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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

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

Case No. M-07-1827-SI
MDL No. 1827

16 This Document Relates To Case No.: 09-4997 SI
17 AT&T MOBILITY LLC; AT&T CORP.; AT&T
SERVICES, INC.; BELLSOUTH
18 TELECOMMUNICATIONS, INC.; PACIFIC
BELL TELEPHONE COMPANY; AT&T
19 OPERATIONS, INC.; AT&T DATACOMM,
INC.; SOUTHWESTERN BELL TELEPHONE
20 COMPANY,

21 Plaintiffs,

22 v.

23 AU OPTRONICS CORPORATION; AU
OPTRONICS CORPORATION AMERICA,
INC.; CHI MEI CORPORATION; CHI MEI
24 OPTOELECTRONICS CORPORATION; CHI
MEI OPTOELECTRONICS CORPORATION
25 USA, INC.; CMO JAPAN CO. LTD.; NEXGEN
MEDIATECH, INC.; CHUNGHWA PICTURE
26 TUBES LTD.; TATUNG COMPANY OF
AMERICA, INC.; HANNSTAR DISPLAY
27 CORPORATION; LG DISPLAY CO. LTD.; LG
DISPLAY AMERICA, INC.; SAMSUNG
28 ELECTRONICS CO., LTD.; SAMSUNG

**JOINT OPPOSITION TO
PLAINTIFFS' MOTION TO
CERTIFY UNDER 28 U.S.C. 1292(B)**

Date: February 17, 2010
Time: 9:00 A.M.
Place: Courtroom 10, 19th Floor
Judge: The Hon. Susan Illston

1 SEMICONDUCTOR, INC.; SAMSUNG
2 ELECTRONICS AMERICA, INC.; SHARP
3 CORPORATION; SHARP ELECTRONICS
4 CORPORATION; TOSHIBA CORPORATION;
5 TOSHIBA AMERICA ELECTRONIC
6 COMPONENTS, INC.; TOSHIBA MOBILE
7 DISPLAY CO., LTD.; TOSHIBA AMERICA
8 INFORMATION SYSTEMS, INC.; EPSON
9 IMAGING DEVICES CORPORATION; EPSON
10 ELECTRONICS AMERICA, INC.,

11
12 Defendants.

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1 **I. INTRODUCTION**

2 Plaintiffs seek certification for appellate review of this Court’s November 12, 2010 order
3 (“November 12 Order”) dismissing certain state law claims alleged in Plaintiffs’ Second
4 Amended Complaint (“SAC”). Specifically dismissed were claims under the laws of those
5 states, including those alleged under California law, in which specific Plaintiffs were not alleged
6 to have purchased products in those states. *See* November 12 Order, Doc. No. 2142.¹ The
7 Court’s November 12 Order followed its earlier Order, rendered on June 28, 2010 (“June 28
8 Order”), which likewise dismissed state law claims of certain Plaintiffs who did not purchase
9 products with allegedly price-fixed LCD panels in those states. *See* June 28 Order, *In re TFT-*
10 *LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2010 WL 2609434 (N.D. Cal. June 28, 2010)
11 (Doc. No. 1822).

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

18 Plaintiffs’ motion should be denied, for several reasons.

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

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

26 _____

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

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

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

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

19 **II. BACKGROUND**

20 **1. The Motion to Dismiss Plaintiffs’ First Amended** 21 **Complaint.**

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

27 The FAC asserted claims on behalf of all the Plaintiffs under California’s Cartwright Act
28 and, “in the alternative,” under California’s Unfair Competition law, as well as under the

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

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

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

18 2. The Motion to Dismiss Plaintiffs’ Second Amended 19 Complaint.

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

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

1 3-4. Specifically, and most relevant to the instant motion, the Court rejected Plaintiffs’ argument
 2 that they “may pursue all of their claims under California law because defendants’ price-fixing
 3 conduct in California creates the significant contacts between California and plaintiffs’ claims
 4 required by Due Process.” *Id.* at 2-3. This Court stated that it had “rejected this same argument
 5 when ruling on defendants’ motion to dismiss the first amended complaint, and for all of the
 6 reasons set forth in the June 28, 2010 order, the Court finds that only those plaintiffs who
 7 purchased products in California may allege claims under California law.” *Id.* at 3.

8 **III. ARGUMENT**

9 The party seeking certification under 28 U.S.C. 1292(b) must move in a timely fashion.
 10 *Spears v. Wash. Mut. Bank FA*, 2010 WL 54755, at *1-2 (N.D. Cal. Jan. 8, 2010) (“*Spears*”). It
 11 must also demonstrate that (1) there is a controlling question of law, (2) there are substantial
 12 grounds for difference of opinion, and (3) an immediate appeal may materially advance the
 13 ultimate termination of the litigation. *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026
 14 (9th Cir. 1982).

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

18 **A. Plaintiffs’ Motion is Untimely.**

19 Section 1292(b) is designed to promote judicial efficiency, and thus “a district judge
 20 should not grant an inexcusably dilatory request” for certification. *Spears*, 2010 WL 54755, at
 21 *1-2 (quoting *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.*, 202 F.3d 957, 958 (7th Cir.
 22 2000) (Posner, J.)).² Here, Plaintiffs’ unexplained delay of two months from the Court’s

23
 24 ² See also *Scholl v. United States*, 68 Fed. Cl. 58, 60 (2005) (“Unreasonable delay
 25 constitutes sufficient cause to deny a motion [for certification]...”); *Weir v. Propst*, 915 F.2d
 26 283, 285-87 (7th Cir. 1990) (Posner, J.) (declining jurisdiction under 28 U.S.C. § 1292(b) due to
 27 defendants’ “gratuitous” and “protracted” delay of five months in seeking certification); *In re*
 28 *Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 49 (S.D.N.Y. 2002) (denying request for
 certification due to “inexcusable or, at best, unexplained delay” of three months); *Ferraro v.*
Secretary of United States H.H.S., 780 F. Supp. 978-80 (E.D.N.Y. 1992) (denying request for
 certification due to plaintiff’s unjustified delay of two and a half months).

1 November 12 Order alone is inexcusably dilatory. *Richardson Elecs.*, 202 F.3d at 958 (an
2 unexplained delay of two months is “inexcusably dilatory”). And its *actual* unexplained delay of
3 almost seven months from the June 28 Order — which addressed the same legal issue that
4 Plaintiffs argue is the controlling legal issue in the November 12 Order³ — highlights Plaintiffs’
5 inexcusable dilatory conduct, and compels denial of their motion.

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

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

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

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

26 _____
27 ³ See November 12 Order at 2-3 (noting that the Court had addressed Plaintiffs’ ability to
28 sue under California law in its June 28 Order).

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

3 For purposes of Section 1292(b), a controlling question of law is one whose resolution on
4 appeal would end the case, or at a minimum could “materially affect the eventual outcome of the
5 litigation.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026-27 (a question whose resolution on
6 appeal “would not materially affect the outcome of this litigation, but only its duration” is not a
7 controlling question of law); *see also United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir.
8 1959) (Section 1292(b) “was intended primarily as a means of expediting litigation by permitting
9 appellate consideration during the early stages of litigation of legal questions which, if decided in
10 favor of the appellant, would end the lawsuit.”).

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

14 Nor do Plaintiffs demonstrate that resolution of this issue on appeal will “materially
15 affect” this case’s eventual outcome. Plaintiffs merely assert that, if they prevail on their
16 requested appeal, they “will be permitted to seek damages under the Cartwright Act for all of
17 their indirect purchases of LCD Products regardless of where those products were purchased,”
18 which they say will “have a substantial impact on the scope of Plaintiffs’ claims in this case, as
19 well as the legal standards governing Plaintiffs’ recovery of damages on those claims.” Pl.’s Br.
20 at 4. But such conclusory speculation is not sufficient to satisfy the first element of Section
21 1292(b). *Link v. Mercedes-Benz of N. Am., Inc.*, 550 F.2d 860, 863 (3d Cir. 1977) (“Section
22 1292(b) is not intended to grant the appellate courts power to give advice on speculative
23 matters.”); *Terry v. June*, 368 F. Supp. 2d 538, 540 (W.D. Va. 2005) (Section 1292(b) is not
24 meant to resolve “issues which may or may not ultimately prove to affect the outcome of the
25 case.”).

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

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

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

- 8 • Cell phone manufacturers which purchased panels directly from defendants have
 9 asserted claims under the Cartwright Act. *See, e.g.*, Nokia Amended Complaint
 For Damages and Injunctive Relief at ¶ 216, Doc. No. 1922.
- 10 • AT&T Mobility purports to sue based on its purchase of wireless handsets that it
 11 resold to consumers, and purports to assert claims under the Cartwright Act.
 AT&T SAC at ¶¶ 234-35.
- 12 • Many U.S. retailers have asserted indirect purchaser claims under the Cartwright
 13 Act for their cell phone purchases. *See, e.g.*, Complaint For Damages and
 Injunctive Relief at ¶ 197, *Target Corp. et. al. v. AU Optronics et. al.*, Case No.
 14 10-04945, Doc. No.1 (N.D. Cal. Nov. 1, 2010).
- 15 • California’s Attorney General purports to sue under the Cartwright Act on behalf
 16 of consumers who purchased wireless handsets. *See* Complaint For Damages and
 Injunctive Relief at ¶¶ 2, 8, 10, *People of the State of California v. AU Optronics,*
et. al., Case No. 10-05212, Doc. No. 1 (N.D. Cal. Nov. 17, 2010).

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

19 But even if Plaintiffs could establish a difference between California law and the laws of
 20 these other states, their motion still presents no argument that a successful appeal will terminate
 21 this case, or even materially alter its outcome. And, in any event, the court will need to address
 22 the laws of California and 20 other state laws regardless of the outcome of any appeal.⁴ If
 23 anything, Plaintiffs appeal will make the outcome of this case more uncertain. Moreover, the
 24 issue of which state’s law should apply does not address the controlling question of whether
 25

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

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

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

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

7 The second requirement for certification under Section 1292(b) is a showing that there is
8 a lack of authority, or a split of authority, on the relevant issue, *e.g.*, “a dearth of precedent
9 within the controlling jurisdiction and conflicting decisions in other circuits.” *Wilton Miwok*
10 *Rancheria v. Salazar*, 2010 WL 693420, at *12 (N.D. Cal. Feb. 23, 2010) (quoting *APCC Servs.,*
11 *Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)). A party’s disagreement with a
12 court’s ruling is not sufficient. *See, e.g., Spears*, 2010 WL 54755, at *2.⁵

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

25 ⁵ *See also Hansen Bev. Co. v. Innovation Ventures LLC*, 2010 WL 743750 (S.D. Cal. Feb.
26 25, 2010); *Mateo v. The M/S Kiso*, 805 F. Supp. 792, 800 (N.D. Cal. 1992) (*abrogated on other*
27 *grounds by Brockmeyer v. May*, 361 F.3d 1222, 1226 (9th Cir. 2004)).

28 ⁶ Plaintiffs’ argue that these cases do not apply to claims under the Cartwright Act (Pl.’s

(Footnote Continued on Next Page.)

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

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

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

23 _____
(Footnote Continued from Previous Page.)

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

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

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

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

5 ⁸ Plaintiffs' other cited cases equally do not show a split of authority with the conclusion
 6 reached by the Court in its June 28 and November 12 Orders. *See Budget Rent-A-Car System,*
 7 *Inc. v. Chappell*, 407 F.3d 166 (3d Cir. 2005) (New York law properly applied to a car accident
 8 that paralyzed a New York resident, where the car had been driven in New York prior to the
 9 incident and where the accident occurred on a trip that began in New York); *Adventure*
 10 *Comm'n. v. Kentucky Registry of Election Fin.*, 191 F. 3d 429, 437-38 (4th Cir. 1999)
 11 (Kentucky's electioneering law applied to broadcasters who had stations in Kentucky, whose
 12 broadcasts were directed to Kentucky, who maintained written retransmission consent
 13 agreements with cable television systems whose subscribers live in Kentucky, who employed
 14 Kentucky residents, who "solicit[ed] business from candidates in statewide electoral contests in
 15 Kentucky by marketing directed to the candidates and their agents situated in Kentucky," as well
 16 as to the candidates' agents situated outside Kentucky, "and for whom "the majority of the
 17 advertising revenue received . . . was comprised of Kentucky tax dollars."); *Manuel v.*
 18 *Convergys Corp.*, 430 F. 3d 1132 (11th Cir. 2005) (Georgia law properly applied to a non-
 19 compete agreement sought to be enforced against a Georgia resident, and whose effect would be
 20 felt in Georgia); *Mzamame v. Winfrey*, 693 F. Supp. 2d 442, 468 n.9, 475 (E.D. Pa. 2010)
 21 (Pennsylvania law governed defamation claim because "Plaintiff was domiciled in Pennsylvania
 22 and allegedly suffered harm to her reputation in Pennsylvania."); *Kelley*, 251 F.R.D. at 550
 23 (Washington law governed consumer protection action where "[d]efendant created its allegedly
 24 deceptive and unfair marketing scheme in Washington," and defendant, a Washington resident,
 25 contractually required litigation under Washington law); *Mooney v. Allianz Life Ins. Co.*, 244
 26 F.R.D. 531, 535 (D. Minn. 2007) (Minnesota law applied to claim arising from fraudulent sale of
 27 annuity products because defendant was incorporated and headquartered in Minnesota, it created
 28 and distributed the allegedly fraudulent marketing materials from Minnesota, the policies were
 prepared and issued from Minnesota, the defendant received premium payments in Minnesota,
 and brochures used in the sale of those annuities listed the address and telephone number of
 defendant's Minnesota home office); *In re Heritage Bond Litig.*, 2004 WL 1638201, at *10
 (C.D. Cal. July 12, 2004) (the court did not list the contacts between plaintiffs' claims and
 California, but stated that the plaintiffs and certain defendants' respective reply briefs had shown
 a "significant aggregation of contacts" between California and plaintiffs' common law claims);
Michelson v. Merrill Lynch Pierce Fenner & Smith, Inc., 669 F. Supp. 1244, 1253 (S.D.N.Y.
 1987) (New Mexico law properly applied to non-antitrust claims arising from injuries allegedly
 suffered when plaintiff's metal futures trading account was liquidated by his broker because
 plaintiff resided in New Mexico, his trading base was there and the alleged impact was felt
 there); *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 272 (N.D. Cal. 1987) (California law
 properly governed securities fraud action where "dissemination of the Registration Statement,
 prospectus, and various annual quarterly reports occurred in California"); *In re Computer*
Memories Sec. Litig., 111 F.R.D. 675, 686 (N.D. Cal. 1986) (California law properly governed
 securities fraud action where (1) "the public offering of securities emanated from California"
 and most activities of the defendants in connection with the public offering took place in
 California; and (2) the capital raised by the offering went to company offices in California); *Am.*
Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1427 (E.D.N.C. 1986)
 (North Carolina's antitrust law governed claims based on product disparagement where
 "defendant's alleged disparagement . . . the course of conduct giving rise to the . . . claims, was
 carried out in substantial part in North Carolina.")

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

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

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

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

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

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

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

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

14 **IV. CONCLUSION**

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

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

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

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