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8
9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 (SAN FRANCISCO DIVISION)
12

13 IN RE: TFT-LCD (FLAT PANEL)
14 ANTITRUST LITIGATION

CASE NO. 3: 07-md-1827 SI
MDL NO. 1827

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

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16
17 This Document Relates To:

18 ALL INDIRECT PURCHASER CLASS
19 ACTIONS
20

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

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1 **I. INTRODUCTION**

2 In July 2006, LG Display self reported to the government and began cooperating
3 with the [REDACTED] Plaintiffs argue, despite unambiguous
4 case law to the contrary, that to effectuate the withdrawal, LG Display must also inform its
5 alleged coconspirators of its decision to withdraw from the conspiracy, [REDACTED]

6 [REDACTED] But plaintiffs' own Opposition includes citations and even
7 quotations affirming that self-reporting to the authorities is an "affirmative act" establishing
8 withdrawal. And plaintiffs have failed to present any facts to contradict LG Display's evidence
9 that it self-reported to the authorities. Therefore, the Court should affirm that the "making of a
10 clean breast to the authorities" constitutes an effective withdrawal and enter summary judgment
11 in LG Display's favor.

12 **II. ARGUMENT**

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

15 Under Ninth Circuit law, the "making of a clean breast to the authorities" is a
16 legally sufficient affirmative act of withdrawal. *United States v. Koonin*, 361 F.3d 1250, 1253
17 (9th Cir. 2004) (citing *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert denied*,
18 379 U.S. 960 (1965)), *vacated and remanded on other grounds to consider intervening*
19 *authority*, 544 U.S. 945 (2005), *aff'd in light of intervening authority*, 234 F. App'x 761 (2007),
20 *cert denied*, 552 U.S. 1186 (2008). But plaintiffs deny that self-reporting to the authorities
21 constitutes an affirmative act inconsistent with the objects of the conspiracy. Indirect Purchaser
22 Pls.' Mem. in Opp'n 8-9, ECF No. 3236 ("Opposition"). Plaintiffs argue that LG Display's
23 case law "does not so hold." Opp'n at 8. In so asserting, plaintiffs quote *Borelli* (which they
24 incorrectly attribute to the Seventh Circuit): "[T]here must be [*sic*] also be affirmative action
25 [*sic*] either the making of a clean breast to the authorities or [*sic*] . . . communication of the
26 abandonment in a manner reasonably calculated to reach co-conspirators.'" Opp'n at 8
27 (quoting *Borelli*, 336 F.2d at 388). As is apparent, *Borelli* contradicts the very proposition for
28 which plaintiffs quote it.

1 Plaintiffs cite approvingly and rely on other decisions that confirm that self-
2 reporting to the authorities can be an effective withdrawal. *See Hyde v. United States*, 225 U.S.
3 347, 371-72 (1912) (affirming that one defendant’s disclosure of the illegal scheme to
4 authorities could constitute effective withdrawal from the conspiracy), *discussed in* LG
5 Display’s Motion for Partial Summary Judgment on Withdrawal (“Motion”) at 6-7 and Opp’n
6 at 7; *see also United States v. U. S. Gypsum Co.*, 438 U.S. 422, 463-65 (1978) (confirming that
7 disclosure to the authorities constitutes a sufficient, if not necessary, act constituting effective
8 withdrawal), *discussed in* Motion at 7 and Opp’n at 7-8; *United States v. Finestone*, 816 F.2d
9 583, 589 (11th Cir. 1987) (explaining that to establish withdrawal, defendant must prove he
10 took affirmative steps inconsistent with the objects of the conspiracy such as “either
11 communicat[ing] those acts in a manner reasonably calculated to reach his co-conspirators or
12 disclos[ing] the illegal scheme to law enforcement authorities.”), *cited in* Motion at 5 and
13 Opp’n at 7.

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

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

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

12 **C. Plaintiffs’ Cases Establish that Withdrawal Severs Liability.**

13 Plaintiffs similarly misconstrue *United States v. Lothian*, which they
14 nevertheless declare as “instructive,” incorrectly concluding that it “makes clear that withdrawl
15 [*sic*] will not shield a defendant from liability from the inevitable consequences of the actions
16 the defendant took what [*sic*] was participating in the conspiracy.” Opp’n at 8 (citing *U.S. v.*
17 *Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992), *cited in* Motion at 5-6). In fact, *Lothian* makes
18 clear the exact opposite, stating that “a defendant cannot be held liable for substantive offenses
19 committed before joining or after withdrawing from a conspiracy.” 976 F.2d at 1262 (citing
20 *Levine v. United States*, 383 U.S. 265, 266 (1966)); *see also In re Brand Name Prescription*
21

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

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

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

14 **D. LG Display’s Evidence that It Self-Reported to the Authorities
 15 and Withdrew Is Uncontradicted**

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

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

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

4 In the alternative, plaintiffs try to disqualify as hearsay some of LG Display's
5 affirmative evidence that it self-reported to the authorities. With its Motion, LG Display
6 submitted a [REDACTED]

7 [REDACTED] See Decl. of Michael R. Lazerwitz in Supp. of LG Display's
8 Mot., ECF No. 3171 ("Lazerwitz Motion Declaration"), Ex. A. Plaintiffs assert in a conclusory
9 parenthetical that [REDACTED]

10 [REDACTED] – is hearsay. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED].⁴

17
18 ³ In addition, both Exhibits B and C of the Howard Declaration are inadmissible because they
19 include translations that contravene on their face the Special Master's Order Re Defendants'
20 Motion for Entry of a Protocol Regarding the Use of Translations, Dec. 27, 2010, ECF No. 2248
21 ("Translation Protocol"). Both Exhibits fail to provide certifications for the translations, as
22 required, and Exhibit B provides a new translation when an existing translation of the same
23 document has already been affirmed under the Translation Protocol. LG Display has met and
conferred with plaintiffs about this matter, and plaintiffs have agreed to withdraw the inadmissible
exhibits and to submit translations conforming to the Translation Protocol in a supplemental filing.
LG Display reserves the right provided by the Translation Protocol to review and object to any
newly offered translations.

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

27 [REDACTED]

28

1 Plaintiffs also claim that the Declaration of Bang Soo Lee (“Lee Declaration”),
2 Lazerwitz Motion Declaration, Exhibit B, is inadmissible as hearsay. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

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

26 ⁵ Even if the Lee Declaration is deemed inadmissible, [REDACTED]
27 [REDACTED]

1 **III. CONCLUSION**

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

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7 DATED: August 12, 2011

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