No. 11-16188

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AT&T MOBILITY LLC, ET AL.,

Plaintiffs – Appellants,

v.

AU OPTRONICS CORPORATION, ET AL.,

Defendants – Appellees.

On Appeal From the United States District Court
For the Northern District of California
Honorable Susan Illston, Case No. 3:09-cv-04997-SI

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Appellees certify that:

1. Sharp Corporation is a publicly traded corporation in Japan that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. Sharp Electronics Corporation is a wholly-owned subsidiary of Sharp Corporation.

Dated: October 24, 2011 BINGHAM MCCUTCHEN LLP

By: s/ Richard S. Taffet
Richard S. Taffet
Attorneys for Sharp Corporation and Sharp Electronics Corporation

2. AU Optronics Corporation is a publicly traded corporation in Taiwan that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock. The parent corporation of AUO Corporation America is AUO (L) Corporation.

Dated: October 24, 2011 NOSSAMAN LLP

By: s/ Christopher A. Nedeau
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3. Chi Mei Corporation has no parent corporation and no publicly-held corporation owns 10 percent or more of its stock. Chimei Innolux Corporation (f/k/a Chi Mei Optoelectronics Corporation) is a publicly-traded corporation in Taiwan that has no parent corporation, and no publicly-held corporation owns 10 percent or more of its stock except for Chi Mei Corporation, which holds 13.6% of its outstanding shares. CMO Japan Co., Ltd. is a wholly-owned subsidiary of Chimei Innolux Corporation; no other publicly-held corporation owns 10 percent or more of its stock. Chi Mei Optoelectronics USA, Inc., is a subsidiary of CMO Japan Co., Ltd.; no publicly-owned corporation owns 10 percent or more of its stock.

Dated: October 24, 2011 DAVIS, POLK & WARDWELL LLP

By: s/ Christopher B. Hockett
Christopher B. Hockett
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4. Chunghwa Picture Tubes, Ltd. is a publicly-traded company in Taiwan, and no publicly-traded company owns 10 percent or more of its stock.

Dated: October 24, 2011 BAKER & MCKENZIE, L.L.P.

By: s/ Patrick J. Ahern
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Attorneys for Chunghwa Pictures Tubes, Ltd.

5. Epson Imaging Devices Corporation is a wholly-owned subsidiary of Seiko Epson Corporation. Epson Electronics America, Inc. is a California corporation and is a wholly-owned subsidiary of U.S. Epson, Inc., which is in turn a wholly-owned subsidiary of Seiko Epson Corporation. U.S. Epson, Inc. is not a publicly-held corporation. Seiko Epson Corporation is a publicly-held company traded in Japan.

Dated: October 24, 2011 MORRISON & FOERSTER LLP

By: s/ Derek F. Foran
Derek F. Foran
Attorneys for Epson Imaging Devices Corporation and Epson Electronics America, Inc.

6. Neither Nexgen Mediatech, Inc. nor Nexgen Mediatech USA, Inc. has a parent corporation and no publicly held corporation owns 10 percent or more of their stock.

Dated: October 24, 2011 DAVIS, POLK & WARDWELL LLP

By: s/ Christopher B. Hockett
Christopher B. Hockett
Attorneys for Nexgen Mediatech, Inc. and Nexgen Mediatech USA, Inc.

7. LG Display America, Inc. is a wholly owned subsidiary of LG Display Co., Ltd. American Depositary Receipts of LG Display Co., Ltd. are publicly traded on the New York Stock Exchange. According to the most recently

available information, LG Electronics holds 37.9 percent of the outstanding shares of LG Display Co., Ltd. No other entity holds more than 10 percent of shares in LG Display Co., Ltd.

Dated: October 24, 2011 CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: s/ Michael R. Lazerwitz
Michael R. Lazerwitz
Attorneys for LG Display Co., Ltd. and LG Display America, Inc.

8. Samsung Semiconductor, Inc. is a non-governmental corporate entity and is a wholly-owned subsidiary of Samsung Electronics America, Inc. Samsung Electronics America, Inc. is not a publicly held corporation and is a wholly-owned subsidiary of Samsung Electronics Co., Ltd., a non-governmental corporate entity with no parent corporation. Samsung Electronics Co., Ltd. is a Korean corporation that is publicly traded on the Korean stock exchange. There is no publicly held corporation that owns 10 percent or more of Samsung Electronics Co., Ltd.

Dated: October 24, 2011 COVINGTON & BURLING LLP

By: s/ Robert D. Wick
Robert D. Wick
Attorneys for Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Samsung Electronics America, Inc.

9. Tatung Company, a Taiwanese public company, owns 50 percent of Tatung Company of America, Inc. stock. No other publicly-held corporation owns 10 percent or more of stock of Tatung Company of America, Inc.

Dated: October 24, 2011 BAKER & MCKENZIE, L.L.P.

By: s/ Patrick J. Ahern
Patrick J. Ahern
Attorneys for Tatung Company of America, Inc.

10. Toshiba Corporation has no parent company, and no publicly held corporation owns 10 percent or more of its stock. Toshiba Mobile Display Co. Ltd. is a wholly owned subsidiary of Toshiba Corporation. Toshiba America Electronic Components, Inc. and Toshiba America Information Systems, Inc. are wholly owned subsidiaries of Toshiba America, Inc., which is a holding company wholly owned by Toshiba Corporation.

Dated: October 24, 2011 WHITE & CASE LLP

By: s/ John H. Chung
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Attorneys for Toshiba Corporation, Toshiba Mobile Display Co. Ltd., Toshiba America Electronic Components, Inc. and Toshiba America Information Systems, Inc.

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STATEMENT OF JURISDICTION

Appellees agree that jurisdiction exists over this interlocutory appeal.

ISSUE PRESENTED FOR REVIEW

Did the district court properly dismiss, on due process grounds, claims alleged under California's Cartwright Act and unfair competition law, Cal. Bus. & Prof. Code § 17200 *et seq.*, to the extent Plaintiffs sought to apply California law to purchases made outside of California and harm suffered outside California? (Answer, "yes.")

STATEMENT OF THE CASE

On October 20, 2009, Plaintiffs filed their initial complaint (ER 708-76), and on January 29, 2010, they filed their first Amended Complaint ("FAC"), alleging a global price-fixing conspiracy by suppliers of liquid crystal display ("LCD") panels used in certain electronic products, that resulted in Plaintiffs, through direct and indirect purchases of products containing LCD panels, allegedly paying more for such products than they would have paid absent the alleged conspiracy. (Supplemental Excerpts of Record ["SER"] 15-17, 52-54 at ¶¶ 1, 5, 6, 149, 150, 154.) All eight Plaintiffs purported to sue under California's Cartwright Act and, "in the alternative," under California's Unfair Competition Law (the UCL), as well as, "in the alternative," under the antitrust, consumer protection, unfair trade and deceptive practices laws of roughly twenty other states, the District of Columbia

and Puerto Rico. (SER 17-18, 61-89 at ¶¶ 7, 9, 10, 189-213.) The FAC did not allege that any Plaintiff purchased the alleged price-fixed products in California.

On February 23, 2010, Defendants moved to dismiss the FAC's state-law claims on the grounds that Plaintiffs failed to allege contacts with the states whose laws they sought to invoke sufficient to satisfy the Due Process Clause of the U.S. Constitution. On June 28, 2010, the court granted Defendants' motion. (ER 5-11.) Citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981), the court held that to allege a state-law claim consistent with due process, a plaintiff must plead facts showing "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." (ER 8.) The court explained that in this price-fixing case, "the relevant 'occurrence or transaction' is the plaintiff's purchase of an allegedly price-fixed good." (*Id.*) The court thus ruled that a plaintiff may bring state-law claims under the laws of only those states in which it bought allegedly price-fixed products. (ER 9.) In its analysis, the court considered Plaintiffs' allegations that certain Defendants did business in California, certain Defendants admitted in plea agreements to sales of the allegedly price-fixed products in California (although not to any of the Plaintiffs), and that Plaintiffs did business in and sold products containing LCD panels in California. (ER 8-9.) The court found these alleged facts insufficient to establish the requisite link between Plaintiffs' claims and California. (*Id.*)

The district court accordingly dismissed all Plaintiffs' state-law claims because Plaintiffs failed to allege that they bought the allegedly price-fixed products in the states whose laws they invoked. (ER 9.) The court granted Plaintiffs leave to amend only "to allege each plaintiffs' contacts with each State – here, purchases of price-fixed goods – in order to satisfy Due Process." (*Id.*) In granting leave to amend, the court emphasized that due process requires "'an individualized choice of law analysis [for] each plaintiff's claims'" and therefore "plaintiff-specific allegations" are necessary. (*Id.* [quoting *Georgine v. Amchem Prods.*, 83 F.3d 610, 627 (3d Cir. 1996)].)

Plaintiffs filed their Second Amended Complaint ("SAC") on July 23, 2010. The SAC purported to state claims under the laws of California and roughly twenty other states, without reference to pleading in the alternative. (ER 615-16 at ¶¶ 12, 14.) Despite the court's prior admonition that due process requires an individualized choice-of-law analysis with respect to each party, Plaintiffs continued to improperly aggregate all of their claims. Thus, in addition to alleging that certain Plaintiffs bought relevant products in certain states, the SAC purported to allege claims on behalf of *all* Plaintiffs under the laws of *all* twenty states whose laws the SAC invoked, even states in which specific Plaintiffs were not alleged to have purchased anything. (ER 611 at lines 7-11; ER 615-16, 629-32 at ¶¶ 12, 14, 69-79.)

On November 12, 2010, the court granted Defendants' motion to dismiss the SAC, and dismissed on due process grounds all state-law claims asserted on behalf of Plaintiffs not alleged to have purchased in those states. (ER 1-4.) 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." (ER 2-3.) The court noted that it "rejected this same argument when ruling on defendants' motion to dismiss the [FAC], 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." (ER 3.) The court accordingly dismissed the Cartwright Act and UCL claims of all Plaintiffs not alleged to have purchased products in California. (ER 3-4.)

On March 4, 2011, the district court certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b). (ER 13-14.) On May 10, 2011, this Court granted Plaintiffs permission to appeal. (ER 12.) This appeal followed.

STATEMENT OF FACTS

A. The Parties

Eight plaintiffs seek to pursue claims under California's Cartwright Act and UCL: AT&T Mobility, AT&T Corp., AT&T Services, Bellsouth Telecommunications, Pacific Bell Telephone Company, AT&T Operations, AT&T Datacomm, and Southwestern Bell Telephone Company. Only two of the eight

Plaintiffs allege that they do business in California;[1] four other Plaintiffs allege no connection to California other than as the location of some indeterminate amount of their purchases; and the last two Plaintiffs allege no connection to California of any kind. (*See, e.g.*, ER 629-32, 674-75, 677-78 at ¶¶ 69-79, 235-37, 245(f).)

Only one Plaintiff (Pacific Bell Telephone Company) is headquartered in California; the rest are incorporated and have principal places of business in various other states. (ER 619-21 at ¶¶ 25, 27, 30.) AT&T Mobility, a Delaware company, and BellSouth Telecommunications, a Georgia company, are headquartered in Georgia. (ER 619-20 at ¶¶ 25, 27.) AT&T Corp. is a New York company with its headquarters in New Jersey. (ER 620 at ¶ 27.) AT&T DataComm is a Delaware company headquartered in Illinois. (*Id.*) AT&T Services (a Delaware company), AT&T Operations (a Delaware company) and Southwestern Bell Telephone Company (a Missouri company) are headquartered in Texas. (*Id.*) Two Plaintiffs also sue as assignees of Georgia and Texas corporations. (ER 620-21 at ¶ 29.) Finally, AT&T Inc. is a Delaware holding company with its principal place of business in Texas. (ER 619-20 at ¶ 27.)

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[1] AT&T Mobility is the only Plaintiff to allege stores operating in California; AT&T Mobility and Pacific Bell Telephone Company are the only two Plaintiffs to allege service to customers in California. (ER 630, 677-78 at ¶¶ 71, 245(f).)

Plaintiffs further allege that a minority of Defendants are headquartered in or otherwise have offices in California. (ER 614 at ¶ 8.) Plaintiffs allege, however, that most Defendants are headquartered overseas or in states whose laws Plaintiffs do not seek to invoke. (ER 621-28 at ¶¶ 31-62.)

B. The Alleged Conspiracy

The alleged conspiracy to fix the prices of LCD products sold to the Plaintiffs similarly has only a tenuous connection to California.

Out of the "hundreds" of meetings, calls and emails that Plaintiffs claim occurred relating to the conspiracy (ER 611 at ¶ 3), Plaintiffs allege only a handful of instances of California-related conduct. Plaintiffs allege that the conspiracy "was effectuated through a combination of group and bilateral discussions that took place in Japan, South Korea, Taiwan, and in California and elsewhere in the United States." (ER 635, 637 at ¶¶ 92, 96.) Plaintiffs allege that Defendants' "[p]ricing directions came from Asia," and that conduct in "Japan, South Korea, and Taiwan" included discussions in which Defendants "agreed to illegally increase the prices of LCD Panels sold in the United States and around the world." (ER 637 at ¶ 96; *see also* ER 638 at ¶ 98; ER 664 at ¶ 194 ["high-level executives based at defendants' Asian headquarters agreed on prices"].) Plaintiffs further allege that numerous "Crystal Meetings" in furtherance of the conspiracy occurred regularly over five years exclusively in Taiwan. (ER 640-642 at ¶¶ 105-113.)

While Plaintiffs rely on certain Defendants' admissions in plea agreements that "acts in furtherance of the conspiracy were carried out within the Northern District of California" (OB at 2), Plaintiffs' own allegations explain that the guilty pleas in fact admitted to conduct that took place largely outside the United States. (*See e.g.*, ER 646 at ¶ 127 [Chi Mei admitted to conspiratorial conduct in Taiwan]; ER 647 at ¶¶ 128-129 [LG Display admitted to conduct in Taiwan, South Korea, and United States]; ER 648-49 at ¶¶ 132-34 [Chunghwa executives' guilty pleas noting that conduct took place in Taiwan, South Korea, and United States]; ER 649-50 at ¶¶ 135-137 [Sharp and Epson Japan admitted to conduct that occurred in the United States and Japan].) Regarding California, the plea agreements merely state that the "acts in furtherance" were sales of relevant products to customers in California. (ER 8.) Notably, the plea agreements do not state that any Defendant sold relevant products to *Plaintiffs* in California. (*Id.*)

C. The Plaintiffs' Alleged Purchases

The SAC alleges that at various time periods AT&T Mobility, "one of the most significant purchasers of mobile wireless handsets" in the U.S., purchased mobile wireless handsets containing LCD Panels in Tennessee, Illinois, and New York. (ER 611-12, 629-30 at ¶¶ 2, 5, 69-70.) The SAC does not allege that AT&T Mobility, or any other plaintiff, purchased any mobile wireless handsets in California. Six of the eight Plaintiffs are alleged to have made *some* purchases in

California – *i.e.*, notebook computers and desktop monitors for use in their own business – but they do not allege which Defendant, if any, manufactured the LCD panels contained in these products, nor do they allege any supporting facts about the purchases. (ER 630-32 at ¶¶ 72-74, 76-78.) By Plaintiffs' own admission, a "significant portion" of their total purchases – "nearly 40 percent" or "$900 million worth of indirect purchases" – were made *outside* California. (SER 12-13; Petition for Permission to Appeal at 2, 10.[2]) Two Plaintiffs allege no California purchases of any kind. (ER 631-32 at ¶¶ 75, 79.)

SUMMARY OF ARGUMENT

Plaintiffs concede that they seek to recover under California law based on their out-of-state purchases because the states in which they made the purchases (including presumably Georgia and Texas, where five of the Plaintiffs are headquartered) do not permit indirect purchasers actions like the ones Plaintiffs allege here. (SER 12 ["Because the Court's Order limits [Plaintiffs'] claim to those purchases of LCD Products in the twenty states listed in the [SAC] that have passed an *Illinois Brick*-repealer statute, Plaintiffs will be unable to pursue claims with respect to purchases in other states . . . ."].) The Court should not permit

[2] The above-cited Petition refers to the Petition filed by Plaintiffs in this Court on March 14, 2011 (in Case No. 11-80070) seeking permission to file this appeal.

Plaintiffs to evade the laws that properly apply to their claims. The district court's dismissal, on due process grounds, of Plaintiffs' claims that are based on California law – yet seek remedies for purchases outside of California – is correct and should be affirmed.

Due process requires a showing that "significant contacts or a significant aggregation of contacts" exist between the state whose laws are invoked and both the parties *and* "the occurrence or transaction giving rise to the litigation." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). Only where such significant contacts are shown to exist between the state, the parties, *and* the occurrence or transaction out of which *each* Plaintiff's claim arises, may the law of that state be constitutionally applied. *Shutts*, 449 U.S. at 821-22 ("significant contacts or significant aggregation of contacts" must be shown between the state and "the claims asserted by *each* [plaintiff]" . . . to ensure that the choice of the [state's] law is not arbitrary or unfair") (emphasis added).

The district court expressly adopted and properly applied the *Shutts/Allstate* standard to Plaintiffs' allegations when it dismissed, after a thorough analysis, Plaintiffs' price-fixing claims brought under the Cartwright Act and the UCL to the extent those claims relied on purchases made outside of California. As the court concluded correctly, because, in a price-fixing case, "the relevant 'occurrence or

transaction'" giving rise to a plaintiff's claim is the "purchase of an allegedly price-fixed good," due process requires that a plaintiff demonstrate that it made its purchase in the state whose law it seeks to invoke. (ER 8-9.) All but one court to address the due process question at issue here have reached the same conclusion. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig. ("GPU")*, 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276-77 (D. Mass. 2004).[3]

The district court's decision is consistent with the purposes of the antitrust laws: "compensating consumers, not policing corporate conduct." *Relafen*, 221 F.R.D. at 277; *see also Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999) (describing "consumer protection" as the "primary purpose of the antirust laws"). It is, therefore, the consumer's purchase that gives rise to its price fixing claim, which is, in turn, "the relevant transaction or occurrence" for purposes of the due process analysis. The district court thus properly focused on the location of the purchase.

The expansive assertion by Plaintiffs and the State of California as *amicus*, that due process is satisfied because California has a significant state interest in

[3] The lone contrary authority, an unpublished decision from the Northern District of California, is unpersuasive, as discussed herein.

deterring any anticompetitive conduct that occurs within its borders, even if all affected purchases were made and all injuries were suffered elsewhere, is not supported by their cited cases. It also is inconsistent with *Shutts'* requirement of an individualized evaluation of the specific transactions giving rise to each plaintiff's claim. *Shutts*, 472 U.S. at 820-22.

Thus, while California may have an interest in "protecting consumers with respect to sales within its borders," it has a "relatively weak interest, if any, in applying [its] policies to consumers or sales in neighboring states." *Relafen*, 221 F.R.D. at 278. That the Cartwright Act generally gives non-residents standing to sue – assuming *arguendo* that a claim exists – is irrelevant to whether the Cartwright Act may be applied consistent with due process to sales wholly outside of California. *See, e.g., In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005) ("State consumer protection standing statutes do not extinguish federal constitutional rights or relieve courts from performing the analysis required to safeguard those rights.").

In addition, Plaintiffs' (and the State's) expansive view of California's interests in applying its antitrust laws to out-of-state purchases cannot be reconciled with the legislative intent of the Cartwright Act, which makes clear that the Act is designed "to promote free competition in commerce and all classes of business *in this state.*" *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 783 (2010)

(emphasis added). It also directly undermines the laws of several states that have made affirmative policy decisions not to allow indirect purchaser actions, thus implicating significant comity concerns and encouraging forum shopping. Plaintiffs' entire due process analysis is designed to ignore that conflict.

Even if an in-state purchase were not required to satisfy due process in this antitrust case, Plaintiffs' allegations still would not satisfy *Shutts'* "significant contacts" standard. Plaintiffs' analysis of its allegations fails to consider, as the district court properly did, whether any of the limited California contacts they allege relate to the "the occurrence or transaction giving rise to the litigation." *Shutts*, 472 U.S. at 818; *Allstate*, 449 U.S. at 308, 313. When properly considered, it is clear that the district court properly found that they do not.

This Court should affirm.

ARGUMENT

I. THE DISTRICT COURT CONCLUDED CORRECTLY THAT CALIFORNIA LAW MAY NOT BE APPLIED TO PLAINTIFFS' CLAIMS THAT ARE BASED ON PURCHASES OF GOODS EXCLUSIVELY OUTSIDE OF CALIFORNIA.

The Due Process Clause of the United States Constitution limits the power of a forum state to apply its substantive law to claims and parties with which it has little or no relationship. For the application of a State's substantive law to comply with due process, that State must have "significant contacts or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction [giving rise to the litigation]." *Allstate*, 449 U.S. at 308, 312-13; *see*

also Shutts, 472 U.S. at 818. These "contacts or significant aggregation of contacts" must be shown to exist between the state and "the claims asserted by *each* [plaintiff] . . . in order to ensure that the choice of the [state's] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-22 (emphasis added). These constitutional requirements are rooted in principles of fairness and comity. *McCluney v. Joseph Schlitz Brewing Co.*, 649 F.2d 578, 582 (8th Cir. 1981) ("The Court's 'significant contacts' analysis addresses the traditional concerns of Due Process: preventing unfairness to the parties and promoting healthier interstate relations.").

A. In This Price-Fixing Case, the Law of the State In Which the Allegedly Price-Fixed Product Is Purchased Must Be Applied to Satisfy Due Process.

The district court, relying on *Allstate* and *Shutts*, correctly found that, in this price-fixing case, "the relevant 'occurrence or transaction'" for purposes of the due process analysis, "is the plaintiff's purchase of an allegedly price-fixed good." (ER 8, citing *Allstate*, 449 U.S. at 308.) Thus, to constitutionally invoke the Cartwright Act, each plaintiff must allege that it purchased allegedly price-fixed goods in California. *Allstate*, 449 U.S. at 308. It is the in-state purchase that ensures the requisite due process connection between the forum state and the Plaintiffs' claims.

The operative Second Amended Complaint alleged no facts to support applying California law to the dismissed claims – *i.e.*, those claims based solely on

transactions occurring outside California. (ER 629-32 at ¶¶ 69-79; *compare* ER 3 [court's order holding that "only those plaintiffs who purchased products in California may allege claims under California law"].)

Significantly, in reaching its holding, the district court acknowledged that certain defendants "did business" and "maintained offices and/or sales agents in California," that one Plaintiff "is headquartered in California," and the "plaintiffs have a presence in the various states," but rightly reasoned that "these allegations do not provide a link between plaintiffs' claims that they purchased the price fixed product and California." (ER 8-9.) The court similarly noted that certain Defendants' plea agreements "do[] not establish the requisite connection with California" because they "do not state, nor have plaintiffs alleged, that any defendants sold products to any of the plaintiffs in California." (ER 8.)

The court's order is consistent with *Allstate* and *Shutts* and the other published decisions that have considered this issue. Following *Allstate* and *Shutts*, the courts in *GPU* and *Relafen* both concluded that a plaintiff cannot constitutionally bring a state-law antitrust claim based on purchases made in another state. *GPU*, 527 F. Supp. 2d at 1027-28; *Relafen*, 221 F.R.D. at 276-77.

Relafen declined to apply Pennsylvania law to antitrust claims of plaintiffs who purchased the product at issue outside of Pennsylvania. There, the company producing the product was headquartered in Pennsylvania and the product was sold

and distributed from Pennsylvania. *Relafen*, 221 F.R.D. at 276-77. While the court found that Pennsylvania had a "substantial connection to [one of the two defendants] and some, though not all, of its alleged conduct," it reasoned that the purpose of antitrust laws is to compensate consumers, and not to police corporate conduct. *Id.* Given the nature of state-law antitrust claims, the court held that the "more significant contact" in the due process analysis was "the location of the sales to the end payor plaintiffs." *Id.* at 277.[4]

In *GPU*, the court similarly applied the *Allstate/Shutts* "significant contacts" test to strike the plaintiffs' allegations relating to a nationwide class under the Cartwright Act on the ground that plaintiffs who did not purchase the allegedly price-fixed products in California could not constitutionally invoke California law. *GPU*, 527 F. Supp. 2d at 1027-28. In analyzing whether the plaintiffs alleged sufficient contacts to satisfy the *Allstate/Shutts* due process test, the court agreed with the *Relafen* court's determination that, in an antitrust case, "the more significant factor was the location of the injury, or where the plaintiff was located

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[4] Plaintiffs incorrectly argue that *Relafen* "stopped short of finding" that application of Pennsylvania law to claims based on out of state purchases "would violate due process." (OB at 36.) The court specifically noted that it had to determine if the claims at issue met the *Shutts/Allstate* due process test. 221 F.R.D. at 276. Thus, in rejecting the application of Pennsylvania law to a nationwide class, the court necessarily found that such application would violate due process with respect to purchases that took place outside Pennsylvania.

when the injury occurred from purchasing the products." *Id.* at 1027.[5] *GPU* noted that "[i]t is hard to see why the laws of other states should be tossed overboard and their residents remitted to California law for transactions that, for individual consumers, are local in nature." *Id.*

Like the *Relafen* and *GPU* courts, the district court here correctly concluded that the location of the purchase of allegedly price fixed goods is the predominant factor in a due process analysis in a price-fixing case. The "basic policies underlying the particular field of law" is a key factor underlying a choice of law analysis. Restatement (Second) of Conflict of Laws § 6(2)(e) (1971). And "[t]he primary aim of antitrust and consumer protection laws generally – and those of indirect purchaser states particularly – is compensating consumers, not policing corporate conduct." *Relafen*, 221 F.R.D. at 277; *see also Cel-Tech Commc'ns*, 20 Cal. 4th at 185 (describing "consumer protection" as the "primary purpose of the antirust laws"); *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 935 (1976) ("Antitrust laws are designed primarily to aid the consumer."). It is the plaintiff's purchase that gives rise to any alleged injury resulting from a price

[5] The court's decision was not, as Plaintiffs contend, based on the lack of specificity of plaintiffs' allegations. (OB at 35.)

fixing claim, which is, in turn, "the relevant transaction or occurrence" for purposes of the *Shutts/Allstate* due process analysis. The district court thus properly focused on the location of the purchase.[6]

California's "interest in preventing and remedying unlawful conduct that takes place within this state" (OB at 25-28, 30-31; Amicus Br. at 3, 6-7, 21-23), cannot support a different conclusion. For starters, the argument that California's interest in preventing and remedying anticompetitive conduct that occurs in California is "substantial" even if "the plaintiff's injury occurred outside the state"

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[6] The unpublished decision in *Pecover v. Elec. Arts Inc.*, 2010 U.S. Dist. LEXIS 140632 (N.D. Cal. Dec. 21, 2010) does not support a different result. *Pecover* relied erroneously on a footnote in *Allstate* to conclude that the location of purchase of an allegedly price-fixed product is not required to satisfy due process because "[c]ourts [] have moved away from the view that the location of the event is controlling" and have instead moved to an "interest analysis." *Id.* at *49-50 (citing *Allstate*, 449 U.S. at 308 n.11). *Pecover*, however, misconstrued *Allstate* and the published authorities (*GPU* and *Relafen*) that have followed it. In *GPU* and *Relafen*, the courts properly conducted the "interest analysis" required by *Allstate* and found that, given the specific antitrust claims alleged, the location of the purchase was the "more significant" factor in the analysis. Moreover, although *Pecover* referred to the purpose of the antitrust and consumer protection laws, it failed to take into account how that purpose affects the due process analysis. Application of a state's antitrust law simply because some of the alleged conduct touched that state is at odds with the fact that antitrust laws are not intended to "polic[e] corporate conduct." *Relafen*, 221 F.R.D. at 277. *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896 (N.D. Cal. 2008), which Plaintiffs imply followed *Pecover* (OB at 30), had nothing to do with due process and so provides no support for Plaintiffs' argument.

(OB at 27-28), is wrong.[7] The states in which the allegedly price-fixed sales occurred have a far more significant and legitimate interest in having their laws applied to those transactions. California may have an interest in "protecting consumers with respect to sales within its borders," but it has a "relatively weak interest, if any, in applying [its] policies to consumers or sales in neighboring states." *Relafen*, 221 F.R.D. at 278; *see also Sheet Metal Workers Local 441 Health & Welfare Plan v. Glaxosmithkline, PLC*, 737 F. Supp. 2d 380, 392 (E.D. Pa. 2010) (describing in a choice-of-law analysis "each state's strong interest in protecting its own consumers (but a far weaker interest in protecting consumers from other states)").

Nor can Plaintiffs' and the State's argument be reconciled with the well-settled principle that a state's regulatory authority to protect consumers within its borders does not allow it to impose its regulatory choices on other jurisdictions where the transactions took place. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989) ("a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's

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[7] The case Plaintiffs cite in support – *Diamond Multimedia Sys. v. Super. Ct.*, 19 Cal. 4th 1036 (1999) (OB at 27-28) – did not address due process (or antitrust) issues and so is distinguishable. So too are *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987) and *Norwest Mortgage, Inc. v. Super. Ct.*, 72 Cal. App. 4th 214 (1999) (OB at 28 n.10). *See supra* at p. 37.

authority"); *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (to avoid infringing on policy choices of other states, "the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy"); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there."); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997) ("In so far as the Alabama suit challenges sales from plants or offices in other states to pharmacies in other states, it exceeds the constitutional scope of the Alabama antitrust law.").[8]

[8] The district court has not yet had the opportunity to consider whether the Commerce Clause permits California to apply its law to Plaintiffs' purchases occurring outside of California. However, a well-established body of case law holds that California's law may not reach this far. *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) ("The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."); *Midwest Title Loans Inc. v. Mills*, 593 F.3d 660, 665-69 (7th Cir. 2010); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 619-20 (7th Cir. 1999); *Motor Vehicle Mfrs. Ass'n v. Abrams*, 720 F. Supp. 284, 287-89 (S.D.N.Y. 1989). The Commerce Clause thus provides yet another basis for rejecting Plaintiffs' California claims.

The focus of the due process inquiry is thus appropriately on where the sale to a particular buyer took place. Both Plaintiffs and the State, however, attempt to render irrelevant the location of each Plaintiff's purchases, and instead group all of the Plaintiffs together in their due process analysis. Plaintiffs argue that all Plaintiffs, no matter where they purchased, should be able to sue under the Cartwright Act so long as some of the Defendants are present in California and some of the alleged anticompetitive conduct occurred here. (OB at 14.) This argument, however, would eviscerate the *Shutts* requirement that an individualized evaluation must be made of the nexus between the state and the specific transactions giving rise to each Plaintiff's claim. *Shutts,* 472 U.S. at 820-22.

In *Shutts*, the Supreme Court reversed the Kansas Supreme Court's determination that "Kansas law was applicable to all of the transactions which it sought to adjudicate." *Id.* at 823. *Shutts* involved a nationwide class of gas company investors seeking to recover, under Kansas law, interest on royalties on gas leases involving land located in eleven different states, including Kansas, and royalty owners located in all 50 states, the District of Columbia and several foreign countries. *Id.* at 799. The Court found that application of Kansas law to every claim in the case exceeded constitutional limits, even though the defendant owned property and conducted "substantial business" in Kansas, oil and gas extraction was "an important business to Kansas," and "hundreds of Kansas plaintiffs were

affected by [the defendant's] suspension of royalties." *Id.* at 819-22. The Supreme Court found it inappropriate to "aggregate[e] all the separate claims" in the case. *Id.* at 820. Rather, the Court held that the transactions giving rise to *each* class member's claims had to be evaluated, and it was constitutionally impermissible to adjudicate under Kansas law any claim that arose from "transaction[s] with little or no relationship" to the state. *Id.* at 821-22. Plaintiffs, in short, urge a result that is directly contrary to Supreme Court precedent.

The cases Plaintiffs cite do not even address the plaintiff-specific evaluation required by *Shutts*, and do not support their position that contacts by certain plaintiffs with California and some allegedly anticompetitive conduct occurring in this State can be sufficient to meet due process in a price-fixing context.[9]

The State goes even further than Plaintiffs in arguing for a rejection of the *Shutts/Allstate* requirement of a nexus between the parties *and* the specific

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[9] Indeed, most of Plaintiffs' cases are not antitrust cases and none involved price-fixing at all. (OB at 19-22.) Plaintiffs' cite only two antitrust cases – *Pecover* (discussed *supra* at note 6) and *American Rockwool Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411 (E.D.N.C. 1986). *American Rockwool* is easily distinguishable. There, antitrust and unfair competition law of North Carolina were found to apply to a disparagement claim where the sole plaintiff was a resident of and had its principal place of business in North Carolina, the sole defendant did business in North Carolina, and defendant's "course of conduct giving rise to [the] claims, was carried out in substantial part in North Carolina." *Id.* at 1427. Accordingly, the court found the requisite nexus of the parties *and* the transaction with North Carolina existed.

occurrence and transaction with the State whose laws are sought to be invoked, by suggesting that the location of the defendants' conduct should be the exclusive factor in a due process analysis. (Amicus Br. at 2, 4, 5-6.) According to the State, only a "significant, non-de minimis" amount of the defendants' wrongful conduct must occur in California. (*Id.* at 2, 6.) "Non-de minimis," however, is not synonymous with "significant" – nor is the proffered "non-de minimis" standard supported by the case law.[10] Indeed, requiring only that a defendant's conduct have a "non-de minimis" contact with the forum state would render meaningless the due process "significant contacts" test.[11]

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[10] Two of the cases that the State cites in support of its proposed standard – *Diamond Multimedia Sys. v. Super. Ct.*, 19 Cal. 4th 1036 (1999) and *People v. Morante*, 20 Cal. 4th 403 (1999) (Amicus Br. at 6-8) – are not due process cases at all, but rather involve the proper construction of state statutes. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95 (2006), does not support the State's argument either. *Kearney* held that California privacy laws could constitutionally be applied where plaintiffs' claims were based on defendant's "alleged policy and practice of recording telephone calls of *California* clients, while the clients are *in California*, without the clients' knowledge or consent." *Id.* at 104 (reasoning that "[t]his is a traditional setting in which a state may act to protect the interests of its own residents while in their home state"). *Norwest Mortgage Co.*, 72 Cal. App. 4th at 225-27, applied the *Shutts* "significant contacts" test and thus, contrary to the State's contention, provides no support for a due process standard that requires no more than "a de minimis connection between [the alleged unlawful conduct] and the state." (Amicus Br. at 12.) *See also supra* at p. 37.

[11] The State's description of that test as one that only requires contacts that are "more than 'slight and casual'" (Amicus Br. at 2, 15, 20) is puzzling. That language appears in the *Allstate* dissent (*see* 449 U.S. at 333 (Powell, J., writing for dissent)), not the controlling plurality opinion.

B. The Location of the Purchase As the Predominant Factor in a Due Process Analysis Is Consistent With the Language and Intent of the Cartwright Act.

Plaintiffs assert erroneously that the language and legislative intent of the Cartwright Act support their expansive interpretation of the law's purpose that would permit, in their view, disregard for fundamental due process principles. (OB at 30.) Indeed, Plaintiffs' analysis, in which a state statute defines the boundaries of a federal constitutional requirement, turns the proper constitutional analysis on its head.

Plaintiffs' reliance on the Cartwright Act's general grant of standing to non-residents improperly conflates an issue of standing under a statute with the limitations imposed by the Federal Constitution. (OB at 30.) As such, it "opposes basic constitutional law." *St. Jude Medical*, 425 F.3d at 1121 ("State consumer protection standing statutes do not extinguish federal constitutional rights or relieve courts from performing the analysis required to safeguard those rights.").[12] It is also irrelevant to this appeal. Defendants do not contest that a non-resident could bring a claim under California law – as long as the statute applies and the

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[12] The State also claims that the district court's opinion somehow undermines "federalism goals," arguing that in areas traditionally regulated by the states, "courts will presume that Congress did not intend to preempt state law." (Amicus Br. at 23.) But there is no preemption argument here, and Congress has taken no action to affect the scope of each state's antitrust laws. The issue here is the proper

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requirements of due process are satisfied based on the relevant purchase having taken place in California (and indeed the California claims of several non-resident AT&T entities remain in the case as a result).[13] But simply because an out-of-state plaintiff can bring claims for purchases in California does not mean that it may bring a Cartwright Act claim for a purchase made outside of California, which is a fundamentally different transaction in a price-fixing case.

There is simply no legitimate interest under a state's antitrust laws in protecting consumers who made purchases in other states, and neither the Cartwright Act (nor any of the cases cited by Plaintiffs and the State) articulates such an interest. The Cartwright Act's plain language supports the district court's determination that the location of the purchase is paramount. The Act's private enforcement provision notes that an action "may be brought by any person *who is injured* in his or her business or property by reason of anything forbidden or declared unlawful in this chapter…" Cal. Bus. & Prof. Code § 16750(a) (emphasis added). And the injury in a price-fixing case occurs at the time the product is

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constitutional limitations on the application of one state's laws, specifically the limitation not to impinge on the effective enforcement of sister States' laws.

[13] The State's argument that the district court's decision hinders constitutional principles of equal treatment is therefore also wrong (Amicus Br. at 20-21) – California residents and non-residents are treated exactly the same under the district court's analysis.

purchased. *See, e.g., Nichols v. Mobile Bd. of Realtors, Inc*., 675 F.2d 671, 676 (7th Cir. 1982).

Plaintiffs and the State quote extensively from *Clayworth*, 49 Cal. 4th 758, for the proposition that the Cartwright Act was intended to enable disgorgement, deter antitrust violations and protect competition. (OB at 31; Amicus Br. at 21-22.) Defendants do not dispute this general proposition, but it necessarily must be bounded by Constitutional principles. As the California Supreme Court in *Clayworth* recognized, the Cartwright Act is intended to promote "free competition in commerce . . . *in this state*," 49 Cal. 4th at 783 (emphasis added), not to police corporate conduct nationwide, or to impose California law where other States' interests are more direct.

C. The Plaintiffs' and State's Proposed Expansive Reading of Due Process Law Would Directly Undermine the Affirmative Policy Decisions of Other States and Encourage Forum Shopping.

Plaintiffs have essentially conceded that they are seeking to circumvent the laws of the states in which the LCD panels were purchased – because many of those competing states' laws do not allow indirect purchaser claims, or provide limitations that otherwise are unfavorable to Plaintiffs. SER 12 [acknowledging that the court's order limits plaintiffs' claim to purchases in states that have passed *Illinois Brick* repealer statutes]; Petition for Permission to Appeal (*supra* note 2) at 2-3 [admitting that Plaintiffs allege California claims based on out-of-state purchases because they cannot pursue them "under the law of any other state"].)

For example, several Plaintiffs are located in Texas and thus presumably purchased the allegedly price-fixed products in that state. (ER 620 at ¶ 27.) Under *Abbot Labs., Inc. v. Segura*, 907 S.W.2d 503, 504 (Tex. 1995), indirect purchasers do not have standing to raise claims under either the Texas Free Enterprise and Antitrust Act ("Texas Antitrust Act") or the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). This reflects the policy of Texas with respect to its internal interests, which may be different from that of California, and such differences are exactly what the district court here protected by dismissing Plaintiffs' claims. Indeed, to allow Plaintiffs to pursue damages for out-of-state purchases under the Cartwright Act would allow the state with the most expansive damages and standing rights to basically set the law for the rest of the country. That would be fundamentally unfair and ignores the reasoned and varied approaches taken by each state to reflect their particular interests.

Respecting the internal laws and policies of sister states are important to the due process analysis, cannot be ignored and further support the propriety of the district court's decision here. *McCluney*, 649 F.2d at 582 ("When a state's law is applied to a transaction with which the state has no significant contact, it infringes upon the legitimate interests that other states may have in the transaction; this infringement is not reasonable in a due process sense within the context of our federal system of government."). Indeed, the State concedes that "California's

interest in providing non-residents with a means of recovery for damages occurring due to conduct that has a sufficient nexus to California" must give way where, as here, "the home states of these non-residents" have "identified an interest in denying recovery." (Amicus Br. at 10.) Otherwise, allowing Plaintiffs here to arbitrarily choose California law to apply to their out-of-state purchase claims, would create tremendous incentives for prospective indirect purchaser plaintiffs to improperly forum shop. *See Shutts*, 472 U.S. at 820 ("If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation of forum shopping would be irresistible.").

Nor are the internal laws and policies of other states relevant only to a traditional choice-of-law analysis, and not to the due process analysis, as the State (but not the Plaintiffs) suggests. (Amicus Br. at 4, 24-25.) First, a choice-of-law analysis is distinct from that required for purposes of whether Constitutional due process requirements are met, and Constitutional requirements cannot be ignored. *GPU*, 527 F. Supp. 2d 1027 ("The *Shutts* test . . . deals with whether the application of a certain state's law . . . violates due process and the full faith and credit clause, while a choice-of-law analysis is a nonconsititutional question under the common law of the state, here California. *Shutts* cannot be swept under the rug."). Here, as shown and properly found by the district court, due process limits

the application of California law only to claims arising from purchases by Plaintiffs of allegedly price fixed goods in that state.

Second, even under traditional choice-of-law principles, affirmance of the district court's decision is still appropriate. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (Rule 12(b)(6) dismissal may be affirmed on any basis supported by the record). Specifically, Plaintiffs allege no facts showing that California has a greater interest in pursuing remedies for out-of-state purchases, when compared to the states in which those purchases occurred, particularly where the Plaintiffs (with one exception) are not headquartered here, and Defendants are not based here, and the states in question (*e.g.*, Texas) have enunciated their own internal policies for injuries occurring in those states. *See*, *e.g.*, *GPU*, 527 F. Supp. 2d 1027-28 (under traditional choice-of-law analysis, California law cannot be applied to nationwide antitrust claims, as it "would allow residents of some states who abide by *Illinois Brick* to have claims where their respective state governments have declined to allow them").

Notably, the district court in this consolidated proceeding, in relation to other plaintiffs' claims, has reached this very conclusion – *i.e.*, that a traditional choice-of-law analysis would not permit application of California law to purchases made (and thus injuries suffered) outside of California. (SER 5-7.)

II. PLAINTIFFS' ALTERNATIVE DUE PROCESS ANALYSIS IS CONSTITUTIONALLY FLAWED.

In place of the district court's reasoned due process analysis, Plaintiffs advance an alternative theory that fails to consider, as the district court properly did, whether any of the limited California contacts alleged relate to "the occurrence or transaction giving rise to the litigation." *Shutts*, 472 U.S. at 818, 821-22; *Allstate*, 449 U.S. at 308, 313. Plaintiffs' alternative theory therefore is flawed for a number of reasons and would not pass constitutional muster.

First, Plaintiffs' undue focus on the place where some of the Defendants do business and the locations of some of the Defendants' sales offices and agents (OB at 5-7, 23) confuses due process limitations with a personal jurisdiction analysis. *See e.g., Shutts*, 472 U.S. at 821 (personal jurisdictional and constitutional choice of law are "entirely distinct" and "state may not use assumption of [personal] jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law"); *Norwest Mortgage*, 72 Cal. App. 4th at 226-27 (recognizing that beyond a finding of personal jurisdiction, due process test must still be met).

Plaintiffs' allegations about Defendants' purported offices and business activities also fail to provide the required link between the Plaintiffs' ***claims*** and California. *Shutts*, 449 U.S. at 818, 820-22. Plaintiffs also ignore that several Defendants are not California residents, do not do business in California, and are

not alleged to have engaged in any conspiratorial conduct in California.[14] (ER 621-28 at ¶¶ 31-62.)

Second, to satisfy due process, the "significant contact or significant aggregation of contacts" must be shown to exist between the state and "the claims asserted by *each* [plaintiff]…in order to ensure that the choice of the state's [law] is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-22 (emphasis added); *see also St. Jude Medical*, 425 F.3d at 1119-21 (even where defendant headquartered in Minnesota and alleged conduct occurred there, remanding to trial court in part because court failed to analyze contacts of Minnesota to each of plaintiff class member's claims). Here, eight different AT&T entities are Plaintiffs in this litigation, and yet Plaintiffs allege that only two of them do business in California: Plaintiff argues only that one of them, AT&T Mobility, conducts business in California and maintains some inventory in California, and that another, Pacific Bell Telephone Company, provides services in California and has its headquarters there. (OB at 11-12, 24.) But Plaintiff's complaint, like its brief, fails to explain how those allegations relate to the claims at issue in this case. *Shutts*, 472 U.S. at

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[14] Plaintiffs' conclusory allegations that "[e]ach defendant conducts substantial business in the state of California" (OB 23; ER 617 at ¶ 17) and that the alleged conspiratorial conduct "was centered in California" (OB at 7) are unsupported by their allegations and must be disregarded. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

818, 821-22 (contacts must be shown between state whose laws are invoked and both parties and occurrence or transaction giving rise to claim); *Allstate*, 449 U.S. at 308 (same). If such contacts were sufficient, then any major corporation could sue under the laws of any state in which it did business any time it suffered injury anywhere in the United States. That is not the law.

Third, Plaintiffs imply, without analysis, that their selective quotation of limited conspiratorial activities that allegedly occurred in California amounts to "substantial" activities in this state. (OB at 7-11, 24.) Plaintiffs do not mention, however, that even by their own allegations, the overwhelming majority of alleged conspiratorial activity, and the most significant of that alleged activity, did not occur in California (or even in the U.S.). (ER 635-642, 664 at ¶¶ 92, 96, 98, 105-113, 194 [alleging conduct in Taiwan was "necessary and integral" part of conspiracy, "pricing directions came from Asia," agreement was made abroad to increase prices of LCD panels sold in U.S., and that dozens of Crystal meetings occurred exclusively in Taiwan].) *See also* discussion *supra* at Statement of Facts, § B.

The cases upon which Plaintiffs rely for their alternative due process theory also do not provide support for ignoring the requirement for a required nexus between a plaintiff's claim and the transaction or occurrence at issue. Significantly, none of the cases sought to be relied upon are price-fixing cases,

where the injury to be addressed is patently the purchase of the allegedly overpriced product. In addition, the cases cited by Plaintiffs (and the State) factually do establish the requisite nexus between claims alleged and the particular transaction and occurrence involved in each of those cases.

For example, Plaintiffs argue that their alleged contacts with California are "far more numerous and significant than those found sufficient" in *Allstate*. (OB at 25.) Not so, and more significantly the facts of *Allstate* show a close nexus between the state laws invoked and the transactions and occurrences in that case. In *Allstate*, a widow who resided in Minnesota sued Allstate in a Minnesota court for failure to pay on insurance policies owned by her late-husband (who died in a car crash in Wisconsin). The Court concluded that sufficient contacts existed between Minnesota and the occurrence giving rise to the litigation for Minnesota to apply its own laws to the dispute, including that (1) Allstate knew when it issued the policies that the decedent commuted daily to Minnesota – and the policies covered those commutes; (2) the decedent was a member of the Minnesota workforce – and thus his death affected his Minnesota employer; (1) the widow's residence in Minnesota gave that state a significant interest in keeping her "off welfare rolls" of that state; and (4) Allstate did substantial business in Minnesota. *Allstate*, 449 U.S. at 313-19. Plaintiffs do not allege similar contacts with California here.

Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935), a pre-*Allstate* and *Shutts* case the State relies upon, is similarly inapposite. Its due process analysis does not track the test the Supreme Court later announced and therefore does not set forth the applicable due process standard. Moreover, *Alaska Packers* concluded that California had the right to apply its own workman's compensation law where the employment contract was entered into in California, even though the employee's injury occurred in Alaska, because the contract provided for the employee's return travel to California where his wages would be received. *Alaska Packers*, 294 U.S. at 542. The Court highlighted the "special circumstances" of the case, which gave California a heightened interest in controlling and regulating this employer-employee relationship because, as the Court found, the "probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation." *Id.* at 542-43. Without providing a California-law remedy, there was a danger that plaintiffs "might become public charges," which was a matter of "grave public concern to the state." *Id.* at 542.

Further, as with substantially all of the cases cited by Plaintiffs and the State, *Alaska Packers* does not concern an antitrust claim, and, contrary to the State's contention, does not "stand for the proposition that the due process analysis . . . focuses on whether the nexus between the alleged unlawful acts and the state itself is attenuated or slight and casual." (Amicus Br. at 2.) And, the analysis of the state's interest in the "special circumstances" involved in *Alaska Packers* is irrelevant to the state interest in enforcing antitrust laws in this case.

The circuit court decisions upon which Plaintiffs rely are likewise readily distinguishable. Each addresses parties and conduct that had far more significant relationships with forum states than those alleged here. For example, in *Sullivan v. Oracle Corp.*, 547 F.3d 1177, 1186 (9th Cir. 2008), withdrawn on other grounds, 557 F.3d 979 (9th Cir. 2009), the Court found that California's labor law applied to the overtime claims of two non-residents where the sole defendant had its principal place of business in California, the key decisions relating to overtime pay were made in California, and the work at issue was performed entirely in California. (*Compare with* OB at 21 [mischaracterizing due process test as met in *Sullivan* merely because defendant had headquarters and principal place of business in California].) Similarly, in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 437-38 (4th Cir. 1999), Kentucky's electioneering law was held applicable to out-of-state television and radio broadcasters who sold

advertising time to Kentucky gubernatorial candidates where defendants' conduct had "substantial and pervasive" contact with Kentucky: defendant broadcasters had several stations in Kentucky, directed broadcasts to Kentucky, maintained retransmission consent agreements with cable systems whose subscribers lived in Kentucky, provided regular news coverage of Kentucky events, marketed their services in Kentucky, employed Kentucky residents, and the majority of the advertising revenue earned was comprised of Kentucky tax dollars. *See also Manuel v. Convergys Corp.*, 430 F.3d 1132, 1139 (11th Cir. 2005) (Georgia law applied to non-compete agreement to be enforced against Georgia resident because "effects [of the non-compete agreement] would be felt" in forum state) (internal quotation omitted); *Budget Rent-A-Car Sys., Inc. v. Chappell*, 407 F.3d 166 (3d Cir. 2005) (New York law applied to car accident paralyzing New York resident, where car had been driven in New York prior to incident and accident occurred on trip that began in New York); *Northwest Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997) (Minnesota law applied to defamation claims where sole plaintiff headquartered in Minnesota and "statements giving rise to the claims" were "made in Minnesota to a local newspaper, were first published

in Minnesota, and involved the performance of contracts that the parties had agreed would be governed by Minnesota law").[15]

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[15] The district court cases upon which Plaintiffs rely (OB at 21-22, 26-27) are to similar effect. *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008) (Washington consumer protection statute applied to marketing scheme where scheme was created in Washington, defendant was incorporated and had headquarters there, named plaintiff was Washington resident, and defendants contractually required litigation under Washington law); *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 535 (D. Minn. 2007) (Minnesota law applied to claim arising from fraudulent sale of annuity products where sole defendant incorporated and headquartered in Minnesota, created and distributed marketing materials that were basis of claim in Minnesota, benefitted from fraudulent materials when received insurance payments in Minnesota, listed Minnesota home office as contact and place of origin on marketing materials); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 669 F. Supp. 1244, 1253 (S.D.N.Y. 1987) (involving claims under New Mexico law based on plaintiff's losses in trading metal futures through account with defendant in New Mexico; without providing any detailed due process analysis, court noted that aggregation of sole plaintiff's New Mexico residence and "trading base" with "fact of personal jurisdiction over [two] defendants" were sufficient to permit plaintiff to rely on New Mexico law with respect to claims against only two defendants, but not four others); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 475-76 & n.9 (E.D. Pa. 2010) (Pennsylvania law governed defamation claim because "Plaintiff was domiciled in Pennsylvania and allegedly suffered harm to her reputation in Pennsylvania," and defendant aware that plaintiff would remain in Pennsylvania for length of employment); *Keilholtz v. Lennox Hearth Products Inc.*, 268 F.R.D. 330, 339-40 (N.D. Cal. 2010) (California law applied in product liability class action where "significant portion of Defendants' alleged harmful conduct emanated from California," including fact that 19% of fireplaces were sold in California and 76% of fireplaces were manufactured, assembled or packaged in California); *Chavez v. Blue Sky Natural Beverages Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (California law applied to deceptive product labeling claim where defendants headquartered in California and misconduct originated in California); *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 272 (N.D. Cal. 1987) (California law governed securities fraud action where corporate defendant headquartered in California, individual defendants resided in

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The California state court cases cited also do not compel a different result, and in any event the State's self-serving statements about the broad application of its law should be given little weight. *Clothesrigger*, 191 Cal. App. 3d at 613 (sufficient contacts found where "the alleged fraudulent misrepresentations forming the basis of the claim of every Sprint subscriber nationwide emanated from California"); *Norwest Mortgage*, 72 Cal. App. 4th at 222, 225-27 (UCL applied to non-California residents where defendant's purchase of policy at issue occurred in California, but did not apply to non-California residents where defendant's policy purchase took place out of state, even though defendant was incorporated and did business in California and had substantial number of loans in California); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 241-42 (2001) (California law applied to UCL claim where sole defendant was California corporation with principal place of business in California, literature was prepared and distributed from California, and "the core decision at issue," the change of policy upon which claim was based, was made in California).

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California, dissemination of the documents at issue occurred in California, and alleged fraudulent conduct was "perpetrated primarily in California"); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986) (California law governed securities fraud action where public offering of securities "emanated from California," most of defendants' activities at issue took place in California, and capital raised by offering went to company offices in California).

In short, Plaintiffs' cited authorities, if anything, *support* the district court's ruling requiring a close nexus of the conduct addressed with the state whose laws are sought to be invoked. In each of the cases cited, the specific conduct and other facts involved satisfied the controlling Constitutional test, and the facts and circumstances of those cases cannot properly be imported to control the distinct circumstances of this case.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the decision of the district court.

DATED: October 24, 2011

Respectfully Submitted,

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ATTESTATION PURSUANT TO CIRCUIT RULE 25-5(e)

I, Richard S. Taffet, attest that all other parties on whose behalf the filing is submitted concur in the filing's content.

DATED: October 24, 2011

s/ Richard S. Taffet
Richard S. Taffet

CERTIFICATE OF COMPLIANCE

I certify that this joint answering brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. Proc. 32(a)(5) and (6). This brief is 9,297 words, excluding the portions exempted by Fed. R. App. Proc. 32(a)(7)(B)(iii).

DATED: October 24, 2011 s/ Richard S. Taffet

Richard S. Taffet

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees state that they know of no cases related to this one within the meaning of Rule 28-2.6.

DATED: October 24, 2011

s/ Richard S. Taffet

Richard S. Taffet

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 24, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 24, 2011, I caused to be mailed the foregoing document by First-Class Mail, postage prepaid, with courtesy copies by electronic mail, to the following non-CM/ECF participants:

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DATED: October 24, 2011

s/ Richard S. Taffet

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