Jeffrey H. Howard (pro hac vice)
Jerome A. Murphy (pro hac vice)
CROWELL & MORING LLP
1001 Pennsylvania Ave. N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116

Jason C. Murray, Esq. (State Bar No. 169806)
CROWELL & MORING LLP
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
Telephone: (213) 622-4750
Facsimile: (213) 622-2690
Email: jmurray@crowell.com

Counsel for Plaintiffs
AT&T Mobility LLC, et al.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In Re TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Document Relates To: *AT&T Mobility LLC, et al. v. AU Optronics Corporation, et al.*, C 09-4997 SI	Case No. M 07-1827 SI MDL No. 1827 **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO CERTIFY UNDER 28 U.S.C. 1292(b) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: February 15, 2011 Time: 9:00 a.m. Crtrm.: 10 Judge: Honorable Susan Illston

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2011 at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 10, 19th Floor, San Francisco, California, before the Honorable Susan Illston, Plaintiffs AT&T Mobility LLC, AT&T Corp., AT&T Services, Inc., BellSouth Telecommunications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T DataComm, Inc. and Southwestern Bell Telephone Company ("Plaintiffs") will and hereby do move the Court, pursuant to 28 U.S.C. § 1292(b), for an Order certifying for Appeal the Court's Order of November 12, 2010 dismissing in part Plaintiffs' Second Amended Complaint. This Order presents the following controlling question of law for which Plaintiffs seek immediate appellate review: whether the application of California law to claims against defendants subject to suit in California based on conduct occurring in part in California violates the Due Process Clause of the United States Constitution.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

This motion is based upon this Notice and Motion, the accompanying Memorandum of Points and Authorities in support thereof, and such other matters as the Court may consider.

DATED: January 12, 2011

CROWELL & MORING LLP

By: */s/ Jason C. Murray*

Attorneys for Plaintiffs
AT&T MOBILITY LLC, et al.
Jason C. Murray (CA Bar No. 169806)
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
Telephone: 213-443-5582
Facsimile: 213-622-2690
Email: jmurray@crowell.com

Jeffrey H. Howard (*pro hac vice)*
Jerome A. Murphy (*pro hac vice)*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116
Email: jhoward@crowell.com
jmurphy@crowell.com

Kenneth L. Adams (*pro hac vice*)
R. Bruce Holcomb (*pro hac vice*)
Christopher T. Leonardo (*pro hac vice*)
Christopher H. Wood (*pro hac vice*)
ADAMS HOLCOMB LLP
1875 Eye Street NW
Washington, DC 20006
Telephone: 202-580-8822
Email: adams@adamsholcomb.com
holcomb@adamsholcomb.com
leonardo@adamsholcomb.com
wood@adamsholcomb.com

Counsel for AT&T Mobility, LLC, AT&T Corp., AT&T Services, Inc., BellSouth Telecommunications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T DataComm, Inc., and Southwestern Bell Telephone Company

TABLE OF CONTENTS

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

CALIFORNIA STATUTES

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

Whether the Court's Order of November 12, 2010, dismissing in part Plaintiffs' Second Amended Complaint and holding that Plaintiffs may not assert claims under California's Cartwright Act for indirect purchases of price-fixed LCD Panels outside of California, presents a controlling question of law for which there is a substantial ground for difference of opinion in light of the Supreme Court's decision in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and lower court decisions interpreting that decision.

INTRODUCTION

Plaintiffs' Second Amended Complaint ("SAC") alleges that the defendants – all of whom are subject to the personal jurisdiction of California courts – engaged in a "long-running conspiracy" to fix the prices for LCD panels. SAC ¶ 1. As alleged in the complaint, the conspiracy "included communications and meetings in which defendants agreed to eliminate competition and fix the prices of LCD panels that were ultimately incorporated into LCD products . . . that [defendants] knew would be sold in California." *Id.* ¶ 2. Defendants "engaged in conspiratorial conduct both within and outside the United States"; defendants' domestic conduct "was centered in California."

Plaintiffs brought this action as purchasers of LCD products in California as well as in other states, invoking California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.* Defendants have never questioned that the Cartwright Act applies by its terms to the conduct at issue here, nor have they questioned that Plaintiffs have properly stated a claim for damages under California law for out-of-state purchases. Instead, defendants moved to dismiss portions of Plaintiffs' claims on the ground that application of California law to a claim for damages based on out-of-state purchases would violate the Due Process Clause of the United States Constitution (U.S. Const. XIV, § 1 ("Due Process Clause").)

In its ruling of November 12, 2010 ("November 12 Order"), this Court agreed with defendants and held that "only those plaintiffs who purchased products in California may allege claims under California law." November 12 Order at 3. The Court based its decision on the

reasoning of its ruling of June 23, 2010 ("June 23 Order") granting defendants' joint motion to dismiss Plaintiffs' first amended complaint. The Court there adopted a bright-line rule that, "[i]n a price-fixing case," application of a "particular State's law comports with the Due Process clause" only if "the plaintiff's purchase of an allegedly price-fixed good" took place in that particular state. June 28 Order at 4.

Plaintiffs respectfully move the Court to certify its November 12 Order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The criteria for interlocutory appeal under § 1292(b) are satisfied here. *First*, this case involves a controlling question of law – namely, whether the Due Process Clause bars application of California's antitrust laws to purchases made out of state when the claims at issue are based in part on conduct that took place and affected competition in California. *Second*, there are substantial grounds for difference of opinion on that issue: other courts routinely allow states to apply their laws to claims involving out-of-state purchases, so long as the state has a sufficient interest in regulating the conduct at issue and so long as the state has sufficient "contacts" with "the parties and with the occurrence or transaction giving rise to the litigation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). *Third*, resolution of this issue will materially advance this litigation by clarifying both the scope of Plaintiffs' claims under California law and the relevant legal and factual issues to be litigated. Moreover, resolution of this issue will affect several other cases pending before this Court, as well as future litigation under the Cartwright Act.[1]

STATEMENT OF THE FACTS

Plaintiffs have alleged claims based on both direct and indirect purchases of LCD panels for which defendants conspired to fix prices. In their first amended complaint, Plaintiffs asserted claims for all of their indirect purchases under California's Cartwright Act, alleging (1) that defendants engaged in anticompetitive conduct in furtherance of the price-fixing conspiracy in

[1] The Court indicated at the November 3, 2010, hearing on defendants' motion to dismiss Motorola's complaint that it may certify an issue related to the application of the Foreign Trade Antitrust Improvement Act to Motorola's claims. Plaintiffs respectfully suggest that it may be efficient to certify both issues to the Ninth Circuit, as they arise from the same set of facts.

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

California; (2) that defendants were present in California; (3) that defendants' conspiracy was intended to and did affect LCD panel and LCD product prices in California; and (4) that some (but not all) Plaintiffs conduct business activities in California.

After the Court dismissed Plaintiffs' complaint, Plaintiffs filed the Second Amended Complaint, in which they continued to assert claims for all of their purchases under the Cartwright Act.[2] In support of their claims under California law, Plaintiffs included more detailed allegations of defendants' anticompetitive conduct occurring in California. REDACTED

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

ARGUMENT

Certification for appeal under 28 U.S.C. § 1292(b) is appropriate where three factors are met: (1) the order involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) interlocutory appeal will "materially advance" the litigation. *Northstar Fin. Advisors Inc. v. Schwab Inv.*, No. C 08-4119 SI, 2009 WL 1126854 at *1 (N.D. Cal. Apr. 27, 2009), *rev'd*, 615 F.3d 1106 (9th Cir. 2010). Each of those criteria is satisfied here.

[2] Plaintiffs also specifically alleged the states where they purchased LCD products affected by defendants' conspiracy and asserted claims in the alternative under the laws of those states.

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

I. The Question Is Controlling

Whether the Due Process Clause bars application of a particular state's antitrust laws to out-of-state purchases – even when conspiratorial conduct allegedly took place in the state and defendants are subject to suit there – is a controlling question of law because it governs the scope of Plaintiffs' claims under California law. A question of law need not be dispositive of the entire lawsuit in order to be "controlling" for purposes of § 1292(b). *Lakeland Village Homeowners Assoc. v. Great American Ins. Group*, No. 2:10-cv-00604-GEB-GGH, 2010 WL 2891250 at *9 (E.D. Cal. July 22, 2010). It is sufficient that the "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *Id.*

Here, if the Ninth Circuit rules that the allegations of defendants' California conduct and the other contacts pleaded in the Second Amended Complaint permit application of California law to claims based on out-of-state purchases, Plaintiffs will be permitted to seek damages under the Cartwright Act for all of their indirect purchases of LCD Products regardless of where those products were purchased. This question will thus have a substantial impact on the scope of Plaintiffs' claims in this case, as well as the legal standards governing Plaintiffs' recovery of damages on those claims.

II. There Is Substantial Ground for Difference of Opinion

There is a substantial ground for difference of opinion over whether the Due Process Clause prohibits the application of California's antitrust laws solely on the basis that the price-fixed good was sold outside of California. This Court has previously held that "substantial ground for difference of opinion" exists where its decision departed from one decision by one court of appeals. *See Northstar Fin. Advisors*, 2009 WL 1126854 at *1 (certifying a decision for interlocutory appeal because it departed from a Second Circuit decision); *see also, e.g., Lakeland Village Homeowners Ass'n*, 2010 WL 2891250, at *9; *Wells Fargo Bank v. Bourns, Inc.*, 860 F. Supp. 709, 717 (N.D. Cal. 1994). Here, this Court's November 12 Order departs from several decisions by other courts.

There is no dispute that the Due Process Clause places limitations on a particular state's authority to apply its law to out-of-state conduct. "[T]here is a difference between jurisdiction to

adjudicate or judicial jurisdiction on the one hand, and legislative jurisdiction on the other. The former concerns the power of a state to resolve a particular dispute through its court system, while the latter involves the authority of a state to make its law applicable to persons of activities." *Adventure Commc'n v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 435 (4th Cir. 1999) (internal quotation marks omitted). The Due Process Clause of the Fourteenth Amendment requires that there be "some minimal contact between a State and the regulated subject" before the state may legislate. *Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1236 (11th Cir. 2001). "In other words, we inquire not only into the contacts between the regulated *party* and the state, but also into the contacts between the regulated *subject matter* and the state." *Id.* (emphasis in original). Any assertion of legislative authority by the state "must be supported by the State's interest in protecting its own consumers or its own economy." *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

Nevertheless, the Supreme Court has recognized that the "restrictions on the application of forum law" imposed by the Due Process Clause are "modest." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). All that is required for "a State's substantive law to be selected in a constitutionally permissible manner" is that the "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

This Court's determination that it would be unconstitutional to permit plaintiffs to pursue claims under California law for out-of-state purchases turns on its judgment that the *only* "transaction or occurrence" that matters for purposes of the due process analysis is the purchase of the price-fixed good. That analysis would carry considerable force if the state statute at issue simply governed the sale of the product at issue: for example, a state consumer-protection statute – which, by its nature, concerns itself with consumer transactions occurring within the state – cannot be constitutionally applied to consumer transactions taking place outside of California. *See Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999).

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

But the Cartwright Act does not regulate consumer transactions; rather, it broadly prohibits unlawful business combinations, *see* Cal. Bus. & Prof. Code § 16720, and it grants a cause of action to "any person" injured as a result of such unlawful conduct, *see id.* § 16750. In evaluating the sufficiency of defendants' "contacts" and California's "state interests," therefore, the Court should have looked to *the conspirators and conspiratorial conduct* – and not merely the out-of-state sale. *See, e.g.*, *Kelley v. Microsoft Corp*., 251 F.R.D. 544, 550 (W.D. Wash. 2008) (Due Process Clause does not foreclose application of Washington fraud law to out-of-state sales, even though "the injury to Plaintiffs and the potential class members may have occurred outside of Washington," because "Defendant created its allegedly deceptive and unfair marketing scheme in Washington," and because Defendant was headquartered in that State). Here, not only was each of the defendants subject to the personal jurisdiction of the California courts, but plaintiffs have alleged that defendants purposefully directed their unlawful conduct at California markets and carried out part of the conspiracy in California. That California has an interest in regulating such conduct is plain. Likewise, there is no unfairness in subjecting defendants to liability for out-of-state sales when the conduct giving rise to the liability took place, in part, in California.

Furthermore, the Court's analysis is inconsistent with the Supreme Court's analysis in *Allstate*. In that case, a Minnesota resident brought a claim under Minnesota law against an insurance company, even though the policy had been sold to a Wisconsin resident and the accident giving rise to the claim occurred in Wisconsin. Under this Court's analysis, application of Minnesota law to the claim in that case would almost certainly have been unconstitutional, because the "transaction or occurrence" giving rise to the claim was either the sale of the policy or the accident, both of which occurred in Wisconsin. Nevertheless, the Supreme Court found three contacts that created the state interests required by Due Process: (1) Minnesota's "police power" interest in a non-resident who commuted to Minnesota for work; (2) the defendant's business presence in Minnesota and consequent familiarity with Minnesota law; and (3) the decedent's spouse later moved to Minnesota before bringing the suit. *Id.* at 313-19. California's regulatory interest – protecting California markets from illegal conspiracies directed at and occurring within the state – is much stronger here. Defendants are present in California and familiar with its laws.

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

And, while some plaintiffs are not California residents, they are nevertheless "persons" harmed by conduct that violated California law, with a consequent right to sue under the Cartwright Act. *Cf. Diamond Multimedia Sys., Inc. v. Superior Court,* 19 Cal. 4th 1036 (1999) (remedy of California securities laws available to in-state and out-of-state purchasers and sellers alike).

In applying *Allstate* in other contexts, this Court has similarly evaluated the plaintiffs' alleged contacts in the aggregate, and has treated the location of the defendants' illegal conduct as an important contact with California that allows a nonresident plaintiff to assert a claim under California law. For example, in *In re Seagate Techs. Sec. Litig.*, 115 F.R.D. 264, 272 (N.D. Cal. 1987), this Court found that contacts between the plaintiffs' securities fraud claims and California included the defendant's headquarters in California, fraudulent conduct taking place in California, and California's interest in deterring fraudulent acts committed by California residents within the state, and held that these allegations satisfied Due Process under *Allstate*. And in *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686 (N.D. Cal. 1986), this Court took a similar approach, finding the application of California law to be consistent with Due Process where the defendants were headquartered in California, transacted business in California, and the conduct giving rise to the plaintiffs' claims occurred in California.

More recently, the Central District of California relied on both *Allstate* and *Seagate* and likewise concluded that several contacts in the aggregate, including the defendants' headquarters in California and the fact that the illegal conduct in question took place in California, allowed for the application of California law to the plaintiffs' claims. *See In re Heritage Bond Litig.*, No. MDL 02-ML-1475, 2004 WL 1638201 at *10 (C.D. Cal. July 12, 2004). Although *Seagate*, *Computer Memories*, and *Heritage Bond* did not involve claims of price fixing, like this case they involved fraudulent, deceptive and misleading conduct within California that inflicted economic injury on persons both within and outside of California.

Moreover, numerous other courts outside of the Ninth Circuit have assessed alleged contacts in the aggregate and held that the Due Process Clause does not foreclose the application of state law simply because part of the "transaction or occurrence" giving rise to the claim occurred out of state. For example, in *Am. Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*,

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

640 F. Supp. 1411, 1418 (E.D.N.C. 1987), the court held that, under *Allstate*, the Due Process Clause does not prevent application of North Carolina's antitrust laws to "publications, statements, prices or other conduct" by the defendant outside of North Carolina. *See id.* at 1426-28, 1434-35. The court relied on a "significant aggregation of contacts, creating state interests" in the application of North Carolina law – including that "the course of conduct giving rise" to the claims "was carried out in substantial part in North Carolina" and that the defendant "has been present doing business in North Carolina." *Id.* at 1427.

Similarly, other courts have interpreted *Allstate* to mean that an "aggregation of contacts" can authorize the application of state law to out-of-state transactions of goods or services. For example, in *Budget Rent-A-Car System, Inc. v. Chappell*, 407 F.3d 166 (3d Cir. 2005), the Third Circuit held that *Allstate* and the Due Process Clause do not foreclose the application of New York's vicarious-liability law to a car accident that occurred in Pennsylvania and to a car-rental transaction that occurred in Michigan, given the "'significant aggregation of contacts'" created by the plaintiff's residence in New York and the fact that the plaintiff drove the car in New York at some time prior to the accident. *Id.* 175 (quoting *Allstate*). In *Adventure Communications*, the Fourth Circuit held that *Allstate* and the Due Process Clause do not foreclose the extraterritorial application of Kentucky's electioneering laws to advertising expenditures made in West Virginia, given the "aggregate contacts" between West Virginia media companies and Kentucky, as well as Kentucky's interest in maintaining the integrity of its elections. *See Adventure, Commc'n*, 191 F.3d at 435; *see also id.* at 437 ("It is clear . . . that there can be sufficient contacts between the taxing state and the person or transaction to be taxed to satisfy due process even though the transaction does not physically transpire within the state's borders or the person is not physically present there."). And in *Manuel v. Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005), the Eleventh Circuit held that *Allstate* and the Due Process Clause do not foreclose the extraterritorial application of Georgia law to invalidate a non-compete agreement that was signed in Florida between plaintiff, then a Florida resident, and an Ohio corporation. The court emphasized that, because plaintiff moved to Georgia after signing the non-compete agreement, the effects of

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

enforcing the agreement would be felt in Georgia, and those effects were sufficient to create an aggregation of contacts under *Allstate*.

These decisions, and many others,[3] provide much more than the substantial ground for difference of opinion regarding this Court's conclusion than an out-of-state sale, standing alone, is sufficient to foreclose the application of California law under *Allstate*.

III. An Immediate Appeal Would Materially Advance Plaintiffs' Case as well as the Indirect Purchaser Claims of Similarly Situated Direct Action Plaintiffs

A party seeking immediate appellate review must show that such review would "materially advance" the ultimate termination of the litigation. *Northstar Fin. Advisors*, 2009 WL 1126854 at *1. Interlocutory appellate review may "materially advance the litigation" even though it may not dispose of the entire lawsuit. *Assoc. of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1093 (E.D. Cal. 2008). Here, immediate appellate review would materially advance this litigation by clarifying a threshold issue that will affect the scope of Plaintiffs' claims and define legal and factual issues in dispute.

Plaintiffs in this case have alleged claims under the Cartwright Act based on all of their indirect purchases of price-fixed LCD panels during the conspiracy period. Under the Court's November 12 Order, Plaintiffs may now pursue claims only for those indirect purchases that occurred in particular states, as alleged in the Complaint. SAC ¶¶ 224-256. Immediate appellate review here would advance the litigation by clarifying the volume of indirect purchases, and thus

---

[3] *See also, e.g.*, *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 475 (E.D. Pa. 2010) (Due Process Clause does not foreclose extraterritorial application of Pennsylvania defamation law to statements made at teleconference between Oprah Winfrey, who made the statements in Chicago, and news reporters, who reported the statements in South Africa, because plaintiff's domicile in Pennsylvania "creates a significant state interest for Pennsylvania in providing redress for injury to plaintiff's reputational interest"); *Mooney v. Allianz Life Ins. Co. of North America*, 244 F.R.D. 531, 535 (D. Minn. 2007) (Due Process Clause does not foreclose extraterritorial application of Minnesota consumer-protection law to class members who purchased insurance policies outside of Minnesota because defendant "created and distributed the allegedly fraudulent marketing materials from Minnesota," and because defendant was headquartered there); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 669 F. Supp. 1244, 1253 (S.D.N.Y. 1987) (even where plaintiff failed "to allege any nexus between the acts and transactions of the conspiracy in which they are charged with having participated and the state of New Mexico," Due Process Clause does not foreclose application of New Mexico securities laws because defendants maintained offices in New Mexico, and New Mexico had an interest in protecting its residents, including plaintiff).

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

damages, at issue in Plaintiffs' case, and could facilitate the ultimate resolution of Plaintiffs' claims.

Appellate review may also narrow the number of factual and legal issues in dispute. Under the November 12 Order, Plaintiffs must proceed under the laws of twenty different states to recover for their indirect purchases. The large number state antitrust laws at issue will multiply the number of legal questions that the Court will be asked to address in this case. And the fact that Plaintiffs must split their indirect purchaser claim among the various states where they purchased the products in question will introduce factual issues that would not arise if Plaintiffs could pursue their entire indirect purchaser claim under the law of a single state. For example, the defendants cannot assert a "pass-on defense" under the Cartwright Act, *see Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 786 (2010), but they may seek to assert such a defense under other states' laws. The need to litigate that issue will not only multiply the number of legal disputes, but may require investigation into a complicated set of facts – namely, plaintiffs' subsequent sales – that would remain outside the case entirely if the case were litigated under forum law. Immediate appellate review thus has the potential to streamline this case and make litigation of Plaintiffs' indirect purchase claims more efficient.

In addition, immediate appellate review will materially advance this litigation by removing a major obstacle to potential pretrial settlement. *See, e.g., Hoffman v. Citibank (S. Dakota), N.A.*, Case No. SACV 06-0571 AG, 2007 WL 5659406 at *4 (C.D. Cal. Feb. 15, 2007) (certifying an order under § 1292(b) because doing so "could materially advance the litigation by . . . giving the parties an opportunity to settle or dismiss without having to wait for an appeal following final judgment"); *In re N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 526 F. Supp. 887, 919 (N.D. Cal. 1981) (same), (*appeal permitted*, 693 F.2d 847 (9th Cir. 1982)); *Lawson v. FMR LLC*, 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (certifying an order under § 1292(b) because immediate appellate review could "shape . . . settlement strategies in a fashion which should expedite resolution of these cases overall"). Here, the exclusion of a significant number of purchases from the litigation – on legal grounds that Plaintiffs dispute – will make it harder for the parties to resolve the case before trial and ultimate appeal.

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

Finally, the question for which Plaintiffs seek immediate appellate review will arise in nearly every direct action plaintiff case involving indirect purchaser claims. And in these other cases, the question of whether California law can be applied to all indirect purchaser claims, on the basis of defendants' conduct in and other contacts with California, will also likely have a similar impact on the volume of purchases at issue, damages, and the number of factual and legal issues in dispute. This Court and others have held that immediate appellate review "materially advances" the litigation where it has the potential to clarify an important issue not only for the parties themselves but for similarly situated litigants. *See Wilton Miwok Rancheria v. Salazar*, No. C-07-02681-JF-PVT, 2010 WL 693420 at *13 (N.D. Cal. Feb. 23, 2010) (certifying interlocutory appeal where resolution of question was important for similarly situated future litigants); *Assoc. of Irritated Residents*, 634 F. Supp. 2d at 193 (stating that "the opportunity to achieve appellate resolution of an issue important to other similarly situated [litigants] can provide an additional reason for certification"). Immediate review of this issue would provide needed clarity for all the Direct Action Plaintiffs and would promote more efficient litigation of their indirect purchaser claims.

crowell moring
515 South Flower Street, 40th Floor
Los Angeles, CA 90071
(213) 622-4750

CONCLUSION

For all of these reasons, plaintiffs respectfully request that the Court grant their motion to certify for immediate appeal under 28 U.S.C. § 1292(b) the question whether the Due Process Clause bars application of California law to plaintiffs' claims.

DATED: January 12, 2011 CROWELL & MORING LLP

By: */s/ Jason C. Murray*

Attorneys for Plaintiffs
AT&T MOBILITY LLC, et al.
Jason C. Murray (CA Bar No. 169806)
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
Telephone: 213-443-5582
Facsimile: 213-622-2690
Email: jmurray@crowell.com

Jeffrey H. Howard (*pro hac vice)*
Jerome A. Murphy (*pro hac vice)*
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-624-2500
Facsimile: 202-628-5116
Email: jhoward@crowell.com
jmurphy@crowell.com

Kenneth L. Adams (*pro hac vice*)
R. Bruce Holcomb (*pro hac vice*)
Christopher T. Leonardo (*pro hac vice*)
Christopher H. Wood (*pro hac vice*)
ADAMS HOLCOMB LLP
1875 Eye Street NW
Washington, DC 20006
Telephone: 202-580-8822
Email: adams@adamsholcomb.com
holcomb@adamsholcomb.com
leonardo@adamsholcomb.com
wood@adamsholcomb.com

Counsel for AT&T Mobility, LLC, AT&T Corp., AT&T Services, Inc., BellSouth Telecommunications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T DataComm, Inc., and Southwestern Bell Telephone Company