

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT))	MDL No. 1917
ANTITRUST LITIGATION)	
_____)	Case No. C-07-5944-SC
)	
This Order Relates To:)	ORDER ADOPTING IN PART AND
)	MODIFYING IN PART SPECIAL
ALL DIRECT PURCHASER ACTIONS)	MASTER'S REPORT AND
)	RECOMMENDATION ON
)	DEFENDANTS' MOTION TO
)	DISMISS THE DIRECT ACTION
)	<u>PLAINTIFFS' COMPLAINTS</u>
)	
_____)	

I. INTRODUCTION

Now before the Court are the Direct Action Plaintiffs' ("DAPs") and Defendants'¹ competing objections to and motions to adopt the Special Master's May 2, 2013 Report and Recommendation on Defendants' Motion to Dismiss the DAP Complaints.² The matter is

¹ The full list of DAPs and Defendants in this case is excessively long. Where necessary in this Order, the Court will address the arguments of particular groups of Defendants by name.

² The complaints at issue are: Stoebner v. LG Electronics, Inc., No. 11-cv-05381 (N.D. Cal.) [ECF No. 1] (Nov. 7, 2011) ("Polaroid Compl."); Target Corp. v. Chunghwa Picture Tubes, Ltd., No. 11-cv-05514 (N.D. Cal.) [ECF No. 9] (Jan. 6, 2012) ("Target Am. Compl."); P.C. Richard & Son Long Island Corp. v. Hitachi, Ltd., No. 12-cv-02648 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("P.C. Richard Compl."); Schultze Agency Servs., LLC v. Hitachi, Ltd., No.

1 fully briefed,³ and the Court finds it appropriate for decision
 2 without oral argument. Civ. L.R. 7-1(b). As explained below, the
 3 Court ADOPTS in part and MODIFIES in part the Special Master's
 4 Report and Recommendation, and accordingly GRANTS IN PART and
 5 DENIES IN PART Defendants' motions to dismiss the DAP Complaints.

7 **II. BACKGROUND**

8 The DAPs allege that Defendants, each a manufacturer of
 9 cathode-ray tubes ("CRTs"), conspired to fix prices for CRTs. The
 10 DAPs do not allege that Defendants conspired to fix the prices of
 11 products containing CRTs ("CRT Products").

12 Each DAP alleges that it bought at least one CRT product from
 13 a Defendant or an entity owned or operated by a Defendant. The
 14 DAPs, despite their moniker, are classified as indirect purchasers
 15 under antitrust law -- not direct purchasers.

17 12-cv-02649 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("Tweeter
 18 Compl."); CompuCom Systems, Inc. v. Hitachi, Ltd., No. 11-cv-06396
 19 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("CompuCom Compl.");
 20 Interbond Corp. of Am. v. Hitachi, Ltd., No. 11-cv-06275 (N.D.
 21 Cal.) [ECF No. 1] (Nov. 14, 2011) ("Interbond Compl."); Costco
 22 Wholesale Corp. v. Hitachi, Ltd., No. 11-cv-06397 (N.D. Cal.) [ECF
 23 No. 1] (Nov. 14, 2011) ("Costco Compl."); Siegel v. Hitachi, Ltd.,
 24 No. 11-cv-05502 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("Circuit
 25 City Compl."); Office Depot, Inc. v. Hitachi, Ltd., No. 11-cv-
 26 06276 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("Office Depot
 27 Compl."); Best Buy Co., Inc. v. Hitachi, Ltd., No. 11-cv-05513
 28 (N.D. Cal.) [ECF No. 1] (Nov. 14, 2011) ("Best Buy Compl."); and
Electrograph Systems, Inc. v. Hitachi, Ltd., No. 11-cv-01656 (N.D.
 Cal.) [ECF No. 5] (Mar. 10, 2011) ("Electrograph Am. Compl.").

³ ECF Nos. 1676 ("Defs.' Statement"), 1704 ("DAP Obj'ns: Philips &
 LG"), 1706 ("Defs.' Joint Obj'ns"), 1708 ("DAP Obj'ns: Joint"),
 1749 ("DAP Mot. to Adopt"), 1750 ("LG Joinder"), 1752 ("Defs.'
 Joint Mot. to Adopt"), 1755 ("Philips Mot. to Adopt"), 1799
 ("Defs.' Joint Reply"), 1800 ("DAP Reply: Philips & LG"), 1801
 ("DAP Reply: Joint"). The underlying motions are, of course, fully
 briefed as well. ECF Nos. 1317 ("Defs.' MTD"), 1319 ("Philips
 MTD"), 1320 ("LG MTD Joinder"), 1384 ("Opp'n to Defs. MTD"), 1387
 ("Opp'n to Philips MTD"), 1419 ("Reply ISO Philips MTD"), 1420 ("LG
 Joinder Re: Philips Reply"), 1422 ("Joint Reply ISO Defs.' MTD").

1 In August 2012, Defendants jointly filed a motion to dismiss
2 and a motion for judgment on the pleadings as to some of the DAP
3 complaints. Separately, Koninklijke Philips Electronics N.V. and
4 Philips Electronics North America Corp. (collectively "Philips ")
5 filed a similar motion, joined by LG Electronics, Inc. and LG
6 Electronics USA, Inc. (collectively ("LG")).

7 On February 15, 2013, the motions to dismiss came before this
8 case's Special Master for oral argument. See ECF No. 1707 ("J.A.")
9 Ex. 14 ("Tr."). The Special Master issued his Report and
10 Recommendation in this matter on May 2, which makes numerous
11 conclusions and recommendations that are summarized below. ECF No.
12 1664 ("R&R"). The parties then filed lengthy objections and
13 motions to adopt parts of the R&R.⁴ Now they ask the Court to rule
14 on those requests.

16 **III. LEGAL STANDARD**

17 **A. The Court's Review of the Special Master's Conclusions**

18 The Court reviews the Special Master's conclusions of law de
19 novo. ECF No. 302 ("Order Appointing Special Master").

20 **B. Motions to Dismiss**

21 A motion to dismiss under Federal Rule of Civil Procedure
22 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
23 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
24 on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory."
26 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.

27 _____
28 ⁴ The Court commends the parties' and the Special Master's
cooperation and coordination on what all can agree has been a
lengthy, complicated matter.

1 1988). "When there are well-pleaded factual allegations, a court
2 should assume their veracity and then determine whether they
3 plausibly give rise to an entitlement to relief." Ashcroft v.
4 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
5 must accept as true all of the allegations contained in a complaint
6 is inapplicable to legal conclusions. Threadbare recitals of the
7 elements of a cause of action, supported by mere conclusory
8 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
9 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
10 complaint must be both "sufficiently detailed to give fair notice
11 to the opposing party of the nature of the claim so that the party
12 may effectively defend against it" and "sufficiently plausible"
13 such that "it is not unfair to require the opposing party to be
14 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
15 1202, 1216 (9th Cir. 2011).

16 17 **IV. DISCUSSION**

18 **A. Federal Claims**

19 Each DAP asserts causes of action under the federal antitrust
20 laws. Federal antitrust plaintiffs normally have standing only if
21 they are direct purchasers of the allegedly price-fixed goods.
22 Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Indirect
23 purchasers generally do not have federal antitrust standing. See
24 Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1211-12 (9th Cir.
25 1984). However, the Court held in Defendants' motion for summary
26 judgment against the Direct Purchaser Plaintiffs ("DPP") class that
27 indirect purchasers may have federal antitrust standing under the
28 "ownership or control" exception by establishing that they were

1 harmed by a price-fixing conspiracy between a manufacturer and an
2 entity it owns or controls. See In re CRT Antitrust Litig., 911 F.
3 Supp. 2d 857, 868-69 (N.D. Cal. 2012) (citing Royal Printing Co. v.
4 Kimberly Clark Corp., 621 F.2d 323 (9th Cir. 1980)).

5 The parties do not dispute that the Court's holding on the
6 ownership or control exception remains law of the case, thereby
7 compelling denial of Defendants' motion to dismiss the DAPs'
8 federal claims. Defendants seek to preserve their objections to
9 that holding for appeal, and to apply the Court's holdings denying
10 application of two other exceptions to the Illinois Brick rule, the
11 "co-conspirator" and "cost-plus" exceptions. The Special Master
12 accordingly recommended that the Court grant Defendants' motion to
13 the extent that it challenges the application of those two
14 exceptions, and deny the motion to the extent that it challenges
15 the DAPs' right to proceed under the ownership or control
16 exception. R&R at 5. The Court finds the Special Master's
17 conclusions on this matter appropriate and ADOPTS the Special
18 Master's recommendations. Id. Defendants' motion is GRANTED to
19 the extent that it challenges the DAPs' right to proceed under the
20 cost-plus or co-conspirator exceptions to Illinois Brick, and
21 DENIED to the extent that it challenges the DAPs' right to proceed
22 under the ownership or control exception.

23 This Order expresses no view as to whether the DAPs will be
24 able to prove what is needed to establish the ownership or control
25 exception. The Court also makes no ruling on the adequacy of the
26 DAPs' allegations of ownership and control.

27 ///

28 ///

1 **B. State Law Claims**

2 **i. Joint Motion to Dismiss Based on Statutes of**
3 **Limitation**

4 Nine of the twelve DAP Complaints were filed on approximately
5 November 14, 2011. R&R at 6. They allege violations of seventeen
6 states' laws. Id. Fourteen of those states have four-year
7 statutes of limitations on the DAPs' claims, and two have three-
8 year statutes of limitations. Id. Accordingly, as the Special
9 Master found, any claim based on Defendants' actions before
10 November 14, 2007, is prima facie barred by those states' statutes
11 of limitations. Id. The parties disputed whether those statutes
12 of limitations should be tolled because of the tolling doctrines of
13 either fraudulent concealment or so-called "American Pipe" or
14 cross-jurisdictional tolling. Id. Defendants assert that
15 fraudulent concealment could not apply to toll the statutes of
16 limitation, because the DAPs had actual notice (or at least inquiry
17 notice) of the factual basis for their claims by November 8, 2007
18 at the earliest and November 14, 2007 at the latest. Id. The
19 Special Master found that Defendants' notice argument turned on
20 disputed issues of fact, not law. Id. He therefore recommended
21 that the Court deny Defendants' motion on this point as
22 inappropriate under Rule 12(b)(6). Id. The Special Master did not
23 reach the issue of American Pipe tolling. Id.

24 Defendants object to the Special Master's recommendation,
25 arguing that as a matter of law, the DAPs had a duty as of November
26 8, 2007, to inquire into whether they had claims against
27 Defendants. Defs.' Joint Obj'ns at 19-21. On that day, as the
28 European Commission issued a press release about certain Defendants

1 being raided in connection with a worldwide antitrust investigation
2 of CRT pricing. Id. at 19. According to Defendants, these raids
3 would have raised red flags impelling any reasonably diligent
4 person to investigate and act on possible antitrust claims. Id.
5 Indeed, more than thirty complaints were filed within six months of
6 those 2007 raids, and many specifically identify the raids as
7 triggering notice. Id. DAPs argue that the November 8, 2007 press
8 release was insufficient to put them on notice, because it did not
9 (1) "identify which category of illegal conduct it was
10 investigating"; (2) establish that there was a violation; (3)
11 identify the companies investigated; (4) indicate whether the
12 investigation related to products the DAPs purchased; or (5)
13 indicate whether United States commerce was affected. DAP Mot. to
14 Adopt at 14-15.

15 Defendants challenge all of these assertions, arguing that (1)
16 the press release indicated that the investigation was part of a
17 "cartel inquiry"; (2) the press release's language on cartels and
18 restrictive business practices should have raised an antitrust
19 flag; (3) DAPs themselves note that the CRT industry was dominated
20 by just a few companies, and other plaintiffs managed to figure out
21 who had been subject to investigation; (4) the press release
22 clearly referred to CRTs, and DAPs were some of the world's largest
23 CRT purchasers; and (5) DAPs alleged a global CRT market
24 conspiracy, which would necessarily include both the European and
25 United States markets. Defs.' Joint Reply at 10-11.

26 Defendants also argue that the R&R applies a higher notice
27 standard than is necessary in the Ninth Circuit. Defs.' Joint Mot.
28 at 20. They claim that the Ninth Circuit requires only that

1 "[w]here a plaintiff's suspicions have been or should have been
2 excited, there can be no fraudulent concealment where he could have
3 then confirmed his earlier suspicion by diligent pursuit of further
4 information," not that tolling continues until plaintiffs have
5 constructive notice and enough time to file a complaint. Id.
6 (quoting Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc., 858 F.2d 499,
7 502 (9th Cir. 1988)).

8 The Court does not find Defendants' arguments persuasive.
9 They remain reliant on disputed facts. The Court therefore finds
10 the Special Master's conclusions correct and ADOPTS them. "[I]t is
11 generally inappropriate to resolve the fact-intensive allegations
12 of fraudulent concealment at the motion to dismiss stage,
13 particularly where the proof relating to the extent of the
14 fraudulent concealment is alleged to be largely in the hands of the
15 alleged conspirators." In re Rubber Chemicals Antitrust Litig.,
16 504 F. Supp. 2d 777, 789 (N.D. Cal. 2007); see also Conmar, 858
17 F.2d at 504-05.

18 Further, the Special Master's discussion of constructive
19 notice had nothing to do with the standard of review he applied,
20 which ultimately looked to the difference between matters of fact
21 and matters of law under a Rule 12(b)(6) motion.

22 Finally, the Court finds that it need not address the issue of
23 American Pipe tolling, also called cross-jurisdictional tolling.
24 American Pipe & Construction Co. v. Utah, 414 U.S. 538, 554 (1974),
25 established that in some instances, filing a federal class action
26 tolls statutes of limitation on the individual claims of putative
27 class members, pending a decision on class certification. The
28 Special Master recommended in the R&R that it would be unnecessary

1 to consider American Pipe if the Court adopted the recommendation
2 on fraudulent concealment, since the cross-jurisdictional tolling
3 question is not dispositive and would require the Court to rule on
4 a messy array of non-binding, extra-jurisdictional case law and
5 policy arguments. R&R at 7. The Court agrees. There is no reason
6 to decide as a matter of law that cross-jurisdictional tolling
7 applies in this case.

8 **ii. Joint Motion to Dismiss Based on Due Process**

9 Defendants argue that subjecting them to state antitrust laws
10 would violate their right to due process, which demands significant
11 contacts between the parties or occurrences and the state whose law
12 is to be applied. See Defs.' Joint Reply at 2-5. The DAPs move to
13 adopt the Special Master's R&R denying Defendants' motion on this
14 point. DAP Mot. to Adopt at 3-6.

15 At the hearing before the Special Master, the parties both
16 argued that they were applying the legal standard from Allstate
17 Insurance Co. v. Hague, 449 U.S. 302 (1981), though on the day of
18 the hearing, the Ninth Circuit was to issue an opinion on the due
19 process applicability of California antitrust law to out-of-state
20 plaintiffs. See R&R at 9. The Ninth Circuit did so in AT&T
21 Mobility LLC v. AU Optronics Corp., 707 F.3d 1106 (9th Cir. 2013),
22 and the Special Master ordered supplemental briefing on that case's
23 applicability to the parties' arguments. After reviewing those
24 briefs and the record, the Special Master concluded that AT&T
25 broadened Allstate and compelled the denial of Defendants' motion
26 because application of a state's law would only violate due process
27 if the state has "no significant contact or significant aggregation
28 of contacts, creating state interests, with the parties and the

1 occurrence or transaction." R&R at 9 (citing AT&T, 707 F.3d at
2 1110). Since the due process theories Defendants had articulated
3 did not rely on that relatively broad standard -- instead,
4 Defendants would have limited territorial application of state law
5 to states where the DAPs purchased CRT Products or negotiated their
6 purchase -- the Special Master recommended that Defendants' motion,
7 as framed, should be denied. Id.

8 Defendants object to the Special Master's recommendations on
9 three grounds: (1) the R&R erroneously applied the AT&T standard to
10 the DAPs' California claims under the Cartwright Act, since the
11 DAPs provide only conclusory allegations about Defendants'
12 California-related conduct; (2) AT&T does not apply to the DAPs'
13 claims for other states' laws, since that case was limited to
14 discussion of California's Cartwright Act alone; and (3) even if
15 AT&T applied to other states' laws, the DAPs' non-California claims
16 would not satisfy the requirements of due process. Defs.' Joint
17 Obj'ns at 9-10. The DAPs ask the Court to adopt the R&R on this
18 point. DAP Mot. to Adopt at 3-5.

19 AT&T addressed what factual allegations district courts should
20 consider in determining whether due process limits the application
21 of a given state's law. The specific question before the Ninth
22 Circuit in AT&T was whether a district court was correct to
23 consider the "relevant occurrence or transaction," for due process
24 purposes in an antitrust case under California law, as being
25 limited to the price-fixed good's place of purchase. AT&T, 707
26 F.3d at 1109. The district court had held that because an
27 antitrust plaintiff's purchase of the allegedly price-fixed good
28 occurred outside California, due process prevented the application

1 of California law to the defendants even though some conspiratorial
2 activity had occurred in California. Id. The Ninth Circuit held
3 that such a narrow consideration was improper, based partly on the
4 fact that Allstate set a permissive standard for due process
5 considerations compared to the former standard that tied state
6 laws' applicability to the place of purchase. Id. at 1113. The
7 Ninth Circuit concluded that "anticompetitive conduct by a
8 defendant within a state that is related to a plaintiff's alleged
9 injuries and is not 'slight and casual' establishes a 'significant
10 aggregation of contacts, creating state interests, such that choice
11 of its law is neither arbitrary nor fundamentally unfair.'" Id. at
12 1113.

13 Defendants argue that AT&T's reasoning was narrowly restricted
14 to Cartwright Act claims, based on the Ninth Circuit's specific
15 holding about the case below, but they ignore the case's broader
16 affirmation of the Allstate standard and the guidance it provides
17 to district courts. Nothing in AT&T or Judge Illston's
18 consideration of it on remand limits AT&T's application to
19 California or the Cartwright Act. Defendants' argument that AT&T's
20 reasoning does not apply outside California is an inaccurate
21 reading of the case, and an inaccurate statement of the law, since
22 AT&T effectively reaffirms the decades-old rule from Allstate.

23 There remains, however, the threshold question of whether
24 Defendants properly raise the theories on which they base their
25 objections to the Special Master's R&R. Their arguments before him
26 were, again, premised on their theory that some states' antitrust
27 and consumer protection laws cannot apply to Defendants if the DAPs
28 do not allege purchases or negotiations in those particular states.

1 See R&R at 8-9. The Special Master denied Defendants' motion on
2 those grounds because it relied on a theory the Ninth Circuit
3 expressly overruled in AT&T. Defendants' arguments in this round
4 of briefing are newly raised, because Defendants did not make the
5 same arguments in their motion to dismiss or before the Special
6 Master. However, Defendants maintain in their reply brief that the
7 core of their arguments before the Special Master and in these
8 papers is the same: "certain of the DAPs' claims must be dismissed
9 because they do not sufficiently allege the appropriate contacts
10 with the relevant states at issue." Defs.' Joint Reply at 3.

11 The Court finds, in this particular case, that there is no
12 good reason to ignore a fully briefed argument on procedural
13 grounds. Moreover, the parties' briefs before the Special Master
14 discuss essentially these same issues in detail. The DAPs have
15 always contended that Allstate's contacts analysis has been the
16 right one,⁵ as the Ninth Circuit affirmed in AT&T, and while
17 Defendants' argument has changed during this briefing round, both
18 sides adequately addressed the issues. See DAP Opp'n to Defs.' MTD
19 at 24-25 & nn.26-28 (arguing that all of the DAPs' complaints meet
20 Allstate's standard). Essentially, AT&T affirms that the Court's
21 due process analysis in cases like this one should proceed as it
22 has since Allstate's decision in 1982. As noted above, the Court
23 has found that AT&T is applicable to the parties' arguments, so the
24 question is whether the DAPs' pleadings survive a due process
25 challenge.

26 ///

27 _____
28 ⁵ See, e.g., DAP Opp'n to Defs.' Mot. at 24 n.23 (confirming the
DAPs' consistent position that plaintiffs' purchasing activities
are not the only relevant contacts for due process purposes).

1 Accordingly, the central question in this case is whether the
2 DAPs have alleged anticompetitive conduct by Defendants within a
3 state that is related to the DAPs' alleged injuries and is not
4 "slight and casual," thereby establishing a "significant
5 aggregation of contracts, creating state interests, such that
6 choice of its law is neither arbitrary nor fundamentally unfair."
7 See AT&T, 707 F.3d at 1113 (quoting Allstate, 449 U.S. at 312-13).
8 In undertaking this analysis, the Court is to consider more than
9 just the place where an allegedly price-fixed product was
10 purchased. See id. at 1111-12. Defendants argue that the DAPs'
11 claims under all state laws fail to allege facts tying Defendants'
12 alleged anticompetitive conduct to any of the states under whose
13 laws the DAPs seek relief. See Defs.' Joint Reply at 3. According
14 to Defendants, this Court has found such pleading defects to
15 warrant dismissal in cases like this one. Id. (citing In re TFT-
16 LCD, Nos. M 07-1827 SI, C 10-4945 SI, 2013 WL 1891367, at *4 (N.D.
17 Cal. May 6, 2013)).

18 Defendants are wrong on this point as well. They rely on In
19 re TFT-LCD, 2013 WL 1891367, in part, to argue that the DAPs'
20 pleadings of state-specific purchases and general conspiratorial
21 activities are insufficient to tie Defendants to the states at
22 issue in this case, but that decision is factually inapposite here.
23 As noted above, the question in that case was whether plaintiffs
24 could, within the bounds of due process, bring state antitrust
25 claims against defendants who had not sold goods within a state but
26 had allegedly conducted some conspiracy-related business there.
27 See id. at *1-2. On remand after AT&T, Judge Illston found that
28 the place of purchase alone was not dispositive: if there was no

1 purchase within a state, other activities related to the
2 plaintiffs' injury could warrant application of that state's laws
3 so long as it would not be arbitrary or unfair. Id. at *3-4.

4 That conclusion does not mean, however, that a purchase alone
5 is insufficient to merit application of a state's laws despite a
6 due process challenge. Defendants' arguments on this point muddle
7 the issue. Defendants seem to suggest that if the DAPs allege a
8 sale within a state, but do not include detailed, defendant-by-
9 defendant allegations of anticompetitive conduct in those states,
10 due process would deny claims under those states' laws. Defs.'
11 Joint Obj'ns at 9-10. This misses the point of AT&T, which held
12 that absence of a sale within a state did not preclude the
13 application of that state's antitrust laws if other facts
14 sufficiently tied the defendants' activities to that state. AT&T
15 did not hold that an in-state sale alone could not satisfy due
16 process, especially when, in context, it would be proper under due
17 process to subject a defendant to the rules of that state.

18 Defendants also argue that AT&T does not apply to state laws
19 that address only the sale of price-fixed goods, but not agreements
20 or conspiracies involving those goods. Defs.' Joint Obj'ns at 9-10
21 & n.5. This argument fails. Defendants provide no support for
22 their restrictive interpretations of those states' laws. Moreover,
23 their argument relies on the proposition that AT&T only applies to
24 the Cartwright Act, which is wrong.

25 In this case, the Court finds that Defendants' direction of
26 price-fixed goods into certain states renders Defendants subject to
27 those states' antitrust and consumer protection laws. The DAPs'
28 pleadings on this issue are somewhat bare, but not unacceptably so

1 in context.⁶ The DAPs make it clear enough, for Rule 12(b)(6)
 2 purposes, that Defendants are alleged to have conspired to fix
 3 prices on CRT Products and then sold those goods to businesses and
 4 consumers in the various states alleged in the DAPs' complaints.
 5 This is not a slight and casual connection, nor is the application
 6 of those states' laws to Defendants' conduct arbitrary or unfair.
 7 See Allstate, 449 U.S. at 312-13; AT&T, 703 F.3d at 1113.

8 The Court ADOPTS the Special Master's recommendation on this
 9 point, as modified above, and DENIES Defendants' motion to dismiss
 10 the DAPs' state law claims on due process grounds. This does not
 11 mean that future due process challenges are foreclosed, pending the
 12 discovery of additional facts.

13 **iii. Joint Motion to Dismiss Based on Prudential Standing**

14 Defendants argued that DAPs' state law claims failed to meet
 15 the requirements of prudential standing: (1) plaintiffs must assert
 16 their own legal rights and interests, not those of others'; (2)
 17 courts will not adjudicate generalized grievances; and (3)
 18 plaintiffs' claims must "fall within the zone of interests to be
 19 protected or regulated by the statute or constitutional guarantee

20
 21 ⁶ The DAPs' pleadings alleging sufficient contacts with the various
 22 states at issue in this matter, including Defendants' alleged sales
 23 of products and conspiratorial activities, appear in the following
 24 complaints: CompuCom Compl. ¶¶ 11, 16, 18, 21, 31, 42, 47, 49, 59,
 25 61-62, 67, 79, 173-76, 178, 187, 237-39, 242, 254, 256-67; Costco
 26 Compl. ¶¶ 12-14, 47-48, 53, 142-46; Electrograph FAC ¶¶ 16, 18-20,
 27 27, 29, 36, 56, 61, 63, 73, 75, 77, 89, 189-92, 200, 251-53, 256,
 28 260, 266, 269, 271-72, 276-77, 280; Office Depot Compl. ¶¶ 11, 18,
 19, 49, 61-62, 66, 78, 172-75, 177, 186, 244-46, 249; Polaroid
 Compl. ¶¶ 4, 8, 9, 11, 18, 21, 189-91, 36, 46, 47, 60, 64, 166,
 168, 194; Target Compl. ¶¶ 14, 16-19, 21, 22, 27, 29, 32-33, 37,
 42, 49, 60, 65, 67, 77, 79-80, 85, 191-195, 203; Tweeter Compl. ¶¶
 11, 13, 16, 22, 25, 27, 35, 40, 45, 50, 52, 62-65, 69, 79, 171,
 175-78, 180, 189; Best Buy Compl. ¶¶ 11, 13-16, 20-21, 27, 29, 37,
 42, 47, 54-57, 61, 81, 176, 180-185, 194, 238; P.C. Richard Compl.
 ¶¶ 11, 14-15, 17-18, 21, 24, 27, 29, 37, 42, 47, 52, 54, 64-67, 71,
 81, 173, 177-80, 182, 191, 238, 246, 247, 248, 249.

1 in question." Defs.' Joint Mot. at 21 (citing Valley Forge
2 Christian Coll. v. Americans United for Separation of Church &
3 State, Inc., 454 U.S. 464, 474-75 (1982)). While the Special
4 Master found that the DAPs asserted their own legal rights and did
5 not bring generalized grievances, he made no finding as to the
6 "zone of interests" factor. R&R at 7-8. Rather, he concluded that
7 Defendants' request for dismissal was too broad and general because
8 it did not demonstrate which of the DAPs' claims, and under the
9 laws of which states, were allegedly deficient. Id. at 8. He
10 recommended that the Court deny Defendants' motion on this point,
11 because it would not be supported by the record and could sweep too
12 broadly.

13 Defendants object to the R&R's recommendations, arguing that
14 they specifically identified the DAPs' state law claims in Appendix
15 C to their original motion to dismiss and that those claims are
16 insufficient to establish that the DAPs purchased CRT Products in
17 the relevant states. Defs.' Joint Obj'ns at 11; Defs.' Joint MTD
18 App'x C. Specifically, Defendants argue that one group of DAPs did
19 not allege purchases of CRT Products in states where they filed
20 claims, and another asserted only conclusory or insufficient
21 allegations that they purchased CRT Products in the relevant
22 states. Id. at 12-16.

23 The DAPs ask the Court to adopt the R&R, arguing that
24 Defendants' arguments about the "zone of interests" are the same as
25 their due process arguments and should be dismissed for the same
26 reasons. DAP Mot. to Adopt at 7.

27 The DAPs are right. Defendants' arguments repeat their due
28 process arguments. Those arguments fail both here and there. See

1 Section IV.B.iii supra. The Court finds that the DAPs' pleadings
2 satisfy the prudential standing requirements. Defendants' motion
3 is DENIED on these grounds, and the Court ADOPTS the Special
4 Master's R&R on this point, though the Court MODIFIES the Special
5 Master's recommendation on the zone of interest.

6 **iv. Joint Motion to Dismiss Based on Associated General**
7 **Contractors**

8 Defendants move to dismiss the DAPs' claims for lack of
9 standing under California, Washington, Arizona, Illinois, and
10 Michigan law, arguing that dismissal is required under Associated
11 General Contractors v. California State Counsel of Carpenters
12 ("AGC"), 459 U.S. 519 (1983). Defs.' MTD at 23-25. The DAPs
13 concede that AGC applies to their California and Washington claims,
14 but they argue that AGC does not apply to their Arizona, Michigan,
15 and Illinois claims. DAP Opp'n at 26.

16 AGC established a multi-factor test for determining whether a
17 given plaintiff is a proper party to bring a private antitrust
18 action. 459 U.S. at 535, 537-44 & n.1. The factors are: "(1) the
19 nature of the plaintiff's alleged injury; that is, whether it was
20 the type the antitrust laws were intended to forestall; (2) the
21 directness of the injury; (3) the speculative measure of the harm;
22 (4) the risk of duplicative recovery; and (5) the complexity in
23 apportioning damages." Id. at 535; see also Lucas Auto. Eng'g,
24 Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir.
25 1998) (citing AGC).

26 Defendants contend that AGC applies to the DAPs' claims under
27 Arizona, Illinois, and Michigan law, and that the DAPs have not
28 satisfied the AGC factors for those states' claims. Defs.' Joint

1 Mot. to Adopt at 4-15. The DAPs respond that AGC should not apply
2 to any of those claims. The Special Master concluded on this point
3 that the DAPs do not participate in the market that they allege was
4 restrained, since they only pled that the CRTs themselves were
5 price-fixed, and they participated only in the CRT Products market.
6 R&R at 10. For this reason, he found that the DAPs do not meet the
7 "antitrust injury" factor of the AGC analysis. Id. He therefore
8 recommended that the DAPs' allegations under the antitrust laws of
9 California, Illinois, Michigan, Arizona, and Washington be
10 dismissed with leave to amend so that the DAPs can file an amended
11 complaint adequately alleging standing under AGC. Id. at 11.
12 Defendants now move to adopt the Special Master's recommendation,
13 and the DAPs object.

14 In their objections to the Special Master's conclusion, the
15 DAPs assert that under Ninth Circuit law, AGC is only applicable to
16 state antitrust claims when there is "clear directive" from the
17 state legislature or high court adopting AGC. DAP Reply: Joint at
18 3 (citing In re TFT-LCD, 586 F. Supp. 2d 1109, 1120-24 (N.D. Cal.
19 2008)). The DAPs claim that the Special Master erred in finding
20 only that "existing state law, whether it is by the highest court
21 or by an intermediate court, is the applicable authority." Id.
22 (quoting R&R at 11) (emphasis in original). The DAPs therefore
23 object to the Special Master's and Defendants' citations of
24 intermediate appellate and other court decisions in support of
25 AGC's application in this case -- they claim that absent a
26 statement from a state's highest authority, the Court should
27 abstain from applying AGC. Id. Defendants maintain that the
28 Special Master's recommendation is correct, because the five states

1 at issue here have all either applied AGC in intermediate appellate
2 decisions on antitrust standing, or adopted harmonization
3 provisions stating that their antitrust laws were to be construed
4 in accordance with federal law. Defs.' Joint Mot. to Adopt at 4-5
5 & nn. 1-2.

6 The DAPs' argument that Ninth Circuit law requires more than
7 an intermediate appellate case to apply AGC to a state claim is
8 based partly on the Court's decision in In re CRT, 738 F. Supp. 2d
9 at 1023. That opinion did not stand for that proposition, and did
10 not analyze the same arguments the parties raise here. The Ninth
11 Circuit sets forth clear guidance on this matter: on questions of
12 state law, federal courts are bound by that state's highest court's
13 decision, but if that court has not decided an issue, the federal
14 court is to follow relevant intermediate appellate precedent unless
15 the federal court finds convincing evidence that the state's
16 supreme court would not follow it. Id. (citing United Broth. of
17 Carpenters & Joiners of Am. Local 586 v. NLRB, 540 F.3d 957, 963
18 (9th Cir. 2008); Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994
19 (9th Cir. 2007); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1483
20 (9th Cir. 1986)).

21 The DAPs alternatively claim that Defendants fail to show that
22 AGC would be applied in the state courts of Michigan, Arizona, or
23 Illinois. First, they argue that the Michigan cases Defendants
24 cite are not published or precedentially binding. DAP Reply: Joint
25 at 4-5 (citing Michigan Court Rule 7.215(C)). Second, they contend
26 that Arizona's Supreme Court has held that AGC is not necessary to
27 determine indirect purchasers' standing in state antitrust law
28 claims, and also that Arizona's harmonization provision is

1 permissive, not mandatory. Id. at 5-6 (citing Bunker's Glass Co.
2 v. Pilkington PLC, 75 P.3d 99, 102, 133 (Ariz. 2003)). Finally,
3 they claim that the Illinois cases Defendants cite did not involve
4 AGC at all, and that an Illinois federal district court held AGC
5 inapplicable under Illinois law. Id. at 6 (citing In re
6 Aftermarket Filters Antitrust Litig., No. 08 C 4883, 2009 WL
7 3754041, at *7 (N.D. Ill. Nov. 5, 2009)).

8 The Court is not convinced by all of the DAPs' arguments.
9 First, while under Michigan's Court Rules an unpublished decision
10 is not necessarily binding under the principle of stare decisis,
11 such a decision is not worthless, especially if a higher court has
12 not spoken. The DAPs argue that the Court should ignore those
13 unpublished opinions based on People v. Reid, 233 Mich. App. 457,
14 474 (Mich. Ct. App. 1999). But that case states only that it is
15 inappropriate for another Michigan court to consider an unpublished
16 opinion (which was later overruled) substantively binding. Id.
17 The Court does not find this sufficient to ignore Ninth Circuit law
18 on how the Court is to address these issues. The Court has no
19 conclusive evidence that the Michigan Supreme Court would overrule
20 an intermediate appellate court's adoption of AGC, so the lower
21 court decisions Defendants cite are the Court's best guidance now.
22 Since that court adopted AGC, the Court sees no reason to hold that
23 Michigan law forbids doing so.

24 Second, the Court finds that the Arizona Supreme Court would
25 not apply AGC. Bunker's Glass indicates that Arizona has chosen to
26 provide broader protection to its citizens by allowing indirect
27 purchasers to bring antitrust suits under Arizona state law. 75
28 P.3d at 110. Further, even though the Arizona Supreme Court held

1 that while Arizona courts are free to follow more restrictive
2 federal laws on standing, that court itself declined to do so,
3 based largely on its understanding that the Arizona Constitution
4 and Arizona antitrust laws were designed to allow for more standing
5 than federal law. Id. at 102-03, 110. Therefore, even though an
6 intermediate appellate court in Arizona opted to apply AGC
7 standing, the Court finds that the Arizona Supreme Court would not
8 likely follow the same course. The sparse reasoning from the trial
9 court in Luscher v. Bayer AG, No. CV-2004-014835 (Ariz. Super. Ct.
10 Sept. 14, 2005), is not persuasive when compared to the higher
11 authority of Bunker's Glass. Accordingly, the DAPs who rely on
12 Arizona law are not required to meet AGC standing requirements.

13 Finally, the Court finds the DAPs' arguments about Illinois
14 law unconvincing. For example, the DAPs cite In re Aftermarket
15 Filters as having found AGC inapplicable to claims brought under
16 Illinois law, but that conclusion was based on the court's
17 rejection of the defendants' argument that the two classes of
18 purchasers participated in markets separate from the direct and
19 indirect purchasers. 2009 WL 3754041, at *7. The court did not
20 reject AGC because some aspect of Illinois law required doing so.
21 And while the DAPs are right that neither of Defendants' other two
22 cases directly apply the AGC factors, neither states that AGC is
23 inapplicable, and both suggest that it could apply in some cases.
24 County of Cook v. Philip Morris, Inc., 817 N.E. 2d 1039, 1045 (Ill.
25 App. Ct. 2004), cites AGC approvingly, and O'Regan v. Arbitration
26 Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997), states clearly
27 that federal antitrust standing rules apply under the Illinois
28 Antitrust Act. In this setting, the Court finds no convincing

1 evidence that the Illinois Supreme Court would not apply AGC.
2 Therefore the Special Master was correct in finding that AGC
3 applies to the DAPs' Illinois claims.

4 The question remains whether the DAPs meet AGC's requirements.
5 The Special Master found that they failed to do so because, as
6 purchasers of CRT Products but not CRTs themselves, they were not
7 participants in the same allegedly restrained market and therefore
8 could not demonstrate injury appropriate for antitrust standing
9 under AGC. R&R at 10-11. The Special Master concluded that, since
10 antitrust injury is essential to AGC's multi-factor analysis, the
11 DAPs fail to show standing based on the absence of that single,
12 significant factor. Id. at 11 (citing Bhan v. NME Hosp., Inc., 772
13 F.2d 1467, 1370 n.3 (9th Cir. 1985) ("[T]he inquiry whether the
14 plaintiff has suffered an injury of the type which the antitrust
15 statute was intended to forestall is a factor of tremendous
16 significance.")). The DAPs disagree, arguing that in the Ninth
17 Circuit, courts have "embraced antitrust standing in cases
18 involving component parts and their corresponding finished
19 products." DAPs' Reply: Joint at 7.

20 The DAPs cite to the Court's earlier order in this case
21 finding that the Direct Purchasers and Indirect Purchasers had
22 adequately pled antitrust standing. In re CRT, 738 F. Supp. 2d at
23 1023-25. The Special Master considered the DAPs' arguments and
24 found a distinction: in that case, the alleged conspiracy involved
25 both CRTs themselves and CRT Products, while the DAPs' complaints
26 concern only the CRTs themselves. R&R at 10 (citing Tr. 18-19).
27 The Special Master found that "[t]here is a real market
28 distinction, and hence a real legal distinction, between the

1 finished products and just the CRTs," and concluded that a
2 complaint that embraces only one of the two allegedly intertwined
3 products fails to show that an antitrust injury occurred within the
4 same allegedly restrained market. Id.

5 Defendants argue that the Special Master correctly found that
6 the DAPs' pleadings foreclosed the possibility of an antitrust
7 injury, and that the DAPs "have not alleged that the cost or price
8 of standalone CRT tubes are components that 'can easily be traced'
9 through relevant distribution channels, or that standalone CRT[s]
10 account for a specific percentage of the cost of manufacturing the
11 finished product." Defs.' Joint Mot. to Adopt at 11-12. The DAPs
12 respond, however, that regardless of what the pleadings say, the
13 market for CRTs themselves and CRT Products remain inextricably
14 intertwined. DAP Reply: Joint at 7-9. Further, the DAPs note that
15 their complaint alleges that CRTs are discrete, identifiable parts
16 of the CRT Product's supply chain, such that any CRT-related prices
17 and overcharges can be traced along with the physical CRT down a
18 chain of causation from allegedly anticompetitive conduct to
19 antitrust injury. Id. at 9 & n. 7 (citing relevant complaints).

20 The Court finds that, for purposes of the present motion, the
21 DAPs have sufficiently pled an antitrust injury, and that this
22 factor slightly favors standing. The Court finds that where a
23 product like a CRT itself is virtually valueless on its own, and
24 the markets for CRTs themselves and CRT products are plausibly pled
25 to be inextricably intertwined, a plaintiff adequately pleads an
26 antitrust injury when the alleged anticompetitive activity
27 surrounding a component affects the market for the finished product
28 in a traceable way. See, e.g., In re Flash Memory Antitrust

1 Litig., 643 F. Supp. 2d 1133, 1154 (N.D. Cal. 2009); In re GPU
2 Antitrust Litig., 540 F. Supp. 2d 1085, 1098 (N.D. Cal. 2007).
3 Accordingly, the Court respectfully declines to adopt the R&R on
4 this point.

5 The next step is to evaluate the other factors of AGC and
6 balance them. The first factor, discussed above, is very
7 significant but not dispositive. The second factor of AGC concerns
8 the directness of the DAPs' alleged injury. Defendants argue that
9 the DAPs' allegations fail to support a causal connection between
10 the allegedly anticompetitive and the claimed harm. See Defs.'
11 Joint Mot. to Adopt at 14. Their argument on this point, like
12 their argument for the remaining factors, is essentially a rehash
13 of their arguments about the differences between the markets for
14 CRTs themselves and for CRT Products. See id. at 14-15. The Court
15 has already found that the link between the two markets is enough,
16 at least at this stage, to make an allegation of antitrust harm
17 plausible. The Court finds that the DAPs' allegations of traceable
18 overcharges, given the severability of CRTs from CRT Products, are
19 sufficient to favor standing under this factor. Whether or not the
20 DAPs can actually prove that an overcharge would be passed down the
21 chain is a factual question for a later motion.

22 The third factor considers the speculative nature of the
23 alleged harm. As above, Defendants claim that the DAPs'
24 allegations of injury are "inherently speculative," since there is
25 no secondary market for CRTs themselves and mere allegations of
26 pass-on damages are insufficient to show non-speculative damages.
27 Defs.' Joint Mot. to Adopt at 15 (citing In re DRAM Antitrust
28 Litig., 516 F. Supp. 2d 1072, 1092 (N.D. Cal. 2007)). In In re

1 DRAM, this Court found that plaintiffs alleging injury related to
2 purportedly price-fixed Dynamic Random Access Memory ("DRAM")
3 lacked standing as to their purchases of DRAM in the form of a
4 component product, since tracing the price-fixed DRAM through the
5 component products would have been too attenuated in that case.
6 516 F. Supp. 2d at 1092-93. In this case, as a pleading matter,
7 the Court finds that the DAPs sufficiently allege that overcharges
8 are passed on to CRT Product purchasers in a traceable way, since
9 the market and physical distribution chain for CRTs are both
10 limited. Moreover, absent a more developed factual record, the
11 Court finds it inappropriate to determine "complex and intensely
12 factual" damages issues without "a more fully developed factual
13 record." See In re GPU, 540 F. Supp. 2d at 1098. The Court makes
14 the same findings as to traceability and apportionability under the
15 fourth and fifth factors, which can be condensed and considered
16 alongside each other. See, e.g., AGC, 459 U.S. at 544.

17 Accordingly, the Court finds that the DAPs meet AGC's standing
18 requirements. As noted above, the DAPs have conceded that the
19 principles of AGC apply in California and Washington, and the Court
20 has found that Arizona does not apply AGC but allows for suits of
21 the DAPs' type. Therefore, the Court respectfully declines to
22 adopt the Special Master's recommendations on this point, and
23 DENIES Defendants' motion on this issue.

24 ///

25 ///

26 ///

27 ///

28 ///

1 **v. Other Joint Motions Asserted**

2 **a. Massachusetts and Washington Consumer**
3 **Protection Statutes**

4 Defendants move to dismiss the DAPs' claims under
5 Massachusetts's and Washington's consumer protection statutes.

6 **1. Massachusetts**

7 To bring a claim under the Massachusetts Consumer Protection
8 Act ("MCPA"), a plaintiff must first have served a written demand
9 for relief on a defendant at least thirty days before filing the
10 action if that defendant has a place of business or keeps assets in
11 Massachusetts. Mass. Gen. Laws ch. 93A §§ 2, 9. The Special
12 Master, noting that the Court has dismissed earlier claims under
13 Massachusetts law for failing to provide notice, found that the
14 DAPs' case was similarly deficient. R&R at 12. He recommended
15 that the Court dismiss the Massachusetts claims without leave to
16 amend, because the DAPs do not plead or provide evidence showing
17 that they provided the requisite statutory notice to any
18 Massachusetts-linked Defendants. Id. Defendants ask the Court to
19 adopt that recommendation. Defs.' Joint Mot. to Adopt at 17-19.
20 The DAPs claim that the Court should reject the Special Master's
21 recommendation, arguing that thirty-seven of the thirty-nine
22 Defendants are located outside Massachusetts and are not subject to
23 the MCPA's notice requirement. DAP Reply: Joint at 12-13.

24 A review of the transcript, the parties' briefs, and the
25 relevant case law reveals a serious factual question as to whether
26 any of the DAPs ever sent notice (and whether, if sent, it was
27 proper notice under the law). The complaints do not plead that any
28 DAP bringing an MCPA claim sent notice, and the DAPs do not claim

1 that they did. See DAP Reply: Joint at 12-13. The DAPs
2 essentially put the burden on Defendants to show that they
3 maintained a place of business or kept assets in Massachusetts.
4 Id. To support this argument they cite a memorandum decision from
5 a Massachusetts trial court. The Court is not convinced by this
6 argument: the DAPs should have done their research and provided the
7 requisite notice. However, to the extent that the DAPs claim that
8 they can cure their pleading defect, the Court finds that the DAPs
9 should have leave to amend their Massachusetts claims to show that
10 they followed the law. The Court therefore ADOPTS the R&R on this
11 point, as modified.

12 **2. Washington**

13 Washington forbids indirect purchasers from bringing their own
14 actions under the Washington consumer protection statute. R&R at
15 12. The DAPs claim, however, that Washington's harmonization
16 provision, Wash. Rev. Code § 19.86.920, requires the Court to
17 evaluate claims under Washington law by applying Illinois Brick and
18 finding that an exception to it applies here. DAP Reply: Joint at
19 14. Defendants argue that no case law or legislation supports the
20 argument that Illinois Brick exceptions are applicable to claims
21 under the Washington Consumer Protection Act. Neither party cites
22 case law to support their position, and the Court declines to make
23 law, especially since the R&R is sound and Washington law's
24 prohibition of indirect actions would seem to override any
25 suggestion of an Illinois Brick loophole being read into the
26 state's harmonization provision. The Court ADOPTS the Special
27 Master's recommendation and DISMISSES the DAPs' Washington law
28 claims without leave to amend.

1 however, read the following section carefully in considering
2 whether to amend their complaints for unjust enrichment claims.

3 **c. California Restitution and Unjust Enrichment**
4 **Laws**

5 DAP Circuit City alleges that Defendants violated California's
6 laws for restitution and unjust enrichment. Defendants moved to
7 dismiss these claims because California law does not provide for
8 standalone restitution or unjust enrichment claims. The Special
9 Master noted correctly that California courts are divided on this
10 issue, but recommended that these claims be dismissed without leave
11 to amend, since California law provides specific and adequate
12 remedies for these claims via the Cartwright Act. R&R at 13. The
13 DAPs urge that the Court follow the line of cases allowing unjust
14 enrichment and restitution to be pled as independent causes of
15 action, arguing that the difference is merely semantic and that the
16 Court should not determine the adequacy of alternative remedies at
17 this stage of litigation. DAP Obj'ns: Joint at 20-21; DAP Reply:
18 Joint at 14-17. Defendants move to adopt the Special Master's
19 recommendation. Defs.' Joint Mot. to Adopt at 23-26.

20 The Court agrees with Defendants and the Special Master that
21 these equitable remedies are duplicative where the DAPs' statutory
22 claims provide adequate relief at law. The Court ADOPTS the
23 Special Master's recommendation and DISMISSES Circuit City's
24 restitution and unjust enrichment claims without leave to amend.

25 **d. California's UCL**

26 Defendants move to dismiss the Circuit City, CompuCom, and
27 Polaroid DAPs' claims for alleged violations of California's
28 statutory Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§

1 17200 et seq. The Special Master recommended that this motion be
2 dismissed because the DAPs' complaints allege antitrust violations
3 (even if they are subject to exceptions or special applications),
4 such that the Special Master could not conclude that no DAP alleged
5 any valid antitrust claims on which they could predicate a UCL
6 claim. R&R at 13. Neither party addresses this recommendation.
7 The Court, having considered the briefs and the Special Master's
8 R&R, ADOPTS the Special Master's recommendation and DENIES
9 Defendants' motion to dismiss on these grounds.

10 **e. State Laws Repealing Illinois Brick**

11 Defendants move to dismiss the DAPs' state law claims under
12 Nebraska, Nevada, and New York law, arguing that the DAPs cannot
13 sue for purchases prior to the date that those states passed
14 statutes repealing Illinois Brick. The DAPs concede that they lack
15 standing under New York law based on purchases prior to December 3,
16 1998, so the Special Master recommended that the Court dismiss
17 those claims with prejudice. R&R at 14. The Court ADOPTS that
18 recommendation and DISMISSES the DAPs' New York claims based on
19 pre-December 3, 1998 purchases with prejudice.

20 As to Nebraska and Nevada, the Special Master noted that the
21 Court has already held that indirect purchasers lack standing under
22 those states' laws for purchases predating Nebraska's and Nevada's
23 respective Illinois Brick repeal statutes. Id. (citing In re CRT,
24 738 F. Supp. 2d at 1025). Since the DAPs cited no new reasons why
25 the Court should not apply the same analysis in this case, the
26 Special Master recommended that the Court dismiss with prejudice
27 the DAPs' claims based on purchases predating Nebraska's and
28 Nevada's repeal statutes. The DAPs dispute this recommendation,

1 arguing that recent cases offer new interpretations of the DAPs'
2 arguments. See DAP Obj'ns: Joint at 22-23.

3 First, the DAPs argue that the Court is bound by Arthur v.
4 Microsoft Corp., 676 N.W.2d 29 (Neb. 2004), in which the Nebraska
5 Supreme Court reversed dismissal of claims predating Nebraska's
6 2002 repealer statute. DAP Reply: Joint at 18-20. On this point,
7 the DAPs contend that the Court should follow Judge Illston's
8 decision from In re TFT-LCD Antitrust Litigation, No. M 07-1827 SI,
9 C 10-4945 SI, 2011 WL 3738985, at *3 (N.D. Cal. Aug. 24, 2011),
10 which held that even though Arthur considered claims brought under
11 Nebraska's Consumer Protection Act, its reasoning extends to
12 Nebraska antitrust claims, since Arthur indicated that Nebraska law
13 was never meant to be harmonized with Illinois Brick. Defendants
14 cite several cases and a section of judicial history, which to them
15 suggests that Nebraska's 2002 amendment of its antitrust law to
16 provide indirect-purchaser standing meant that no such standing
17 existed before 2002. Defs.' Joint Mot. to Adopt at 27-28. The
18 Court disagrees, based on the clear language from Arthur and Judge
19 Illston's reasoning in In re TFT-LCD. The Court's prior ruling on
20 this issue is not law of the case, since the Indirect Purchaser
21 Plaintiffs ("IPPs") did not object to the Special Master's
22 recommendation of a dismissal of the pre-2002 Nebraska claims, and
23 so the issue was neither briefed nor fully discussed by the Special
24 Master or the Court. There was, essentially, no controversy before
25 the Court at that time. The Court therefore respectfully declines
26 to adopt the R&R on this point, and DENIES Defendants' motion to
27 dismiss the DAPs' Nebraska claims based on pre-2002 purchases.

28 Second, the DAPs argue that the Court should read Nevada's

1 1999 amendment as merely clarifying who may bring suit under the
2 Nevada Unfair Trade Practices Act, not as changing the standing
3 requirements to require indirect purchasers to sue for their
4 antitrust injuries. DAP Reply: Joint at 20-21. Defendants claim
5 that legislative history supports the interpretation that the
6 statute meant to cut off claims for purchases made before 1999, and
7 that Nevada's high court presumes that statutes apply prospectively
8 and that the legislature intends to change (not just clarify) law
9 when it amends statutes. Defs.' Joint Mot. to Adopt at 30-31
10 (citing In re Estate of Thomas, 998 P.2d 560, 562 (Nev. 2000);
11 McKay v. Bd. of Supervisors, 730 P.2d 438, 442 (Nev. 1986)).

12 The Court agrees with Defendants. As Judge Illston held in In
13 re TFT-LCD, the Nevada Unfair Trade Practices Act ("UTPA") has a
14 harmonization provision, Nev. Rev. Stat. § 598A.050, and the Nevada
15 Supreme Court would likely interpret the UTPA "in harmony" with
16 Illinois Brick. In re TFT-LCD, 2011 WL 3738985, at *3. The Court
17 finds no convincing high court evidence to the contrary, and is not
18 persuaded by the lower court cases that the DAPs cite. The Court
19 ADOPTS the R&R on this point and GRANTS Defendants' motion to
20 dismiss the DAPs' Nevada claims based on purchases that occurred
21 before October 1, 1999.

22 **C. Philips and LG's Separate Joint Motion to Dismiss**

23 The Philips and LG Defendants filed a separate joint motion to
24 dismiss the DAPs' complaints. See Philips MTD at 5-14; LG Joinder
25 at 1-2. The critical differences in this motion concern Philips
26 and LG's joint venture, LGDP (a.k.a. "LP Displays" or "LPD").
27 According to the DAPs' complaints, Philips transferred its entire
28 CRT business to LGDP in the form of a 50/50 joint venture with LG.

1 E.g., Best Buy Compl. ¶ 46.⁷ At this point, Philips's only
2 connection to the alleged cartel was through LGDP. Id. ¶ 150. In
3 January 2006, LGDP went bankrupt. R&R at 15. In March or April
4 2007, it "became an independent company," and its shares were
5 "owned by financial institutions and private equity firms," not by
6 Philips or LG. Best Buy Compl. ¶¶ 36, 40; R&R at 15.

7 The Special Master found that the January 2006 bankruptcy and
8 March 2007 divestment amounted to Philips and LG's withdrawal from
9 the alleged conspiracy. R&R at 14-15. Further, the Special Master
10 found that the DAPs had failed to show that the relevant state and
11 federal statutes of limitations should be tolled, because they had
12 failed to sufficiently allege fraudulent concealment. Id. at 15.
13 According to the Special Master, the DAPs have had the benefit of
14 four years of pleadings, motions, and discovery in this case, and
15 so a conclusory pleading of fraudulent concealment, addressed to
16 all Defendants generally but not the unusual circumstances of
17 Philips and LG particularly, was insufficient. Id. Accordingly,
18 the Special Master recommended that the Court dismiss the DAPs'
19 state and federal claims against Philips and LG.

20 Philips and LG ask the Court to adopt that recommendation, but
21 they claim that they actually withdrew from the conspiracy by June
22 2001, when they ceased participating directly in the CRT market and
23 formed LGDP. See Philips Mot. to Adopt at 1-3. According to
24 Philips and LG, this would bar all of the DAPs' state and federal
25 claims on statute of limitations grounds. Id. at 17-33.
26 Specifically, Philips and LG contend that even if the Court found

27 _____
28 ⁷ Obviously, there are multiple complaints in this particular
matter, but the Special Master used Best Buy's complaint as an
exemplar and the parties do the same. So will the Court.

1 cross-jurisdictional tolling applicable based on the DPP Class's
2 November 2007 filing -- which they argue the Court should not do --
3 the June 2001 date is still outside any applicable limitations
4 period. Id. at 23-24. Philips and LG also state that since the
5 DAPs fail to plead fraudulent concealment as to Philips and LG in
6 particular, no possible tolling argument can save any of the DAPs'
7 claims. Id. at 18-22, 29-33.

8 The DAPs claim that the Special Master erred in finding that
9 Philips and LG withdrew from the conspiracy and by finding that the
10 DAPs failed to allege fraudulent concealment. DAP Obj'ns: Philips
11 & LG at 6-14. The DAPs also argue that their federal claims and
12 state law claims were tolled as of November 26, 2007, and that
13 cross-jurisdictional tolling would extend the DAPs' claims back to
14 November 2003. Id. at 14-17.

15 The Court finds that the parties' withdrawal and fraudulent
16 concealment arguments raise factual questions inappropriate for
17 decision at this stage. Too many of the parties' arguments depend
18 on the resolution of factual disputes about Philips and LG's stakes
19 in LPD, the actual involvement of Philips and LG in LPD and the
20 conspiracy, and so forth. The Court finds that the DAPs'
21 allegations of fraudulent concealment, in context, are sufficient
22 under Rule 9(b). Indeed, in a highly complex, long-running
23 antitrust conspiracy case like this one, it is likely that further
24 information about the extent of two parties' involvement is in
25 those parties' hands, awaiting discovery (or potentially not).
26 "[I]t is generally inappropriate to resolve the fact-intensive
27 allegations of fraudulent concealment at the motion to dismiss
28 stage, particularly when the proof relating to the extent of the

1 fraudulent concealment is alleged to be largely in the hands of the
2 alleged conspirators." In re Rubber Chems. Antitrust Litig., 504
3 F. Supp. 2d 777, 789 (N.D. Cal. 2007). Similarly, the withdrawal
4 dispute hinges on facts about Philips and LG's involvement in their
5 joint venture, and the Court cannot resolve such a dispute at this
6 point. Id. at 1025. Accordingly, the Court respectfully declines
7 to adopt the R&R on this point, and denies Defendants' motion. The
8 Court also declines to address American Pipe tolling at this time.
9 See supra Section IV.b.i.

10
11 **V. CONCLUSION**

12 For the reasons explained above, the Court approves and adopts
13 the Special Master's recommendation in part, and modifies it in
14 part. As to the above-captioned Defendants' motions to dismiss the
15 Direct Action Plaintiffs' complaints, the Court ORDERS as follows:

- 16 • Defendants' motion to dismiss the DAPs' Complaints is
17 GRANTED to the extent that it challenges the DAPs'
18 alleged right to proceed under the "cost-plus" and "co-
19 conspirator" exceptions to Illinois Brick.
- 20 • Defendants' motion to dismiss the DAPs' Complaints is
21 DENIED to the extent that it challenges the DAPs' right
22 to proceed under the "ownership or control" exception to
23 Illinois Brick, but this Order expresses no view as to
24 whether the DAPs will be able to prove what is needed to
25 establish that exception with respect to their purchases
26 of finished products containing CRTs. Defendants' joint
27 motion to dismiss does not presently challenge the
28 adequacy of the DAPs' allegations of ownership or

1 control, and the Court makes no ruling on that issue.
2 Defendants' joint motion does not presently raise the
3 issue of the application of the statute of limitations to
4 the federal claims.

- 5 • Defendants' joint motion to dismiss the DAPs' claims
6 based on state statutes of limitation is DENIED.
- 7 • Defendants' joint motion to dismiss the DAPs' claims
8 based on prudential standing is DENIED.
- 9 • Defendants' joint motion to dismiss the DAPs' claims
10 based on due process is DENIED.
- 11 • Defendants' joint motion to dismiss the DAPs' state law
12 claims based on Associated General Contractors is DENIED.
- 13 • The DAPs' Massachusetts claims under the state consumer
14 protection statute are DISMISSED with leave to amend.
- 15 • The DAPs' claims brought under Washington law are
16 DISMISSED with prejudice.
- 17 • The DAPs' claims for common law unjust enrichment are
18 DISMISSED with leave to amend, with the limitations
19 described above.
- 20 • The DAPs' claims for restitution and unjust enrichment
21 under California law are DISMISSED with prejudice.
- 22 • Defendants' motion to dismiss the DAPs' UCL claims is
23 DENIED.
- 24 • The DAPs' New York claims based on pre-December 3, 1998
25 purchases are DISMISSED with prejudice.
- 26 • Defendants' motion to dismiss the DAPs' claims under
27 Nebraska law based on pre-2002 purchases is DENIED.
- 28 • The DAPs' Nevada law claims that are premised on

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

purchases predating October 1, 1999, are DISMISSED with prejudice.

- Philips and LG's motion to dismiss the DAPs' claims as to them is DENIED.
- Per the Special Master's recommendation, given the profusion of underlying motions and arguments regarding these Defendants' motions to dismiss the DAP Complaints, any motions from these parties' briefs that were not discussed in this Order or the R&R are DENIED without prejudice.

If the DAPs choose to file amended complaints for any of the claims noted above, they must do so within thirty (30) days of this Order's signature date. Failure to do so may result in the deficient claims' dismissal with prejudice.

IT IS SO ORDERED.

Dated: August 21, 2013



UNITED STATES DISTRICT JUDGE