

1 seeking to recover for a “long-running conspiracy . . . to fix, raise, stabilize, and maintain prices for
2 Liquid Crystal Display panels (‘LCD Panels’).” Compl. at ¶1. Brandsmart filed a first amended
3 complaint on November 1, 2011. The FAC contains two claims: 1) a claim under the Sherman Act; and
4 2) a claim under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). FAC at ¶¶271-
5 285.

6 Defendants now move to dismiss Brandsmart’s FAC.

7 8 LEGAL STANDARD

9 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint that
10 fails to state a claim upon which relief may be granted. To survive a Rule 12(b)(6) motion to dismiss,
11 the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
12 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff
13 to allege facts that add up to “more than a sheer possibility that a defendant has acted unlawfully.”
14 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading
15 of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
16 level.” *Twombly*, 550 U.S. at 544, 555.

17 In deciding whether the plaintiff has stated a claim upon which relief may be granted, the Court
18 must assume that the plaintiff’s allegations are true and must draw all reasonable inferences in the
19 plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the
20 Court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions
21 of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

22 23 DISCUSSION

24 As stated above, defendants have filed two motions to dismiss Brandsmart’s complaint: a joint
25 motion and a separate motion that pertains only to NEC.

26 27 I. Defendants’ Joint Motion

28 Defendants’ joint motion to dismiss raises three grounds for dismissal. First, defendants argue

1 that Brandsmart's FDUTPA claims are untimely. Second, defendants contend that Brandsmart's
2 FDUTPA claim must be dismissed to the extent it is based upon purchases made outside of Florida.
3 Third, they argue that Brandsmart's FAC impermissibly relies on group pleading.

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5 **A. Timeliness of Brandsmart's Claims**

6 Defendants first argue that Brandsmart's FDUTPA claim is untimely. Brandsmart filed suit on
7 June 3, 2011, more than four years after the DOJ's December 11, 2006, announcement of its
8 investigation into the conspiracy.¹ Because the FDUTPA has a four-year statute of limitations,
9 defendants contend that Brandsmart's FDUTPA claim must be dismissed.²

10 Brandsmart raises two bases for tolling that it asserts make its claim timely. First, it asserts that
11 a number of indirect-purchaser class action complaints tolled the statutes of limitations from December
12 14, 2006, to November 5, 2007. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) ("[T]he
13 commencement of a class action suspends the applicable statute of limitations as to all asserted members
14 of the class who would have been parties had the suit been permitted to continue as a class action.").
15 Second, it asserts that the direct-purchaser plaintiffs' class action complaint, by virtue of equitable and
16 cross-jurisdictional tolling, tolled the statute of limitations from November 5, 2007, until January 4,
17 2011, the date Brandsmart opted out of the direct-purchaser class.

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21 ¹This Court has treated a plaintiff's allegations of fraudulent concealment as sufficient, as a
22 pleading matter, to toll the statute of limitations until the DOJ announced its investigation on December
23 11, 2006. *See Order Granting in Part and Denying in Part Defendants' Motions to Dismiss Complaints*,
Master Docket No. 666, at 27-28 (August 25, 2008); *see also Order Denying Defendants' Joint Motion*
for Partial Summary Judgment based on the Florida Statute of Limitations, Master Docket No. 3628
(September 20, 2011).

24 ²Brandsmart has filed two requests for judicial notice of four indirect-purchaser class actions.
25 The first request, filed in conjunction with Brandsmart's opposition brief, was unopposed. The Court
GRANTS this request.

26 Brandsmart's second request for judicial notice was filed on January 17, 2012, and requested
27 that the Court take judicial notice of one case: *Eisler v. AU Optoelectronics Co., Ltd., et al.*, Case No.
3:07-cv-60289-JIC (S.D. Fla. Feb. 28, 2007). Defendants have opposed this request, claiming that it
28 was untimely. Given that the Court has relied upon the *Eisler* case in its discussion of tolling in the
Office Depot action, however, the Court will also rely on it here. Accordingly, the Court GRANTS
Brandsmart's second request as well.

1 1. Tolling Based on Indirect-Purchaser Complaints

2 Brandsmart has requested this that this Court take judicial notice of two indirect-purchaser class
3 actions³: *Jafarian v. LG Philips LCD Company Ltd.*, Case No. 07-0994 (N.D. Cal., Feb. 16, 2007), and
4 *Eisler v. AU Optoelectronics Co., Ltd., et al.*, Case No. 3:07-cv-60289-JIC, 2007 U.S. Dist. Ct.
5 Pleadings 60289 (S.D. Fla., March 1, 2007). The Court has previously found these cases, which
6 included FDUTPA claims and were brought by Florida residents, sufficient to toll the Florida statute
7 of limitations. *See* Order Denying Defendants’ Motions to Dismiss, Master Docket No. 4592, at 3-4
8 (January 18, 2012) (“Office Depot Order”); *see also Sacred Heart Health Sys., Inc. v. Humana Military*
9 *Healthcare Servs., Inc.*, 2008 WL 2385506 (N.D. Fla., June 9, 2008).

10 Defendants raise a number of arguments against this conclusion, but the Court does not find
11 them convincing. Defendants argue, for example, that the class actions Brandsmart relies upon did not
12 toll its claims because the class definitions were subsequently narrowed to exclude Brandsmart. While
13 the narrowing of the class definitions may have ended the tolling, the Court believes that Brandsmart
14 is entitled to tolling up until the date the class definition was narrowed. *See Del Sontro v. Cendant*
15 *Corp.*, 223 F. Supp. 2d 563, 581 (D.N.J. 2002) (“When class certification is denied, or a purported class
16 member for any reason ceases to be a member of the putative class, the toll ends by operation of law and
17 the limitations period begins to run immediately.”). Second, defendants argue that Brandsmart’s claims
18 were not tolled because the class action plaintiffs, all of whom were individual consumers, lacked
19 standing to assert the claims of a reseller such as Brandsmart. *See Palmer v. Stassinis*, 236 F.R.D. 460,
20 465 (N.D. Cal. 2006) (“[T]he filing of Palmer and Hammer’s putative class action cannot have tolled
21 the statute of limitations as to the UCL claim [because] Palmer and Hammer lacked standing to assert
22 claims under the UCL.”). Defendants, however, have not established that the plaintiffs lacked standing
23 to represent Brandsmart in the class action. The case defendants rely on denied class certification based
24 in part on the inability of the named plaintiff to adequately represent all members of the proposed class.

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26 ³Brandsmart also relies on two additional indirect-purchaser class actions that purported to bring
27 claims under the FDUTPA. Neither of those cases, however, involved plaintiffs that were Florida
28 residents. Because it was apparent from the face of the complaints that the plaintiffs lacked standing
to bring claims under Florida law, the Court agrees with defendants that Brandsmart may not rely on
them for *American Pipe* tolling. *See* Office Depot Order at 4.

1 *In re Methionine Antitrust Litig.*, 204 F.R.D. 161, 167 (N.D. Cal. 2001). The case did not find that the
2 plaintiff lacked standing.

3 The Court agrees with defendants, however, that only those claims expressly asserted in the
4 above actions were tolled. Thus, to the extent Brandsmart’s FDUTPA claim is based upon direct
5 purchases, it was not tolled by the above cases. In addition, the Court agrees with defendants that tolling
6 is limited to those defendants, products, and conspiracy periods identified in the class actions complaints
7 Brandsmart relies upon.

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9 2. Tolling Based on Direct-Purchaser Complaints

10 Brandsmart also contends that its FDUTPA claim was tolled by the direct-purchaser class-action
11 complaint under the doctrines of cross-jurisdictional and equitable tolling. The direct-purchaser
12 complaint was filed on November 5, 2007. It did not, however, include any claims under Florida law.

13 Brandsmart has not provided any authority for its contention that *American Pipe* tolling operates
14 to toll claims that were not asserted in the class action. To the contrary, courts have generally refused
15 to allow tolling in such circumstances. *See Williams v. Boeing Co.*, 517 F.3d 1120, (9th Cir. 2008)
16 (because “neither the Original nor the First Amended Complaints stated a claim for compensation
17 discrimination . . . the statute of limitation was not tolled for that claim as it would have been for the
18 promotion discrimination, hostile work environment, and retaliation claims properly raised”); *In re*
19 *Vertrue Marketing and Sales Practices Litig.*, 712 F. Supp. 2d 703, 718 (N.D. Ohio 2010) (“Since
20 *Crown, Cork & Seal*, courts interpreting Justice Powell’s concurrence have held that only the claims
21 expressly alleged in a previous federal lawsuit are subject to tolling.”). Nor has it established that
22 Florida law recognizes such tolling. In the absence of any such authority, the Court cannot conclude
23 that the direct-purchaser complaint tolled claims it did not assert. Accordingly, Brandsmart’s FDUTPA
24 claim is dismissed to the extent it is based upon direct purchases of LCD products.

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26 **B. Due Process**

27 Next, defendants assert that Brandsmart’s FDUTPA claim must be dismissed to the extent the
28 claim is based on purchases made in other states. Brandsmart does not dispute this contention, and

1 represents that its FDUTPA claim is based only on purchases made within Florida. Given Brandsmart’s
2 representation, the Court find Brandsmart’s allegations sufficient to survive defendants’ motion.

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4 **D. Group Pleading**

5 Finally, defendants contend that Brandsmart’s complaint impermissibly relies on group pleading.
6 This Court has addressed similar arguments numerous times in this MDL and has concluded that
7 allegations substantially similar to Brandsmart’s satisfy federal pleading standards. *See, e.g.*, Order
8 Denying Defendants’ Joint Motion to Dismiss the Second Amended Complaint, Master Docket No.
9 3590, at 3-4 (September 15, 2011); Order Denying Defendants’ Joint Motion to Dismiss, Master Docket
10 No. 3614, at 4-5. Accordingly, the Court DENIES defendants’ motion to dismiss on this basis.

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12 **II. NEC’s Motion**

13 Through its motion, NEC argues that Brandsmart’s allegations against it fail to make a plausible
14 showing that it was involved in the conspiracy.⁴ It also contends that Brandsmart’s complaint
15 impermissibly relies on “group pleading.” This Court has recently addressed both of NEC’s arguments
16 in ruling on NEC’s motion to dismiss Office Depot’s first amended complaint. *See* Office Depot Order
17 at 8. Brandsmart’s allegations against NEC are more detailed than those the Court found sufficient in
18 that case. *See, e.g.*, FAC at ¶¶132-35, 137. Accordingly, the Court finds that Brandsmart’s complaint
19 states a plausible claim for relief against NEC.

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⁴The Court GRANTS NEC’s unopposed request for judicial notice.

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CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS IN PART defendants' joint motion to dismiss and DENIES NEC's motion to dismiss. Docket Nos. 4258, 4272 in 07-1827; Docket Nos. 35, 37 in 11-3763.

IT IS SO ORDERED.

Dated: January 18, 2012



SUSAN ILLSTON
United States District Judge