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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Case No. M-07-1827-SI MDL No. 1827
This Document Relates To Case No.: 09-4997 SI AT&T MOBILITY LLC; AT&T CORP.; AT&T SERVICES, INC.; BELLSOUTH TELECOMMUNICATIONS, INC.; PACIFIC BELL TELEPHONE COMPANY; AT&T OPERATIONS, INC.; AT&T DATACOMM, INC.; SOUTHWESTERN BELL TELEPHONE COMPANY, Plaintiffs, v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA, INC.; CHI MEI CORPORATION; CHI MEI OPTOELECTRONICS CORPORATION; CHI MEI OPTOELECTRONICS CORPORATION USA, INC.; CMO JAPAN CO. LTD.; NEXGEN MEDIATECH, INC.; CHUNGHWA PICTURE TUBES LTD.; TATUNG COMPANY OF AMERICA, INC.; HANNSTAR DISPLAY CORPORATION; LG DISPLAY CO. LTD.; LG DISPLAY AMERICA, INC.; SAMSUNG ELECTRONICS CO., LTD.; SAMSUNG	**JOINT OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY UNDER 28 U.S.C. 1292(B)** Date: February 17, 2010 Time: 9:00 A.M. Place: Courtroom 10, 19th Floor Judge: The Hon. Susan Illston

SEMICONDUCTOR, INC.; SAMSUNG ELECTRONICS AMERICA, INC.; SHARP CORPORATION; SHARP ELECTRONICS CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; TOSHIBA MOBILE DISPLAY CO., LTD.; TOSHIBA AMERICA INFORMATION SYSTEMS, INC.; EPSON IMAGING DEVICES CORPORATION; EPSON ELECTRONICS AMERICA, INC.,

Defendants.

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I. INTRODUCTION

Plaintiffs seek certification for appellate review of this Court's November 12, 2010 order ("November 12 Order") dismissing certain state law claims alleged in Plaintiffs' Second Amended Complaint ("SAC"). Specifically dismissed were claims under the laws of those states, including those alleged under California law, in which specific Plaintiffs were not alleged to have purchased products in those states. *See* November 12 Order, Doc. No. 2142.[1] The Court's November 12 Order followed its earlier Order, rendered on June 28, 2010 ("June 28 Order"), which likewise dismissed state law claims of certain Plaintiffs who did not purchase products with allegedly price-fixed LCD panels in those states. *See* June 28 Order, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2010 WL 2609434 (N.D. Cal. June 28, 2010) (Doc. No. 1822).

Plaintiffs' instant motion asserts that the November 12 Order presents a controlling question of law: Does applying California law to claims against Defendants, who are subject to suit in California, based on conduct occurring in part in California, violate the Due Process Clause of the United States Constitution. *See* Plaintiffs' Notice of Motion and Motion to Certify Under 28 U.S.C. 1292(b) and Memorandum of Points and Authorities In Support Thereof at 1 ("Pl.'s Br."), Doc. No. 2310.

Plaintiffs' motion should be denied, for several reasons.

First, it is untimely. Plaintiffs' unexplained two-month delay in moving for certification of the November 12 Order, standing alone, is sufficient grounds to deny their motion. Denial is further compelled because Plaintiffs' delay was effectively nearly *seven* months, as Plaintiffs' motion essentially seeks review of this Court's June 28 Order dismissing Plaintiffs' state law claims alleged in their First Amended Complaint.

Second, Plaintiffs fail to demonstrate that the November 12 Order presents a controlling question of law. To meet this requirement, Plaintiffs must show, at a minimum, that the question

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[1] Unless otherwise noted, all docket numbers refer to *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Case No. 07-1827.

is one whose resolution on appeal could materially affect the eventual outcome of this litigation. Plaintiffs fail to do so.

Third, Plaintiffs fail to demonstrate, as they must, that there are substantial grounds for difference of opinion regarding the Court's November 12 Order (as well as its June 28 Order). To make this showing, Plaintiffs must demonstrate a lack of authority, or a split of authority, on the relevant issue — whether Due Process requires, in the context of a price-fixing case, that a plaintiff purchase the allegedly price-fixed product in the state whose laws it seeks to invoke. Here, there is no absence of authority or even a split of authority. To the contrary, each case that has addressed the relevant question in the context of a price-fixing case has agreed with the key legal ruling underlying this Court's November 12 and June 28 Orders. Moreover, most of the cases relied upon by Plaintiffs in this motion — none of which involved price fixing — were considered by this Court in connection with its prior Orders, and were found not to compel a different conclusion.

Fourth, Plaintiffs have failed to show that an immediate appeal may materially advance the ultimate termination of this litigation. Plaintiffs' assertions that an immediate appeal might narrow the relevant issues, or clarify the scope of relevant purchases, are unsupported. If anything, an appellate decision in Plaintiffs' favor would make this case more complex and expensive, not less.

II. BACKGROUND

1. The Motion to Dismiss Plaintiffs' First Amended Complaint.

On January 29, 2010, Plaintiffs filed their First Amended Complaint ("FAC"), which alleged a global price-fixing conspiracy by suppliers of LCD panels used in mobile wireless handsets, two-way radios, computer monitors, televisions and other electronic products, that resulted in Plaintiffs being overcharged for LCD products (products containing LCD panels). FAC at ¶¶ 1, 5, 6, Doc. No. 1504.

The FAC asserted claims on behalf of all the Plaintiffs under California's Cartwright Act and, "in the alternative," under California's Unfair Competition law, as well as under the

antitrust, consumer protection, unfair trade and deceptive practices laws of roughly twenty other states. FAC at ¶¶ 7, 9, 10, 189-213. The FAC did not allege that any Plaintiff purchased the allegedly price-fixed products in California, nor in any of the states whose laws the FAC invoked "in the alternative."

By its June 28 Order, this Court granted Defendants' motion to dismiss the FAC's state law claims. This Court held that to allege a state law claim consistent with Due Process, a plaintiff must allege "the contacts of the State, whose law [is to be] applied, with the parties *and* with the occurrence or transaction giving rise to the litigation." June 28 Order at *2 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981)). In price-fixing cases, the Court held, "the relevant 'occurrence or transaction' is the plaintiff's purchase of an allegedly price-fixed good." *Id*. Due Process, moreover, requires an individualized choice of law analysis for each plaintiff's claims. *Id.* at *3 (citing *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir.1996)). Thus, in a price-fixing case like this one, this Court ruled, a plaintiff may bring state law claims under the laws of only those states in which it bought allegedly price-fixed products. *Id*.

This Court accordingly dismissed with leave to replead all Plaintiffs' state law claims because Plaintiffs failed to allege that they bought the allegedly price-fixed products in the states whose laws Plaintiffs invoked. *Id*.

2. The Motion to Dismiss Plaintiffs' Second Amended Complaint.

On July 23, 2010, Plaintiffs filed their Second Amended Complaint for Damages and Injunctive Relief. The SAC sued under the laws of California and roughly twenty other states, no longer in the alternative. *See e.g.*, SAC at ¶¶ 12, 14, Doc. No. 1919. And while the SAC, unlike the FAC, alleged that Plaintiffs bought the relevant products in certain of the states whose laws were invoked, it brought claims on behalf of all Plaintiffs under the laws of all twenty states (including California), even states in which certain Plaintiffs were not alleged to have purchased any relevant products. *See e.g.*, SAC at ¶¶ 1, 2, 12, 14, 245(f).

On Defendants' motion, the Court dismissed all the state law claims asserted on behalf of Plaintiffs not alleged to have purchased relevant products in those states. November 12 Order at

3-4. Specifically, and most relevant to the instant motion, the Court rejected Plaintiffs' argument that they "may pursue all of their claims under California law because defendants' price-fixing conduct in California creates the significant contacts between California and plaintiffs' claims required by Due Process." *Id.* at 2-3. This Court stated that it had "rejected this same argument when ruling on defendants' motion to dismiss the first amended complaint, and for all of the reasons set forth in the June 28, 2010 order, the Court finds that only those plaintiffs who purchased products in California may allege claims under California law." *Id.* at 3.

III. ARGUMENT

The party seeking certification under 28 U.S.C. 1292(b) must move in a timely fashion. *Spears v. Wash. Mut. Bank FA*, 2010 WL 54755, at *1-2 (N.D. Cal. Jan. 8, 2010) ("*Spears*"). It must also demonstrate that (1) there is a controlling question of law, (2) there are substantial grounds for difference of opinion, and (3) an immediate appeal may materially advance the ultimate termination of the litigation. *In re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir. 1982).

Plaintiffs have failed to timely move for certification, and have failed to meet their burden of demonstrating any of the other requirements, much less all of them, for certification. Their motion should therefore be denied.

A. Plaintiffs' Motion is Untimely.

Section 1292(b) is designed to promote judicial efficiency, and thus "a district judge should not grant an inexcusably dilatory request" for certification. *Spears*, 2010 WL 54755, at *1-2 (quoting *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc*., 202 F.3d 957, 958 (7th Cir. 2000) (Posner, J.)).[2] Here, Plaintiffs' unexplained delay of two months from the Court's

[2] *See also Scholl v. United States*, 68 Fed. Cl. 58, 60 (2005) ("Unreasonable delay constitutes sufficient cause to deny a motion [for certification]…."); *Weir v. Propst*, 915 F.2d 283, 285-87 (7th Cir. 1990) (Posner, J.) (declining jurisdiction under 28 U.S.C. § 1292(b) due to defendants' "gratuitous" and "protracted" delay of five months in seeking certification); *In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 49 (S.D.N.Y. 2002) (denying request for certification due to "inexcusable or, at best, unexplained delay" of three months); *Ferraro v. Secretary of United States H.H.S.*, 780 F. Supp. 978-80 (E.D.N.Y. 1992) (denying request for certification due to plaintiff's unjustified delay of two and a half months).

November 12 Order alone is inexcusably dilatory. *Richardson Elecs*., 202 F.3d at 958 (an unexplained delay of two months is "inexcusably dilatory"). And its *actual* unexplained delay of almost seven months from the June 28 Order — which addressed the same legal issue that Plaintiffs argue is the controlling legal issue in the November 12 Order[3] — highlights Plaintiffs' inexcusable dilatory conduct, and compels denial of their motion.

Judge Whyte's decision in *Spears* supports this conclusion. There, the Court denied the defendants' motion to dismiss the plaintiffs' RESPA claim on March 9, 2009, but the defendants did not seek certification for an interlocutory appeal at that time. *Spears*, 2010 WL 54755, at *1-2. After the plaintiffs filed an amended complaint, the defendants again moved to dismiss, on substantially the same grounds as their earlier motion. *Id*. On August 30, 2009, the Court again denied defendants' motion, for largely the same reasons underlying its earlier denial. On November 13, 2009, defendants moved for certification under Section 1292(b). *Id.*

Judge Whyte denied the motion, finding that defendants' unexplained delay of two and a half months was inexcusably dilatory. *Id.* In so finding, the Court emphasized that the defendants could have, but did not, seek certification following the Court's March 9, 2009 order, which came to the same conclusion on the same relevant point of law. *Id.* ("EA has provided no reason for the two and a half month delay in seeking certification of the court's August 30, 2009 order denying EA's motion to dismiss plaintiffs' RESPA claim under § 2607(a) (eight months from the court's March 9, 2009 order).")

Much like the defendants in *Spears*, Plaintiffs here could have sought certification from the Court's June 28 Order, which came to the same conclusion on the same relevant point of law as in the November 12 Order. Plaintiffs failed to do so, with no explanation. Likewise, Plaintiffs offer no excuse for waiting two months since the Court's November 12 Order to file this motion.

The instant motion is therefore untimely and should be denied for this reason alone.

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[3] *See* November 12 Order at 2-3 (noting that the Court had addressed Plaintiffs' ability to sue under California law in its June 28 Order).

B. Plaintiffs Have Not Demonstrated That There is a Controlling Question of Law.

For purposes of Section 1292(b), a controlling question of law is one whose resolution on appeal would end the case, or at a minimum could "materially affect the eventual outcome of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d at 1026-27 (a question whose resolution on appeal "would not materially affect the outcome of this litigation, but only its duration" is not a controlling question of law); *see also United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (Section 1292(b) "was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit.").

Plaintiffs present no such controlling question of law here. Indeed, they do not even contend that resolution of the question for which they seek an immediate appeal — *i.e.*, whether all Plaintiffs may, consistent with Due Process, sue under California law — will end the lawsuit.

Nor do Plaintiffs demonstrate that resolution of this issue on appeal will "materially affect" this case's eventual outcome. Plaintiffs merely assert that, if they prevail on their requested appeal, they "will be permitted to seek damages under the Cartwright Act for all of their indirect purchases of LCD Products regardless of where those products were purchased," which they say will "have a substantial impact on the scope of Plaintiffs' claims in this case, as well as the legal standards governing Plaintiffs' recovery of damages on those claims." Pl.'s Br. at 4. But such conclusory speculation is not sufficient to satisfy the first element of Section 1292(b). *Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir. 1977) ("Section 1292(b) is not intended to grant the appellate courts power to give advice on speculative matters."); *Terry v. June*, 368 F. Supp. 2d 538, 540 (W.D. Va. 2005) (Section 1292(b) is not meant to resolve "issues which may or may not ultimately prove to affect the outcome of the case.").

Plaintiffs also fail to demonstrate *how* permitting each of them to sue under the Cartwright Act would impact the scope of their claims, or the legal standards governing their recovery of damages. Plaintiffs attempt to do so by asserting that a difference exists between

California law and that of the other twenty states under whose laws claims are alleged. Specifically, they contend that under *Clayworth v. Pfizer*, 49 Cal. 4th 758 (2010), "defendants cannot assert a pass-on defense under [California's] Cartwright Act," but that defendants *can* assert a pass-on defense under other states' laws. Pl's Br. at 10.

However, "[i]n instances where multiple levels of purchasers have sued, or where a risk remains they may sue . . . defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages." *Clayworth*, 49 Cal. 4th at 787. That is the case here:

- Cell phone manufacturers which purchased panels directly from defendants have asserted claims under the Cartwright Act. *See, e.g.*, Nokia Amended Complaint For Damages and Injunctive Relief at ¶ 216, Doc. No. 1922.
- AT&T Mobility purports to sue based on its purchase of wireless handsets that it resold to consumers, and purports to assert claims under the Cartwright Act. AT&T SAC at ¶¶ 234-35.
- Many U.S. retailers have asserted indirect purchaser claims under the Cartwright Act for their cell phone purchases. *See, e.g.*, Complaint For Damages and Injunctive Relief at ¶ 197, *Target Corp. et. al. v. AU Optronics et. al.*, Case No. 10-04945, Doc. No.1 (N.D. Cal. Nov. 1, 2010).
- California's Attorney General purports to sue under the Cartwright Act on behalf of consumers who purchased wireless handsets. *See* Complaint For Damages and Injunctive Relief at ¶¶ 2, 8, 10, *People of the State of California v. AU Optronics, et. al*, Case No. 10-05212, Doc. No. 1 (N.D. Cal. Nov. 17, 2010).

Plaintiffs, moreover, do not discuss whether and/or when the pass-on defense is available under the laws of the other states whose laws the SAC invokes.

But even if Plaintiffs could establish a difference between California law and the laws of these other states, their motion still presents no argument that a successful appeal will terminate this case, or even materially alter its outcome. And, in any event, the court will need to address the laws of California and 20 other state laws regardless of the outcome of any appeal.[4] If anything, Plaintiffs appeal will make the outcome of this case more uncertain. Moreover, the issue of which state's law should apply does not address the controlling question of whether

[4] Any argument by Plaintiffs that it would pursue claims only under California law are of no moment. It cannot amend its pleading by argument in connection with this motion. Fed. R. Civ. P. 15(a)(2).

permitting claims under California law would meet the requirements of Due Process, the answer to which is a definitive no. *See infra* Part III.C.

In such circumstances, Plaintiffs have failed to show a controlling question of law for purposes of Section 1292(b).

C. Plaintiffs Have Not Shown Substantial Grounds for Difference of Opinion.

The second requirement for certification under Section 1292(b) is a showing that there is a lack of authority, or a split of authority, on the relevant issue, *e.g.*, "a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits." *Wilton Miwok Rancheria v. Salazar*, 2010 WL 693420, at *12 (N.D. Cal. Feb. 23, 2010) (quoting *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)). A party's disagreement with a court's ruling is not sufficient. *See, e.g.*, *Spears*, 2010 WL 54755, at *2.[5]

Plaintiffs have failed to make the required showing, and they cannot. As briefed in connection with Defendants' motions to dismiss, and as relied on by this Court's June 28 Order, a number of cases — in this circuit and others — consistently and uniformly agree with this Court's conclusion: to satisfy Due Process a plaintiff may bring a state law price-fixing claim only under the laws of the state in which it purchased the allegedly price-fixed products. June 28 Order, at *2 (citing *Pecover v. Elecs. Arts Inc.*, 633 F. Supp. 2d 976, 984-85 (N.D. Cal. 2009) ("*Pecover*") (dismissing state law claims under Rule 12(b)(6) where complaint failed to allege plaintiffs purchased the products in those states); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007) (striking California state law claims under Rule 12(b)(6) where complaint failed to allege plaintiffs bought the relevant products in California); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 277 (D. Mass. 2004) (refusing to apply Pennsylvania law where plaintiff purchased the product at issue outside that state)).[6]

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[5] *See also Hansen Bev. Co. v. Innovation Ventures LLC*, 2010 WL 743750 (S.D. Cal. Feb. 25, 2010); *Mateo v. The M/S Kiso*, 805 F. Supp. 792, 800 (N.D. Cal. 1992) (*abrogated on other grounds by Brockmeyer v. May*, 361 F.3d 1222, 1226 (9th Cir. 2004)).

[6] Plaintiffs' argue that these cases do not apply to claims under the Cartwright Act (Pl.'s

(Footnote Continued on Next Page.)

Plaintiffs cite no case holding otherwise. Indeed, none of Plaintiffs' cited cases even involved price fixing.[7] Each, moreover, involved far more extensive contacts with both (1) the parties, and (2) the plaintiffs' claims, than Plaintiffs alleged here.

For example, in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), upon which Plaintiffs principally rely (both here and in opposition to Defendants' motions to dismiss), a Wisconsin resident who took out insurance policies in Wisconsin died in a Wisconsin car crash. When his widow, who had by that time moved to Minnesota, sued Allstate in a coverage dispute, the Court found that application of Minnesota law to her claim complied with Due Process because: (1) the plaintiff resided in Minnesota, and thus the effect of Allstate's coverage decision would be felt in Minnesota, and Minnesota had an interest in keeping her "off welfare rolls and able to meet [her] financial obligations;" (2) Allstate knew when it issued the policies that the decedent commuted daily to Minnesota, and the policies at issue covered those commutes; (3) the decedent was a member of the Minnesota workforce, and thus his death affected his Minnesota employer; and (4) the defendant did substantial business in Minnesota. *Allstate*, 449 U.S. at 313-19. Due Process was held satisfied in *Allstate* based on facts that established a far greater nexus between the plaintiff, and her non-antitrust, non-price-fixing claims, and Minnesota than those alleged by Plaintiffs here between them, their claims, and California. Settled price-fixing precedent confirms that to establish the same degree of nexus with California with regard to price-fixing claims as was found sufficient in *Allstate* with regard to other claims, Plaintiffs would have to show that they purchased allegedly price-fixed products in that state.

Circumstances and the nature of the claim matter, and *Allstate*'s holding based on the specific facts there does not create grounds for a difference of opinion regarding the Court's

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(Footnote Continued from Previous Page.)

Br. at 5-6), but ignore that *Pecover* specifically involved a claim under the Cartwright Act. *Pecover*, 633 F. Supp. 2d at 984.

[7] Plaintiffs suggest that *Kelley* v. *Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008) ("*Kelley*") involved California's Cartwright Act (*see* Pl.'s Br. at 6:3-10), but *Kelley* involved allegedly deceptive advertising challenged under Washington's consumer protection statute. 251 F.R.D. at 557.

decisions here, nor regarding holdings of the other cases that have considered the Due Process question in the context of a price-fixing case.[8]

Plaintiffs have thus failed to meet their burden of showing substantial grounds for a

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[8] Plaintiffs' other cited cases equally do not show a split of authority with the conclusion reached by the Court in its June 28 and November 12 Orders. *See Budget Rent-A-Car System, Inc. v. Chappell*, 407 F.3d 166 (3d Cir. 2005) (New York law properly applied to a car accident that paralyzed a New York resident, where the car had been driven in New York prior to the incident and where the accident occurred on a trip that began in New York); *Adventure Commc'n. v. Kentucky Registry of Election Fin.*, 191 F. 3d 429, 437-38 (4th Cir. 1999) (Kentucky's electioneering law applied to broadcasters who had stations in Kentucky, whose broadcasts were directed to Kentucky, who maintained written retransmission consent agreements with cable television systems whose subscribers live in Kentucky, who employed Kentucky residents, who "solicit[ed] business from candidates in statewide electoral contests in Kentucky by marketing directed to the candidates and their agents situated in Kentucky," as well as to the candidates' agents situated outside Kentucky, "and for whom "the majority of the advertising revenue received . . . was comprised of Kentucky tax dollars."); *Manuel v. Convergys Corp.*, 430 F. 3d 1132 (11th Cir. 2005) (Georgia law properly applied to a non-compete agreement sought to be enforced against a Georgia resident, and whose effect would be felt in Georgia); *Mzamame v. Winfrey*, 693 F. Supp. 2d 442, 468 n.9, 475 (E.D. Pa. 2010) (Pennsylvania law governed defamation claim because "Plaintiff was domiciled in Pennsylvania and allegedly suffered harm to her reputation in Pennsylvania."); *Kelley*, 251 F.R.D. at 550 (Washington law governed consumer protection action where "[d]efendant created its allegedly deceptive and unfair marketing scheme in Washington," and defendant, a Washington resident, contractually required litigation under Washington law); *Mooney v. Allianz Life Ins. Co.*, 244 F.R.D. 531, 535 (D. Minn. 2007) (Minnesota law applied to claim arising from fraudulent sale of annuity products because defendant was incorporated and headquartered in Minnesota, it created and distributed the allegedly fraudulent marketing materials from Minnesota, the policies were prepared and issued from Minnesota, the defendant received premium payments in Minnesota, and brochures used in the sale of those annuities listed the address and telephone number of defendant's Minnesota home office); *In re Heritage Bond Litig.*, 2004 WL 1638201, at *10 (C.D. Cal. July 12, 2004) (the court did not list the contacts between plaintiffs' claims and California, but stated that the plaintiffs and certain defendants' respective reply briefs had shown a "significant aggregation of contacts" between California and plaintiffs' common law claims); *Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 669 F. Supp. 1244, 1253 (S.D.N.Y. 1987) (New Mexico law properly applied to non-antitrust claims arising from injuries allegedly suffered when plaintiff's metal futures trading account was liquidated by his broker because plaintiff resided in New Mexico, his trading base was there and the alleged impact was felt there); *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 272 (N.D. Cal. 1987) (California law properly governed securities fraud action where "dissemination of the Registration Statement, prospectus, and various annual quarterly reports occurred in California"); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (California law properly governed securities fraud action where (l) "the public offering of securities .... emanated from California" and most activities of the defendants in connection with the public offering took place in California; and (2) the capital raised by the offering went to company offices in California); *Am. Rockwool, Inc.* v. *Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411, 1427 (E.D.N.C. 1986) (North Carolina's antitrust law governed claims based on product disparagement where "defendant's alleged disparagement . . . the course of conduct giving rise to the . . . claims, was carried out in substantial part in North Carolina.")

difference of opinion. *F.T.C. v. Swish Mktg.*, 2010 WL 1526483, at *2-4 (N.D. Cal. Apr. 14, 2010) (rejecting § 1292(b) certification because cases cited by defendants were not on point and thus did not show a substantial grounds for difference of opinion); *Harris v. Vector Mktg. Corp*., 2009 WL 4050966, at *3-4 (N.D. Cal. Nov. 20, 2009) (same).

D. Plaintiffs Have Not Demonstrated That Immediate Appellate Review Will Materially Advance Termination of the Litigation.

To show for purposes of Section 1292(b) that an immediate appeal will materially advance termination of the litigation, the party seeking certification must show that resolution of the legal question on appeal "may appreciably shorten the time, effort, or expense of conducting a lawsuit." *In re Cement*, 673 F.2d at 1027. In addition to the reasons set forth in connection with the first and second elements required to be established for purposes of Section 1292(b), Plaintiffs fail to meet its burden on the third element for the following additional reasons.

Plaintiffs first contend that immediate appellate review "would advance the litigation by clarifying the volume of indirect purchases, and thus damages, at issue in Plaintiffs' case, and could facilitate the ultimate resolution of Plaintiffs' claims," by facilitating settlement. Pl.'s Br. at 9-10. But this is entirely speculative, since Plaintiffs do not demonstrate how appellate review of whether all of Plaintiffs' claims can be maintained under California law might achieve clarity on the volume of indirect purchases. This argument, thus, fails to satisfy Plaintiffs' burden under Section 1292(b). *Acosta v. Pace Local I-300 Health Fund*, 2007 WL 1074093, at *3 (D.N.J. Apr. 9, 2007) ("[T]he party seeking certification . . . should come forward with something more than mere conjecture in support of his claim that certification may save the court and the parties substantial time and expense.").[9]

Plaintiffs next contend that appellate review might "narrow the number of factual and legal issues in dispute" asserting that, "under the November 12 Order, Plaintiffs must proceed

[9] Equally speculative and unavailing is Plaintiffs' contention that clarification of the volume of indirect purchases in this case, and narrowing this case's factual and legal issues, might assist resolution of similar issues in similar cases in the future. Pl.'s Br. at 11. Certainly, Plaintiffs' failure to make such a showing in connection with this case dooms its argument with respect to other cases.

under the laws of twenty different states," and that the "large number of state antitrust laws at issue will multiply the number of legal questions that the Court will be asked to address in this case." Pl.'s Br. at 10. However, the "large number of state antitrust laws at issue" in this case results only from Plaintiffs' complaints, not this Court's November 12 Order.[10] As previously explained (*see supra* p. 7 & note 4), even if Plaintiffs were to succeed on appeal, and those Plaintiffs who did not purchase allegedly price-fixed products in California were nonetheless permitted to sue under California law, no simplification of the issues in this case would occur. Because the Plaintiffs would still be pursuing claims under the laws of twenty other states, permitting those Plaintiffs to sue also under California law would only make this case even more complex.[11]

Accordingly, Plaintiffs have failed to make any showing how intermediate appellate review "may appreciably shorten the time, effort, or expense of conducting" this suit, and thus have failed to meet their burden under Section 1292(b). *In re Cement*, 673 F.2d at 1027.

IV. CONCLUSION

Plaintiffs' motion is untimely, and fails to satisfy any, much less all, of the required elements of Section 1292(b). It should therefore be denied.

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[10] *See* Complaint For Damages and Injunctive Relief at ¶10, *AT&T Mobility et. al. v. AU Optronics et. al.*, Case No. 09-4997, Doc. No. 1 (N.D. Cal. Oct. 20, 2009) (asserting claims under the Cartwright Act and under the laws of roughly twenty other states "in the alternative"); FAC at ¶ 10 (same); SAC at ¶ 14 (asserting claims under the laws of roughly 20 states).

[11] Also as previously commented, Plaintiffs' argument that this case will be simplified because California law does not permit a pass-on defense, is both wrong legally and immaterial for purposes of Section 1292(b). *Supra* pp. 7-8 .

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