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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

THIS DOCUMENT RELATES TO:

3:11-CV-02591 SI

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

Plaintiff,

vs.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Case No. 3:11-cv-02591 SI

MDL NO. 3:07-MD-1827 SI

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS IN PART AMENDED COMPLAINT

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff T-Mobile U.S.A., Inc's ("T-Mobile") Opposition to Defendants' Joint Motion to Dismiss in Part Amended Complaint ("Opposition") reflects T-Mobile's awareness of the fatal defects in its Amended Complaint which require Defendants' Joint Motion to Dismiss ("Motion") to be granted. As the Court is aware, Defendants' Motion raised four issues:

1. Whether T-Mobile's California state law claims should be dismissed as untimely.

2. Whether T-Mobile's claims brought under the laws of California and New York must be dismissed under the Due Process Clause of the U.S. Constitution because T-Mobile does not allege that it purchased LCD products in these states.

3. Whether T-Mobile's Sherman Act claims, based upon indirect purchases of LCD products, should be dismissed for lack of standing under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

4. Whether T-Mobile's New York Donnelly Act claims for indirect purchases made prior to December 23, 1998, should be dismissed for lack of standing.

T-Mobile's Opposition concedes that issues 2 through 4, above, should be answered affirmatively, requiring dismissal of its Amended Complaint as requested. With regard to issue number 1, above, T-Mobile acknowledges that "this Court need not reach these arguments if it dismisses the claims for lack of standing." (Opp. p. 2:7-8.) However, if the Court reaches the statute of limitations issue, T-Mobile has failed to allege any facts to toll its California claims past December 2006—when the alleged conspiracy became public knowledge—and these claims should be dismissed as untimely. T-Mobile's reliance on three "placeholder" class actions filed by plaintiffs residing in Tennessee, Florida, and New Mexico with cookie-cutter listings of alleged state statute violations cannot toll the statute of limitations for its California claims. Nor does the Direct Purchaser Plaintiffs' ("DPP") consolidated class action complaint filed in November 2007 save T-Mobile's claims as the DPP complaint did not allege any California claims. Simply, the answer to all four issues above is "yes," requiring the Motion to be granted in its entirety.

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II. ARGUMENT

A. If The Court Considers T-Mobile's Tolling Arguments, T-Mobile's California State Law Claims Should Be Dismissed As Untimely.

T-Mobile relies on three early "placeholder" class actions and the DPP consolidated class action in a futile attempt to save its time-barred California state law claims which have a four-year statute of limitation. T-Mobile references three indirect purchaser class action complaints: (1) *Audio Video Artistry v. Samsung Elecs. Co. Ltd.*, *et al.*, Case No. 2:06-cv-02848 (W.D. Tenn.), Dkt. No. 1 ("*AVA* Compl."); (2) *Jafarian v. LG Philips LCD Co. Ltd., et al.*, Case No. 3:07-cv-00994-SI (N.D. Cal.), Dkt. No. 1 ("*Jafarian* Compl."); and (3) *Minoli, et al. v. LG Philips LCD Co., Ltd., et al.,* Case No. 6:07-cv-00235-MV-WDS (D.N.M.), Dkt. No. 1 ("*Minoli* Compl.") for the proposition that these cases tolled its state law claims. T-Mobile also references the DPP consolidated class action, which does not allege California claims, as grounds for tolling its time-barred claims. However, none of these class actions tolled T-Mobile California claims.

1. The Class Plaintiffs In The Indirect Purchaser Class Actions Cited By T-Mobile Lacked Standing To Bring California Law Claims.

AVA, *Jafarian*, and *Minoli* were very early class action complaints filed in December 2006, February 2007, and March 2007, respectively.[1] (Opp. pp. 4-5.) Each of these complaints contained outrageously broad definitions of the respective putative class. (*See*, *AVA Compl*. ¶ 19, *Jafarian Compl*., ¶ 19, and *Minoli Compl*. ¶ 39.) More importantly, none of the named plaintiffs in *AVA*, *Jafarian*, and *Minoli* resided in or were alleged to have any contacts with California. (*See*, *AVA Compl*., ¶ 4, *Jafarian Compl*., ¶ 11, and *Minoli Compl*. ¶¶14, 15.) To the contrary, the named plaintiff in *AVA* resided in Tennessee, the named plaintiff in *Jafarian* resided in Florida, and the named plaintiffs in *Minoli* resided in New Mexico. (*Id.*) As a result, these three indirect class actions cannot toll the statute of limitations on T-Mobile's California state law claims.

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[1] T-Mobile alleges in the Amended Complaint that only *AVA* and *Minoli* tolled the statute of limitations. (Amd. Compl. ¶ 279.) There is no allegation in the Amended Complaint regarding *Jafarian*. T-Mobile has failed to request the Court to take judicial notice of any of the complaints and all should be disregarded as a matter of law. *Lee v. Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (As a general rule, a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion. However, a court may take judicial notice of matters of public record outside the pleadings.).

The Ninth Circuit district courts have held that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the filing of a purported class action does not toll the statute of limitations for claims that the proposed class representative had no standing to assert. *See Maine State Ret. Sys. v. Countrywide Fin. Corp*., 722 F. Supp. 2d 1157, 1166-67 (C.D. Cal. 2010); *In re Wells Fargo Mortgage-Backed Certificates Litig*., No. 09 CV 01376, 2010 WL 4117477, at *3 (N.D. Cal. Oct. 19, 2010); *Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1*, 748 F. Supp. 2d 1246, 1258-59 (W.D. Wash. 2010); *Palmer v. Stassinos*, 236 F.R.D. 460, 464-66 (N.D. Cal. 2006). As this Court already held in *Office Depot, Inc v. AU Optronics Corporation, et al.*, No. 3:11-cv-02225-SI, Docket No. 79, with regard to the *AVA* complaint cited by T-Mobile here, "the Court finds that tolling would be inappropriate. It is apparent from the face of the complaints Office Depot has identified that the plaintiffs lacked standing. Accordingly, the Court agrees with defendants that Office Depot may not rely on these purported class actions to toll its California claims." *Citing, In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, ___ F. Supp. 2d ___, 2011 WL 4089580 (S.D.N.Y. 2011) ("[t]here may be circumstances where the representative so clearly lacks standing that no reasonable class member would have relied.").[2]

Here, the plaintiffs in T-Mobile's referenced class actions reside in Tennessee, Florida, and New Mexico and, therefore, patently lacked standing to assert claims under California law. *See Pecover v. Electronics Arts Inc*., 633 F. Supp. 2d 976, 984-85 (N.D. Cal. 2009) (dismissing eighteen state law claims where "[t]he named plaintiffs . . . alleged no basis for standing to bring claims under the laws of other states"); *In re Graphics Processing Units Litig. ("GPU")* 527 F. Supp. 2d 1011, 1026-27 (dismissing claims under the laws of seven states because "no named plaintiff resides in those states . . . [a]ccordingly, no named plaintiff has standing to bring antitrust claims in those states."). Accordingly, T-Mobile's reliance on these "placeholder" complaints, with their conclusory allegations and wholesale lists of alleged state law violations, does not save its California claims. As none of the plaintiffs in the

[2] *See*, *PC Richard & Son Long Island Corporation, et al v. AU Optronics Corporation et al*., No 3:11-cv-04119-SI, Document No 63, p. 4, n.4, holding that the PC Richard plaintiffs could not rely on two indirect purchaser class actions to invoke Arizona law when the named class plaintiffs were not Arizona residents. *See also, Interbond Corporation of America v. AU Optronics Corporation et al*., No. 3:11-cv-03763-SI, Document No. 54, p. 4 , n.3, holding that Brandsmart could not rely on two indirect purchaser class actions to invoke Florida law when the named class plaintiffs did not reside in Florida.

referenced class actions had standing to bring California law claims, these claims should be dismissed from T-Mobile's Amended Complaint as untimely.

2. The DPP Class Action Did Not Toll T-Mobile's California Claims.

Neither the DPP consolidated complaint, nor any of the amended complaints filed in the DPP thereafter, tolls T-Mobile's state law claims. The DPP complaint only asserted federal law claims and did not allege state law claims. (*DPP Cons. Compl.* ¶¶ 189-195) (MDL Dkt. No. 1416).) Moreover, the DPP complaint was only brought on behalf of direct purchasers. (*Id.* at ¶ 68.)

Under *American Pipe*, the DPP complaint tolled the statute of limitations only for the claims it actually asserted. *See Johnson v. Ry. Express Agency, Inc*., 421 U.S. 454, 467 (1975) ("the tolling effect given to the timely prior filings in *American Pipe* . . . depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (Powell, J. concurring) (*American Pipe* does not "leav[e] a plaintiff free to raise different or peripheral claims following denial of class status"); *Williams v. Boeing Co*., 517 F.3d 1120, 1136 (9th Cir. 2008); *In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703, 718-19 (N.D. Ohio 2010) ("only the claims expressly alleged in a previous federal lawsuit are subject to tolling"). Because the DPP complaint stated only federal claims and was brought on behalf of direct purchasers, it did not toll T-Mobile's California state law claims, and, in particular, did not toll T-Mobile's indirect claims.

T-Mobile's reliance on *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009), which interpreted California law with regard to equitable tolling for class action claims in a cross-jurisdictional context, is misplaced. Contrary to T-Mobile's contention, *Hatfield* expressly held that the application of cross-jurisdictional equitable tolling is limited to California residents. *Hatfield* held, "[a]lthough 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." *Id*. at 1189; *see also*, *Clemens v. DaimlerChrysler Corp.,* 534 F.3d 1017 (9th Cir. 2008) ("the weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law."). Here, T-Mobile, which has its principal place of business in Washington and is incorporated in Delaware, (Amd. Compl. ¶ 22), cannot take advantage of the

residency exception in *Hatfield*.[3] *See, Office Depot, Inc v. AU Optronics Corporation, et al.*, No. 3:11-cv-02225-SI, Docket No. 79., ("*Hatfield*, however, held only that California residents could take advantage of equitable tolling based upon class actions filed in other jurisdictions.")

None of the class actions cited by T-Mobile save its time-barred California claims. T-Mobile's California state claims were brought by T-Mobile more than four years after the alleged conspiracy was publicly disclosed and, therefore, must be dismissed as time-barred.

B. T-Mobile's California And New York Law Claims Fail Because T-Mobile Has Not Alleged That It Purchased Any Alleged Price-Fixed Products In These Two States.

T-Mobile's Opposition "acknowledges the Court's prior rulings" likely bar its California state law claims because it cannot allege that it purchased LCD products in California. (Opp. p. 1:6-10.) Instead, T-Mobile requests the Court to reconsider its previous ruling because of T-Mobile's "significant presence in California . . . ." (Opp. p. 1:12-16) Surprisingly, T-Mobile ignores the effect of the Court's prior rulings on its New York Donnelly Act claims, although the Amended Complaint is completely barren of any allegations regarding any purchases of LCD products in the State of New York.[4] The same due process rules of law that require T-Mobile's California state law claims be dismissed require the dismissal of T-Mobile's New York claims.

This Court has made it abundantly clear that, "Due Process requires a plaintiff seeking to bring claims under a state's antitrust law to demonstrate that the purchases giving rise to those claims occurred within that state." *In re TFT-LCD (Flat Panel) Antitrust Litig*. (State of Fl.), No. M 07–1827 SI, 2011 WL 1100133, at *5 (N.D. Cal. Mar. 24, 2011); *see also, In re TFT-LCD (Flat Panel) Antitrust Litig. (Costco)*, No. M 07-1827 SI, ECF No. 3396, at 3-5 (N.D. Cal. Aug. 29, 2011) (dismissing plaintiff's state law claims because it did not allege that it purchased the allegedly price-fixed products in those states); *In re TFT-LCD (Flat Panel) Antitrust Litigation* (*AT&T Mobility)*, 2010 WL 2609434, at *2-3 (holding that "in order to invoke the various state laws at issue, plaintiffs must be able to allege that 'the occurrence or transaction giving rise to the litigation' – plaintiffs' purchases of allegedly price-fixed

[3] Additionally, should this Court find that any one of the class actions toll T-Mobile's claims, "tolling [should be] limited to the defendants, products, and conspiracy period identified" in the class action complaint. *See* MDL Dkt. No. 4601 at 6; MDL Dkt. No. 4602 at 5.

[4] T-Mobile mentions in footnote 2 of the Opposition that Defendants argue that T-Mobile's Donnelly Act claims for indirect purchases should be dismissed on standing grounds, but makes not attempt to respond to this argument.

goods – occurred in the various states"); *In re TFT-LCD (Flat Panel) Antitrust Litigation (Nokia)*, 2010 WL 2629728, at *3-4 (same); *In re TFT-LCD (Flat Panel) Antitrust Litig. (Motorola)*, No. M 07-1827 SI, 2010 WL 2610641, at *8-9 (N.D. Cal. June 28, 2010) (same); *Pecover v. Elecs. Arts. Inc.*, 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009); *In re Graphics Processing Units Antitrust Litig*., 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007). T-Mobile does not, and cannot, allege that it purchased allegedly price-fixed LCD products in California or New York. As a result of the Court's prior rulings, and as implicitly acknowledged by T-Mobile, its claims based on California and New York law fail on due process grounds and should be dismissed.

C. T-Mobile Acknowledges That It Is Not Bringing Any Sherman Act Or Clayton Act Claims For Damages Based On Indirect Purchases From OEM's.

T-Mobile explicitly acknowledges that *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), bars it from recovering damages under the federal antitrust laws for indirect purchases of LCD products. (Opp. p. 1:23-26, n.1.) While its Amended Complaint is less than clear on this issue, T-Mobile is explicit in its Opposition: "T-Mobile has alleged that it purchased cellular phones containing LCD screens directly from Defendants, and it is asserting damages claims under the Sherman Act solely with respect to such direct purchases." (*Id.*) Accordingly, by T-Mobile's own admission, Defendants' Motion should be granted to the extent the Amended Complaint seeks federal redress for indirect purchases of LCD products.

D. T-Mobile Concedes That It Is Not Asserting Any Donnelly Act Claims Based On Purchases Prior To The Enactment Of New York's *Illinois Brick* Repealer.

T-Mobile's Opposition for the first time unambiguously states that it "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." (Opp. p.1, n.1.) The Motion should thus be granted as to any claims based on such purchases.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss (i) T-Mobile's California Cartwright Act and Unfair Competition Act claims as untimely; (ii) T-Mobile's state law claims because T-Mobile has failed to allege that they are based on alleged price-fixed goods purchased

in California and New York; (iii) T-Mobile's claims under the Sherman Act and Clayton Act based on indirect purchases; and (iv) to the extent the Court denies Defendants' motion to dismiss T-Mobile's New York claims on due process grounds, any New York Donnelly Act claims based on purchases made before the enactment of New York's *Illinois Brick* repealer amendment.

Respectfully submitted,

DATED: January 31, 2012

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Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from the signatories to this document.