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Northern District of California Dismisses No Poach Case Against LG and Samsung

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In a decision that was recently unsealed, Judge Beth Labson Freeman granted a Rule 12(b)(6) motion to dismiss a putative "no poach" class action against LG Electronics and Samsung Electronics. *Frost, et al. v. LG Electronics Inc., et al.*, No. 16-cv-5206-BLF, ECF No. 206 (N.D. Cal. July 9, 2018).

Plaintiffs filed separate class actions alleging that LG and Samsung entered into no poach agreements in Korea that affected the practices of their U.S. subsidiaries (LG USA and Samsung America). Plaintiff Frost, who was employed by LG USA, claim that he received no responses to at least ten employment applications he filed with Samsung companies. He also claimed that after a recruiter contacted him, the recruiter quickly followed up saying it was an error to do so: "I made a mistake! I'm not supposed to poach LG for Samsung!!! Sorry! The two companies have an agreement that they won't steal each other's employees. Sorry 'bout that!" After a year of separation from LG, Samsung America hired him. Plaintiff Ra alleged he was employed by LG USA and received no responses to applications for open positions at Samsung America and other Samsung companies. A friend at Samsung told him Samsung and LG do not hire each other's employees, and LG USA co-workers told him Samsung and LG have a "gentlemen's agreement" in Korea not to hire each other's employees, and the agreement "trickles down" to their U.S. subsidiaries. There also was an allegation that the head of LG's human resources in India had stated that his company and Samsung have an "understanding" not to hire from each other without a gap of a year.

The lawsuits were related and plaintiffs filed a consolidated class action complaint. After the Court granted defendants' motion to dismiss, plaintiffs filed a second amended complaint (SAC), asserting antitrust claims under the Sherman Act, the Cartwright Act, and the New Jersey Antitrust Act. All four defendants filed a motion to dismiss under Rule 12(b)(6) arguing the SAC failed to state a claim because it did not plausibly allege an

anticompetitive no poach agreement between the Korean parent companies, LG and Samsung.

The Court immediately turned to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), to review the now-familiar pleading standards for antitrust claims to survive a motion to dismiss. It then turned to the Ninth Circuit's test that the plaintiffs' allegations must "answer the basic questions: who, did what, to whom (or with whom), where, and when?" Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008). The Court explained that plaintiffs must plead evidentiary facts regarding the alleged conspiracy through either direct evidence of an agreement or circumstantial evidence in the form of parallel conduct and "plus factors."

The Court found that plaintiffs' allegations failed to meet these standards. Taken together, the allegations would require the Court to infer an agreement between the Korean parent companies. In addition, the Court agreed with defendants that the SAC did "not contain *any* evidentiary facts regarding the 'specific time, place or person' involved in the alleged agreement as required under *Kendall*." (Emphasis in original.) The allegations were too imprecise, because the experience of employees in the United States and India did not give rise to a plausible claim that executives at LG and Samsung in Korea entered into a collusive agreement. The Court specifically rejected plaintiffs' allegations regarding how *Korean* chaebols operate as a basis to find a conspiracy. The Court said it carefully considered plaintiffs' allegations, but found that they did not contain the kind of more specific evidentiary allegations that were in the complaints in the prominent no poach cases of *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d (N.D. Cal. 2012), and *In re Animation Workers Antitrust Litigation*, 123 F. Supp. 3d 1175 (N.D. Cal. 2015).

The Court granted the defendants' motion without leave to amend, and plaintiffs have filed a notice of appeal.