

1 **MILSTEIN ADELMAN, LLP**
 GILLIAN L. WADE, State Bar No. 229124
 2 gwade@milsteinadelman.com
 SARA D. AVILA, State Bar No. 263213
 3 savila@maklawyers.com
 2800 Donald Douglas Loop North
 4 Santa Monica, California 90405
 Telephone (310) 396-9600
 5 Facsimile (310) 396-9635

6 **WHATLEY DRAKE & KALLAS, LLC**
 Joe R. Whatley, Jr. (admitted *pro hac vice*, NY Bar No.4406088)
 7 jwhatley@wdklaw.com
 Edith M. Kallas (admitted *pro hac vice*, NY Bar No. 2200434)
 8 ekallas@wdklaw.com
 Patrick J. Sheehan (admitted *pro hac vice*, NY Bar No. 3016060)
 9 psheehan@wdklaw.com
 380 Madison Avenue, 23rd Floor
 10 New York, New York 10017
 Tel: (212) 447-7070
 11 Fax: (212) 447-7077

12 Attorneys for Plaintiffs
 Additional Counsel Listed on Signature Page

13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

15 In re Google Phone Litigation) Lead Case No. 5:10-cv-01177-EJD
 16) (Consolidated with No.5:10-CV-03897EJD)
 17)
 18) Assigned to Hon. Edward J. Davila
 19) **CLASS ACTION**
 20) **CONSOLIDATED AMENDED**
 21) **COMPLAINT**
 22)
 23) 1. Breach of Implied Warranty
 24)
 25) 3. Violation of Cal. Bus. & Prof. C. §§ 17200,
) *et seq.*
 26)
 27) 4. Violation of Cal. Civ. Code §§ 1750, *et seq.*
 28) **DEMAND FOR JURY TRIAL**
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)
)

26 Plaintiffs Mary McKinney and Nathan Nabors (collectively, “Plaintiffs”), on behalf of
 27 themselves and all others similarly situated, bring this consolidated amended complaint against
 28

1 Google, Inc. and HTC Corp. (“HTC”) (collectively, “Defendants”), and alleges as follows:

2 **INTRODUCTION**

3 1. This is a class action against Defendants on behalf of Plaintiffs and a class of all
4 consumers who purchased the Nexus One mobile device (the “Google Phone”) manufactured and
5 marketed by Google and HTC and sold to access a 3G wireless network (the “Class”), arising out
6 of the failure of the Google Phone to maintain connectivity to a wireless network, as well as for
7 Defendants’ lack of customer support to assist Google Phone customers in coping with this
8 defect. Plaintiffs reserve the right to amend the complaint after the Rule 26 conference, subject to
9 court approval.

10 **JURISDICTION AND VENUE**

11 2. This Court has jurisdiction over the subject of this Complaint under the Class
12 Action Fairness Act, 18 U.S.C. § 1332(d). In the aggregate, the damages suffered and sought to
13 be recovered by Plaintiffs and the Class exceed the Court’s jurisdictional minimum for a class
14 action. The exact amount of damages caused to Class members cannot be precisely determined
15 without access to Defendants’ records.

16 3. This Court has jurisdiction over each Defendant because each Defendant is either a
17 corporation or an association organized under the laws of California, a foreign corporation or
18 association authorized to do business in California and registered with the California Secretary of
19 State, or does sufficient business in or has sufficient minimum contacts with California, or
20 otherwise intentionally avails itself of the California markets through the promotion, marketing,
21 advertising and/or sales of their products and services in California to render the exercise of
22 jurisdiction by California courts permissible under traditional notions of fair play and substantial
23 justice.

24 4. Under 28 U.S.C. section 1391, venue is proper in this District because Google is
25 headquartered in, and maintains its principal place of business within, this District, and HTC does
26 business and continues to do business in this District. Moreover, a substantial portion of the acts
27 and practices underlying this Complaint occurred here.

28

1 10. McKinney's third Google Phone was shipped to her from T-Mobile in
2 approximately March or April of 2010. She continues to use this phone, because it is her best
3 option for cellular phone and data service after spending hundreds of dollars and hours of her
4 personal time dealing with service failures.

5 11. Because McKinney refused to pay the additional \$529 dollars for a new phone,
6 Google refused to ship McKinney a "new" phone to replace the "new" phone that she purchased.
7 Instead, Google and T-Mobile only replaced McKinney's new, full-price Google Phone with a
8 "used" Google Phone that they represented had been refurbished.

9 12. McKinney has had to spend countless hours dealing unsuccessfully with customer
10 service issues. In addition to time, effort, and the taxing mental exertion of dealing with
11 Defendants and T-Mobile, McKinney also has lost money or property as a result of the failures of
12 her Google Phone, and has suffered cognizable injury as a result of the Defendants' conduct.

13 13. Because McKinney does not have extensive records of her communications with
14 Defendants and T-Mobile, she is informed and believes that Defendants and T-Mobile have
15 extensive records regarding McKinney's purchases and service requests.

16 ***Plaintiff Nathan Nabors***

17 14. Plaintiff Nathan Nabors is, and at all relevant times hereto has been, a resident of
18 Orlando, Florida. He purchased his Google Phone through the Google website
19 (google.com/phone). Nabors paid \$563.38 for the phone and also paid a fee to terminate his then-
20 existing telephone contract with another company.

21 15. Nabors purchased the phone in reliance on a number of statements by Google in its
22 advertising and marketing of the Google Phone, including statements about the phone's 3G
23 connectivity and relied on those statements in purchasing the phone. However, once Nabors
24 purchased the phone, he missed numerous phone calls on the phone, experienced many "dropped"
25 calls while using the phone and routinely was unable to connect to the 3G network.

26 16. When Nabors went to Google and his new service provider, T-Mobile, for
27 assistance with his problems with the phone, Google's customer service was not helpful. In sum,
28

1 Nabors lost money or property because he spent money for a Google Phone that did not perform
2 as promised by Google.

3 17. Because Nabors does not have extensive records of his communications with
4 Defendants and T-Mobile, he is informed and believes that Defendants and T-Mobile have
5 extensive records regarding Nabors' purchase and service requests.

6 ***Defendants***

7 18. Defendant Google is a Delaware corporation that maintains its principal place of
8 business in Mountain View, California. Google develops brands, promotes, markets, distributes
9 and/or sells the Google Phone throughout the United States.

10 19. Defendant HTC is a Taiwanese corporation that, at all relevant times, was doing
11 business in the State of California. HTC designed and manufactured the Google Phone.

12 ***Non-Defendant Third Party***

13 20. Non-Defendant T-Mobile, a third-party that served as Plaintiffs' wireless carrier, is
14 an American subsidiary of Germany-based Deutsche Telekom's T-Mobile International business,
15 which has its principal place of business in Bellevue, Washington. T-Mobile provides wireless
16 voice and data communications services to subscribers in the U.S., including California. T-
17 Mobile was a provider of the telephone and data service plans for the Google Phone throughout
18 the U.S., including California.

19 21. Plaintiffs are informed and believes and based thereon alleges that at all times
20 relevant herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate,
21 partner, assignee, successor-in-interest, alter ego or other representative of each of the remaining
22 Defendants and was acting in such capacity in doing the things herein complained of and alleged.
23 In committing the unlawful and wrongful acts as alleged herein, Defendants planned and
24 participated in and furthered a common scheme by means of manufacturing, marketing and
25 selling the Google Phone for access to T-Mobile's 3G network, despite Google Phone's inability
26 to maintain connectivity to the 3G network. Further, Defendants failed to provide adequate
27 customer service to Plaintiffs and the Class to cope with this defect.

28

1 **FACTUAL ALLEGATIONS**

2 22. Google is an American public corporation specializing in Internet search and
3 advertising services and recently, entered the retail business when it decided to develop and sell
4 “smart phones”, which are multi-functional mobile devices with advanced capabilities. “Smart
5 phones” have become a lucrative market for companies, who are scrambling for market share in
6 this highly competitive field.

7 23. The Google Phone was an advanced mobile cellular phone which operated using
8 the Android Mobile Technology Platform and included various features, such as video and audio
9 player, and an Internet device which provided email and Internet access on the 3G Network. The
10 Google Phone’s primary competitor, at the time it was released, was Apple’s popular iPhone 3G,
11 a cellular device very similar to the Google Phone that also uses the 3G wireless network.

12 24. The Google Phone could not be purchased through HTC Corp.

13 25. The Google Phone was “[d]eveloped in partnership with hardware manufacturer
14 HTC,” according to WIRED magazine, and was released throughout the United States on January
15 5, 2010. Matthew Honan, WIRED, “*Google Debuts Android-Powered Nexus One*
16 *‘Superphone’*,” Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-
17 powered-nexus-one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/) (last visited June 8, 2010).

18 26. When the Google Phone was first released in the United States, T-Mobile was the
19 exclusive wireless carrier that allowed the Google Phone to be used on a 3G wireless network.

20 27. An estimated 20,000 Google Phones were sold during the first week of the phone’s
21 release.¹

22 28. The Google Phone was advertised widely. Perhaps the most important ad portal
23 for the Google Phone, however, was the Google.com homepage itself. Upon its release, Google
24 changed its homepage to be viewed as follows:

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28 ¹ In July 2010, Google determined that it would not sell any of the Nexus One model Google
Phones. Suzanne Choney, *Google Will Stop Selling Nexus One Phones in US*, msnbc.com, July
19, 2010, at <http://www.msnbc.msn.com/id/38309866> (last visited Nov. 29, 2010).

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Jason Kincaid, “The Nexus One Gets A Priceless Ad On Google’s Homepage,” *Tech Crunch*, Jan. 6, 2010, at <http://techcrunch.com/2010/01/06/nexus-one-google-homepage/> (last visited June 8, 2010).

29. One commentator said as follows regarding that ad: “This is the kind of advertising that money can’t buy, because it simply isn’t for sale. And because Google almost never features ads on the page, you can be sure it’s going to be catching quite a few eyeballs. Last time an ad popped up here John Gruber called it ‘the most valuable ad space on the entire Internet’.” *Id.* Based on Google’s approximately 88 billion searches run each month during 2009, that statement has concrete validity.

30. Google’s representations regarding the Google Phone’s capabilities were made to the public through multiple points of contact. Based on information and belief, this includes internet, print, television and radio advertising. This includes the information Defendants presented to Plaintiffs and the Class on the web site Google set up to sell its phone. Defendants would have records reflecting such advertising and marketing data.

31. **Unfortunately, all of Google’s promotional materials have been scrubbed from that address** and, for an extended period of time, only a “sorry” message was presented to the public when the public searches for information regarding that device. *See* www.google.com/phone (visited Aug. 24, 2010). Likewise, **all of HTC’s promotional**

1 materials have been scrubbed from its website. See
2 <http://community.htc.com/na/messages/default.aspx?MessageID=9> (visited September 29, 2011).

3 32. Even if she had wanted to print out records of the advertisements and visual
4 representations she saw, Plaintiff McKinney could not, because she does not own a printer.
5 Nabors, likewise, does not have copies of advertisements and representations he read and relied
6 upon. On information and belief, however, discovery will bear out consistent representations from
7 Defendants Google and HTC, and other entities regarding the speed and efficacy of the Google
8 Phone as a true 3G device. At present all of that information is solely within the control of
9 Defendants and other third parties, and is unavailable to Plaintiffs or the class.

10 33. Plaintiff McKinney specifically was told by a T-Mobile sales representative that
11 the Google Phone had 3G speed. Plaintiff McKinney also was told that the device was “essential
12 for web surfing and email.” T-Mobile told McKinney that she had to purchase the Google Phone
13 directly from Google, because they could not sell it to her, and the T-Mobile sales representative
14 directed Plaintiff McKinney to the Google web store, where she could complete her purchase.
15 The Google Phone also could not be purchased through Defendant HTC.

16 34. Those representations by T-Mobile and Google consistently presented the Google
17 Phone as a true “3G” device that would offer superior upload and download speeds, and a device
18 that would be worth the premium Plaintiffs and the Class would pay both for their devices and for
19 the more expensive service plans that would be needed to support their devices.

20 35. Defendants represented to Plaintiffs before they bought their Google Phones that
21 the Google Phone was at least as fast as the iPhone 3G, the primary competitor to the Google
22 Phone. Defendants also represented to Plaintiffs before they bought their Google Phones, and in
23 the case of Nabors, before he cancelled his then-existing mobile phone contract in order to sign
24 up with T-Mobile, that T-Mobile had the ability to support the Google Phone.

25 36. The “3G” technology is alleged to feature faster peak data transfer rates over
26 previous networks of up to 7.2 Mbps (megabytes per second). These data transfer rates are
27 especially important to many “smart phone” users who employ their devices to run and store
28

1 applications; send and receive email; download and play media; and share pictures and
2 information via social networking systems.

3 37. Without purchasing a wireless service plan through T-Mobile for 3G network
4 access, the Google Phone cost buyers \$529. With a new T-Mobile wireless network service plan,
5 which is a two-year contract, customers paid \$179 for the Google Phone plus the additional
6 monthly charge for the T-Mobile wireless service, which may exceed \$100 per month.

7 38. Initially, the Google Phone was only available through an online purchase and if
8 customers desired to use the 3G wireless service on their Google Phone without paying the full
9 cost of \$529 for an “unlocked” phone, they had no option but to purchase the Google Phone with
10 a two-year commitment to T-Mobile.

11 39. “Unlocked” Google Phones could be used on the network provided by AT&T
12 Mobility, LLC (for \$529 per phone, not including data plan) beginning on March 16, 2010. Both
13 Sprint and Verizon announced initially that they would offer their network capability options for
14 purchasers of the Google Phone, but both later reversed course.

15 40. In May 2010, almost five months after the Google Phone was first sold through
16 Google’s online store, Google announced that it was shifting from an online-only retail strategy to
17 a “bricks-and-mortar” sales option. Tom Krazit, cNet, “*Google turns Nexus One strategy upside*
18 *down,*” May 14, 2010, at http://news.cnet.com/8301-30684_3-20005015-265.html (last visited
19 June 8, 2010). Google, therefore, opened new avenues of sales and service to later-arriving
20 customers that it refused to provide to “early adopters.”

21 41. T-Mobile customers who were under contract were allowed to upgrade and
22 purchase the Google Phone, but such an upgrade required those customers to pay the difference
23 between the \$529 price of the phone and any upgrade credit allotted to the customer’s account.
24 Those customers also are required to extend their T-Mobile contract for an additional two years.

25 42. Plaintiff McKinney, who was under contract to T-Mobile when she bought her
26 first Google Phone, was eligible for such an upgrade credit, but never received her discount from
27 either Defendants or T-Mobile. The Nexus One was the first 3G phone McKinney has owned,
28 and a primary reason McKinney purchased this phone was its 3G capability.

1 43. Defendants consistently advertised the Google Phone, working in tandem with a
2 mobile network, as providing 3G data transfer rates. For consumers the appellation “3G” is
3 commonly understood to provide superior data transfer rates over older cell technology, which
4 worked on an “EDGE” standard.

5 44. Plaintiffs understood the “3G” appellation to be consistent with the common
6 understanding of other users.

7 45. Second generation multiple access standards known as GSM/EDGE, which are
8 commonly understood as working on 2G or 2.5G levels, have a maximum data transfer rate of
9 237 kbps (kilobytes per second). The Google Phone was designed to operate both on the 2G
10 network and a third generation, or 3G, multiple access standard network. According to
11 Defendants, 3G technology features faster peak data transfer rates over previous networks.

12 46. The Google Phone was designed to operate, and marketed to operate, on a 3G
13 level. If, however, 3G connectivity was unavailable, the phone and data operations could still be
14 used, but at a substantially lower data transfer rate than the 3G level that was advertised.

15 47. Contrary to Defendants’ assertions, Plaintiffs and other members of the Class
16 experience connectivity on the 3G wireless network only a fraction of the time they are connected
17 to the T-Mobile’s 3G wireless network, or receive no 3G connectivity at all for a significant
18 portion of time. The lack of 3G connectivity also caused Plaintiffs and other members of the
19 Class to experience a significant number of dropped calls when the Google Phone cannot locate
20 an available 3G network connection. Defendants either knew, reasonably should have known, or
21 were obligated to understand that the Google Phone could not consistently perform at a 3G level,
22 contrary to the Defendants’ representations.

23 48. Plaintiff McKinney never had 3G service on her first Google Phone, and has had
24 3G service on later Google Phones that can best be described as sporadic and inconsistent. These
25 defects caused McKinney to be unable to use her phone for any purpose for a significant portion
26 of the time she has owned the Google Phone.

27 49. These problems were apparent only days after the launch of the Google Phone. On
28 January 11, 2010, cNet—a trusted technology website—noted as follows: “If you bought a Nexus

1 One, there's a chance you may be experiencing issues with connecting to T-Mobile's 3G network,
2 but the good news is that you're not alone. The bad news is, well, you're not getting 3G." Bonnie
3 Cha, cNet, Jan. 11, 2010, "*T-Mobile acknowledges 3G issues on Nexus One*" at
4 http://www.cnet.com/8301-19736_1-10432087-251.html (last visited June 8, 2010).

5 50. Google, HTC, and T-Mobile have not provided satisfactory answers with regard to
6 the defects experienced by Plaintiffs and Class members.

7 A spokesperson for HTC, the manufacturer of the Nexus One phone sold by
8 Google and deployed thus far on T-Mobile's GSM network, told Betanews late
9 Monday evening that it is aware of the magnitude of 3G connectivity problems
10 reported by customers nationwide since last week. As of Monday evening, several
11 hundred messages were posted to Google's support Web site, many reporting
12 essentially the same problem: For the most part, their 3G connections are spotty
13 and variable; and for some, 3G is non-existent.

14 *Contrary to reports, however, HTC is not acknowledging a problem with the*
15 *phone. As of now, the T-Mobile network remains equally suspect, especially amid*
16 *the complete lack of much news whatsoever, including to its customers, from*
17 *Google.*

18 "While the majority of Nexus One owners have been thrilled with their experience,
19 HTC is aware that some owners have reported having some technical issues with
20 their Nexus One devices," the spokesperson told Betanews. HTC, Google, and T-
21 Mobile take all such reports very seriously, and are working closely together to
22 determine what issues may be behind these reports."

23 ****

24 But although blogs today reported that this thread was an admission of problems
25 with T-Mobile's network, actually, T-Mobile made no such admission. It merely
26 acknowledged the issue and its personnel (unlike Google's) are interacting with
27 customers in search of a resolution.

28 Customers who did manage to get through to HTC support personnel report having
been told that a software patch of some sort is in the works; some who received
that message last week were told they would receive a patch as soon as today. It
does not appear certain that such a patch, if it exists, specifically addresses this
problem.

All that Google will say on the subject is as follows: "We are investigating this
issue and hope to have more information for you soon. We understand your
concern and appreciate your patience."

Scott M. Fulton III, *Betanews*, "HTC admits customers have Nexus One 3G trouble, not yet
blaming the phone", Jan. 11, 2010, at <http://www.betanews.com/article/HTC-admits-customers->

1 [have-Nexus-One-3G-trouble-not-yet-blaming-the-phone/1263265252](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986) (last visited June 8, 2010).

2 51. Even areas where T-Mobile's limited 3G coverage was represented to exist, T-
3 Mobile's network did not provide consistent 3G performance for Google Phone purchasers.
4 "Complaints on Google's support forum said users were unable to get 3G service in areas where
5 T-Mobile's maps indicated they should get it. Google doesn't have a solution for the problem yet,
6 [Google spokesperson Carolyn Penner] said." San Jose Mercury News, "*Hype, complaints top*
7 *sales so far for Google's Nexus One phone*," Jan. 21, 2010, at
8 [http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986)
9 [nexus-one-phone/1066986](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986) (last visited June 8, 2010).

10 52. Defendants failed to warn Plaintiffs and Class members of the limitations
11 associated with using the Google Phone or its internal understanding that the T-Mobile 3G
12 network was not designed to provide consistent connectivity to its 3G network for Google Phone
13 users.

14 53. Moreover, Defendants did not provide adequate customer service to assist Google
15 Phone customers in helping resolve the issues. When customers contacted T-Mobile to request
16 assistance, the customer was provided with only an email address to contact Google directly. The
17 customer then had to wait for several days for a response:

18 New owners of the Nexus One, the latest touch-screen "smart phone" to run on
19 Android, Google's mobile operating system, have found themselves at a loss
20 when it comes to resolving problems with the handset. They cannot call Google
21 for help, and the company warns that it may take up to 48 hours to respond to e-
22 mail messages.

23 ****

24 Early buyers of the device, like Kiran Konathala, a 27-year-old database
25 programmer in Long Branch, N.J., have complained of dropped calls, plodding
26 download speeds and connectivity snags. "The hardware is great, but the software
27 is a mess," he said. "It's not been a happy experience so far."

28 The phone presents a puzzle for users like Mr. Konathala: Who do you call when
you have a problem?

Most people use the phone on T-Mobile's network, which offers a subsidy if a
customer buys a contract, and the phone is made by HTC, a major Taiwanese
manufacturer. But it is sold exclusively by Google through a special Web-based
store.

1 Despite its central role in the process, Google does not appear to have built a
2 significant infrastructure to provide customer support. There is no phone number
3 for support, for example, and customers who send an e-mail message may wait
4 for days to hear back.

5 *****

6 Andy Rubin, Google vice president for engineering in charge of Android
7 technology, acknowledged last week that the company needed to improve. “We
8 have to get better at customer service,” Mr. Rubin said during an on-stage
9 interview at the Consumer Electronics Show in Las Vegas. Instead of taking three
10 days to respond to e-mail messages, he said, “We have to close that three-day gap
11 to a couple of hours.” But Mr. Rubin said that the release of the Nexus One had
12 gone smoothly.

13 Some analysts said that Google appeared to have misjudged the service demands
14 that come with being in the business of selling sophisticated gadgets.

15 “They may have been clouded by their own personal experience and way of
16 thinking about how they deal with technology,” said Charles S. Golvin, an
17 analyst with Forrester Research. “They’ve got a long way to go in terms of
18 understanding all the components of the retail process — not just selling phones
19 but the after-sales care — to be as skilled in this endeavor as they are in the rest
20 of their endeavors.”

21 Jenna Wortham & Miguel Heft, *N.Y. Times*, “Hey Google, Anybody Home?,” Jan. 13, 2010, at
22 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,
23 2010).

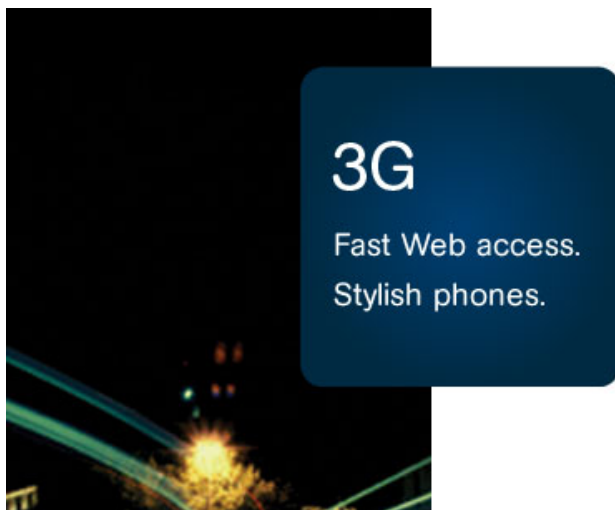
24 54. Further, if the customer buys a subsidized Google Phone when entering into a new
25 two year contract with T-Mobile, and the customer chooses to terminate the contract during the
26 first 120 days, the customer is liable for not only the termination fees to T-Mobile, but also must
27 pay Google the difference between the full price of the Google Phone and the subsidized price,
28 which may be upwards of \$350.

55. Despite knowledge that the Google Phone cannot maintain consistent 3G service
and that they do not provide adequate customer service, Defendants continue to manufacture,
design, promote and and/or sell the Google Phone as being able to operate on a 3G wireless
network.

1 56. Moreover, Defendants did not offer refunds to consumers who purchased the
2 Google Phone expecting it to operate properly on the 3G wireless network, when it has not, after
3 the standard 14-day period (or 30-day period in California) following the purchase.

4 57. The Google Phone is designed to search for an available 3G radio network
5 connection, and if that is not available, it will connect to a slower network. It is common for
6 Google Phone users to be on the 3G network for only a few minutes before their Google Phone
7 switches over to a slower network, or simply lose connectivity altogether.

8 58. While the strain on the T-Mobile's 3G wireless network was foreseeable, based on
9 how the Google Phone is set up and designed, the combination of the phone and/or the network
10 made it difficult for Class members to receive reliable and sustained connectivity on the 3G
11 wireless network as compared to a slower network. On its website, T-Mobile touts its 3G network
12 as offering several advantages:



13 Enjoy the Internet on the go: Web
14 pages download faster

15 Multi-task: Browse the Web, send
16 messages, or find movie times—all while
17 talking

18 Send photos faster to friends and family
19 Watch YouTube™ and other video files
20 Do more with your phone

- Send e-mail with large attachments
- Download documents, applications, and music faster
- Upload and share large files (photos,

21 videos, presentations)

- Browse and download the online information you need—fast

22
23 http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_Go3G (last visited

24 June 8, 2010). Unfortunately, in an inconspicuous place in minute font at the bottom of that page,

25 T-Mobile offers the following qualifying language:

26
27 3G coverage is available only in certain markets. To provide the best network
28 experience for all our customers we may temporarily reduce data throughput for a
small fraction of customers who use a disproportionate amount of bandwidth.
Your data session, plan, or service may be suspended, terminated, or restricted for

1 significant roaming or if you use your service in a way that interfaces with our
2 network or ability to provide quality service to other users. Some devices require
3 specific data plans; if you do not have the right plan for your device, you may not
4 be able to use data services. Additional charges may apply. Domestic use only.

5 59. Plaintiff Nabors paid \$230 to break his then- contract with AT&T so he could use
6 the T-Mobile network in order to buy a Google Phone. Nabors relied on the representations made
7 by Defendants about 3G network capabilities of the Google Phone and T-Mobile network when
8 he spent the \$230 to break his then-contract. Had he known those representations were false, he
9 would not have broken his contract and spent the money to do so. Plaintiff did not have a contract
10 with T-Mobile, so it was a month-to-month service.

11 60. Plaintiff Nabors paid \$563.38 for the Google Phone, in addition to the \$230 he
12 spent to break his AT&T contract. Plaintiff Nabors also purchased the Google Phone directly
13 from Google online. Indeed, Plaintiff Nabors wanted the “Google experience” that was promised
14 and described above.

15 61. When Plaintiff Nabors first purchased his Google Phone, Defendants did not
16 activate his phone for several days. Once it was finally activated, Plaintiff Nabors missed
17 numerous calls, experienced a high volume of “dropped” calls and the Google Phone did not
18 function properly. When Plaintiff Nabors called T-Mobile, T-Mobile’s representatives told
19 Plaintiff Nabors these problems were not T-Mobile’s problems and they could not, or would not,
20 help him. When Plaintiff Nabors attempted to speak to Google about these problems, Google’s
21 representatives told Plaintiff Nabors these problems were not Google’s problems and they could
22 not, or would not, help him. Plaintiff Nabors made approximately eight to ten calls for customer
23 service.

24 62. Plaintiffs and other members of the Class were injured in fact and lost money or
25 property as a result of Defendants’ material misstatements and omissions of material fact, paying
26 more to receive inferior service in relation to what they believed they had purchased. Plaintiffs
27 suffered injury-in-fact, because, as described above, the Google Phone she purchased was
28 unsatisfactory and worth less than what she paid for it. This includes the “refurbished” Google
Phone, for which she paid full price.

1 **A. Numerosity**

2 69. Class members are so numerous that individual joinder of all members is
3 impracticable. While the precise number of Class members has not been determined at this time,
4 and the facts to determine that number presently are within Defendants' sole control, based on
5 public reports Plaintiffs believe the number of Class members who bought a Google Phone and
6 purchased T-Mobile 3G service during the class period is well over one hundred thousand people.

7 70. Class members are readily ascertainable. Defendants' sales, service plan and
8 subscription records contain information as to the number and location of all Class members, a
9 significant number of whom are likely still under service contracts with T-Mobile. Because
10 Google and T-Mobile should have accurate and detailed sales and service information regarding
11 individual Class members and up-to-date contact information, including their e-mail or SMS
12 addresses, an easy and accurate method is available for identifying and notifying Class members
13 of the pendency of this action.

14 **B. Commonality**

15 71. Common questions of law and fact predominate over questions affecting
16 individual Class members. These common questions of law and fact include the following:

- 17 (a) Whether Defendants advertised and sold the Google Phone by promoting the
18 characteristics of 3G speed and performance, when in fact the actual
19 performance was materially different, and worse, than the promises and claims
20 made by defendants;
- 21 (b) Whether Defendants failed to disclose material facts about limitations in the
22 speed and performance characteristics of the Google Phone to consumers, and;
- 23 (c) Whether Defendants forced Class members to pay unjust charges for the goods
24 and services they were sold, as well as whether that failure violates statutory and
25 common law prohibitions against such conduct, as detailed more fully below.

26 **C. Typicality**

27 72. Plaintiffs' claims are typical of the claims of the Class. Plaintiffs sustained injury
28 and a loss of money or property arising from, and as a result of, Defendants' unlawful common

1 course of conduct. Plaintiffs purchased the Google Phone based in substantial part on the
2 uniform advertised claim of the phone having the characteristics of increased data transfer speed
3 and greater performance than was actually provided. Those representations were a substantial
4 factor in the decision to purchase the Google Phone. Plaintiffs have received, at best, sporadic 3G
5 speed or connection to a 3G network with their respective Google Phones. Plaintiffs did not
6 receive any disclosures from Defendants before or after purchase explaining the material
7 limitations in the Google Phone and how its interaction with a 3G network materially reduced its
8 performance such that, for a significant period of time, the phones do not in fact provide 3G
9 capability and access.

10 **D. Adequacy of Representation**

11 73. Plaintiffs can fairly and adequately represent and protect the Class's interests.
12 Plaintiffs' claims are both typical of the Class's claims and are based on facts that are common to
13 the Class. Plaintiffs have suffered similar injuries and damages arising from Defendants'
14 conduct. As such, Plaintiffs can adequately represent the Class because they seek the same or
15 similar remedies that would be available to other Class members. No irreconcilable conflicts
16 exist between the positions of Plaintiffs and those of the Class members.

17 74. Plaintiffs have retained attorneys who are competent and experienced in litigating
18 significant class actions to represent their interests and that of the Class. Counsel have significant
19 experience in handling class actions and the types of claims asserted herein, and have been
20 appointed as class counsel by courts in other actions. Plaintiffs and their counsel already have
21 done significant work in identifying and investigating the potential claims in this action, and are
22 willing to devote the necessary resources to vigorously litigate this action. Plaintiffs and their
23 counsel are aware of their fiduciary responsibilities to the Class to represent fairly and adequately
24 the Class and are determined to discharge those duties by seeking the maximum possible recovery
25 for the Class based on the merits of these claims and the available resources.

26 **E. Superiority of a Class Action**

27 75. A class action is a superior method for resolving the claims herein alleged as
28 compared to other available group-wide methods for adjudicating these issues. The remedy to

1 resolve the common classwide issues regarding the issues detailed herein would be to refund a
2 portion of the cost of the Google Phone and/or the increased service plan costs. Because of the
3 nearly-certain low individual damage amount, which is less than \$1,000 per Class member in
4 almost every conceivable circumstance, individual Class members would have little incentive to
5 prosecute such claims on an individual basis. Such individual actions are not cost-effective or
6 practical, as the costs associated with proving a prima facie case would exceed the obtainable
7 recovery.

8 76. Important interests are served by addressing the issues raised in this Consolidated
9 Amended Complaint in a class action. Adjudication of individual claims would result in a great
10 expenditure of court and public resources. Resolving the claims on a classwide basis results in
11 significant cost savings. Class action treatment allows similarly situated persons to litigate their
12 claims in the manner that is most efficient and economical for the parties and the judicial system.

13 77. There is a substantial likelihood of inconsistent verdicts, which would frustrate the
14 resolution of these legal issues for Defendants and force them to comply with inconsistent legal
15 standards.

16 78. Failure to certify a class would make it impossible for a great many of the Class
17 members to seek relief. For those who seek judicial relief, there is a strong likelihood that
18 separate court rulings would lead to inconsistent verdicts, working a substantial prejudice on
19 Defendants, especially, as in this case, where equitable relief is being sought. A class action
20 presents fewer management difficulties and provides the benefits of single adjudication, economy
21 of scale, and comprehensive supervision by a single court.

22 79. Plaintiffs are unaware of any insurmountable difficulties in the management of this
23 action to preclude its maintenance as a class action and believe their claims can all be established
24 at trial on a classwide basis.

25 **FIRST CAUSE OF ACTION**
(Breach of Implied Warranty)

26 *By All Plaintiffs and the Class as Against All Defendants*

27 80. Plaintiffs incorporate by reference each and every preceding paragraph as though
28 fully set forth herein.

1 81. Plaintiffs and Class members purchased the Google Phone from Google or other
2 mobile phone retailers.

3 82. At the time of the purchase, Google, the designer, manufacturer and/or retailer of
4 the Google Phone, held itself out as having special knowledge or skill regarding smart phones and
5 technology related to smart phones.

6 83. Defendant HTC, the designer and/or manufacturer of the Google Phone, held itself
7 as having special knowledge or skill regarding smart phones and related smart phone technology.

8 84. Plaintiffs purchased Google Phones for the phone's ordinary and intended purpose
9 of calling, receiving and sustaining telephone calls on the phone and to use the Android Mobile
10 Technology Platform's features, which were represented by Defendants as accessible, or optimal,
11 using the 3G network.

12 85. Plaintiffs also entered into agreements with Google and/or wireless providers or
13 their agents in connection with the purchase of such phones. Plaintiff Nabors actually spent over
14 \$200 to break his then-existing contract with another mobile phone company so he could use the
15 T-Mobile network in order to get a Google Phone.

16 86. The Google Phone cannot perform its ordinary and represented purpose because it
17 does not provide consistent connection to a 3G wireless network in combination with using the
18 Google Phone.

19 87. The Google Phone also could not perform its ordinary and represented purpose of
20 being capable of mobile phone usage because Plaintiffs experienced a number of missed and
21 dropped phone calls.

22 88. In sum, the Google Phone was sold with actual defects.

23 89. Moreover, Defendants had a duty to provide adequate customer service for Google
24 Phone customers. Defendants, however, did not provide adequate customer service for Google
25 Phone customers. For example, Plaintiff and the Class were told by service providers to contact
26 Google with customer service inquiries and Google told Plaintiff and the Class to contact service
27 providers with customer service inquiries, when they could get through to Google. Indeed,
28 Plaintiffs and the Class were forced to wait for numerous days to receive responses email

1 inquiries for customer service, which was the only way to contact Google, and during that time,
2 their Google Phone could not be used on a 3G wireless network.

3 90. When Defendants placed the Google Phone into the stream of commerce, they
4 knew, reasonably should have known, or were obligated to understand that the intended and
5 ordinary purpose of their phone was to provide a smart phone that was capable of sustaining
6 telephone calls (i.e. that did not “drop” calls) and maintaining consistent connectivity to a
7 supposedly faster 3G network and that users would expect regular 3G connectivity and materially
8 faster data transfer rates.

9 91. Plaintiffs and the Class purchased their Google Phone with the reasonable
10 expectation that they would receive a phone with which they could receive and sustain telephone
11 calls, was capable of allowing Plaintiffs and the Class to utilize the Android platform, and was
12 capable of sustaining connectivity to a purportedly faster 3G network.

13 92. Plaintiffs took reasonable steps to notify Defendants within a reasonable time that
14 the Google Phone did not have the expected qualities. As described in detail above, Plaintiffs
15 spoke with Defendants about their customer service issues on numerous occasions.

16 93. Plaintiffs were harmed as a result of Defendants’ conduct. This includes Plaintiffs’
17 payments of substantial sums of money for the Google Phone, which did not operate as promised
18 by Defendants and were not fit for their ordinary purposes.

19 94. The failure of the Google Phone to have the expected quality was a substantial
20 factor in Plaintiffs’ harm.

21 95. Plaintiffs and Class members are entitled to damages as a result of such breaches.

22 96. Plaintiffs and the Class request relief as described in the Prayer for Relief below.

23 **SECOND CAUSE OF ACTION**
24 **(Violation of Consumers Legal Remedies Act, California Civil Code § 1750, et seq.)**

25 ***By All Plaintiffs and the Class as Against All Defendants***

26 97. Plaintiffs incorporate by reference each and every preceding paragraph as though
27 fully set forth herein.

28 98. This cause of action is brought under the Consumers Legal Remedies Act,
California Civil Code § 1750, et seq. (“CLRA”). Plaintiffs are consumers as defined by

1 California Civil Code § 1761(d), and the Google Phone is a good within the meaning of the
2 CLRA.

3 99. Defendants violated and continue to violate the CLRA by engaging in the
4 following deceptive practices proscribed by California Civil Code § 1770(a) in connection with
5 transactions intended to result in, and that did result in, the sale of the Google Phone at issue
6 herein to Plaintiffs and members of the Class in violation of, inter alia, the following provisions:

- 7 a. Representing the goods and services have characteristics, uses or benefits which
8 they do not have, by, among other things, warranting (indirectly and/or directly)
9 that the Google Phone could consistently sustain telephone calls, that its Android
10 operating platform would work properly, that it could maintain connectivity to a
11 3G network and that the Google Phone could perform at a faster speed (Cal. Civ.
12 Code § 1770(a)(5));
- 13 b. Representing the goods and services are of a particular standard, quality or grade if
14 they are of another, in that Defendants warranting (indirectly and/or directly) that
15 the Google Phone could operate at a faster speed, consistently sustain telephone
16 calls and connectivity to the Android operating system and the 3G network (Cal.
17 Civ. Code § 1770(a)(7));
- 18 c. Advertising goods and services with the intent not to sell them as advertised, in
19 that Defendants knew or should have known that it would not be able to operate at
20 the faster speed, consistently sustain telephone calls and connectivity to the
21 Android operating system nor consistently maintain a connection to the 3G
22 network (Cal. Civ. Code § 1770(a)(9)); and,
- 23 d. Representing the goods and services have been supplied in accordance with a
24 previous representation when they have not, since the Google Phones could not
25 consistently sustain telephone calls, operate a faster speeds, maintain connectivity
26 to the 3G network nor operate at a faster speed (Cal. Civ. Code § 1770(a)(16)).

27 100. Under Section 1782 of the CLRA, Plaintiffs notified Defendants in writing of the
28 particular violations of Section 1770 of the CLRA (the Notice) and demanded, among other

1 things, that Defendants cease engaging in the wrongful conduct alleged herein and that
2 Defendants provide restitution. Plaintiffs sent Notice by means of by certified mail, return-receipt
3 requested, to Defendants at their principal places of business. Since Defendants failed to respond
4 to their demands within thirty days of receipt of the Notice, pursuant to section 1782(a) and (d) of
5 the CLRA, Plaintiff seeks statutory damages, actual damages, plus punitive damages, interest and
6 attorney’s fees. Plaintiffs request that this Court enter such orders or judgments as may be
7 necessary to restore any person in interest any money which may have been acquired by means of
8 such unfair business practices, and for such relief as provided in Civil Code § 1780 and the Prayer
9 for Relief.

10 101. Plaintiffs and the Class suffered injury in fact and lost money and property as a
11 result of Defendants’ unlawful conduct.

12 102. Pursuant to Cal. Civ. Code § 1780(a)(2), Defendants should be enjoined from
13 continuing to employ the unlawful methods, acts and practices alleged herein to prevent any
14 future harm to Plaintiffs and other members of the Class.

15 **THIRD CAUSE OF ACTION**

16 **(Unlawful and Unfair Business Practices in Violation of
17 California Business & Professions Code §17200, et seq.)**

18 ***By Both Plaintiffs and the Class as Against All Defendants***

19 103. Plaintiffs reallege and incorporate herein by reference each of the foregoing
20 paragraphs.

21 104. The Unfair Competition Law, California Business and Professions Code § 17200,
22 et seq., defines unfair competition to include any “unfair,” “unlawful,” or “fraudulent” business
23 act or practice.

24 105. By engaging in the above described acts and practices, Defendants have
25 committed an unfair business practice within the meaning of California Business and Professions
26 Code § 17200, et seq.

27 106. Defendants’ acts and practices were unfair under the UCL and constitute unfair
28 business practices. Specifically, despite Defendants implied warranties, the Google Phone does

1 not consistently sustain telephone calls, does not consistently maintain connectivity to a 3G
2 wireless network and does not operate at the speeds promised.

3 107. The acts and practices of Defendants also constitute unlawful business acts or
4 practices because they violate the laws identified in this Complaint, including breach of warranty
5 and violation of the CLRA. Defendants also had duties to provide adequate customer service and
6 breached that duty, as described in detail above.

7 108. As discussed above, Plaintiffs and members of the Class purchased the Google
8 Phone directly from Google and/or its authorized agents.

9 109. Consumers suffered substantial injury they could not reasonably have avoided
10 other than by not purchasing the product, and there was no countervailing benefit to consumers
11 from Defendants' unsupported claims and premature release of the Google Phone.

12 110. Defendants received the funds paid by Plaintiffs and the members of the Class.
13 Defendants profited enormously by misrepresenting the speed and performance of the Google
14 Phone and not disclosing material problems and limitations with the Google Phone and its
15 interaction with 3G wireless networks.

16 111. Defendants' revenues attributable thereto are thus directly traceable to the millions
17 of dollars paid out by Plaintiffs and the Class for the Google Phone, the required service plans
18 and the associated fees.

19 112. Unless Defendants are enjoined from continuing to engage in the unlawful, unfair
20 and fraudulent business acts and practices as described herein, Plaintiffs and the Class will
21 continue to be injured by Defendants' conduct.

22 113. Defendants, through their acts of unfair competition, have acquired money from
23 Class members. Plaintiffs and the Class request this Court disgorge and restore such money to
24 them and enjoin Defendants from continuing to violate California Business and Professions Code
25 §17200, *et seq.*

26 114. The unlawful, unfair and fraudulent conduct described herein is ongoing and
27 continues to this date. Plaintiffs and the Class, therefore, are entitled to relief described below as
28 appropriate for this Cause of Action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of herself and on behalf of the members of the Class defined herein, as applicable, pray for judgment and relief as follows as appropriate for the above causes of action:

1. An order certifying this case as a class action and appointing Plaintiffs and their counsel to represent the Class;
2. A temporary, preliminary and/or permanent order for injunctive relief enjoining Defendants from pursuing the policies, acts and practices complained of herein;
3. Declaratory judgment stating that Defendants may not pursue the policies, acts and practices complained of herein;
4. An award of actual, statutory and/or exemplary damages;
5. An order requiring disgorgement of Defendants' ill-gotten gains;
6. Reasonable attorneys' fees and costs of suit
7. Pre- and post-judgment interest; and
8. Such other and further relief as the Court may deem necessary or appropriate.

DATED: September 30, 2011

Attorneys for Plaintiffs and the Proposed Class

By: /s/ Sara D. Avila
MILSTEIN ADELMAN, LLP
Gillian L. Wade
Sara D. Avila

WHATLEY DRAKE & KALLAS, LLC
Joe R. Whatley, Jr.
Edith M. Kallas
Patrick J. Sheehan

LAW OFFICE OF HOWARD
RUBINSTEIN
Howard Rubinstein
howardr@pdq.net
914 Waters Avenue, Suite 20
Aspen, Colorado 81611
Tel: (832) 715-2788

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SMITH & VANTURE, LLP
Brian W. Smith
bws@smithvanture.com
1615 Forum Place, Suite 4C
West Palm Beach, Florida 33401
Tel: (800) 443-4529
Fax: (561) 688-0630

JURY DEMAND

Plaintiffs and the Class demand a trial by jury on all claims so triable.

DATED: September 30, 2011

Attorneys for Plaintiffs and the Proposed Class

By: /s/ Sara D. Avila
MILSTEIN ADELMAN, LLP
Gillian L. Wade
Sara D. Avila

WHATLEY DRAKE & KALLAS, LLC
Joe R. Whatley, Jr.
Edith M. Kallas
Patrick J. Sheehan

LAW OFFICE OF HOWARD
RUBINSTEIN
Howard Rubinstein
howardr@pdq.net
914 Waters Avenue, Suite 20
Aspen, Colorado 81611
Tel: (832) 715-2788

SMITH & VANTURE, LLP
Brian W. Smith
bws@smithvanture.com
1615 Forum Place, Suite 4C
West Palm Beach, Florida 33401
Tel: (800) 443-4529
Fax: (561) 688-0630

1 **CERTIFICATE OF SERVICE**

2 I, Sara D. Avila, am the ECF user whose ID and password are being used to file this
3 Consolidated Complaint. In compliance with General Order 45, section X.B., I hereby attest that
4 I have on file the concurrences for any signatures indicated by a “conformed” signature (/S)
5 within this e-filed document.

6 DATED: September 30, 2011

Attorneys for Plaintiff Mary McKinney and the
Proposed Class

7
8
9 By: /s/ Sara D. Avila
10 MILSTEIN, ADELMAN & KREGER, LLP
Wayne S. Kreger
Sara D. Avila

11
12 **WHATLEY DRAKE & KALLAS, LLC**
Joe R. Whatley, Jr.
Edith M. Kallas
Patrick J. Sheehan
Adam P. Plant

13
14
15 **LAW OFFICE OF HOWARD**
RUBINSTEIN
Howard Rubinstein
howardr@pdq.net
914 Waters Avenue, Suite 20
Aspen, Colorado 81611
Tel: (832) 715-2788

16
17
18
19 **SMITH & VANTURE, LLP**
Brian W. Smith
bws@smithvanture.com
1615 Forum Place, Suite 4C
West Palm Beach, Florida 33401
Tel: (800) 443-4529
Fax: (561) 688-0630