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15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 IN RE: CATHODE RAY TUBE (CRT)
20 ANTITRUST LITIGATION

This Document Relates To:

21 STATE OF FLORIDA,

22 Plaintiff,

23 v.

24 LG ELECTRONICS, INC., et al.,
25 Defendants.

Master File No. 3:07-cv-05944-SC

MDL No. 1917

Individual Case No. 11-cv-06205 SC

**DEFENDANTS' JOINT MOTION TO
DISMISS THE STATE OF FLORIDA'S
CLAIMS FOR INJUNCTIVE RELIEF**

Date: September 20, 2012
Time: 12:00 P.M.
Location: JAMS, Two Embarcadero
Center, Suite 1500
Judge: Hon. Samuel Conti
Special Master: Hon Charles A. Legge
(Ret.)

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 Through its Amended Complaint, Plaintiff seeks an order to “[e]njoin and restrain . . .
4 Defendants . . . from continuing to engage in any anticompetitive conduct and from adopting in
5 the future any practice, plan, program or device having a similar purpose or effect” as the
6 purported CRT conspiracy alleged in the Complaint.¹ Plaintiff’s request for an injunction is
7 unsupported and unnecessary and should be dismissed. Plaintiff alleges no facts to support its
8 contention that there is any “continuing conspiracy” to enjoin. To the contrary, all of the facts
9 alleged in the Complaint relate to a period before November 25, 2007 – *i.e.*, more than five years
10 ago.

11 Moreover, as Plaintiff concedes, the cathode ray tube is an obsolete product that has been
12 all but supplanted by superior, more popular display technologies like LCD and plasma. This fact
13 is obvious to anyone who has walked through an electronics retail store in recent years, where so-
14 called “flat screen” LCD and plasma televisions and monitors are ubiquitous.

15 Accordingly, almost all of the Defendants before the Court ceased manufacturing and
16 selling CRTs years ago.² Only two Defendants—both belonging to the same Defendant family—
17 continue to produce a small number of CRTs in foreign countries. Simply put, there could be no
18 “continuing” CRT price-fixing conspiracy because almost no Defendant makes CRTs anymore.

19 _____
20 ¹ Am. Compl. ¶ 156(d). It is not clear from the Complaint on which statutory authority Plaintiff relies for its
21 injunctive claims, which are purportedly brought “pursuant to federal and state law” (Am. Compl. ¶ 157(d)), but
22 the standard is the same for each of the federal and state statutes identified in the Complaint. The Sherman Act,
23 the FAA and FUDTPA require a showing of “threatened loss or damage,” which Plaintiff cannot meet here.
24 Moreover, Plaintiff incorrectly asserts that its federal injunctive claim is timely because the Clayton Act’s four-
25 year statute of limitations “has nothing to do with Florida’s federal claim.” Pls. Response to Motion to Dismiss at
26 3 (Dkt No. 1330). This is not so - the Ninth Circuit and other courts have barred equitable claims four years after
27 accrual. *See, e.g., ITT v. GTE Corp.*, 518 F.2d 913, 926 (9th Cir. 1975) (“Equity, when there is no statute of
28 limitations applicable to suits, fashions its own time remedies through laches....”). Here Plaintiff was
indisputably on notice of potential claims by November 2007 at the latest and yet still waited more than four
years to file its Complaint seeking damages and injunctive relief. Laches applies.

² The Defendants joining this Motion are Hitachi, Ltd., Hitachi Displays, Ltd. (n/k/a/ Japan Display East Inc.),
Hitachi Asia, Ltd., Hitachi Electronic Devices (USA), Inc., Koninklijke Philips Electronics N.V., Philips
Electronics North America Corporation, Panasonic Corporation (f/k/a Matsushita Electric Industrial Co., Ltd.),
Panasonic Corporation of North America, MT Picture Display Co., Ltd., LG Electronics, Inc., LG Electronics
USA, Inc., Samsung SDI America, Inc., Samsung SDI Co., Ltd., Samsung SDI (Malaysia) SDN. BHD., Samsung
SDI Mexico S.A. DE C.V., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., Tianjin Samsung SDI
Co., Ltd., Toshiba Corporation and Toshiba America Electronic Components, Inc.

1 Finally, there are multiple other lawsuits seeking the same relief Plaintiff seeks here,
2 rendering Plaintiff's injunctive claims duplicative and unnecessary.

3 For each of these reasons, Plaintiff cannot meet the standards for injunctive relief, and its
4 claims should be dismissed.

5 **II. ISSUE TO BE DECIDED**

6 Whether Plaintiff may pursue claims for prospective injunctive relief when (a) the latest
7 allegedly illegal conduct occurred at least five years in the past; (b) almost none of the defendants
8 presently make or sell the products at issue; and (c) other, earlier filed complaints also seek the
9 same relief.

10 **III. BACKGROUND**

11 Plaintiff filed its initial Complaint on December 9, 2011. It alleged a conspiracy among
12 Defendants to fix prices and supply levels for CRTs from 1995 through at least 2007. The
13 Complaint sought damages and civil penalties for alleged violations of the Sherman Act, the
14 Florida Antitrust Act ("FAA") and the Florida Deceptive and Unfair Trade Practices Act
15 ("FDUTPA").

16 Defendants moved to dismiss Plaintiff's damages and penalties claims on statute of
17 limitations grounds. Plaintiff responded by serving an Amended Complaint on July 16, 2012.
18 Defendants renewed their Motion to Dismiss the claims for monetary relief asserted in the
19 Amended Complaint on August 2, 2012, on the grounds that those claims were barred by the
20 relevant statutes of limitation. *See* Defendants' Notice of Motion and Motion to Dismiss the State
21 of Florida's Amended Complaint (Dkt. No. 1287). That motion is fully briefed and was argued
22 on September 20, 2012.

23 At the September 20th oral argument, Plaintiff's claims for injunctive relief were
24 discussed, and the Special Master requested additional briefing addressing those claims
25 specifically. This Motion followed.

26 **IV. ARGUMENT**

27 Injunctive relief is a prospective remedy to prevent future harm. An injunction is not
28 appropriate unless "there exists some cognizable danger of *recurrent violation*, something more
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1 than the mere possibility which serves to keep the case alive.” *United States v. W.T. Grant Co.*,
2 345 U.S. 629, 633 (1953) (emphasis added). As the Supreme Court explained in *United States v.*
3 *Oregon State Medical Soc’y*, 343 U.S. 326, 333 (1952):

4 The sole function of an action for injunction is to forestall future violations. It is
5 so unrelated to punishment or reparations for those past that its pendency or
6 decision does not prevent concurrent or later remedy for past violations...[An
7 injunction requires] a real threat of future violation or a contemporary violation of
8 a nature likely to continue or recur.

9 The standard is the same under federal and Florida law.³

10 Plaintiff’s claims and allegations here, by contrast, are all backward looking. All of the
11 facts Plaintiff alleges are at least five years in the past, and Plaintiff alleges no facts that would
12 colorably suggest that there is any danger of a “recurrent violation.” To the contrary, the market
13 facts suggest that a recurrent violation is extremely unlikely, if not impossible. Plaintiff alleges
14 nothing more than the “mere possibility” of a current or future violation, which is not enough to
15 allow its injunctive relief claims to proceed.

16 **A. PLAINTIFF’S CLAIMS OF A CONTINUING VIOLATION ARE**
17 **UNSUPPORTED.**

18 Plaintiff alleges no conduct that could be remedied through an injunction. Although
19 Plaintiff’s Amended Complaint contains bare allegations that there is a “continuing conspiracy”
20 among Defendants, there are no facts alleged to support that legal conclusion and the market facts
21 affirmatively contradict it.

22 It is now a well-established pleading tenet that a plaintiff’s complaint must be dismissed if
23 the complaint fails to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v.*
24 *Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (only a
25 complaint that states a plausible claim for relief survives a motion to dismiss). Plaintiff does not
26 meet the *Twombly/Iqbal* pleading standard, because it has not - and cannot - state a plausible

27 ³Florida courts require the plaintiff to “establish inadequate remedy at law and that irreparable harm will arise absent
28 injunctive relief.” *K.W. Brown & Co. v. McCutcheon*, 879 So. 2d 977, 979 (Fla. 4th DCA 2002) (emphasis
added).

1 claim for an injunction barring defendants from engaging in conduct with respect to products that
2 *they have not made in years.*

3 As we explained in our earlier Motion addressed to Plaintiff’s damages claims, Plaintiff
4 alleges no facts regarding any purported conspiratorial conduct after 2007 – *i.e.*, in the last five
5 years. *See* Defendants’ Notice of Motion and Motion to Dismiss the State of Florida’s Amended
6 Complaint at 5-6 (Dkt. No. 1287). In paragraph 106 of the Amended Complaint, Plaintiff alleges
7 the periods during which each of the Defendants purportedly “agreed on prices and supply levels
8 for CRTs.” Am. Compl. ¶106(a)-(p). No Defendant is alleged to have “agreed on prices and
9 supply levels for CRTs” after 2007, and many are alleged to have participated in conspiratorial
10 conduct only before 2003, 2002, or 2001. For instance, “Hitachi” is alleged to have participated
11 in conspiratorial activities “between at least 1996 and 2001.” *Id.* at ¶ 106(b).

12 Claims for injunctive relief may be mooted by the passage of time. *See, e.g. County of*
13 *Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (there was no reasonable expectation of future
14 harm when plaintiffs had not employed a potentially discriminatory examination for job
15 applicants for at least ten years and had engaged in different hiring practices for the last ten
16 years); *United States v. Oregon State Medical Soc’y*, 343 U.S. at 334 (taking into consideration
17 the length of time since defendants engaged in the conduct at issue, and finding that “conduct
18 discontinued in 1941 does not warrant the issuance of an injunction in 1949”); *Industrial Assn. of*
19 *San Francisco v. United States*, 268 U.S. 64, 84 (1925) (“whatever may have been the original
20 situation, the practice was abandoned long before the present suit was instituted, and nothing
21 appears by way of threat or otherwise to indicate the probability of its ever being resumed”).
22 Given the years that have passed since the last alleged injurious conduct by Defendants, Plaintiff
23 cannot reasonably claim a need for, or entitlement to, an injunction.⁴

24 _____
25 ⁴ Nor can Plaintiff rely on its argument that conduct before 2007 may continue to produce effects to justify its claims
26 for injunctive relief. *Cf.* Pls. Response to Motion to Dismiss at 4-6 (Dkt No. 1330). Plaintiff’s argument is that
27 allegedly price fixed CRTs sold before 2007 may have been incorporated by non-conspirators into finished
28 products that continue to be sold by third parties. *Id.* Putting aside the implausibility of these contentions in
relation to CRT sales made five years ago, no injunction against the Defendants before the Court could remedy
that purported harm, as there is no contention that Defendants control the downstream transactions for finished
products at issue.

1 **B. THERE CANNOT BE A CONTINUING OR FUTURE CRT CONSPIRACY**
2 **BECAUSE CRTs ARE AN OBSOLETE TECHNOLOGY AND ALMOST**
3 **ALL OF THE DEFENDANTS EXITED THE CRT MARKET LONG AGO.**

4 In addition to the lack of any factual support for Plaintiff’s contention that Defendants are
5 engaged in a “continuing conspiracy,” the market facts alleged in the Complaint and elsewhere
6 make clear that it would be all but impossible for a CRT conspiracy to exist now or in the future.

7 As the Supreme Court noted in *United States v. Concentrated Phosphate Export Ass’n.*,
8 “[a] case [for injunctive relief] might become moot if subsequent events made it absolutely clear
9 that the allegedly wrongful behavior could not *reasonably* be expected to occur.” 393 U.S. 199,
10 203 (1968) (emphasis added). Here, even Plaintiff admits that CRTs have been overtaken by
11 different, newer technologies and that “[i]t is extremely unlikely that, at this point in time, a new
12 producer would want to try to enter the CRT market in light of the declining demand for CRT
13 Products.” Am. Compl. at ¶ 75. This is because CRTs are “approaching obsolescence” as they
14 are replaced by better display technologies like LCD and plasma. *Id.* at ¶115 (there is “declining
15 demand due to the approaching obsolescence of CRTs caused by the emergence of a new,
16 potentially superior and clearly more popular, substitutable technology”).

17 Accordingly, almost all of the Defendants before the Court stopped making and selling
18 CRTs years ago. There is thus no reasonable possibility of a recurrent violation that could be
19 remedied through an injunction⁵:

- 20 • “In 2001, LGE transferred its CRT business to a 50/50 CRT joint venture with Defendant
21 [Royal Philips Electronics N.V.] forming LG.Philips Displays.” Am. Compl. ¶ 12.
- 22 • “Royal Philips had sole ownership of its CRT business until 2001, when it transferred its
23 CRT business to a 50/50 joint venture with Defendant LG Electronics, Inc., forming
24 LG.Philips Display.” *Id.* at ¶ 15.

25 ⁵ The Court can take judicial notice of the dates entities ceased production of CRT tubes and exited the CRT tube
26 market. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (courts may take
27 judicial notice of court filings and other matters of public record, including pleadings); *City of Pittsburgh v. West*
28 *Penn Power Co.*, 147 F.3d 256 (3rd Cr. 1998) (court may take judicial notice of regulatory proceedings governing
the future actions of defendants); *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239
U.S. 466 (1916) (Court took judicial notice of World War I when war indefinitely disrupted activities of
defendants).

- 1 • As noted in a Complaint by Best Buy, ownership of LG.Philips Display was ceded to
2 financial institutions and private equity firms more than five years ago. Complaint at ¶40,
3 *Best Buy Co. Inc. v. Hitachi, Ltd.*, No. 11-5513 (Dkt. No. 1) (N.D. Cal. Nov. 14, 2011).
4 (Everett Decl., Ex. 1)
- 5 • The Hitachi entities did not manufacture or sell CRTs after early 2003. *See* Evidentiary
6 Proffer of Defendants Hitachi, Ltd; Hitachi Displays, Ltd.; Hitachi Asia, Ltd.; Hitachi
7 America, Ltd.; and Hitachi Electronic Devices (USA), Inc. (Dkt. Nos. 817 - 825).
8 (Everett Decl., Ex. 2-14).
- 9 • “In 2002, Toshiba Corporation entered into a joint venture with Defendant Panasonic
10 Corporation called MT Picture Display, Co. (“MTPD”), Ltd. in which the entities
11 consolidated their CRT businesses.” Am. Compl. ¶28. Toshiba sold its interest in MTPD
12 in 2007. *Id.* at ¶¶ 31, 32.
- 13 • Panasonic Corporation of North America (“PNA”) was never in the business of
14 manufacturing or selling CRTs, except that an unincorporated division company of PNA,
15 acted as the U.S. sales agent in connection with sales of CRTs to televisions or monitor
16 manufacturers, but only until April 2004. Supplemental Responses and Objections of
17 Panasonic Corp. of N. Am., MT Picture Display Co., Ltd. and Panasonic Corp. to Direct
18 Purchaser Plaintiffs’ First Set of Interrogatories, Dec. 17, 2010, at 2-3. (Everett Decl., Ex.
19 15).
- 20 • Panasonic Corporation ceased the manufacture of CDTs for computer monitors no later
21 than 2001, and exited the CPT business in March 2003. Second Supplemental Responses
22 and Objections of Panasonic Corp. of N. Am., MT Picture Display Co., Ltd. and
23 Panasonic Corp. to Direct Purchaser Plaintiffs’ First Set of Interrogatories, Nov. 3, 2011,
24 at 4. (Everett Decl., Ex. 16).
- 25 • MTPD’s US facilities were dissolved by March 27, 2007. Objections and Responses of
26 Panasonic Corp. of N. Am., MT Picture Display Co., Ltd. and Panasonic Corp. to Direct
27 Purchaser Plaintiffs’ First Set of Interrogatories, May 12, 2010 at 11-12. Globally, MTPD
28 ceased CRT production as of 2009. Tatsuo Tobinaga 30(b)(6) Deposition Transcript, July

1 16, 2012, at 79. (Everett Decl., Ex. 17). Since then, all remaining MTPD subsidiaries are
2 either dissolved or their shares were sold to third parties. Objections and Responses of
3 Panasonic N. Am., MT Picture Display Co., Ltd. and Panasonic Corp. to DPPs’ First Set
4 of Interrogatories, May 23, 2010, at 12. (Everett Decl., Ex. 18).

5 Only two Defendants—Samsung SDI (Malaysia) Sdn. Bhd. and Shenzhen Samsung SDI Co., Ltd.,
6 both members of the Samsung SDI Defendant family—continue to manufacture small numbers of
7 CRTs in foreign countries. Samsung SDI can hardly conspire with itself, and as noted all of the
8 other Defendants before the Court are no longer involved in the CRT business.⁶

9 Plaintiff cannot reasonably satisfy the threshold requirement for injunctive relief that it
10 suffers from a “significant threat of injury” from a conspiracy to limit the future production of
11 CRT tubes or fix the prices charged for CRT tubes because Defendants for the most part are no
12 longer active in the markets at issue.⁷ And, as such, “there is no reasonable expectation that the
13 wrong will be repeated.” *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953) (emphasis
14 added).

15 These facts distinguish this case from *Wilk v. American Medical Ass’n*, 895 F.3d 352 (7th
16 Cir. 1990), which Plaintiff claims establishes a right to seek injunctive relief, even in cases where
17 the alleged conduct occurred in the past. Pls. Response to Motion to Dismiss at 4-5 (Dkt No.
18 1330). The district court imposed the injunction in *Wilk v. American Medical Ass’n* because it
19 “found a cognizable danger of recurrent violations, was unimpressed with the AMA’s expressed
20 intent to comply with antitrust laws, was unpersuaded by the effectiveness of the AMA’s
21 discontinuance of its boycott, and properly considered the systematic and long-term nature of the
22 boycott.” *Id.* at 367. The district court found that the AMA was likely to return to its prior

23 _____
24 ⁶ This distinguishes the instant case from the Packaged Ice case relied upon by Plaintiff. In *In re Packaged Ice*
25 *Antitrust Litigation*, the court found that a defendant’s plea agreement concerned a repudiation of illegal behavior
26 in only one geographic market and that the plea agreement thus offered no bar to conspiracy in relation to the
27 same products sold in other geographic markets. 779 F. Supp. 2d 642, 669 (E.D. Mich. 2011). The defendants in
28 that case continued to sell the products at issue, and continued to compete with one another in sales of those
products in geographic regions outside those covered by the guilty plea. That is not the case here. Plaintiff has
pleaded the existence of a conspiracy related to CRT tubes, and the moving Defendants have all but ceased
production of CRT tubes.

⁷ Given that nearly all of the Defendants no longer sell CRTs, even any arguable effects of the conduct at issue could
not be remedied by an injunction imposed on Defendants.

1 challenged conduct because the AMA had done so on a previous occasion after initially
2 repudiating the conduct at issue. Facing pressure from its members, the AMA sought to persuade
3 a hospital accreditation organization to adopt essentially the same standards disfavoring
4 chiropractors. This led the district court to determine that “present assurances [were] good only
5 until the next chiropractic battle.” *Id.* at 367 (quoting *Wilk v. American Medical Ass’n*, 671 F.
6 Supp. 1465, 1488 (N.D. Ill. 1987)). Here, there is no need to enter the injunctive relief because
7 each defendant has exited the CRT tubes and consequently cannot engage in a conspiracy to fix
8 the prices or limit the production of CRT tubes. Here, Defendants have gone beyond
9 “assurances” by withdrawing from the market.

10
11 **C. PLAINTIFF’S INJUNCTIVE RELIEF CLAIMS ARE DUPLICATIVE.**

12 As Plaintiff notes, there are currently two class actions (Pls. Response to Motion to
13 Dismiss at 5 (Dkt No. 1330)) and nine additional cases before this Court, as well as two cases
14 filed in other state courts that seek essentially the same injunction as that sought by Plaintiff.
15 Those cases were for the most part filed before Plaintiff’s and at least some of them have active
16 claims for monetary relief that survived motions to dismiss. As the Supreme Court noted, “the
17 fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no
18 more effective than one.” *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972); *see also*
19 *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986). There is no equitable
20 reason to allow Plaintiff to pursue a duplicative claim for injunction.

21 “[D]uplicative litigation is heavily disfavored.” *VFD Consulting, Inc. v. 21st Servs. No. C*
22 *04-2161 SBA*, 2005 WL 1115870, at *8 (N.D. Cal. May 11, 2005). Plaintiff requests that the
23 Court “enjoin and restrain, pursuant to federal and state law, Defendants...from continuing to
24 engage in any anticompetitive conduct and from adopting in the future any practice, plan,
25 program, or device having a similar purpose or effect to the anticompetitive actions set forth
26 above.” Am. Compl. ¶156(d). Other outstanding cases request similar injunctive relief sought
27 by Plaintiff. For instance, the Indirect Purchaser Plaintiff class complaint requests that
28 “Defendants...be permanently enjoined and restrained from, in any manner, directly or

1 indirectly, continuing, maintaining or renewing the combinations, conspiracy, agreement,
2 understanding or concert of action, or adopting or following any practice, plan, program or
3 design having a similar purpose or effect in restraining competition.” Indirect Purchaser
4 Plaintiffs’ Third Consolidated Amended Complaint at 94, *In re Cathode Ray Tube (CRT)*
5 *Antitrust Litig.*, No. 07-05944 (Dkt. No. 827) (N.D. Cal. December 11, 2010) (Everett Decl. Ex.,
6 18). *See also*, Direct Purchaser Plaintiffs’ Amended Complaint at 48, *In re Cathode Ray Tube*
7 *(CRT) Antitrust Litig.*, No. 07-05944 (Dkt. No. 436) (N.D. Cal. March 16, 2009) (Everett Decl.,
8 at 19) (“Defendants...be permanently enjoined and restrained from continuing and maintaining
9 the combination, conspiracy, or agreement alleged herein.”).

10 Plaintiff’s belated attempt to join the action merely wastes judicial resources, encourages
11 duplicative litigation and promotes piecemeal resolution of issues that require a uniform
12 outcome. Not unlike the rationale employed by courts in “first-to-file” situations, dismissing
13 Plaintiff’s claims for injunctive relief, which have been separately and earlier alleged by other
14 plaintiffs, would promote judicial efficiency. *See, e.g., Colorado River Water Conservation*
15 *Dist. v. United States*, 424 U.S. 800, 817 (1976) (“though no precise rule has evolved, the
16 general principle is to avoid duplicative litigation”); *see also Barapind v. Reno*, 225 F.3d 1100,
17 1109 (9th Cir. 2000).

18 DATED: October 4, 2012

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