

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

In re: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Case No. C 07-5944 SC

MDL No. 1917

This Document Relates to:

Electrograph Systems, Inc. v.
Technicolor SA, No. 13-cv-05724;

ORDER GRANTING IN PART AND
DENYING IN PART MITSUBISHI'S
MOTION TO DISMISS SHARP'S FIRST
AMENDED COMPLAINT

Alfred H. Siegel v. Technicolor
SA, No. 13-cv-05261;

Best Buy Co., Inc. v.
Technicolor SA, No. 13-cv-05264;

Interbond Corporation of America
v. Technicolor
SA, No. 13-cv-05727;

Office Depot, Inc. v.
Technicolor SA, No.
13-cv-05726;

Costco Wholesale Corporation v.
Technicolor SA, No. 13-cv-05723;

P.C. Richard & Son Long Island
Corporation v. Technicolor SA,
No. 13-cv-05725;

Schultze Agency Services, LLC v.
Technicolor SA, Ltd., No. 13-cv-
05668;

Sears, Roebuck and Co. and Kmart
Corp. v. Technicolor SA, No.
3:13-cv-05262;

Target Corp. v. Technicolor SA,
No. 13-cv-05686

I. INTRODUCTION

Now before the Court is Defendant Mitsubishi's¹ ("Mitsubishi" or "Defendant") motion to dismiss various Direct Action Purchaser Plaintiffs' ("Plaintiffs" or "DAPs") complaints.² ECF No. 2299 ("MTD"). The matter is fully briefed, ECF Nos. 2358-4 ("Opp'n") (filed under seal), 2374-4 ("Reply") (filed under seal), and appropriate for decision without oral argument, per Civil Local Rule 7-1(b). As explained below, the motion is GRANTED in part and DENIED in part.

II. BACKGROUND

Mitsubishi is a relatively new defendant in this case, the basic facts of which are familiar to all parties. The DAPs first named the Mitsubishi entities as defendants in November 2013, though in March 2013 they had sought leave from the Court to amend

¹ "Mitsubishi" refers collectively to Mitsubishi Electric US, Inc., f.k.a. Mitsubishi Electric & Electronics, USA, Inc.; Mitsubishi Electric Corporation; and Mitsubishi Electric Visual Solutions America, Inc.

² Mitsubishi specifically moves to dismiss the complaints in the following actions: Best Buy Co, Inc. v. Technicolor SA, No. 13-cv-05264; Siegel v. Technicolor SA, No. 13-cv-00141; Costco Wholesale Corp. v. Technicolor SA (f/k/a Thomson SA) et al., No. 13-cv-05723; Electrograph Systems, Inc. v. Technicolor SA, No. 2: 13-cv-05724; Interbond Corp. of Am. v. Technicolor SA, No. 13-cv-05727; Office Depot, Inc. v. Technicolor SA, No. 13-cv-05726; P.C. Richard & Son Long Island Corp. v. Technicolor SA, No. 13-cv-05725; Sears, Roebuck & Co. v. Technicolor SA, No. 13-cv-05262; Schultze Agency Services, LLC v. Technicolor SA, No. 13-cv-05668; and Target Corp. v. Technicolor SA, No. 13-cv-05686. Two other cases purport to name Mitsubishi as defendants, but these plaintiffs have not previously requested leave to amend, nor have they served their amended complaints on any Mitsubishi entity: Tech Data Corp. et al. v. Hitachi, Ltd. et al., No. 13-cv-00157 (Sept. 9, 2013), ECF No. 1911; Dell Inc. et al. v. Hitachi, Ltd. et al., No. 3:13-cv-02171, (Jun. 10, 2013), ECF No. 1726.

1 their initial complaints to include Mitsubishi Electric. ECF Nos.
2 1609, 1610. The Court denied that motion on September 26, 2013,
3 because at the time, Plaintiffs had presented no compelling reason
4 as to why Mitsubishi should be part of this case. See ECF No. 1959
5 ("Order Denying Amendment"). Mitsubishi had never been indicted in
6 the United States or anywhere else, had never received a grand jury
7 subpoena in any investigation, and had never even been the subject
8 of any government investigation into CRT price-fixing. Further,
9 Mitsubishi had last been alleged to have participated in the CRT
10 conspiracy in 2004, though it had exited the market for color
11 picture tubes ("CPTs," which are used in televisions) in 1998 and
12 stopped shipping color display tubes ("CDTs," which are used in
13 computer monitors) to the United States in September 2003. Since
14 Mitsubishi asserts that its role in the CRT market was very small,
15 and since it was a purchaser of CRTs itself, Mitsubishi contends
16 that it should not be part of this case: after all, according to
17 Mitsubishi, its participation in the overall market was de minimis,
18 and it would not have participated in a conspiracy that caused it
19 to pay higher prices. See MTD at 2-3.

20 Mitsubishi accordingly moves to dismiss the DAPs' complaints,
21 arguing first that laches applies because the DAPs have possessed
22 the relevant information for some time, they unreasonably delayed
23 filing their complaints against Mitsubishi, causing Mitsubishi
24 prejudice by forcing it to enter long-running, complex litigation
25 at a very late date. Mitsubishi argues further that if the Court
26 does not find that laches bars the DAPs' complaints, they are still
27 untimely per all relevant statutes of limitations and are not
28 tolled by any tolling doctrine.

1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
5 on the lack of a cognizable legal theory or the absence of
6 sufficient facts alleged under a cognizable legal theory."
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
8 1988). "When there are well-pleaded factual allegations, a court
9 should assume their veracity and then determine whether they
10 plausibly give rise to an entitlement to relief." Ashcroft v.
11 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
12 must accept as true all of the allegations contained in a complaint
13 is inapplicable to legal conclusions. Threadbare recitals of the
14 elements of a cause of action, supported by mere conclusory
15 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
16 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
17 complaint must be both "sufficiently detailed to give fair notice
18 to the opposing party of the nature of the claim so that the party
19 may effectively defend against it" and "sufficiently plausible"
20 such that "it is not unfair to require the opposing party to be
21 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
22 1202, 1216 (9th Cir. 2011).

23 Claims sounding in fraud are subject to the heightened
24 pleading requirements of Federal Rule of Civil Procedure 9(b),
25 which requires that a plaintiff alleging fraud "must state with
26 particularity the circumstances constituting fraud." See Kearns v.
27 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy
28 Rule 9(b), a pleading must identify the who, what, when, where, and

1 how of the misconduct charged, as well as what is false or
2 misleading about [the purportedly fraudulent] statement, and why it
3 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
4 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
5 and citations omitted).

6
7 **IV. DISCUSSION**

8 **A. Laches**

9 Laches is an equitable time limitation on a party's right to
10 bring suit that requires a showing of (1) unreasonable delay in
11 filing the suit and (2) prejudice to Defendant. Jarrow Formulas,
12 Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002). A
13 laches defense raised at the motion to dismiss posture requires
14 exclusive reliance on the factual allegations in the complaint.
15 Kourtis v. Cameron, 419 F.3d 989, 1000 (9th Cir. 2005), overruled
16 on other grounds, Taylor v. Sturgell, 553 U.S. 880 (2008). Courts
17 have noted that this requirement poses a nearly insurmountable
18 obstacle to the favorable resolution of a defendant's fact-
19 dependent laches claim at the pleadings stage. See Mishewal Wappo
20 Tribe of Alexander Valley v. Salazar, No. 09-cv-02502-EJD, 2011 WL
21 5038356, at *7 (N.D. Cal. Oct. 24, 2011); Italia Marittima, S.P.A.
22 v. Seaside Transp. Servs., LLC, No. C-10-0803-PJH, 2010 WL 3504834,
23 at *6 (N.D. Cal. Sept. 7, 2010).

24 In considering the complaints, it is difficult not to find
25 some delay -- especially given the Order Denying Amendment -- but
26 new facts have arisen since the Court considered the DAPs' motion
27 for leave to add Mitsubishi as a defendant. The previous request
28 and proposed complaints were all factually deficient, but the facts

1 and the DAPs' arguments have changed at this point.

2 One defendant in this case recently gave extensive details
3 regarding Mitsubishi's participation in the conspiracy, which had,
4 until November 2013, been kept secret. The defendant stated very
5 specifically that Mitsubishi executives participated directly in
6 the conspiracy, and that they agreed to keep their participation
7 secret, including by using coded references to the participating
8 companies. See, e.g., ECF No. 2279-6 ("BrandsMart FAC") (filed
9 under seal) ¶¶ 144-45. This late-arising evidence weighs against
10 finding laches at this point, which the Court is not inclined to do
11 in any event, given the lack of a strong factual record concerning
12 these parties at this point. See Sensible Foods, LLC v. World
13 Gourmet, Inc., No. 11-2819 SC, 2011 WL 5244716, at *5 (N.D. Cal.
14 Nov. 3, 2011). Mitsubishi can, of course, raise laches at a later
15 point, when the record is more developed.

16 **B. Tolling Doctrines Apply for the DAPs' Federal Claims**

17 The doctrine of fraudulent concealment focuses on actions that
18 a defendant took to prevent a plaintiff from learning of grounds
19 for filing a suit. See Lukovsky v. City & Cnty. of S.F., 535 F.3d
20 1044, 1051 (9th Cir. 2008). To invoke the doctrine, plaintiffs
21 must allege facts demonstrating that they could not have discovered
22 the alleged violations by exercising reasonable diligence.
23 Rosenfeld v. JPMorgan Chase Bank N.A., 732 F. Supp. 2d 952, 964
24 (N.D. Cal. 2010). A fraudulent concealment claim must be alleged
25 with particularity under Rule 9(b). Noll v. eBay, Inc., 282 F.R.D.
26 462, 468 (N.D. Cal. 2012).

27 The Court finds that the DAPs' complaints have sufficiently
28 pled fraudulent concealment until November 14, 2007, the latest

1 date this Court has held to provide actual or inquiry notice to the
2 DAPs. See In re Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-
3 5944, 2013 WL 4505701, at *3 (N.D. Cal. Aug. 21, 2013); see also In
4 re Rubber Chems. Antitrust Litig., 504 F. Supp. 2d 777, 789 (N.D.
5 Cal. 2007) ("[I]t is generally inappropriate to resolve the fact-
6 intensive allegations of fraudulent concealment at the motion to
7 dismiss stage, particularly where the proof relating to the extent
8 of the fraudulent concealment is alleged to be largely in the hands
9 of the alleged conspirators."). However, given their late filing
10 date, this still renders their claims time-barred unless they are
11 able to invoke a tolling doctrine or some equivalent that would
12 cover the time period from November 14, 2007 to the filing of the
13 present complaints. The Court is not persuaded by Mitsubishi's
14 arguments that it withdrew from the CRT business by 2005, if not
15 later, since that is a fact-sensitive dispute not suitable to
16 resolution at this posture. Similarly, the Court declines to find
17 that any fraudulent concealment ceased prior to November 14, 2007,
18 since the DAPs' allegations make clear that Mitsubishi worked to
19 hide its involvement in the conspiracy throughout all relevant
20 times.

21 i. American Pipe Tolling

22 American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974), held
23 that commencement of a class action suspends the statute of
24 limitation as to all putative members of the class up to and until
25 class certification is denied or the plaintiff opts out of the
26 class. Id. at 554; Williams v. Boeing Co., 517 F.3d 1120, 1136
27 (9th Cir. 2008); Emp'rs-Teamsters Local Nos. 175 & 505 Pension
28 Trust Fund v. Anchor Capital Advisors, 498 F.3d 920, 925 (9th Cir.

1 2007). "Tolling is fair in such a case because when the complaint
2 is filed defendants have notice of the 'substantive claims being
3 brought against them.'" Williams, 517 F.3d at 1136 (quoting Crown,
4 Cork & Seal Co. v. Parker, 462 U.S. 345, 352-53 (1983)).

5 Mitsubishi was not a defendant in any of the previously filed
6 cases. This is enough for the Court to hold American Pipe tolling
7 inapplicable in this case. See Biotech. Value Fund, L.P. v. Celera
8 Corp., -- F. Supp. 2d --, 2013 WL 6731900, at *8 (N.D. Cal. Dec.
9 20, 2013) (not applying American Pipe to a defendant not named in
10 any putative class action); Tech Data Corp. v. AU Optronics Corp.,
11 No. 07-MD-1827, 2012 WL 3236065, at *5 (N.D. Cal. Aug. 6, 2012)
12 (same). The DAPs argue that the Court should apply American Pipe
13 tolling anyway, contending that this would comport with the spirit
14 of American Pipe and equitable tolling doctrines. Opp'n at 13-14.
15 The Court is not convinced: the parts of American Pipe that the
16 DAPs quote refer to the protection of "all asserted members of the
17 class who would have been parties had the suit been permitted to
18 continue as a class action," but this refers to plaintiffs, not
19 defendants -- rightly so, since the point of American Pipe tolling
20 is partly to preserve the interests of plaintiffs who would have
21 claims against certain defendants, partly to prevent a rush to the
22 courthouse by plaintiffs seeking to preserve their individual
23 claims in the event of class claim denials, and partly to provide
24 notice to defendants against whom claims are tolled. See American
25 Pipe, 414 U.S. at 553-54. The Court will not make new law on this
26 point: Mitsubishi is a new defendant, and American Pipe tolls no
27 claims against it.

28

1 The only remaining question is whether any other tolling
2 doctrine applies as to any of Mitsubishi's state or federal claims.

3 ii. Governmental Action

4 Sharp argues that its claims are also tolled by 15 U.S.C. §
5 16(i), which reads:

6 Whenever any civil or criminal proceeding is instituted
7 by the United States to prevent, restrain, or punish
8 violations of any of the antitrust laws, but not
9 including an action under section 15a of this title, the
10 running of the statute of limitations in respect to
11 every private or State right of action arising under
12 said laws and based in whole or in part on any matter
13 complained of in said proceeding shall be suspended
14 during the pendency thereof and for one year thereafter
15

12 In concurrently filed orders on other motions to dismiss, the Court
13 notes that § 16(i) tolls only federal claims, not state claims. 15
14 U.S.C. § 12 (stating that the statute only applies to an express
15 list of federal laws); Nashville Milk Co. v. Carnation Co., 355
16 U.S. 373, 376 (1958) ("[T]he definition contained in [Section] 1 of
17 the Clayton Act is exclusive. Therefore it is of no moment . . .
18 that [a statute] may be colloquially described as an 'anti-trust'
19 statute."). However, New York's Donnelly Act includes a provision
20 modeled after § 16(i), which applies to the same degree if the
21 Court finds governmental action tolling per § 16(i).

22 The Court finds that § 16(i) tolling applies based on the open
23 indictments in this case. It is undisputed that one criminal
24 matter, pending between March 18, 2011 until its closure in August
25 30, 2012, tolls claims under § 16(i) for that time period plus a
26 year. See Reply at 12-13. A "comparison of the two complaints on
27 their face[s]" shows in this case that there is a significant
28 overlap between the two actions, such "that the matters complained

1 of in the government suit bear a real relation to the private
2 plaintiff's claim for relief." Leh v. Gen. Petro. Grp., 382 U.S.
3 54, 59 (1965).

4 However, Mitsubishi argues that the other indictments, opened
5 around February 2009 and still pending, should not be applied to
6 toll the DAPs' claims under § 16(i). Mitsubishi contends that
7 permitting tolling based on those indictments would contravene both
8 the purposes of government-action tolling and the purposes of
9 statutes of limitation in general. See id. at 13-14. As noted in
10 concurrently filed orders, the Court disagrees. Based on J.M.
11 Dungan v. Morgan Drive-Away, Inc., 570 F.2d 867 (9th Cir. 1978),
12 tolling under § 16(i) begins at least at the indictment stage,
13 though that case had the benefit of at least one completed criminal
14 case. As Mitsubishi notes, Dungan's holding was, in part, that
15 empanelling a grand jury did not "institute" proceedings, but
16 contrary to Mitsubishi's reading of Dungan, the Ninth Circuit's
17 holding was in fact based on the court's reasoning that the return
18 of a grand jury indictment fits the statutory language of § 16(i)
19 more comfortably than empanelling alone would, since the purpose of
20 an indictment is the prevention, restraint, or punishment of
21 antitrust violations.

22 The Court declines to adopt Mitsubishi's arguments that
23 equitable doctrines or alternative views of a criminal proceeding
24 should apply here to require the Court to consider the open
25 indictments effectively closed. As noted in other orders, filed
26 concurrently, the Court cannot presume, as Mitsubishi and other
27 Defendants do, that those open (but in some cases unassigned)
28 criminal cases should be ignored for tolling purposes. The Court

1 finds that the DAPs' federal and New York Donnelly Act claims are
2 tolled from February 10, 2009 to the present.

3
4 **V. CONCLUSION**

5 As explained above, the DAPs' state law claims are DISMISSED
6 WITH PREJUDICE, except their Donnelly Act claims, which remain in
7 the case. All federal claims are undisturbed.

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9 IT IS SO ORDERED.

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11 Dated: March 13, 2014



12 UNITED STATES DISTRICT JUDGE
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