No. 11-16188

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AT&T MOBILITY LLC, et al.,

Plaintiffs and Appellants,

vs.

AU OPTRONICS CORPORATION, et al.,

Defendants and Appellees.

On Appeal From The United States District
Court For The Northern District Of California
Hon. Susan Illston
Case No. C 09-04997

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INTRODUCTION AND SUMMARY

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), the Supreme Court held that a forum state may apply its own substantive law to a plaintiff's claims without violating the federal due process clause so long as the 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." *Shutts*, 472 U.S. at 818 (quoting *Allstate*, 449 U.S. at 312-13). In sharp contrast to these holdings, the district court ruled that a forum state may *not* apply its own law to claims arising out of a price-fixing conspiracy—even one carried out within its borders—*unless* each plaintiff purchased the price-fixed goods within the state. Relying largely on two district court opinions, Defendants defend that ruling, arguing that "[o]nly where . . . significant contacts are shown to exist between the state, the parties, *and* the occurrence or transaction out of which *each* Plaintiff's claim arises, may the law of that state be constitutionally applied." Ans. Br. at 9 (emphasis in original). Defendants then argue that "in a price-fixing case, the relevant occurrence or transaction giving rise to a plaintiff's claim is the purchase of an allegedly price-fixed good." Id. at 9-10 (internal quotations omitted).

This rigid test mandating application of the law of the state where the purchase was made is inconsistent with *Shutts* and *Allstate* and the vast majority of

cases interpreting them, which mandate an inquiry into all contacts between the forum state, the parties and the claims, and an assessment of the forum's corresponding interests. In conducting that analysis, the Supreme Court and lower courts including this Court have considered a variety of factors, including the parties' principal places of business and states of incorporation; whether the defendant could reasonably anticipate that forum law would apply; whether a substantial portion of the defendant's wrongful conduct giving rise to the claim was carried out within the state; and the forum state's interests in applying its law. Defendants' rigid position cannot be reconciled with this controlling body of authority. *See* Part I(A), *infra*.

Here, there are numerous significant contacts between California and the parties and their claims, giving rise to state interests, such that the application of California law to Plaintiffs' claims would be neither arbitrary nor fundamentally unfair. Contrary to the deferential standard governing this Court's review of Plaintiffs' factual allegations on this appeal, Defendants ignore or downplay many of these contacts. In particular, many of the defendants are incorporated or have their principal places of business in California, or acted through California sales agents, and therefore reasonably should have anticipated that forum law would apply to their price-fixing conduct; Defendants engaged in substantial unlawful conduct within California in furtherance of their illegal conspiracy, including entering into the unlawful price-fixing conspiracy in California and attending

meetings or exchanging communications in California in which price and other information was unlawfully disseminated; price-fixed goods were sold to California residents; and a number of Plaintiffs did business in California or had other significant contacts with the state. Indeed, several Defendants that pled guilty to criminal price-fixing charges admitted that "[a]cts in furtherance of this conspiracy were carried out within the Northern District of California." *See* Part I(B)(1), *infra*.

Under the circumstances, California has significant interests in applying its antitrust law here which comport with due process, including its interests in regulating corporations that do business, are incorporated or have their principal places of business in the state, or act through such companies, and in preventing and remedying anticompetitive conduct that occurs within the state. Defendants, who denigrate California appellate decisions affirming the state's substantial interests in applying its laws to non-residents in appropriate circumstances as "self-serving statements" (Ans. Br. at 37), improperly ask this Court to ignore those very real interests. *See* Part I(B)(2), *infra*.

Defendants' one-sided portrayal of the broader implications of the issue presented in this case is unpersuasive. Contrary to Defendants' position, Plaintiffs' suit is not an example of improper forum-shopping or an attempt "to evade the laws that properly apply to [Plaintiffs'] claims." Ans. Br. at 9. Plaintiffs sued Defendants in the same forum where the United States prosecuted them and where

many have pled guilty to criminal price-fixing, and Plaintiffs have sought to apply the forum state's law. This is not "forum shopping."

In any event, applying California law to a price-fixing conspiracy among companies that do business, maintain offices, or are headquartered in California and that took place in part in California, would advance a myriad of important policies underlying the Cartwright Act. These include maximizing deterrence of anticompetitive conduct, protecting both intra- and interstate competition, ensuring that consumers who are injured by such a conspiracy are fully compensated, and preventing co-conspirators who have violated the antitrust laws from retaining the ill-gotten gains of their illegal conduct. *See* Part I(C), *infra*.

Defendants' argument that the State of California lacks any legitimate interest in preventing and remedying anticompetitive conduct in California because the states in which the price-fixed sales occurred have a "more direct" interest in applying their laws to those sales conflates the due process test with the distinct inquiry into conflict of laws. Due process does not mandate selection of the state with the "most significant" interest in the underlying dispute. Due process requires only that the forum state have significant contacts to the parties and the claims, even if other states may also have such contacts. *See* Part I(D), *infra*.

Finally, Defendants suggest that rather than deciding the issue certified to it by the district court, this Court should resolve this interlocutory appeal on one of two alternative grounds—that the Commerce Clause prevents the application of

California law where a purchase was made outside the state, and that under choice-of-law principles California law would not apply. However, Defendants did not raise those arguments below, and the district court did not address them. In any event, Defendants' new arguments are not meritorious. *See* Part II, *infra*.

ARGUMENT

I. APPLICATION OF CALIFORNIA LAW TO A NATIONWIDE PRICE-FIXING CONSPIRACY BY DEFENDANTS THAT ENGAGED IN SUBSTANTIAL UNLAWFUL CONDUCT IN CALIFORNIA IS CONSISTENT WITH DUE PROCESS.

Defendants effectively contend that notwithstanding other contacts between California, the parties and the claims, the Due Process Clause prohibits application of any state law other than that of the state where the plaintiff made the particular purchase giving rise to the claim. *See* Ans. Br. at 13 ("the law of the state in which the allegedly price-fixed product is purchased must be applied to satisfy due process"). However, that inflexible single-factor test is inconsistent with the "significant aggregation of contacts" test mandated by *Allstate* and *Shutts*.

A. The District Court's Inflexible Single-Factor Test Is Inconsistent With Controlling Precedent, Which Mandates Examination Of A "Significant Aggregation Of Contacts, Creating State Interests."

The Due Process Clause permits application of forum law to a plaintiff's claims so long as there is "a significant contact or significant aggregation of

contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Shutts*, 472 U.S. at 818 (quoting *Allstate*, 449 U.S. at 312-13). *See* Op. Br. 16-22. Contrary to Defendants' position, that test does not focus myopically on a single dispositive factor, but instead mandates a wide-ranging inquiry into a variety of contacts that may exist between the state and the parties and the claims. Defendants' one-size-fits-all test, in contrast, would inflexibly impose the same place-of-purchase rule in every antitrust case in which a nonresident plaintiff seeks to invoke forum law, regardless of the other contacts with the forum. That approach is inconsistent with the individualized, case-by-case assessment of significant contacts that even Defendants concede is mandated by *Allstate* and *Shutts*. *See* Ans. Br. at 11 (acknowledging that *Shutts* mandates "an individualized evaluation of the specific transactions giving rise to each plaintiff's claim").

Although Defendants acknowledge that *Allstate* and *Shutts* are controlling and assert that the district court's order is "consistent" with those cases (*id.* at 12-14), they never attempt to explain how the district court's place-of-purchase rule can be reconciled with *Allstate*'s holding. It cannot. In *Allstate*, the Supreme Court held that the Due Process Clause did not bar the Minnesota courts' application of forum law to a car accident, even though the accident took place in Wisconsin, the decedent insured resided in that state, and the insurance policy was delivered there. Thus, if the Court had applied Defendants' "location of the

transaction or occurrence" test, it would have concluded that Minnesota could not constitutionally apply its law, since the insured neither resided in nor was injured in the forum state. Whether one views the "transaction or occurrence" as the issuance of the policy or the site of the accident, neither happened in Minnesota. The plurality of the Court, however, found that Minnesota's contacts with the parties and the occurrence were "obviously significant." *Id.*

In particular, the Court found that Minnesota had three contacts with the parties and the occurrence giving rise to the litigation that, in the aggregate, permitted the application of Minnesota law. *First*, although the insured was a Wisconsin resident, he had been employed in Minnesota and commuted to work there, and Minnesota had an "important" interest in protecting its work force, including nonresident employees. *Id.* at 313-14. *Second*, Allstate "was at all times present and doing business in Minnesota." *Id.* at 317 (footnote omitted). As such, the Court emphasized, it "can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved." *Id.* Particularly because it was licensed to do business in the forum, "it must have known it might be sued there, and that [the forum] courts would feel bound by [forum] law." *Id.* at 318 (footnote, citation and internal quotations omitted). *Third*, the insured's spouse became a bona fide Minnesota resident prior to institution of the litigation. *Id.* at 318-19. Her post-occurrence change of residence to the forum state, and her status as the personal

representative of her late husband's estate, gave Minnesota an interest in her recovery. *Id.* at 319.

Thus, *Allstate* squarely holds that whether a forum state's choice of its own law satisfies due process does not turn on the presence or absence of any particular contact between the forum state and the parties and the occurrence giving rise to the litigation, such as the location of the accident or the place of the purchase, but rather on whether there is a "significant aggregation of contacts." The same is true of the lower court decisions cited in our opening brief, none of which concluded that any single factor was dispositive. *See* Op. Br. at 19-22. For example, in *Sullivan v. Oracle Corp.*, 547 F.3d 1177, 1186 (9th Cir. 2008), *opinion withdrawn on other grounds*, 557 F.3d 979 (9th Cir. 2009), this Court held that the contacts creating California interests were "clearly sufficient" to permit the application of California law to an overtime claim by a putative class of nonresidents where the defendant employer had its headquarters and principal place of business in California, the decision to classify plaintiffs and to deny them overtime pay was made in California, and the work in question was performed in California. *Id.* at 1186.[1] Other than two district court decisions, Defendants do not cite any case in

[1] *See also, e.g.*, *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 437-38 (4th Cir. 1999) (due process did not foreclose application of Kentucky electioneering laws to advertising expenditures made in West Virginia given "aggregate contacts" between West Virginia media companies and Kentucky and its interest in maintaining the integrity of its elections).

which a court found a single factor to be dispositive or imposed an inflexible test comparable to the district court's place-of-purchase rule.[2] Nor do Defendants make any effort to explain why price-fixing cases—alone among all types of litigation—should warrant adoption of a unique due process test for choice of forum law.[3]

Here, like cases applying the outmoded *lex loci delicti* doctrine,[4] Defendants' (and the district court's) approach gives a single contact—the purchase of the goods outside California—"controlling constitutional significance, even though there might have been contacts with another State . . . which would make application of its law neither unfair nor unexpected." *Allstate*, 449 U.S. at 308 n.11. On that ground alone, the district court's ruling should be reversed.

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[2] *In re St. Jude Medical, Inc.*, 425 F.3d 1116 (8th Cir. 2005) held only that the district court had erred in concluding that it need not conduct a due process analysis of the contacts between Minnesota and each class member's claims because Minnesota's consumer protection statutes confer standing on out-of-state plaintiffs. *Id.* at 1120-21. Here, likewise, the district court erred in failing to analyze the contacts between California and Plaintiffs' claims.

[3] Defendants' complaint that "most of Plaintiffs' cases are not antitrust cases and none involved price-fixing at all" (Ans. Br. at 21 n.9; *see also id.* at 34 (same)) is beside the point. The governing due process principles do not vary depending on the substantive area of law involved.

[4] As the plurality explained in *Allstate*, that "wooden" doctrine has been "largely abandoned." 449 U.S. at 316 n.22; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 708 (2004). The district court's single-factor due process test is inconsistent with that development. *See Pecover v. Electronic Arts Inc.*, 2010 U.S. Dist. LEXIS 140632 at *49-50 (N.D. Cal. Dec. 21, 2010) (observing that courts "have moved away from the view that the location of the event is controlling," and that courts "therefore consider several different factors in addition to the location of the sale in determining whether due process is satisfied.").

B. Application Of California Law In This Case Would Be Neither Arbitrary Nor Fundamentally Unfair Because There Are Multiple Contacts Giving Rise To State Interests.

Here, the "modest restrictions" imposed by the Due Process Clause on the application of California law to Plaintiffs' claims (*Shutts*, 472 U.S. at 818) are readily satisfied because there are multiple contacts between California, the parties and the claims giving rise to significant state interests. Foremost among those is California's compelling interest in preventing and remedying illegal conduct within its borders.

1. Defendants Ignore Or Downplay California's Significant Contacts With The Parties And The Claims.

Defendants' brief discussion of California's contacts with the parties and the price-fixing conspiracy giving rise to the litigation (Ans. Br. at 29-32) gives short shrift to those contacts and their significance.[5] The contacts in question are far more numerous and substantial than those the *Allstate* plurality found to be "obviously significant." 449 U.S. at 311. They fall into four principal categories.

[5] Defendants' one-sided and incomplete discussion of Plaintiffs' factual allegations (Ans. Br. at 4-7) ignores the detailed factual allegations summarized in our opening brief (Op. Br. at 4-12), and is inconsistent with the governing standard of review on this appeal, which requires this Court to "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 905 (9th Cir. 2010) (citation omitted).

First, a number of the Defendants are incorporated or have their principal places of business in California, making them citizens of the state.[6] In particular, the Second Amended Complaint names 24 defendants, broken into nine groups of corporate affiliates. Named defendants in nearly all of those groups have their principal places of business or corporate headquarters in California. *See* Op. Br. at 5-6.

Second, other named defendants are alleged to have "used California corporations with principal places of business in Long Beach, California . . . as their sales agents in the United States for LCD Products containing LCD Panels which were affected by the conspiracy." ER 614 ¶ 8. Other Defendants also maintained offices and operations in California during the Conspiracy Period. ER 614 ¶ 8. All Defendants are alleged to have engaged in and implemented their conspiracy through the offices they maintained in California, which were "the means through which [Defendants] implemented their conspiracy in the United States." ER 614 ¶¶ 8, 9. Finally, each Defendant "conducts substantial business in the state of California." ER 617 ¶ 17.[7]

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[6] Under 28 U.S.C. § 1332(c)(1), for purposes of diversity jurisdiction, a corporation is deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. *Hertz Corp. v. Friend*, 130 U.S. 1181, 1184 (2010).

[7] Defendants' contention that the Court should disregard certain of these allegations as "conclusory" (Ans. Br. at 30 n.14) lacks merit. As this Court recently observed,

> It is true that the court need not accept as true conclusory allegations, nor make unwarranted deductions or unreasonable inferences. But so long as

(continued…)

As such, all Defendants reasonably could expect California law to be applied in litigation in which they were involved. *Allstate*, 449 U.S. at 317. Indeed, under *Allstate*, the fact that the defendant does business in a state is a key factor in the due process analysis:

> Allstate was at all times present and doing business in Minnesota. By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved.

449 U.S. at 317-18 (citations and footnote omitted); *see also, e.g., Mooney v. Allianz Life Ins. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) ("As a Minnesota corporation, Allianz can not claim surprise by the application of Minnesota law to conduct emanating from Minnesota, since Minnesota has a 'substantial interest in policing the conduct of its corporations so as to prevent the corporate form from becoming a shield for unfair business dealing'") (citation omitted).

Third, and more broadly, Defendants engaged in substantial unlawful conduct in California in furtherance of the illegal conspiracy. As six Defendants expressly admitted in criminal plea agreements, Defendants implemented their

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(continued…)

> the plaintiff alleges facts to support a theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceedings when the plaintiff's case can be rejected on evidentiary grounds. *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008).

That none of the Defendants ever moved to dismiss for lack of personal jurisdiction lends further credence to Plaintiffs' allegation that they conduct substantial business in California.

unlawful conspiracy through unlawful acts in California, as well as selling products affected by the conspiracy within the state. *See* Op. Br. at 5, 7. In particular, the Second Amended Complaint contains detailed factual allegations regarding Defendants' unlawful conduct in California, including that named employees of specific Defendants met and agreed to fix prices, exchanged information concerning production and capacity in order to fix prices at bilateral and multi-lateral meetings held in California, and held other such communications in California. *See id.* at 8-11. "Defendants' California offices were thus the means through which they implemented their conspiracy in the United States" (ER 614 ¶ 9); indeed, their conspiratorial conduct in the United States was "centered in California." ER 618 ¶ 4.

Fourth, California also has significant contacts with Plaintiffs and their claims. During the Conspiracy Period, many of the Plaintiff AT&T entities conducted a substantial amount of business in California, including selling mobile wireless handsets containing price-fixed LCD Panels to independent agents, retailers, and customers (including consumers, businesses and government customers) at corporate-owned retail stores in California; maintaining in California inventories of mobile wireless handsets containing Defendants' LCD Panels; and operating offices and retail stores in California. *See* Op. Br. at 11-12. And one plaintiff, Pacific Bell Telephone Company, is a California corporation that maintained its headquarters in San Francisco for nearly 100 years. "[E]very state

has an interest in having its law applied to its resident claimants." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001). Just as Minnesota had a significant interest in protecting the rights of the insured in *Allstate* even though his injury took place in Wisconsin, so too here California has a significant interest in Plaintiffs' rights to recover even though they purchased some of the price-fixed goods outside the state's borders.

2. Defendants Improperly Denigrate California's Significant Interests In Applying Its Law To A Price-Fixing Conspiracy Carried Out In Substantial Part In California.

Defendants categorically insist that California lacks any legitimate interest in applying its law to a price-fixing conspiracy carried out in substantial part within the state's own borders unless the price-fixed goods were purchased in California. Ans. Br. at 24 ("There is simply no legitimate interest under a state's antitrust laws in protecting consumers who made purchases in other states"); *see also id.* at 17-18. In the context of this conspiracy, however, that extreme contention is illogical and conflicts with California law, which is squarely to the contrary. Defendants' denigration of that authority as "self-serving" (Ans. Br. at 37), and their invitation to this Court to disregard it, is improper. Contrary to Defendants' contention, California unquestionably has legitimate interests in applying its own forum law to prevent and remedy illegal conduct that occurs in California, even if it comprises part of a larger conspiracy.

Most narrowly, California undoubtedly has a significant interest in regulating the behavior of companies that are incorporated in California or have their principal places of business in the state. *See Allstate*, 449 U.S. at 318; *People ex rel. DuFauchard v. U.S. Financial Management, Inc.*, 169 Cal. App. 4th 1502, 1521 (2009) (California has sufficient contacts with California corporation with principal place of business in San Diego to constitutionally apply California law to its activities). At a minimum, therefore, the Court should reverse the district court's order and remand for application of the proper due process standard with directions to deny those Defendants' motion to dismiss.

California also has a significant interest in regulating the conduct of out-of-state corporations that do business within the state's borders and doncut part of an unlawful conspiracy within the state's borders. As the California Supreme Court has recognized, "an out-of-state company that does business in another state is required, at least as a general matter, to comply with the laws of a state and locality in which it has chosen to do business." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 126 (2006). Such companies reasonably can expect to be held accountable under California law for unlawful conduct within the state, even if it causes injury in other states:

> [A] state generally does not exceed its constitutional authority when it applies its law in such a setting, even if the law may implicate some action or failure to act that occurs outside the state.

Id. at 105. If out-of-state companies that do business in California could avoid state laws such as the Cartwright Act solely because some of their unlawful activities caused some of the injury outside the state, the failure to apply California law "seriously would undermine the objective and purpose of the statute." *Id.* at 126; *see also McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 92 (2010) (a state's interest in having its law "applied to the activities of out-of-state companies within the jurisdiction is equal to its interest in the application of the law to comparable activities engaged in by local businesses situated within the jurisdiction").

Finally, and most broadly, California has a significant interest in deterring illegal conduct that takes place within its borders, even if the companies engaging in the illegal conduct are not headquartered within the state and their conduct injures persons both inside and outside the state's borders. As the California Attorney General has shown persuasively as *amicus curiae* in this Court, the California appellate courts consistently have reached the same conclusion, holding that due process does not preclude nonresident plaintiffs from asserting claims under California law if their claims arise out of unlawful conduct that occurred in California. *See, e.g., Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987) (due process allows applying California law to claims by nationwide class, including nonresident plaintiffs, because "California may have an important interest in applying its law to punish and deter the alleged wrongful conduct"); *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999) (non-

California residents properly could assert claims under California law for alleged unlawful conduct that occurred in California); *cf. Diamond Multimedia Sys. v. Superior Court*, 19 Cal. 4th 1036, 1063 (1999) (recognizing that California has a "clear and substantial interest in preventing fraudulent practices in this state which may have an effect both in California and throughout the country.").

Many other cases support the same conclusion. As discussed in our opening brief (Op. Br. at 19-22, 26-27), numerous courts have concluded that where a defendant engages in substantial unlawful conduct within a state, such conduct amply justifies the application of the forum state's laws to claims arising from the defendant's conduct, even if the conduct injured parties outside the state. *See, e.g.*, *Pecover*, 2010 U.S. Dist. LEXIS at *51-52 (application of California law to antitrust and other claims by nationwide class of indirect purchasers did not offend due process, although most products were sold outside California, where defendant's headquarters were located in California and anticompetitive conduct took place there);[8] *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 340 (N.D. Cal. 2010) (applying California law to nationwide class action satisfied due process although most of the defendant's products were sold outside California

[8] Defendants urge the Court to disregard this decision. Ans. Br. at 10 n.3, 17 n.6. As Defendants acknowledge, however, it is one of only three decisions, all by district courts, squarely to address the specific issue before the Court. *Id.* at 10. Of the three, *Pecover* is the most recent and contains the most comprehensive and thoughtful discussion. Notably, Defendants relied below on an earlier decision in the same case. *See* Op. Br. at 34 (discussing *Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976 (N.D. Cal. 2009)); SER 13.

because "[p]laintiffs have shown that a significant portion of [d]efendants' alleged harmful conduct emanated from California"); *Sound Appraisal v. Wells Fargo Bank, NA*, 717 F. Supp. 2d 940 (N.D. Cal. 2010) (due process did not prevent application of California law to Iowa company with principal place of business in Minnesota, although plaintiffs suffered injuries in Washington and Colorado, where alleged conspiracy was "planned and implemented in California and . . . many of the wrongful acts emanated from" offices in California).

Defendants insist that each of those cases is distinguishable because they involved "parties and conduct that had far more significant relationships with forum states than those alleged here." Ans. Br. at 34, 36 n.15. However, every one of these cases is inconsistent with the place-of-purchase rule the district court adopted, since each of them found that other contacts were sufficient to apply forum law even if most or all of the purchases or injuries occurred outside the state. Moreover, as discussed above, Defendants give short shrift to the detailed factual allegations regarding their extensive contacts with California.

C. Application Of California Law To A Multi-State Price-Fixing Conspiracy Would Advance Important Policies Underlying The Cartwright Act, Including Deterring Violations, Protecting Competition, And Ensuring Disgorgement Of Ill-Gotten Gains.

Defendants contend that "[t]he Cartwright Act's plain language supports the district court's determination that the location of the purchase is paramount," and

that application of California law here would not advance the policies underlying that Act. Ans. Br. at 24-25. Defendants are wrong on both counts.

First, nothing in the language of the Cartwright Act supports Defendants' position that only a plaintiff who purchased goods in California may sue under the Act. Defendants stress the Act's enforcement provision, which provides that an action "may be brought by any person *who is injured* in his or her business or property by reason of anything forbidden or declared unlawful in this chapter . . ." CAL. BUS. & PROF. CODE § 16750(a) (emphasis added). Notably, however, the Legislature did *not* specify that the requisite injury must occur "in this State." Nor does any other provision of the Act support Defendants' contention that the purchase or sale must occur in California to give rise to a claim. In fact, the plain language of the Cartwright Act supports exactly the opposite conclusion. The Act makes it illegal to fix the price of "any article or commodity of merchandise, produce or commerce intended for sale, *barter, use or consumption* in this State." *Id.* § 16720(d) (emphasis added). If Defendants were correct that the sale of the price-fixed product must be in California to violate the Act, the italicized words would be rendered meaningless, which would violate accepted canons of statutory construction. *E.g., People v. Arias*, 45 Cal. 4th 169, 180 (2008) (referring to "the fundamental rule of statutory construction" that significance should be given, if possible, to every word of an act).

Defendants rely on a recital in the original 1907 subtitle of the Cartwright Act stating that it was intended "to promote free competition in commerce and all classes of business *in this state*." Ans. Br. at 11, 25 (supplying emphasis), quoting *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 783 (2010) (quoting Stats.1907, ch. 530, p. 984). But even if that language were found in the statute itself, it could not limit the Act to intrastate transactions. In *Diamond Multimedia Systems*, the California Supreme Court squarely rejected a nearly identical argument, holding that although the Corporate Securities Law provides that it is unlawful "in this state" to engage in market manipulation, that statute cannot be read as providing a remedy "*only* for those who purchase stock in this state." 19 Cal. 4th at 1044-45. Rather, the law provides "a remedy for third parties whose sale or purchase of stock is affected by unlawful conduct in California," regardless of the location of the purchase or sale. *Id.* at 1048, 1056. Here, likewise, the Cartwright Act affords a remedy for anticompetitive conduct in California to "any person" who is injured by unlawful conduct in the state, without any limitation on such person's residence. *California v. Infineon Technologies AG*, 531 F. Supp. 2d 1124, 1135 (N.D. Cal. 2007) (BUS. & PROF. CODE § 16702 grants standing to sue to "all natural persons, corporations, firms, partnerships and associations—regardless of whether they are California residents or not"); *cf. Diamond Multimedia Sys.*, 19 Cal. 4th at 1052 (discussing "any person" language of Corporate Securities Law); *see also Norwest Mortgage, Inc.*, 72 Cal. App. 4th at 224-25 ("state statutory remedies may be invoked by out-

of-state parties when they are harmed by wrongful conduct occurring in California") (Unfair Competition Law).

Second, Defendants' suggestion that the purpose of the Cartwright Act is narrowly limited to protecting consumers who made purchases in California (Ans. Br. at 10-11, 23-25) cannot be reconciled with the Legislature's "overarching legislative goals" in enacting that Act. *Clayworth*, 49 Cal. 4th at 783. Those goals included "maximizing effective deterrence of violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds." *Id.* at 764. Each of those important interests would be furthered by applying the Act's prohibitions to an illegal price-fixing conspiracy carried out within the state which may have effects both in California and throughout the country. Conversely, the district court's narrow location-of-the-purchase rule would seriously undermine each of those interests: it would limit the state's ability to enforce its antitrust laws against illegal anticompetitive conduct in the state; it would disregard the inevitable spill-over effects of such conduct in other states and countries; and it would permit co-conspirators to retain the ill-gotten proceeds of their illegal conduct. Under the Cartwright Act, as in other areas, "the Legislature may reasonably conclude that California does have a legitimate interest in discouraging unlawful conduct that has a potential to harm California [consumers] as well as persons in other states." *Diamond Multimedia Sys.*, 19 Cal. 4th at 1063.

D. Defendants Conflate The Due Process Test With The Conflict Of Laws Analysis.

Defendants deny that California has a legitimate interest in preventing and remedying anticompetitive conduct that occurs in California if the injury occurs outside California because "[t]he states in which the allegedly price-fixed sales occurred have a far more significant and legitimate interest in having their laws applied to those transactions." Ans. Br. at 18; *see also id.* at 25 (arguing that "other States' interests are more direct"). However, that contention conflates the test for due process, which does not mandate selection of the singular state with the "more important" contacts or the greatest interest in the underlying dispute, with the application of the choice-of-law rules, which are not at issue here.

In light of the "modest check" placed on a forum state's power to apply its own laws by the Due Process Clause (*Allstate*, 449 U.S. at 332 (Powell, J., dissenting)),[9] more than one state can have sufficient contacts to apply its own law in a given case consistent with due process. As the Court observed in *Allstate*,

> Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.

[9] The dissenters in *Allstate* expressly agreed with the Court's articulation of "the basic principles that guide us in reviewing state choice-of-law decisions under the Constitution." 449 U.S. at 332 (Powell, J., dissenting); *see Shutts*, 472 U.S. at 818-10; Op. Br. at 17 n.7.

449 U.S. at 307 (plurality opinion) (citations omitted). "As a result, the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy." *Id.* at 308; *accord Shutts*, 472 U.S. at 823 ("We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in Allstate that in many situations a state court may be free to apply one of several choices of law"); *see also, e.g., Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997) (concluding that the substantive law of either Texas or Minnesota could constitutionally be applied because each state had significant contacts with the case).

The two district court decisions upon which Defendants rely reflect a similar confusion between the due process and choice of law inquiries. At most, those fact-specific decisions held only that the particular contacts alleged in those cases were insufficient to warrant application of California law or that the law of another state should apply under the applicable choice-of-law rules.

Thus, the district court in *In re Graphics Processing Units ("GPU") Antitrust Litig.*, 527 F. Supp. 2d 1011 (N.D. Cal. 2007) struck plaintiffs' allegations relating to a nationwide class under the Cartwright Act, finding that "plaintiffs have not pleaded or otherwise shown sufficient contacts to warrant the

application of California law to other states." *Id.* at 1028.[10] The court went on to observe, following the second decision upon which Defendants rely, that "*[e]ven where substantial contacts to the forum state have been pled*, courts have declined to apply a single state's laws to a nationwide antitrust class." *Id.* (emphasis added), citing *In re Relafen Antitrust Litig.*, 221 F.R.D. 260 (D. Mass. 2004).

As the emphasized language indicates, *Relafen* found there were substantial contacts with the forum state, Pennsylvania. *See id.* at 276-77 ("Clearly, Pennsylvania has a substantial connection to [defendant] SmithKline and some, though not all, of its alleged conduct").[11] However, it decided that because the sales at issue did not involve SmithKline or its Pennsylvania location, but instead took place outside Pennsylvania between out-of-state direct purchasers and out-of-state end payors (indirect purchasers), "the more significant contact" was "the location of the injury—that is, the location of the sales to the end payor plaintiffs." *Id.* at 277. That ruling was consistent with Pennsylvania's choice-of-law rule, which requires application of "the law of the state with the greatest interest in the litigation." *St. Paul Fire and Marine Ins. Co. v. Lewis*, 935 F.2d 1428, 1431 n.3

[10] Despite Defendants' denial (Ans. Br. at 16 n.5), the court's reasoning was based on the inadequacy of plaintiffs' factual allegations. *See* 527 F. Supp. 2d at 1028 (observing that plaintiffs did not allege "that the alleged secret meetings took place in California," and "have never alleged the specific locations of any of the meetings between defendants").

[11] Thus, contrary to Defendants' contention (Ans. Br. 15 n.4), the court did not squarely hold that application of Pennsylvania law to claims based on out-of-state purchases would violate due process. *See* 221 F.R.D. at 277.

(3d Cir. 1991). Again, however, under due process the issue is *not* whether another state has the "greatest" or a "more significant" interest, but only whether California has a sufficiently significant aggregation of contacts that application of its law would be neither arbitrary nor fundamentally unfair.

II. DEFENDANTS IMPROPERLY REQUEST THIS COURT TO RESOLVE ISSUES DEFENDANTS DID NOT RAISE AND THE DISTRICT COURT DID NOT DECIDE.

Defendants briefly suggest that rather than decide the question this Court agreed to answer when it granted Plaintiffs' Section 1292(b) petition, this Court instead should resolve this appeal on either of two alternative grounds: that the Commerce Clause precludes California from applying its law to out-of-state purchases (Ans. Br. at 18-19 & n.8); or that California law should not apply "under traditional choice-of-law principles." *Id.* at 28. However, Defendants did not raise either of those issues in the district court, nor did the district court rule on those issues.

A federal appellate court generally will not consider an issue that was not passed upon in the proceedings below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see In re Mercury Interactive Corp. Secs. Litig.*, 681 F.3d 988, 992 (9th Cir. 2010) ("We apply a general rule against entertaining arguments on appeal that were not presented or developed before the district court. Although no bright line rule exists to determine whether a matter has been properly raised below, an issue will generally be deemed waived on appeal if the argument was not raised

sufficiently for the trial court to rule on it.") (citations and internal quotations omitted); *see also, e.g., Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1235 (9th Cir. 2010) ("Because Black Star Farms did not raise this issue before the district court, we decline to address it here"). Moreover, where, as here, a party to an interlocutory appeal "makes no attempt to argue that the additional issues" it seeks to raise "would independently merit interlocutory review," such failure further counsels against this Court deciding them in the first instance. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688-90 (9th Cir. 2011) (declining plaintiff-appellee's request to "extend our review beyond the issues certified").

For these reasons, this Court should summarily decline Defendants' invitation to reach out to decide issues that are not properly before it. In any event, Defendants' discussion of both issues lacks merit.

First, Defendants' suggestion that the Commerce Clause prevents California from applying its law to Plaintiffs' purchases occurring outside of California (Ans. Br. at 18-19 & n.8) is simply wrong. The authorities Defendants cite for that proposition hold, at most, that "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place *wholly* outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (emphasis added). Where, however, as here, defendants' unlawful conduct does *not* take place wholly outside of the state's borders, but rather occurs in substantial part *within* the forum state, the

Commerce Clause does not present any obstacle to applying state law. Indeed, this Court has squarely so held, in a decision that Defendants do not mention. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-94 (9th Cir. 2000) (where defendants' unlawful conduct took place both in Wisconsin and in California, "California may apply its antitrust and unfair competition statutes consistent with the Commerce Clause") (footnote omitted).[12]

Second, Defendants' brief choice-of-law argument is equally ill-founded.[13] Defendants assert that the district court's decision is appropriate "under traditional choice-of-law principles" because Plaintiffs supposedly fail to show that "California has a greater interest in pursuing remedies for out-of-state purchases, when compared to the states in which the purchases occurred. . . . ." Ans. Br. at 28. However, California courts have squarely rejected the argument. *E.g.*, *Clothesrigger, Inc.*, 191 Cal. App. 3d at 616. Thus, even if Defendants had not raised the issue for the first time on appeal, it cannot provide a basis for affirming the district court's order.

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[12] *See also RLH Industries v. SBC Communic'ns*, 133 Cal. App. 4th 1277, 1281-82 (2005) ("We conclude the commerce clause does *not* bar application of California antitrust law to out-of-state anti-competitive conduct that causes injury in California"); *see generally* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 401 (1983) ("the commerce clause does not limit substantially a state's power to apply its antitrust law to an out of state price-fixing conspiracy") (footnote omitted).

[13] Defendants never disputed below that the Cartwright Act would apply under California's choice-of-law rules. One could have expected Defendants to have made a choice-of-law argument below if that argument had merit rather than arguing that the application of California law would be unconstitutional.

CONCLUSION

For the foregoing reasons, the district court's order dismissing AT&T's claims in the Second Amended Complaint for violation of the Cartwright Act should be reversed.

Dated: November 22, 2011

CROWELL & MORING LLP

Respectfully submitted,

/s/Ethan P. Schulman

By _____

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Dated: November 22, 2011 CROWELL & MORING LLP

/s/Ethan P. Schulman

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