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19 **UNITED STATES DISTRICT COURT**
 20 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

21 IN RE TFT-LCD (FLAT PANEL)
 22 ANTITRUST LITIGATION

23 Master File No. C M:07-01827 SI
 24 Individual Case No. C 3:11-02591 SI
 25 MDL NO. 1827

26 This Document Relates to
 27 Case C 3:11-02591 SI

28 T-MOBILE U.S.A., INC.,

Plaintiff,

v.

AU OPTRONICS CORPORATION, et al.,

Defendants.

**PLAINTIFF T-MOBILE U.S.A.,
 INC.'S OPPOSITION TO
 DEFENDANTS' JOINT MOTION TO
 DISMISS IN PART AMENDED
 COMPLAINT**

Date: February 10, 2012
 Time: 9:00 AM
 Location: Courtroom 10, 19th Floor
 450 Golden Gate Ave.
 San Francisco, CA 94102

Master File No. C M:07-01827 SI
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OPPOSITION TO DEFENDANTS' JOINT MOTION
 TO DISMISS IN PART AMENDED COMPLAINT

TABLE OF CONTENTS

Page(s)

1

2

3

4 INTRODUCTION1

5 STATEMENT OF FACTS3

6 ARGUMENT7

7 T-MOBILE’S CLAIMS UNDER CALIFORNIA LAW ARE TIMELY.....7

8 The Doctrine of Fraudulent Concealment Tolled T-Mobile’s Claims

9 Until December 11, 2006.....7

10 T-Mobile’s Claims Were Tolled During the Pendency of the Indirect

11 Purchasers’ Class Actions – from December 14, 2006 to November 5,

12 2007.....9

13 T-Mobile’s California Claims Were Equitably Tolled Between the

14 Filing of the DPPs’ Consolidated Complaint on November 5, 2007 and the

15 Exclusion of Mobile Phone Purchasers from the DPP Class on March 28,

16 2010.....12

17

18

19

20

21

22

23

24

25

26

27 CONCLUSION.....16

28

TABLE OF AUTHORITIES

Page(s)

CASES

American Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1974)..... Passim

Bernson v. Browning-Ferris Indus.,
7 Cal. 4th 926 (Cal. 1994).....7

Boilermakers Nat’l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates,
748 F. Supp. 2d 1246 (W.D. Wash. 2010).....10

Clemens v. DaimlerChrysler Corp.,
534 F.3d 1017 (9th Cir. 2008)13

Collier v. City of Pasadena,
142 Cal. App. 3d 917 (Cal. Ct. App. 1983)14

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983).....9

Griffin v. Singletary,
17 F.3d 356 (11th Cir. 1994) *cert. denied* 513 U.S. 1077 (1995).....11

Haas v. Pittsburgh Nat’l Bank,
526 F.2d 1083 (3d Cir. 1975).....11

Hatfield v. Halifax PLC,
564 F.3d 1177 (9th Cir. 2009)13, 14

Hunter v. Am. Gen. Life & Accident Ins. Co.,
384 F. Supp. 2d 888 (D.S.C. 2005).....3, 12

Maine State Ret. Sys. v. Countrywide Fin. Corp.,
722 F. Supp. 2d 1157 (C.D. Cal. 2010)10, 11

Mayes v. Leipziger,
729 F.2d 605 (9th Cir. 1984)14

Palmer v. Stassinis,
236 F.R.D. 460 (N.D. Cal. 2006).....10

Smith v. Pennington,
352 F.3d 884 (4th Cir. 2003)11, 12

1 *In re TFT-LCD (Flat Panel) Antitrust Litig.*,
2 586 F. Supp. 2d 1109 (N.D. Cal. 2008)8

3 *In re Wells Fargo Mortg.-Backed Certificates Litig.*,
4 No. 09–CV–01376–LHK, 2010 WL 4117477 (N.D. Cal. Oct. 19, 2010).....10

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1 Plaintiff T-Mobile U.S.A., Inc. (“T-Mobile”) respectfully submits this
2 memorandum of law in opposition to Defendants’ Joint Motion to Dismiss in Part T-Mobile’s
3 Amended Complaint.

4 **INTRODUCTION**

5 Defendants assert two arguments in support of their joint motion to dismiss
6 T-Mobile’s claims under California’s Cartwright Act and Unfair Competition Law.¹ *First*,
7 Defendants argue that, as a matter of Due Process and in accordance with this Court’s rulings,
8 T-Mobile cannot assert California state law claims for its purchase of price-fixed LCD products
9 absent a showing that it made such purchases within California. T-Mobile acknowledges the
10 Court’s prior rulings on this question. It further recognizes that, in light of these rulings, the
11 Court might be inclined to rule that T-Mobile cannot avail itself of the protections of California’s
12 antitrust and unfair competition laws. But given T-Mobile’s significant presence in California,
13 and its allegations that Defendants are subject to personal jurisdiction in California, maintained
14 offices in California, transacted business in California, and, by their own admission, committed
15 acts in furtherance of their price-fixing conspiracy within California, T-Mobile believes that
16 reconsideration of the Court’s previous rulings would be warranted here. In any event, T-Mobile
17 has asserted claims against Defendants under the Cartwright Act and California Unfair
18 Competition Law to preserve its right to pursue such claims in the event that the governing law
19 concerning its standing to do so changes during the pendency of this action, including as a result

21
22 ¹ Defendants also move to dismiss T-Mobile’s (i) Sherman Act claims to the extent they are based on the indirect
23 purchase of LCD products, and (ii) New York Donnelly Act claims for indirect purchases made prior to December
24 23, 1998. (See Defendants’ Memorandum of Points and Authorities in Support of Defendants’ Joint Motion to
25 Dismiss in Part T-Mobile’s Amended Complaint (“Defs. Br.”) at 1, 8-10.) As Defendants implicitly acknowledge
26 (see Defs. Br. at 8-9), T-Mobile has alleged that it purchased cellular phones containing LCD screens directly from
27 Defendants, and it is asserting damages claims under the Sherman Act solely with respect to such direct purchases.
(See Amended Complaint for Damages and Injunctive Relief, *T-Mobile U.S.A., Inc. v. AU Optronics Corp., et al.*,
Individual Case No. C 3:11-02591 SI (“Amended Complaint” or “Am. Cpl.”) ¶¶ 253-56, 280-86.) Further,
T-Mobile does not seek relief under New York’s Donnelly Act for indirect purchases made before the effective date
of New York’s *Illinois Brick* repealer amendment, December 23, 1998. Accordingly, Defendants’ arguments
relating to T-Mobile’s standing to assert Sherman Act or Donnelly Act claims are moot.

1 of the AT&T Mobility plaintiffs’ appeal of this Court’s rulings on this question to the U.S. Court
2 of Appeals for the Ninth Circuit.

3 *Second*, Defendants assert that T-Mobile’s claims under the Cartwright Act, and
4 the California Unfair Competition Law are untimely because (a) T-Mobile filed its complaint on
5 April 18, 2011, more than four years after the United States government publicly disclosed the
6 existence of the LCD conspiracy on December 11, 2006, and (b) T-Mobile’s claims were not
7 tolled by the pendency of either the direct or indirect class actions. As a preliminary matter, this
8 Court need not reach these arguments if it dismisses the claims for lack of standing. However, if
9 the Court were inclined to address these arguments, it should reject them because T-Mobile’s
10 claims under California law are in fact timely.

11 Indeed, only one year and 24 days had run on the four-year statute of limitations
12 governing T-Mobile’s Cartwright Act and Unfair Competition Law claims when it filed its
13 original complaint on April 18, 2011. For starters, as a result of Defendants’ fraudulent
14 concealment of their price-fixing conspiracy, the statute of limitations governing T-Mobile’s
15 California claims did not begin running until December 11, 2006, when the conspiracy was first
16 disclosed.

17 After the December 11 disclosure, only three days ran on the statute of limitations
18 before T-Mobile’s claims were tolled again, from December 14, 2006 to November 5, 2007. *See*
19 *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (“[T]he rule most consistent
20 with federal class action procedure must be that the commencement of a class action suspends
21 the applicable statute of limitations as to all asserted members of the class . . .”). During this
22 period, T-Mobile was a class member in three indirect purchaser class actions, filed in December
23 2006, February 2007, and March 2007. Each of those class actions asserted claims under
24 California law, including with respect to mobile phones purchased for resale. Although the class
25 definitions of the indirect purchaser actions were later narrowed to exclude T-Mobile’s claims,
26 there is no authority to suggest that this had the effect of stripping T-Mobile of the benefits of

1 *American Pipe* tolling for the 10 months and 22 days in which it was a member of the class.
2 Even the decisional authority cited by Defendants in related cases does not support such a harsh
3 result. *See, e.g., Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 894 (D.S.C.
4 2005) (“[T]he carved out putative class members retain the right to rely on *American Pipe* tolling
5 *if they file individual actions.*”) (emphasis added). If no additional tolling applied after
6 November 5, 2007, only three years, five months, and 16 days would have run on the statute of
7 limitations governing T-Mobile’s California claims when it filed its complaint on April 18, 2011.

8 Finally, even though additional tolling is not required for T-Mobile’s claims to be
9 timely, the applicable statute of limitations was further tolled from November 5, 2007 to March
10 28, 2010, the day T-Mobile, as a purchaser of cellular phones, was excluded from the Direct
11 Purchaser Plaintiff (“DPP”) class action. For the intervening two years, four months, and 23
12 days, T-Mobile, as a purchaser of cellular phones, was a member of that class, and the filing of
13 the DPP class action equitably tolled the statute of limitations governing T-Mobile’s California
14 law claims.

15 In sum, the statute of limitations on T-Mobile’s California claims was tolled for
16 three years, three months, and 14 days out of the four years, four months, and seven days
17 between the disclosure of Defendants’ conspiracy and the filing of T-Mobile’s original
18 complaint. Defendants’ motion to dismiss T-Mobile’s California claims as untimely should
19 therefore be denied.²

20 **STATEMENT OF FACTS**

21 On December 11, 2006, the United States Department of Justice (“DOJ”)
22 announced that it had launched an investigation into anti-competitive activity among

23 _____
24 ² In addition to asserting indirect purchaser claims under California’s Cartwright Act and Unfair Competition Law,
25 T-Mobile also asserts claims under New York’s Donnelly Act. (Am. Cpl. ¶ 299.) Although Defendants argue that
26 T-Mobile’s Donnelly Act claims for indirect purchases made before December 23, 1998 should be dismissed on
27 standing grounds (*see* Defs. Br. at 1, 9-10), Defendants do not contend that those claims are untimely, and they
would have no basis to do so. As with T-Mobile’s claims under California law, Defendants’ fraudulent concealment
of the price-fixing conspiracy and the pendency of certain indirect and direct purchaser class actions operated to toll
the statute of limitations governing T-Mobile’s Donnelly Act claims.

1 manufacturers of LCD panels. (See Am. Cpl. ¶¶ 174-75.) Until that disclosure, T-Mobile had
2 neither actual nor constructive knowledge of the facts supporting its claims in this action. (*Id.*
3 ¶ 260.)

4 Three days later, on December 14, 2006, a class action complaint was filed
5 against the Defendants asserting indirect purchaser claims on behalf of “[a]ll persons within the
6 United States who indirectly purchased LCD products, either as stand alone devices or pre-
7 installed in other consumer electronic products.” (Class Action Complaint, *Audio Video Artistry*
8 *v. Samsung Elecs. Co. Ltd., et al.*, Case No. 2:06-cv-02848 (W.D. Tenn.), Dkt. No. 1 (“AVA
9 Cpl.”), ¶ 19.) The class definition did not exclude businesses that purchased LCD products for
10 resale. Further, *Audio Video Artistry* asserted claims under both California and New York law.
11 (See *id.* ¶¶ 80 (alleging violations of California’s Cartwright Act and Unfair Competition Act);
12 90 (alleging violations of New York’s Donnelly Act).) The complaint also made clear that “[t]he
13 LCD products at issue in this litigation are used in a broad range of consumer electronic products
14 that are available either as stand alone products . . . or as significant component parts of
15 consumer electronic devices, such as *mobile phone* . . . screens” (*Id.* ¶ 38 (emphasis
16 added).)

17 On February 16, 2007, yet another class action, *Jafarian v. LG Philips LCD Co.*
18 *Ltd., et al.*, was filed against the Defendants that included T-Mobile as a class member and
19 asserted the same state law claims T-Mobile asserts herein. The *Jafarian* class encompassed
20 “[a]ll persons and entities throughout the United States . . . who indirectly purchased products
21 that contain TFT-LCDs manufactured by any Defendant . . . includ[ing] . . . businesses who
22 have purchased TFT-LCDs and/or products containing TFT-LCDs,” and did not exclude
23 businesses that purchased LCD products for resale. (Class Action Complaint, *Jafarian v. LG*
24 *Philips LCD Co. Ltd., et al.* Case No. 3:07-cv-00994-SI (N.D. Cal.), Dkt. No. 1 (“*Jafarian*
25 Cpl.”), ¶ 19.) Moreover, the *Jafarian* complaint defined “TFT-LCD products” to include cell
26 phones (*id.* ¶ 2), and asserted claims under both California and New York law. (See *id.* ¶¶ 52
27

1 (alleging violations of California’s Cartwright Act and New York’s Donnelly Act); 56 (alleging
2 violations of California’s Unfair Competition Act).)

3 On March 9, 2007, a third class action, *Minoli, et al. v. LG Philips LCD Co., Ltd.,*
4 *et al.*, was filed against the Defendants that included T-Mobile in its class definition and pleaded
5 claims under California and New York law encompassing the indirect purchase of cellular
6 phones, including for purposes of resale. (Class Action Complaint, *Minoli, et al. v. LG Philips*
7 *LCD Co., Ltd., et al.*, Case No. 6:07-cv-00235-MV-WDS (D.N.M.), Dkt. No. 1 (“*Minoli Cpl.*”).)
8 Specifically, the *Minoli* class included “[a]ll persons within the United States who indirectly
9 purchased LCD products, either as stand alone devices or pre-installed in other consumer
10 electronic products, which were manufactured, marketed and sold by Defendants” (*Id.*
11 ¶ 39.) As with *Audio Video Artistry* and *Jafarian*, the *Minoli* class did not exclude businesses
12 that purchased LCD products for resale. It also asserted claims under both California and New
13 York law. (*See id.* ¶¶ 99 (alleging violations of California’s Cartwright Act and Unfair
14 Competition Act); 109 (alleging violations of New York’s Donnelly Act.) Finally, like *Audio*
15 *Video Artistry* and *Jafarian*, *Minoli* asserted claims concerning the price-fixing of LCD screens
16 incorporated into mobile phones. (*See id.* ¶ 58.)

17 On November 5, 2007 (10 months, 22 days after the filing of *Audio Video*
18 *Artistry*), the Indirect Purchaser Plaintiffs’ (“IPP”) Consolidated Amended Complaint was filed.
19 That complaint excluded T-Mobile from its operative class definition. (Dkt. No. 367.)³ But on
20 the same day, the DPPs filed their Consolidated Complaint. (Dkt. No. 366.) Although the
21 DPPs’ Consolidated Complaint did not allege claims under state law, that complaint included
22 T-Mobile in its class definition. Moreover, the DPPs based their federal claims on substantially
23 the same allegations of wrongdoing as T-Mobile now bases its claims under California and New
24 York law. Specifically, the DPPs asserted direct purchaser claims on behalf of “all persons and
25

26 ³ Unless otherwise noted, all “Dkt. No.” references concern filings made in *In re TFT-LCD (Flat Panel) Antitrust*
27 *Litig.*, MDL No. 1827, Master File No. C M:07-01827 SI.

1 entities who directly purchased a Thin Film Transistor Liquid Crystal Display (“TFT-LCD”)
2 panel, or a product containing a TFT-LCD panel” (Dkt. No. 366 ¶¶ 1, 68.) The DPPs
3 further alleged, “TFT-LCDs are used in a number of products, including but not limited to . . .
4 *cellular telephones*. As used herein, ‘TFT-LCD Product’ refers to TFT-LCD panels, and
5 products containing TFT-LCD panels” (*Id.* ¶ 1 (emphasis added).)

6 The First Amended DPPs’ Consolidated Complaint, dated December 5, 2008, and
7 the Second Amended DPPs’ Consolidated Complaint, dated March 3, 2009, included the same
8 definitions. (*See* Dkt. No. 748 ¶¶ 1 & 66; Dkt. No. 874 ¶¶ 1 & 67.) As a direct purchaser of
9 cellular phones (*see, e.g.*, Am. Cpl. ¶¶ 254-56), T-Mobile was a member of this class until March
10 28, 2010 – *i.e.*, for two years, four months, and 23 days. On that date, this Court excluded
11 purchasers of cellular phones from the DPP class, defining the class to include only “persons and
12 entities who . . . directly purchased a television, computer monitor, or notebook computer
13 containing a TFT-LCD panel, from any defendant or any subsidiary thereof” (Dkt. No.
14 1641 at 34.)

15 T-Mobile filed its original Complaint in the United States District Court for the
16 Western District of Washington on April 18, 2011 (four years, four months, and seven days after
17 the disclosure of Defendants’ conspiracy). On November 7, 2011, after this action was
18 transferred here for purposes of coordination of pre-trial proceedings (*see* Conditional Transfer
19 Order, Case No. 3:11-cv-02591, Dkt. No. 15 (May 18, 2011)), T-Mobile filed its Amended
20 Complaint in this Court. In its Amended Complaint, T-Mobile alleges that it purchased mobile
21 wireless handsets containing LCD panels directly from Defendants. It further alleges that, as a
22 result of Defendants’ conspiracy to fix the price of LCD Panels, T-Mobile purchased those
23 handsets at artificially-inflated prices. (Am. Cpl. ¶¶ 254-256.) T-Mobile asserts claims under
24 the Sherman Act and Clayton Act related to such direct purchases of LCD products. (*Id.* ¶¶ 282-
25 86.) In addition, T-Mobile alleges that it purchased mobile wireless handsets containing LCD
26 panels from other handset original equipment manufacturers (“OEM”) that, in turn, purchased
27

1 LCD panels and products directly from Defendants. T-Mobile alleges that it was injured as a
2 result of the handset OEMs passing on to it the overcharges caused by Defendants' conspiracy
3 (*id.* ¶¶ 257-58), and asserts claims in respect of its indirect purchases under both California's
4 Cartwright Act and Unfair Competition Law, as well as New York's Donnelly Act. (*Id.* ¶¶ 287-
5 299.)

6 ARGUMENT

7 **T-MOBILE'S CLAIMS UNDER CALIFORNIA LAW ARE TIMELY**

8 Defendants argue that T-Mobile filed its Cartwright Act and California Unfair
9 Competition Law claims after the applicable four-year statute of limitations for each claim
10 expired, and that no grounds exist upon which T-Mobile's claims can be tolled. (Defs. Br. at 4-
11 6.) Defendants are incorrect. Defendants' fraudulent concealment of the LCD Conspiracy, the
12 pendency of class actions that explicitly included T-Mobile's claims, and the doctrine of
13 equitable tolling stopped the running of the statute of limitations on T-Mobile's California law
14 claims for all but three days between December 11, 2006 and March 28, 2010.

15 **A. The Doctrine of Fraudulent Concealment Tolled T-Mobile's Claims** 16 **Until December 11, 2006**

17 Defendants argue that the "fraudulent concealment doctrine cannot salvage"
18 T-Mobile's California law claims because "the alleged conspiracy became public knowledge" in
19 December 2006. (Defs. Br. at 5.) But Defendants cannot legitimately dispute that, under the
20 fraudulent concealment doctrine, the statute of limitations on those claims did not start to run
21 until December 11, 2006.

22 As a matter of law, the doctrine of fraudulent concealment tolls claims asserted
23 against the Defendants under the Cartwright Act and the California Unfair Competition Law.
24 *See Bernson v. Browning-Ferris Indus.*, 7 Cal. 4th 926, 931, 931 n.3 (Cal. 1994) (stating that
25 "[i]t has long been established that the defendant's fraud in concealing a cause of action against
26 him tolls the applicable statute of limitations" and that "[t]he rule of fraudulent concealment is
27

1 applicable whenever the defendant intentionally prevents the plaintiff from instituting suit; the
2 rule applies whether or not the action itself is based on fraud.”) (citations and internal
3 punctuation omitted).

4 Moreover, this Court has ruled that the LCD class action plaintiffs’ allegations of
5 fraudulent concealment were sufficient to toll the plaintiffs’ claims until the conspiracy was
6 publicly disclosed in December 2006. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F.
7 Supp. 2d 1109 (N.D. Cal. 2008). Specifically, this Court has stated:

8 [P]laintiffs have sufficiently alleged fraudulent concealment such
9 that, as a pleading matter, the Court will not dismiss any claims as
10 time-barred. As with the direct purchaser plaintiffs’ consolidated
11 complaint, the indirect purchaser plaintiffs’ complaint alleges that
12 defendants concealed their price-fixing conspiracy through secret
13 discussions about price and output, an agreement not to discuss
14 publicly the nature of their price-fixing agreement, and numerous
15 pretextual and false justifications disseminated to consumers
16 regarding defendants price increases.

17 *Id.* at 1132. *See also id.* at 1119-20 (fraudulent concealment sufficiently alleged where DPPs
18 pleaded “specific pretextual reasons for the inflated prices of LCDs,” that they were “unaware of
19 their claims and discovered them as a result of investigations by the DOJ and other antitrust
20 regulators in December 2006,” “that [d]efendants engaged in a secret conspiracy that did not
21 give rise to facts that would put plaintiffs . . . on inquiry notice,” “that defendants agreed not to
22 publicly discuss the nature of the scheme,” and that plaintiffs therefore “could not have
23 discovered through the exercise of reasonable diligence the alleged conspiracy”) (internal
24 punctuation omitted); *id.* at 1120 (“It is generally inappropriate to resolve the fact-intensive
25 allegations of fraudulent concealment at the motion to dismiss stage.”) (citations and internal
26 punctuation omitted).

27 T-Mobile has made precisely the same allegations of fraudulent concealment that
28 this Court found sufficient when analyzing the DPPs and IPPs’ complaints. (*See, e.g., Am. Cpl.*

¶¶ 260-279.) Accordingly, the doctrine of fraudulent concealment tolled T-Mobile’s California claims until December 11, 2006.

B. T-Mobile’s Claims Were Tolled During the Pendency of the Indirect Purchasers’ Class Actions – from December 14, 2006 to November 5, 2007

Defendants next argue that T-Mobile’s state law claims were not included in the prior class actions and therefore could not be tolled. (See Defs. Br. at 5.) Defendants’ assertion is not correct. Just days after the fraudulent concealment tolling ended on December 11, 2006, several class action complaints were filed against the Defendants. At least one of those complaints, in *Audio Video Artistry* (filed on December 14, 2006), included T-Mobile as a class member. It also asserted the very state-law antitrust claims with respect to the same LCD products (mobile phones) as T-Mobile has asserted here, thereby tolling the statute of limitations once again. See *American Pipe*, 414 U.S. at 554 (“[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”); see also *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (“We conclude, as did the Court in *American Pipe*, that the commencement of a class action suspends the applicable statute of limitations as to *all* asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”) (citations and internal punctuation omitted; emphasis added).

Defendants insist that T-Mobile cannot invoke the class tolling doctrine for its indirect purchaser claims because the “indirect purchaser class action was brought only on behalf of those who made indirect purchases of televisions, computer monitors, and laptop computers for their ‘own use and not for resale.’” (Defs. Br. at 5.) Defendants fail to acknowledge the filing of the *Audio Video Artistry*, *Jafarian*, and *Minoli* complaints, which asserted claims on behalf of indirect purchasers who purchased mobile handsets for resale.

1 Specifically, on December 14, 2006, a class action complaint was filed in *Audio*
2 *Video Artistry* on behalf of a class of indirect purchasers of “LCD products, either as stand alone
3 devices or pre-installed in other consumer electronic products.” (AVA Cpl. ¶ 19.) That class
4 action defined “LCD products” to encompass mobile phones with LCD screens, included as class
5 members businesses that resold LCD products, and asserted claims under California and New
6 York law. (*Id.* ¶¶ 19, 38, 80, 90.) Likewise, *Jafarian*, filed on February 16, 2007, and *Minoli*,
7 filed on March 9, 2007, asserted claims on behalf of indirect purchasers of LCD products,
8 including cellular phones, without regard to whether those purchasers resold such products.
9 (*Jafarian* Cpl. ¶¶ 2, 19; *Minoli* Cpl. ¶¶ 39, 58.) And *Jafarian* and *Minoli* also asserted California
10 and New York claims in respect of such indirect purchases. (*Jafarian* Cpl. ¶¶ 52-53, 56; *Minoli*
11 Cpl. ¶¶ 99, 109.) In short, as an indirect purchaser of mobile phones for resale, T-Mobile
12 unquestionably was a member of the *Audio Video Artistry*, *Jafarian*, and *Minoli* classes, which
13 asserted the same California and New York claims that Defendants now attack as time-barred.

14 In related cases, Defendants have argued that the filing of *Audio Video Artistry*
15 did not toll the statute of limitations governing individual, direct action plaintiffs’ California law
16 claims because the lead plaintiff in that class action lacked standing to assert such claims. (Dkt.
17 No. 4410 at 4.) The cases Defendants cited for this proposition are uniformly inapposite. All
18 address circumstances in which a plaintiff class – as opposed to an individual plaintiff –
19 attempted to avail itself of *American Pipe* tolling after the lead plaintiff was deemed to lack
20 standing to assert certain claims on behalf of the class.⁴ Defendants’ reliance on this line of

22 ⁴ See *In re Wells Fargo Mortg.-Backed Certificates Litig.*, No. 09–CV–01376–LHK, 2010 WL 4117477, at *2, *5,
23 *9 (N.D. Cal. Oct. 19, 2010) (ruling that class tolling was unavailable where plaintiffs amended their pleadings to
24 add plaintiffs who met standing requirements, but recognizing the possibility that former class members might
25 receive the benefit of tolling by proceeding as individual plaintiffs); *Maine State Ret. Sys. v. Countrywide Fin.*
26 *Corp.*, 722 F. Supp. 2d 1157, 1161, 1166-67 (C.D. Cal. 2010) (initial class action did not toll subsequent class action
27 where lead plaintiffs in original suit lacked standing); *Boilermakers Nat’l Annuity Trust Fund v. WaMu Mortg. Pass*
28 *Through Certificates*, 748 F. Supp. 2d 1246, 1250, 1258-59 (W.D. Wash. 2010) (same); *Palmer v. Stassinios*, 236
F.R.D. 460, 463-66 (N.D. Cal. 2006) (lead plaintiffs not entitled to benefit of *American Pipe* tolling where they
sought to amend class action complaint to add additional class representatives with standing to assert time-barred
claims).

1 authority ignores a well entrenched distinction between individual plaintiffs and plaintiff classes
2 with respect to *American Pipe* tolling. Courts have recognized that “extending *American Pipe*
3 tolling to class action claims the original named plaintiffs had no standing to bring will
4 encourage filings made merely to extend the period in which to find a class representative.”
5 *Countrywide*, 722 F. Supp. 2d at 1167. No such concerns are implicated in cases – such as this
6 one – where an individual plaintiff asserts otherwise time-barred claims after being judicially
7 ejected from a class or opting out.

8 Indeed, the weight of authority supports T-Mobile’s position that the narrowing of
9 the indirect purchaser class definition after the filing of *Audio Video Artistry*, *Jafarian*, and
10 *Minoli* does not operate to retroactively deny T-Mobile the benefits of *American Pipe* tolling for
11 the period when it was still a member of these indirect purchaser classes.⁵ *See, e.g., Smith v.*
12 *Pennington*, 352 F.3d 884, 888, 891, 893 (4th Cir. 2003) (“We . . . see no reason in this case to
13 say that [lead plaintiff’s] lack of a viable federal claim [due to lack of standing] prevents . . .
14 members of his asserted class, . . . who might have viable *individual claims*, from obtaining the
15 benefit of tolling.”) (emphasis added); *Griffin v. Singletary*, 17 F.3d 356, 357, 360 (11th Cir.
16 1994) (holding that class action tolled claims of individual plaintiffs where class representatives
17 lacked standing, and recognizing that “putative class members should be entitled to rely on a
18 class action as long as it is pending”), *cert. denied* 513 U.S. 1077 (1995); *see also Haas v.*
19 *Pittsburgh Nat’l Bank*, 526 F.2d 1083, 1097-98 (3d Cir. 1975) (where original class
20 representative lacked standing, class action tolled the statute of limitations as to all members of
21 putative class, and amendment of the complaint by the addition of a new class representative
22
23

24 ⁵ Any other rule would make nonsense out of *American Pipe* because *American Pipe* issues generally
25 arise when a plaintiff was previously part of a class action and later ceases to be a member of the class. In
26 other words, eliminating *American Pipe* tolling for the period in which the individual plaintiff was a
27 member of the class, simply because the plaintiff is no longer a member of the class, would eviscerate
28 *American Pipe*.

1 with standing related back to the filing of the initial complaint).⁶ For these reasons, T-Mobile’s
2 California claims were tolled under *American Pipe* for the ten month, 22 day period between
3 December 14, 2006 and November 5, 2007.

4 **C. T-Mobile’s California Claims Were Equitably Tolled Between the Filing of**
5 **the DPPs’ Consolidated Complaint on November 5, 2007 and the Exclusion**
6 **of Mobile Phone Purchasers from the DPP Class on March 28, 2010**

7 Finally, the four-year statute of limitations on T-Mobile’s California law claims
8 was further tolled by the separate DPP class action, of which T-Mobile was initially a class
9 member. Although the IPP class definition was narrowed to exclude T-Mobile’s claims on
10 November 5, 2007, the DPPs filed their Consolidated Complaint on the same day, asserting
11 direct purchaser claims on behalf of “all persons and entities who directly purchased a Thin Film
12 Transistor Liquid Crystal Display (“TFT-LCD”) panel, or a product containing a TFT-LCD
13 panel” (Dkt. No. 366 ¶¶ 1, 68.) The DPPs’ Consolidated Complaint further alleged, “TFT-
14 LCDs are used in a number of products, including but not limited to . . . *cellular telephones*. As
15 used herein, ‘TFT-LCD Product’ refers to TFT-LCD panels, and products containing TFT-LCD
16 panels” (*Id.* ¶ 1.) The First Amended DPPs’ Consolidated Complaint, dated December 5,
17 2008, and the Second Amended DPPs’ Consolidated Complaint, dated March 3, 2009, included
18 the same definitions. (*See* Dkt. No. 748 ¶¶ 1 & 66; Dkt. No. 874 ¶¶ 1 & 67.) As a direct
19 purchaser of cellular phones (*see, e.g.*, Am. Cpl. ¶¶ 254-56), T-Mobile was unquestionably a
20 member of this class until March 28, 2010. On that date, the Court excluded purchasers of

21 ⁶ Defendants’ reliance elsewhere (*see, e.g.*, Dkt. No. 3949 at 8 n.3) on *Hunter v. Am. Gen. Life &*
22 *Accident Ins. Co.*, 384 F. Supp. 2d 888 (D.S.C. 2005), and *Smith*, 352 F.3d 884, is also misplaced.
23 *Hunter* ruled that *American Pipe* tolling does not apply when a class plaintiff seeks tolling based on the
24 *voluntary* narrowing of the class definition in the earlier class action (a rule designed to curb abuse by
25 class action attorneys). *See id.* at 892. But the court there specifically stated that “the carved out putative
26 class members retain the right to rely on *American Pipe* tolling if they file *individual* actions.” *Id.* at 894
27 (emphasis added). That is the exact basis upon which T-Mobile, an individual plaintiff excluded from the
28 IPP class, is entitled to *American Pipe* tolling here. Similarly, *Smith* clarified the circumstances in which
extrinsic “evidence outside of the complaint can be used to construe a definition of a plaintiff’s asserted
class that is more narrow than what the complaint alone would dictate for the purposes of determining a
party’s entitlement to tolling.” 352 F.3d at 891. Here, there is no question that the class action
complaints in *Audio Video Artistry*, *Jafarian*, and *Minoli* encompassed T-Mobile’s California law claims.

1 cellular phones from the DPP class, defining the class to include only “persons and entities who
2 . . . directly purchased a television, computer monitor, or notebook computer containing a TFT-
3 LCD panel, from any defendant or any subsidiary thereof” (Dkt. No. 1641 at 34.)

4 Without citation to any apposite authority, Defendants state in conclusory fashion
5 that T-Mobile’s California claims could not have been tolled by the DPP class action because it
6 did not “include a claim under the Cartwright Act or Unfair Competition Act.” (Defs. Br. at 5.)
7 But as Defendants have conceded elsewhere, “whether the statute of limitations for a state law
8 claim is . . . tolled by the filing of a class action is . . . controlled by state law” (*see, e.g.*, Dkt. No.
9 3949 at 7), and California courts have expressly recognized that the filing of a class action
10 equitably tolls California state law claims. *See, e.g., Hatfield v. Halifax PLC*, 564 F.3d 1177,
11 1184-85 (9th Cir. 2009) (“[Plaintiff’s] individual claims were equitably tolled by the timely
12 filing of her nearly identical class action in New Jersey state court. Equitable tolling under
13 California law is a judicially created doctrine that operates to suspend or extend a statute of
14 limitations in order to ensure that a limitations period is not used to bar a claim unfairly.”).⁷
15 Under California law, T-Mobile’s membership in the DPP class, which asserted federal claims
16 predicated on substantially the same allegations of wrongdoing as T-Mobile now bases its claims
17 under California law, equitably tolled the statute of limitations controlling those state law claims.

18 The Court in *Hatfield* considered three factors when determining whether to apply
19 equitable tolling based on the pendency of a class action complaint: (1) timely notice to the
20 defendant by the filing of the first claim; (2) lack of prejudice to the defendant in gathering
21 evidence to defend against the second claim; and (3) good faith and reasonable conduct by the
22

23 ⁷ In related cases, Defendants have cited *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir.
24 2008), for the proposition that California courts have declined to adopt a cross-jurisdictional tolling rule,
25 pursuant to which a class action in one jurisdiction would toll claims later filed in another. (*See, e.g.*, Dkt.
26 No. 3949 at 7.) But as the Ninth Circuit made clear in *Hatfield*, “*Clemens*, which only rejected the
27 application of *American Pipe* tolling in a cross-jurisdictional action, does not affect the application of
California’s equitable tolling doctrine, which covers situations beyond those covered by *American Pipe*.”
564 F.3d at 1188.

1 plaintiff in filing the second claim. *Id.* at 1185 (citing *Collier v. City of Pasadena*, 142 Cal. App.
2 3d 917 (Cal. Ct. App. 1983), and *Mayes v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984)).

3 Each of these factors favors the application of equitable tolling to T-Mobile’s
4 California claims based on the pendency of the DPPs’ class action complaint:

- 5 • The Defendants were timely notified of T-Mobile’s California law claims by
6 the (i) filing of indirect purchaser class actions asserting precisely the same
7 claims mere days after Defendants’ conspiracy was disclosed, and (ii) the
8 filing of the DPPs’ Consolidated Complaint, which asserted federal claims
9 arising from the same misconduct as T-Mobile’s state law claims;
- 10 • The Defendants will suffer no prejudice in gathering evidence to defend
11 against T-Mobile’s state law claims, because the Defendants had been subject
12 to substantially similar lawsuits for over a year before T-Mobile filed its
13 complaint, and those lawsuits required Defendants to gather much of the
14 evidence relevant to T-Mobile’s claims; and
- 15 • T-Mobile acted reasonably and in good faith in not splitting its direct and
16 indirect purchaser claims while it was a member of the DPP class.

17 For these reasons, the DPPs’ filing of their complaint on November 5, 2007 tolled the statute of
18 limitations on T-Mobile’s California claims for the two years, four months, and 23 days between
19 November 5, 2007 and March 28, 2010, when T-Mobile was excluded from the DPP class.⁸

20 * * *

21 When T-Mobile filed its complaint against Defendants on April 18, 2011, only
22 one year and 24 days had run on the statute of limitations governing its claims. Indeed, even

23 ⁸ In related cases, Defendants have argued that “*Hatfield* expressly held that the application of equitable
24 tolling is limited to California residents.” (Dkt. No. 4410 at 7.) Defendants’ assertion mischaracterizes
25 the *Hatfield* court’s analysis. *Hatfield* states unambiguously that California courts “would *clearly permit*
26 equitable tolling at least as to any class members who *individually* subsequently filed a similar claim.”
27 564 F.3d at 1189 (emphasis added). It suggestion that non-residents could not avail themselves of
28 equitable tolling was limited to non-residents pursuing claims as part of a class action, not individually.
See, e.g., *id.* at 1189 (“Although we conclude that California would allow its resident *class members* to
reap tolling benefits under its equitable tolling doctrine, the same cannot be said for the non-resident class
members.”). And even then the court’s proscription was far from categorical. The *Hatfield* court
explained that its limitation was intended to address circumstances where non-resident class members, as
part of a plaintiff class, attempted to prosecute an action in California that would be time-barred in the
“jurisdiction whose law would otherwise govern.” *Id.* at 1189. *Hatfield* in no way compels the
conclusion that non-resident class members would be denied equitable tolling in connection with their
prosecution of California state-law claims that accrued in California.

1 without the benefit of equitable tolling between November 5, 2007 and March 28, 2010 – *i.e.*,
2 even if T-Mobile were relying exclusively on fraudulent concealment and *American Pipe* tolling
3 – only three years, five months and 16 days had run on the statute of limitations governing
4 T-Mobile’s California claims as of the date T-Mobile filed its complaint. T-Mobile’s claims
5 under California law are therefore timely.

1 **CONCLUSION**

2 For the reasons stated above, T-Mobile respectfully urges the Court to deny
3 Defendants’ Joint Motion to Dismiss in Part T-Mobile’s Amended Complaint.

4
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6 Respectfully submitted,

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