redacted]

III. CONCLUSION

For the reasons described above, and those contained in the Motion, the Court should grant partial summary judgment to LG Display, holding that LG Display does not have joint or several liability for any actions of the alleged conspiracy on or after July 13, 2006, and dismissing all claims against it based upon purchases on and after July 13, 2006.

DATED: August 12, 2011

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