

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

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

) Case No. 07-5944 SC
)
) ORDER DENYING DEFENDANTS'
) MOTION TO CERTIFY ORDER FOR
) INTERLOCUTORY APPEAL
)

I. INTRODUCTION

On November 29, 2012, this Court entered an Order granting in part and denying in part Defendants' joint motion for summary judgment against nine members of a putative class of alleged direct purchaser plaintiffs ("Named DPP(s)").¹ ECF No. 1470.² Now before the Court is Defendants' joint motion to certify the November 29 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

¹ The nine Named DPPs are: Arch Electronics, Inc.; Crago d/b/a Dash Computers, Inc.; Electronic Design Company; Meijer, Inc. and Meijer Distribution, Inc.; Nathan Muchnick, Inc.; Orion Home Systems, LLC; Radio & TV Equipment, Inc.; Royal Data Services, Inc.; and Studio Spectrum, Inc. The Named DPPs are only nine of the thirteen members of the entire putative DPP class. As explained in Section II *infra*, the term "direct purchaser" is a misnomer as applied to the Named DPPs, who are actually indirect purchasers. However, the Court uses the term "DPP" to stay consistent with past orders and to differentiate the Named DPPs from a putative class called the indirect purchaser plaintiffs, as well as from the direct action plaintiffs.

² In re Cathode Ray Tube Antitrust Litig., No. C-07-5944-SC, 2012 WL 5987861, 2012 U.S. Dist. LEXIS 162762 (N.D. Cal. Nov. 29, 2012) (hereinafter "Nov. 29 Order").

1 The motion is appropriate for decision without oral argument. Civ.
2 L.R. 7-1(b). For the reasons explained below, the motion is
3 DENIED.

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5 **II. BACKGROUND**

6 Defendants' motion for summary judgment against the Named
7 DPPs, the motion at issue in the Nov. 29 Order, argued that the
8 Named DPPs lacked antitrust standing under Illinois Brick Co. v.
9 Illinois, 431 U.S. 720 (1977). See November 29 Order at *1.
10 Illinois Brick sets forth a straightforward rule about standing in
11 antitrust cases: only the first party in a chain of distribution to
12 purchase a price-fixed product has standing to sue for antitrust
13 violations under § 4 of the Clayton Act, 15 U.S.C. § 15. Id.
14 Under this rule, Defendants claimed the Named DPPs could not bring
15 an antitrust suit, because they are not true direct purchasers --
16 that is, they purchased finished products containing the allegedly
17 price-fixed cathode-ray tubes ("CRTs") but not the CRTs themselves.
18 Id.

19 However, there are exceptions to Illinois Brick's general
20 rule, as the Ninth Circuit recently confirmed in In re ATM Fee
21 Antitrust Litig., 686 F.3d 741, 749 (9th Cir. 2012). One exception
22 is the "co-conspirator exception," under which "an indirect
23 purchaser may bring suit where he establishes a price-fixing
24 conspiracy between the manufacturer and the middlemen," if the
25 conspiracy fixed the price paid by the plaintiffs. Id. (citing
26 Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson, 523
27 F.3d 1116, 1123 n.1 (9th Cir. 2008); Arizona v. Shamrock Foods Co.,
28 729 F.2d 1208, 1211 (9th Cir. 1984)). Another exception is the

1 "ownership or control" exception, under which "indirect purchasers
2 may sue when customers of the direct purchaser own or control the
3 direct purchaser . . . or when a conspiring seller owns or controls
4 the direct purchaser" Id. (citing Illinois Brick, 431 U.S.
5 at 736 n.16; Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d
6 323, 326 (9th Cir. 1980)).

7 In the November 29 Order, the Court granted Defendants' joint
8 motion to dismiss to the extent that Defendants' motion challenges
9 the Named DPPs' right to proceed under the co-conspirator
10 exception, because the Named DPPs did not pay for the price-fixed
11 CRTs, a required element of the co-conspirator exception. Nov. 29
12 Order, supra, at *6. However, the Court found that under the Ninth
13 Circuit's decisions in Royal Printing and In re ATM Fee, the
14 ownership or control exception applied to the Named DPPs because
15 they purchased finished products incorporating the allegedly price-
16 fixed CRTs from an entity owned or controlled by an allegedly
17 conspiring defendant. Nov. 29 Order at **8-11. Accordingly, the
18 Court held that, to the extent Defendants' summary judgment motion
19 challenged the Named DPPs' standing on ownership and control
20 grounds, the motion was denied.

21 Now Defendants ask the Court to certify the November 29 Order
22 for interlocutory appeal, arguing that (1) whether the ownership or
23 control exception applies is a controlling question of law, such
24 that a successful immediate appeal from the November 29 Order could
25 "dramatically curtail the scope of the putative DPP class"; (2)
26 there are substantial grounds for a difference of opinion as to
27 whether the ownership or control exception can apply under the
28 circumstances; and (3) immediate appeal of the Nov. 29 Order would

1 materially advance this litigation's termination by settling
2 whether the Named DPPs may sue under federal law. Mot. at 1-2.

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4 **III. LEGAL STANDARD**

5 District courts may certify motions for interlocutory appeal
6 where (1) the order involves a controlling question of law (2) as
7 to which there is substantial ground for difference of opinion, and
8 (3) an immediate appeal from the order may materially advance the
9 ultimate termination of the litigation. 28 U.S.C. § 1292(b). The
10 court of appeals may, but need not, accept and rule on an appeal
11 certified under § 1292(b). Id.

12 "Section 1292(b) is a departure from the normal rule that only
13 final judgments are appealable, and therefore must be construed
14 narrowly." Robin James v. Price Stern Sloan, Inc., 283 F.3d 1064,
15 1067 n.6 (9th Cir. 2002). As such, § 1292(b) certification should
16 be used "only in extraordinary cases where decision of an
17 interlocutory appeal might avoid protracted and expensive
18 litigation." U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th
19 Cir. 1966). Moreover, § 1292(b) "was not intended merely to
20 provide review of difficult rulings in hard cases." Id.; see also
21 In re Cement Antitrust Litig., 673 F. 2d 1020, 1026 (9th Cir.
22 1982).

23
24 **IV. DISCUSSION**

25 **A. Controlling Question of Law**

26 "[A]ll that must be shown in order for a question to be
27 controlling is that resolution of the issue on appeal could
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1 materially affect the outcome of the litigation in the district
2 court." In re Cement, 673 F.2d at 1026.

3 Defendants argue that because the Named DPPs "would lack
4 standing and their claims would be dismissed absent the ownership
5 or control exception . . . whether the exception may apply more
6 than suffices as a controlling question of law." Mot. at 3.
7 Further, Defendants state that the issue is controlling "because
8 resolving who possesses standing is critical to determining the
9 parameters of the putative DPP class." Id.

10 The Court does not agree with Defendants. Defendants
11 themselves acknowledge that the direct and indirect purchasers'
12 class actions would continue regardless of the Named DPPs'
13 standing, Mot. at 9, and also that the plaintiffs who opted out of
14 the class actions may still be able to rely on state law causes of
15 action in pursuing their claims against Defendants, id. at 10.
16 Defendants might be correct that an appeal could affect part of the
17 outcome of this litigation, but the scale of this case relative to
18 the issue decided in the November 29 Order suggests that resolution
19 of the issue on appeal would not, overall, be controlling or
20 material to the outcome of this case.

21 **B. Substantial Ground for Difference of Opinion**

22 A substantial ground for difference of opinion may exist
23 "where the circuits are in dispute on the question and the court of
24 appeals of the circuit has not spoken on the point, if complicated
25 questions arise under foreign law, or if novel and difficult
26 questions of first impression are presented." Couch v. Telescope,
27 Inc., 611 F.3d 629, 633 (9th Cir. 2010) (quotations omitted).
28 However, "a party's strong disagreement with the Court's ruling is

1 not sufficient for there to be a substantial ground for difference,
2 nor is the possibility that settled law might be applied
3 differently." Id. (quotations omitted).

4 Defendants argue that there is substantial ground for
5 difference of opinion here for two reasons. First, they state that
6 there is a substantial ground for difference of opinion as to
7 whether the rationale behind the operation and control exception --
8 the concern that applying Illinois Brick too strictly would "close
9 off every avenue for private enforcement," Royal Printing, 621 F.2d
10 at 326 n.7 -- applies in this case, since other avenues of private
11 antitrust enforcement may remain open. Mot. at 5-6. Second,
12 Defendants claim that "reasonable minds can differ -- and have --
13 over whether the ownership or control exception is available where,
14 as here, the plaintiff did not purchase the allegedly price-fixed
15 product (CRTs) at all, but rather purchased a different, downstream
16 product (such as TVs and monitors)." Mot. at 7-8.

17 The Court disagrees that either of these arguments shows a
18 substantial ground for difference of opinion per § 1292(b). The
19 reason is simple. Though Defendants strongly disagree with the
20 Court's decision on this matter, and indeed there is always a
21 possibility that settled Ninth Circuit law might be applied
22 differently, there appears to be no dispute among the circuit
23 courts on the law the Court applied in its November 29 Order.
24 Indeed, the Ninth Circuit has affirmed multiple times that Royal
25 Printing controls in cases like this one. In re ATM Fee, 686 F.3d
26 at 756-57; Delaware Valley, 523 F.3d at 1121; Freeman v. San Diego
27 Ass'n of Realtors, 322 F.3d 1133, 1146 & n.12 (9th Cir. 2003), cert
28 denied, 540 U.S. 940 (2003). Defendants cite no cases suggesting

1 that other circuits disagree. Moreover, this Court has applied
2 Royal Printing in a manner consistent with the November 29 Order in
3 a number of other cases. See, e.g., In re TFT-LCD (Flat Panel)
4 Antitrust Litig., No. M 07-1827 SI, 2012 WL 5869588, at *3 (N.D.
5 Cal. Nov. 28, 2012); In re Optical Disk Drive Antitrust Litig., No.
6 3:10-md-2143 RS, 2012 WL 1366718, at *6 (N.D. Cal. Apr. 19, 2012).
7 The fact that the Ninth Circuit has given a straightforward rule
8 indicates that there is no substantial ground for difference of
9 opinion on this point.

10 **C. Immediate Appeal Beneficial**

11 If "present appeal promises to advance the time for trial or
12 to shorten the time required for trial, appeal is appropriate."
13 Dukes v. Wal-Mart Stores, Inc., No. C 01-02252 CRB, 2012 WL
14 6115536, at *5 (citations omitted); see also In re Cement, 673 F.3d
15 at 1027. The ultimate question is whether permitting an
16 interlocutory appeal would "minimiz[e] the total burdens of
17 litigation on parties and the judicial system by accelerating or at
18 least simplifying trial court proceedings." Id.

19 Defendants argue that interlocutory review will materially
20 advance the resolution of this litigation by resolving whether the
21 Named DPPs have antitrust standing, establishing the scope of the
22 putative DPP class before class-certification briefing, altering
23 the parties' settlement posture, potentially reducing Defendants'
24 costs of defending claims in this case, and determining whether the
25 opt-out plaintiffs can proceed on their federal claims. Mot. at 9.
26 Defendants also argue, more generally, that clarifying Royal
27 Printing's scope will materially advance the termination of this
28 litigation by allowing the Ninth Circuit to "put to rest" the

1 uncertainty surrounding the contours of the ownership and control
2 exception. Id. As to the last argument, the Court already
3 addressed the fact that the Ninth Circuit has made itself clear on
4 this issue. Supra § IV.B. Further, Defendants' argument that an
5 altered settlement posture counsels granting the appeal is
6 unconvincing, since appeal would almost always modify parties'
7 settlement postures in any given case.

8 The Court also finds Defendants' other arguments unavailing.
9 It is not certain that the Ninth Circuit would resolve this issue
10 prior to the certification of a class in this case unless the Court
11 were to stay the case, which it is unwilling to do, since this case
12 has been pending since November 2007. Moreover, appeal of the
13 November 29 Order would not hasten the termination of this
14 litigation because both putative classes and the DAPs would still
15 have numerous claims left to litigate, even though some federal
16 claims might be extinguished as to some plaintiffs. The Court does
17 not find that certifying the November 29 Order for interlocutory
18 appeal would be beneficial to the termination of this case.

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1 **V. CONCLUSION**

2 For the reasons given above, Defendants' motion to certify the
3 November 29 Order for interlocutory appeal pursuant to 28 U.S.C. §
4 1292(b) is DENIED.

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6 IT IS SO ORDERED.

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8 Dated: February 13, 2013



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UNITED STATES DISTRICT JUDGE