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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14
15
16 In re Google Phone Litigation

Lead Case No. 5:10-CV-01177-EJD
(Consolidated with No. 5:10-CV-03897-EJD)

**DEFENDANTS GOOGLE INC. AND HTC
CORPORATION'S NOTICE OF MOTION
AND MOTION TO DISMISS PLAINTIFFS'
CONSOLIDATED AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

**Date: February 3, 2012
Time: 9:00 a.m.
Dept: 1
Judge: Hon. Edward J. Davila**

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that, on February 3, 2011, in Courtroom 1, on the fifth floor of
4 the above-titled United States District Court, at 9:00 a.m., or as soon thereafter as the matter may
5 be heard, before the Honorable Edward J. Davila, defendants Google Inc. and HTC Corporation
6 will, and hereby do, move this Court, pursuant to Federal Rules of Civil Procedure 9(b) and
7 12(b)(6), for an order dismissing with prejudice the Consolidated Amended Complaint filed by
8 Plaintiffs Mary McKinney and Nathan Nabors on the grounds that: Plaintiffs' claim for breach of
9 the implied warranty of merchantability fails as a matter of law because it is preempted, essential
10 elements are not sufficiently pled, Google's warranty disclaimer bars the claims, and Plaintiffs
11 lack privity with HTC; Plaintiffs' CLRA and UCL claims are not pled with Rule 9(b) particularity
12 and also fail to state claims upon which relief may be granted, and are also preempted; and, as
13 this Court has ruled, Plaintiffs' customer service allegations do not support any viable legal claim
14 for relief.

15 This Motion is based upon this Notice of Motion and Motion, the attached Memorandum
16 of Points and Authorities and exhibits thereto as well as the Request for Judicial Notice filed
17 concurrently herewith, all records on file with this Court, and such oral and written argument as
18 may be presented at, or prior to, the hearing on this matter.

19 Dated: October 24, 2011

Respectfully submitted,

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Despite numerous opportunities to do so, Plaintiffs Mary McKinney and Nathan Nabors
4 (“Plaintiffs”) have not been able to state any viable legal claim against Defendants Google Inc.
5 (“Google”) and HTC Corporation (“HTC”) in this action, which is based on Plaintiffs’ alleged
6 failure to receive “consistent 3G connectivity” to T-Mobile’s 3G wireless network using the
7 Nexus One mobile device. In response to this Court’s orders dismissing Plaintiffs’ last round of
8 complaints in their respective cases (the third complaint in *McKinney*, and the second in *Nabors*),
9 Plaintiffs in their Consolidated Amended Complaint (“CAC”) assert (1) two misrepresentation-
10 based claims, under California’s Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et seq.*
11 (“UCL”), and Consumers Legal Remedies Act, Civ. Code §§ 1750 *et seq.* (“CLRA”), and (2) a
12 common law claim for breach of the implied warranty of merchantability. These claims
13 repeatedly have been dismissed, by Judge Ware and then by this Court.¹ In this third bite at the
14 apple, Plaintiffs’ claims still suffer from all of the many fatal infirmities that previously required
15 dismissal of the claims, and additional infirmities as well.

16 First, as before, Plaintiffs’ misrepresentation-based claims under the CLRA and UCL
17 must be dismissed under Rules 9(b) and 12(b)(6). Plaintiffs continue to allege that the Nexus One
18 does “not consistently perform at a 3G level, contrary to Defendants’ representations.” CAC, ¶
19 47. But Plaintiffs *still* do not, and cannot, identify and plead with particularity any
20 misrepresentations by Google or HTC about the Nexus One or its level of “3G” connectivity –
21 much less any misrepresentation promising that the Nexus One would maintain “consistent” 3G
22 connectivity. Nor do Plaintiffs allege facts showing that they actually relied on any such (non-
23 existent) misrepresentations. Because the few representations pled with Rule 9(b) particularity in
24

25 ¹ See November 16, 2010 Order, Docket No. 73, in *McKinney v. Google Inc. et al.*, Case No.
26 5:10-CV-01177 (Ware, J.) (hereinafter “Nov. 16, 2010 *McKinney* Order”); August 30, 2011
27 Order, Docket No. 106, in *McKinney v. Google Inc. et al.*, Case No. 5:10-CV-01177 (Davila, J.)
28 (hereinafter “Aug. 30, 2011 *McKinney* Order”); August 30, 2011 Order, Docket No. 48, in
Nabors v. Google Inc., Case No. 5:10-CV-03897 (Davila, J.) (hereinafter “Aug. 30, 2011 *Nabors*
Order”).

1 the CAC are the same non-actionable statements already addressed by this Court, dismissal under
2 Rules 9(b) and 12(b)(6) is again warranted.

3 Second, Plaintiffs' common law claim for breach of the "implied warranty of
4 merchantability" continues to be preempted under 47 U.S.C. § 332(c)(3) because it remains
5 inextricably tied to preempted attacks on the sufficiency of T-Mobile's 3G network infrastructure.
6 Plaintiffs *still* do not and cannot plead any claim based on actual defects in the Nexus One that
7 supposedly cause the alleged 3G connectivity issues separate and distinct from deficiencies in the
8 T-Mobile 3G network; in fact, as before, Plaintiffs continue to allege that "the T-Mobile network
9 was not designed to provide consistent connectivity to its 3G network for [Nexus One] users."
10 CAC, ¶ 51. Moreover, the claim also fails as a matter of law because (1) Plaintiffs' theory and
11 allegations do not support any claim that the Nexus One is not "merchantable" under the
12 governing California authorities; (2) Google's lawful disclaimer of any Nexus One warranties in
13 its Terms of Sale contract with Plaintiffs bars the claim; and (3) Plaintiffs lack privity with HTC.

14 Plaintiffs have demonstrated again and again that they cannot plead any legally viable
15 claims against Google or HTC. Consequently, their Consolidated Amended Complaint should be
16 dismissed this time *with prejudice* and without leave to amend. Given Judge Ware's ruling that
17 Plaintiffs' claims against T-Mobile are subject to arbitration, Plaintiffs cannot be heard to
18 complain that dismissing this action would leave them without any avenue for potential relief.
19 Plaintiffs' repeated failures to remedy the fundamental legal flaws in their claims – despite
20 multiple opportunities to do so, and at great cost and expense to Defendants – confirms that the
21 time has come to end this action against Google and HTC.

22 **II. BACKGROUND**

23 **A. Procedural History**

24 On January 29, 2010, Mary McKinney ("McKinney") filed in California state court her
25 original complaint in this action, asserting claims based on the Nexus One's alleged failure to
26 maintain "consistent" connectivity to T-Mobile's 3G wireless network and naming T-Mobile
27 USA, Inc. ("T-Mobile"), Google, and HTC as defendants. The complaint attached as an exhibit
28 what Plaintiffs alleged to be Google's terms of sale agreement with Plaintiffs. *McKinney* Docket

1 No. 2 (Notice of Removal) & Exh. A (Nexus One Phone – Terms of Sale). Defendants removed
2 the action to federal court on March 22, 2010. *Id.* Following Judge Ware’s preemption ruling in
3 *In re Apple iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d 1065, 1076 (N.D. Cal. 2010),
4 McKinney filed her First Amended Complaint on June 14, 2010, and Nathan Nabors (“Nabors”)
5 filed his substantially similar complaint against Google on August 31, 2010.

6 On November 16, 2010, Judge Ware granted T-Mobile’s motion to compel arbitration,
7 and granted Google and HTC’s Rule 12(b)(b) motion to dismiss in *McKinney*. *See* Nov. 16, 2010
8 Order (Docket No. 73). Judge Ware afforded leave to give McKinney the opportunity to identify
9 and plead with Rule 9(b) particularity statements actually made by Google and HTC representing
10 that the Nexus One “will consistently function at 3G all of the time,” as well as McKinney’s
11 actual reliance thereon. *See* Nov. 1, 2010 Hr’g. Tr. at 24:24-25:4; *see also* Nov. 16, 2010 Order,
12 at 17. Judge Ware also dismissed McKinney’s state-law warranty claims as preempted under 47
13 U.S.C. § 332(c)(3) because they were based on allegations of deficiencies in T-Mobile’s 3G
14 network infrastructure “and/or” alleged defects in the Nexus One, and therefore, were inseparably
15 tied to preempted attacks on T-Mobile’s 3G market entry and rates charged for 3G service in
16 connection with the Nexus One. Nov. 16, 2010 Order, at 16. Judge Ware granted leave to
17 amend, however, to the extent McKinney could “state claims against Google and HTC for actual
18 defects” in the Nexus One, as distinct and separable from deficiencies in T-Mobile’s 3G wireless
19 network, that “caused” the alleged 3G connectivity problems. *Id.* at 17. Judge Ware’s Order
20 noted, but left open for resolution, Google and HTC’s many other arguments and contentions why
21 Plaintiff’s breach of warranty claims had to be dismissed. *Id.* at 15-16.

22 McKinney filed her Second Amended Complaint on December 3, 2010, and Nabors filed
23 his substantially similar First Amended Complaint on January 10, 2011. Defendants filed
24 motions to dismiss both complaints, which were pending when the cases were transferred to this
25 Court in April 2011. On August 30, 2011, this Court granted Defendants’ motions in both
26 *McKinney* and *Nabors*, ruling that Plaintiffs’ misrepresentation-based claims were not pled with
27 Rule 9(b) particularity and otherwise failed to state a claim under Rule 12(b)(6), and that
28 Plaintiffs’ warranty claims were still preempted by federal law because Plaintiffs “continue[] to

1 allege that T-Mobile’s wireless network is defective” but afforded leave to amend to try to plead
2 “an implied warranty claim based on actual defects in the Nexus One.” *See* Aug. 30, 2011
3 *McKinney* Order; Aug. 30, 2011 *Nabors* Order. The Court consolidated *McKinney* and *Nabors*,
4 and restyled the consolidated cases as “In re Google Phone Litigation.” *See* Sept. 15, 2011 Order
5 (Docket No. 109), at 1. On September 30, 2011, Plaintiffs filed their Consolidated Amended
6 Complaint.

7 **B. Summary Of Allegations In Plaintiffs’ Consolidated Amended Complaint²**

8 Like Plaintiffs’ prior complaints, the Consolidated Amended Complaint alleges that the
9 Nexus One is “an advanced mobile cellular phone” – or “smart phone” – that “operates using the
10 Android Mobile Technology Platform,” and has an array of “features,” including Internet access,
11 email, texting, and other audio and video capabilities. CAC, ¶¶ 22-23. Plaintiffs continue to
12 allege that the Nexus One is designed to operate on both a “3G” wireless network and a 2G
13 wireless network (also known as GSM/EDGE), and to switch between networks when a 3G
14 connection is unavailable. *Id.*, ¶¶ 46, 57. The Nexus One allegedly could be purchased online
15 from Google for \$529 as an “unlocked” phone usable with any wireless service, or for \$179 when
16 purchased with a new two-year contract for T-Mobile’s wireless service. *Id.*, ¶¶ 37-39.

17 McKinney is a Pennsylvania resident who bought her Nexus One on or about January 9,
18 2010 over the Internet from Google’s website, *id.*, ¶ 6,³ and Nabors is a Florida resident who also
19 purchased the Nexus One over the Internet, *id.*, ¶ 14.⁴ Both McKinney and Nabors allegedly used
20 the Nexus One in connection with only T-Mobile’s wireless network. *See id.*, ¶¶ 8-17.⁵ Both
21 allegedly bought the Nexus One with the “expectation” that it would provide *consistent*

22 ² The Complaint’s well-pleaded allegations are assumed true for purposes of this motion only.

23 ³ As before, McKinney alleges that she has owned three Nexus One devices; that she was “unable
24 to obtain phone service or use any of the features” on the first device; and that her experience
25 with the second device “was similar to the first.” CAC, ¶¶ 8-9. Both devices were replaced. *Id.*
26 McKinney admits that her current Nexus One does provide “cellular phone and data service,” but
27 complains about its allegedly “sporadic and inconsistent” connectivity to T-Mobile’s 3G network
28 as opposed to a 2G/EDGE network. *Id.*, ¶¶ 8-10, 48.

⁴ Google’s records indicate that a Nexus One was sold to Nathan Nabors, with a ship to address in
Orlando, Florida, on or about January 5, 2010.

⁵ As such, Plaintiffs obviously lack standing to assert claims concerning the Nexus One’s
operation on 3G networks of any wireless carries other than T-Mobile.

1 connectivity to T-Mobile’s 3G wireless network, and would thus operate as what Plaintiffs
2 consider to be a “true 3G device.” *Id.*, ¶¶ 7, 32, 34, 47, 63, 91. Plaintiffs complain, however, that
3 3G connectivity has been “sporadic and inconsistent,” which allegedly results in “a significant
4 number of dropped calls.” *Id.*, ¶¶ 47-48.

5 As before, Plaintiffs allege that Google and HTC *misrepresented* that the Nexus One
6 would maintain “consistent” 3G connectivity. CAC, ¶ 47 (Nexus One does “not consistently
7 perform at a 3G level, contrary to Defendants’ representations”); *see also id.* ¶¶ 7, 15, 30-32, 34,
8 52, 55, 58, 62-66. But Plaintiffs continue to rely on entirely conclusory allegations concerning
9 Google and HTC’s supposed “material misrepresentations and omissions of material fact” about
10 3G connectivity, which were allegedly made in some unspecified advertisements on the “internet”
11 and in “print, television and radio advertising.” *Id.*, ¶¶ 30, 62-63. The CAC nowhere identifies
12 with particularity *any* factual representation made by either Google or HTC about 3G
13 connectivity, much less a statement promising “consistent” 3G connectivity. As before, the only
14 statement by Google arguably alleged with any particularity says merely: “Experience Nexus
15 One, the new Android phone from Google.” *Id.*, ¶ 28. And as before, Plaintiffs do not identify
16 *any* advertising or marketing statements about the Nexus One made by HTC. Plaintiffs do,
17 however, identify the same statement allegedly made to McKinney by a “T-Mobile sales
18 representative” that this Court addressed in its August 30, 2011 ruling. *Id.*, ¶ 33 (emphasis
19 added); *see also* Aug. 30, 2011 *McKinney* Order at 3. Plaintiffs further allege, as before, that
20 Google and HTC “failed to warn” that “the T-Mobile 3G network was not designed to provide
21 consistent connectivity to its 3G network” for “users” of the Nexus One. *Id.*, ¶ 52.

22 As before, Plaintiffs continue to allege that Google and HTC failed to provide “adequate
23 customer support.” *See id.*, ¶¶ 1, 8, 12, 16, 53, 61, 107. Plaintiffs continue to allege that their
24 customer service experiences have caused them emotional distress, frustration, and “taxing
25 mental exertion,” *id.*, ¶ 12, even though this Court addressed and rejected claims based on these
26 allegations in the August 30, 2011 Orders in *McKinney* and *Nabors*.

27 Finally, as in all prior complaints, Plaintiffs continue to allege that “T-Mobile’s network
28 did not provide consistent 3G performance for [Nexus One] purchasers”; that “the T-Mobile 3G

1 network was not designed to provide consistent connectivity to its network for [Nexus One]
2 users”; and that the “combination of the phone and/or the network made it difficult...to receive
3 reliable and sustained connectivity on the 3G wireless network.” CAC, ¶¶ 51, 52, 58; *see also*
4 *McKinney* SAC, ¶¶ 58, 59; *Nabors* FAC, ¶¶ 47, 48, 54. Plaintiffs also reprise their same
5 conclusory allegation from their prior complaints that the Nexus One “suffered from defective
6 hardware and/or software,” although they now cosmetically omit from this sentence the
7 conjoining reference to T-Mobile’s defective 3G network that appeared in all prior versions of
8 this allegation. *Compare* CAC, ¶ 64; *with McKinney* SAC, ¶ 69 and *Nabors* FAC, ¶ 58. Other
9 than reprising the same core allegations previously held to be deficient, Plaintiffs add only this
10 entirely conclusory assertion after complaining that the Nexus One fails to provide “consistent”
11 3G connectivity: “In sum, the [Nexus One] was sold with actual defects.” CAC, ¶ 88.

12 Based on these allegations, Plaintiffs’ Consolidated Amended Complaint asserts three
13 claims. In their First Cause of Action, Plaintiffs try to assert a common law claim for breach of
14 the “implied warranty of merchantability.” *See* CAC, ¶¶ 80-96. According to Plaintiffs, the
15 Nexus One is not merchantable and unfit for its ordinary purposes “because” it does not provide
16 “consistent” 3G connectivity and thus allegedly results in “a number of missed and dropped
17 phone calls.” *Id.*, ¶¶ 86-87. In their Second and Third Causes of Action, Plaintiffs assert
18 misrepresentation-based claims under California’s CLRA and UCL, attacking Google and HTC’s
19 allegedly “deceptive” misrepresentations and related omissions about the Nexus One’s consistent
20 3G connectivity. *See* CAC, ¶¶ 97-114.⁶ On their UCL claim, Plaintiffs also invoke the UCL’s
21 “unlawful” prong by incorporating their CLRA and implied warranty claims, *id.*, ¶ 107, and
22 allege that Defendants’ misrepresentations and breach of implied warranties violate the UCL’s
23 “unfair” prong. *Id.*, ¶ 106. As before, Plaintiffs ask the Court to certify a class, for an injunction
24

25 ⁶ Plaintiffs’ CLRA claim is based entirely on Google and HTC’s allegedly “deceptive practices” –
26 *i.e.*, misrepresentations and related omissions in product advertising about the Nexus One’s
27 allegedly promised “consistent” 3G connectivity, speed, and ability to sustain telephone calls,
28 CAC, ¶ 99 – which allegedly caused Plaintiffs “injury in fact and lost money or property.” *Id.*, ¶¶
100-01. Plaintiffs’ UCL claim likewise attacks Google and HTC’s allegedly “unlawful, unfair,
and fraudulent conduct” – including “misrepresent[at]ions” about the consistency of the Nexus
One’s 3G connectivity. *Id.*, ¶¶ 104, 110, 112-14.

1 and a restraining order, for declaratory relief, and for an award of damages, restitution,
2 disgorgement, fees, costs, and interest. *See* CAC, Prayer for Relief.

3 **III. LEGAL STANDARD**

4 A Rule 12(b)(6) motion to dismiss is properly granted unless the complaint alleges
5 “enough” well-pleaded “facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
6 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
7 (2009). To survive a Rule 12(b)(6) motion, the “non-conclusory ‘factual content’” and
8 reasonable inferences therefrom must be “plausibly suggestive of a claim entitling the plaintiff to
9 relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962, 968-72 (9th Cir. 2009) (internal
10 citations omitted). Any conclusory allegations are properly disregarded. *Id.* The Court must
11 consider only the well-pleaded allegations in Plaintiffs’ Consolidated Amended Complaint. *Id.*

12 Under the doctrine of “incorporation by reference,” courts on Rule 12(b)(6) motions to
13 dismiss routinely consider the terms of written agreements between the parties where the
14 documents are not attached to the complaint, but the plaintiff references them in the complaint
15 and their authenticity is not reasonably subject to dispute. *Knievel v. ESPN*, 393 F.3d 1068, 1076-
16 77 (9th Cir. 2005); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 996 (N.D. Cal. 2009); *see*
17 *also Long v. Hewlett-Packard Co.*, 2007 U.S. Dist. LEXIS 79262, **17-18 n.3 (N.D. Cal. July
18 27, 2007) (Ware, J.) (considering on Rule 12(b)(6) motion the terms of defendant’s limited
19 warranty and disclaimer in document referenced in, but not attached to, complaint), *aff’d*, 316 F.
20 App’x 585 (9th Cir. 2009). Here, the Consolidated Amended Complaint explicitly alleges and
21 references the “agreements” that Plaintiffs and putative class members entered in order to
22 purchase the Nexus One. CAC, ¶ 85. McKinney and Plaintiffs’ counsel attached the exact copy
23 of Google’s “Terms of Sale,” attached hereto as Exhibit 1 (“Exh. 1”), to their original complaint
24 filed in California state court and alleged that it was the “agreement” between Google,
25 McKinney, and putative class members. *Compare* Exh. 1; *with* Docket No. 2 (Notice of
26 Removal) & Exh. A (Nexus One Phone – Terms of Sale). HTC’s Limited Warranty is attached
27 hereto as Exhibit 2. Because these agreements are referenced in the complaint and their
28 authenticity cannot reasonably be disputed, the Court may properly consider the entirety of

1 Exhibits 1 and 2 under the incorporation-by-reference doctrine.⁷

2 **IV. ARGUMENT**

3 Both Judge Ware and this Court have repeatedly afforded Plaintiffs leave to amend to give
4 them a full and fair opportunity to try to cure the many legal deficiencies in their prior complaints
5 that resulted in dismissal of all claims against Google and HTC. In this final effort, Plaintiffs'
6 claims and allegations in the Consolidated Amended Complaint fall woefully short. Plaintiffs
7 *still* fail to identify and plead with particularity any potentially actionable misrepresentation by
8 Google or HTC on which Plaintiffs actually relied in purchasing the Nexus One with the alleged
9 expectation that the Nexus One was guaranteed to maintain "consistent" 3G connectivity to 3G
10 wireless networks, including T-Mobile's 3G network. Plaintiffs also *still* fail to plead any viable
11 claim for breach of the "implied warranty of merchantability." Their claim remains preempted
12 under 47 U.S.C. § 332(c)(3) because Plaintiffs *still* do not and cannot plead that the alleged 3G
13 connectivity problems are in fact "caused" by actual defects in the Nexus One itself, as distinct
14 and separable from the alleged deficiencies in T-Mobile's 3G wireless network that permeate the
15 CAC, and thus, Plaintiffs still have not pled any non-preempted claim "based on" any actual
16 defects in the Nexus One.⁸ In fact, Plaintiffs identify no "actual defects" in the Nexus One at all.
17 Plaintiffs' allegations also *still* do not make out a claim for breach of the implied warranty of
18 merchantability under the governing California authorities, and the claim also fails given
19 Google's legally enforceable disclaimer of any implied warranties and Plaintiffs' lack of privity
20 with HTC. Plaintiffs' CAC should be dismissed, this time without leave to amend.

21 **A. Plaintiffs' CLRA And UCL Claims Fail As A Matter Of Law Under Federal**
22 **Rules of Civil Procedure 9(b) And 12(b)(6) (Second And Third Causes Of**
23 **Action).**

24 Plaintiffs have abandoned all but two of the misrepresentation-based claims that they

25 ⁷ Under the incorporation-by-reference doctrine, the defendant may properly "attach[] the
26 document to its motion to dismiss" where, as here, the plaintiff has for whatever reason not
27 attached it to the complaint or explicitly referenced its contents therein. *Knievel*, 393 F.3d at
28 1076-77. In addition to this procedure, Google's Terms of Sale and HTC's Limited Warranty are
also properly subject to judicial notice, as explained in Defendants' Request For Judicial Notice
("RFJN") filed concurrently herewith.

⁸ Aug. 30, 2011 *McKinney* Order, at 5; Aug. 30, 2011 *Nabors* Order, at 5.

1 previously asserted, leaving only statutory claims under California’s CLRA and UCL premised
2 on supposed “misrepresentations” by Google and HTC in their “advertising” and “promotional
3 materials.” CAC, ¶¶ 62-65, 97-114. Plaintiffs’ CLRA claim seeks damages and injunctive relief
4 based on Google and HTC’s “deceptive practices” – *i.e.*, misrepresentations and related omissions
5 in product “advertising” about the Nexus One concerning its allegedly promised “consistent” 3G
6 connectivity, speed, and ability to sustain telephone calls. CAC, ¶¶ 97-102. Plaintiffs’ UCL
7 claim seeks injunctive and restitutionary relief based on allegedly “unlawful, unfair, and
8 fraudulent conduct,” including alleged “misrepresent[ations]” and related omissions about the
9 consistency of the Nexus One’s 3G connectivity. *Id.*, ¶¶ 104, 110, 112-14. Plaintiffs also invoke
10 the UCL’s “unlawful” prong by incorporating their CLRA and implied warranty claims, *id.*, ¶
11 107, and allege that Defendants’ misrepresentations and alleged breach of implied warranties
12 violate the UCL’s “unfair” prong because the Nexus One “does not consistently maintain
13 connectivity to a 3G wireless network” and thus does not operate at the speeds allegedly
14 “promised” and “does not consistently sustain telephone calls.” *Id.*, ¶ 106.

15 To state a CLRA or UCL claim based on alleged misrepresentations, Plaintiffs must plead
16 with particularity that Defendants made some specifically identified factual misstatements about
17 the Nexus One that Plaintiffs not only saw or heard but actually relied upon. *See, e.g., Marolda v.*
18 *Symantec Corp.*, 673 F. Supp. 2d 992, 1002-04 (N.D. Cal. 2009) (CLRA and UCL); *Nelson v.*
19 *Pearson Ford Co.*, 186 Cal. App. 4th 983, 1022 (2010) (CLRA); *In re Actimmune Mktg. Litig.*,
20 2009 WL 3740648, **8-9 (N.D. Cal. Nov. 6, 2009) (UCL); *Kearns v. Ford Motor Co.*, 567 F.3d
21 1120, 1126-28 (9th Cir. 2009) (UCL and CLRA misrepresentation claims must be pled with Rule
22 9(b) particularity); *see also Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1193-94 (S.D.
23 Cal. 2005) (dismissing UCL misrepresentation claim where plaintiffs nowhere alleged they saw
24 or heard and then actually relied upon any particularly alleged misstatement); *accord*, Aug. 30,
25 2011 *McKinney* Order at 8-11; Aug. 30, 2011 *Nabors* Order at 8-11.

26 Because Plaintiffs have not identified *even one* potentially actionable misrepresentation by
27 Google or HTC, nor pled facts sufficient to show their actual reliance on any particularly
28 identified misstatement, their misrepresentation-based CLRA and UCL claims must be dismissed

1 under Rules 9(b) and 12(b)(6). Any remaining aspects of Plaintiffs’ UCL claim under the
2 “unlawful” or “unfair” prongs also fail in accordance with this Court’s prior rulings, or fall along
3 with Plaintiffs’ legally deficient claim for breach of implied warranty (*see* Part IV.B., *infra*).

4 **1. Plaintiffs’ Misrepresentation-Based CLRA And UCL Claims Fail**
5 **Because Plaintiffs Still Do Not And Cannot Plead With Particularity**
6 **Any Actionable “Misrepresentation” By Google Or HTC, Nor Their**
7 **Actual And Reasonable Reliance Thereon.**

8 Plaintiffs’ CLRA and UCL claims are premised on alleged misrepresentations by Google
9 and HTC supposedly promising that the Nexus One would “consistently perform at a 3G level,”
10 and thereby operate as what Plaintiffs consider to be a “true 3G device.” CAC, ¶¶ 7, 47; *see also*
11 *id.*, ¶¶ 15, 30-32, 34, 52, 55, 58, 62-66, 97, 99, 103-06, 110, 112, 114. As this Court has held,
12 Rule 9(b)’s heightened “particularity” pleading requirements apply to these claims. *See* Aug. 30,
13 2011 *McKinney* Order, at 8-11; Aug. 30, 2011 *Nabors* Order, at 8-11; *see also* *Kearns v. Ford*
14 *Motor Co.*, 567 F.3d 1120, 1127-28 (9th Cir. 2009). Because Plaintiffs fail to satisfy Rule 9(b) as
15 to either any affirmative misrepresentation or actionable omission, dismissal is again warranted.⁹

16 Plaintiffs still do not and cannot specifically identify and plead with the requisite
17 particularity *any representation* by Google or HTC about the Nexus One or its level of 3G
18 connectivity – much less any “misrepresentations” promising that the Nexus One would
19 “consistently perform at a 3G level.” *See* CAC, ¶¶ 47, 55, 63. Once again, Plaintiffs do not
20 identify a single statement by HTC about the Nexus One. *See generally* CAC. And once again,
21 the *only* Google statement alleged with particularity is the same entirely non-actionable statement
22 from Google’s website that both Plaintiffs quoted in their prior complaints: “Experience Nexus
23 One, the new Android phone from Google.” *Id.*, ¶ 35. Apart from this non-actionable Google
24 website statement, Plaintiffs include only their reprised quotation of the same statement by a “T-
25 *Mobile* sales representative” to McKinney that this Court addressed and rejected in its prior
26 ruling, which allegedly asserted that the Nexus One was ““essential for web surfing and email””

26 ⁹ *See also* *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 96140, **11-17 (N.D. Cal. Aug. 26,
27 2011) (dismissing fraud and CLRA/UCL claims in amended complaints attacking alleged
28 misrepresentations about Apple’s iPad because plaintiffs still “failed to allege adequately that
Apple misrepresented the conditions under which the iPad would operate or that they justifiably
could rely on those representations in believing that the iPad would operate as they expected”).

1 and “had 3G speed.” CAC, ¶ 33 (emphasis added). In dismissing Plaintiff McKinney’s claims
2 under California’s CLRA, UCL, and FAL for failure to satisfy Rule 9(b)’s particularity
3 requirements, this Court ruled:

4 McKinney fails to identify a single advertisement or commercial in which HTC or
5 Google made any statements about the phone and 3G wireless network
6 connections. She has only identified statements from a T-Mobile sales
7 representative that the phone had 3G speed and “was essential for web surfing and
8 email,” which, even if they were attributable to Defendants, would appear to be
9 non-actionable puffery.

10 Aug. 30, 2011 *McKinney* Order, at 10. As before, Plaintiffs’ Consolidated Amended Complaint
11 still “fails to identify a single advertisement or commercial in which HTC or Google made *any*
12 statements about the phone and 3G wireless network connections,” and the quoted T-Mobile
13 statement remains “non-actionable puffery” even if it could somehow be attributed to Google and
14 HTC, which it cannot be. *Id.* (emphasis added).¹⁰

15 Moreover, in dismissing Plaintiffs’ claims under California’s consumer protection
16 statutes, this Court further emphasized that (1) Plaintiffs failed to allege with Rule 9(b)
17 particularity “any facts showing that Defendants actually stated that the [Nexus One] would
18 provide 3G connectivity, much less any consistent level of connectivity,” *id.* at 11; (2) Plaintiffs
19 did “not allege that the phone does not function at least some of the time by connecting to a 3G
20 network,” *id.* at 9; and (3) Plaintiffs neither alleged nor pled with particularity any instance in
21 which Google or HTC “claimed that the phone would connect to 3G for any specific period of
22 time.” *Id.* These same dispositive observations apply with full force to the legally deficient

23 ¹⁰ Because T-Mobile is no longer a defendant, Plaintiffs cannot even pretend that Google and
24 HTC might somehow be held vicariously liable for an oral statement a T-Mobile representative
25 allegedly made to her. Indeed, Plaintiffs again reference “*Non-Defendant T-Mobile*,” CAC, ¶ 20
26 (emphasis added), and then allege merely that Google and HTC, as “Defendants,” acted as the
27 “agent ... or other representative” of the other “Defendants.” *Id.*, ¶ 21. In any event, the
28 statement attributed to the unidentified T-Mobile sales representative is not even alleged to have
promised that the Nexus One will maintain “consistent” 3G connectivity on T-Mobile’s 3G
wireless network, much less other 3G wireless networks. Perhaps McKinney can raise this in her
arbitration against non-defendant T-Mobile, but it cannot support claims here against Google and
HTC for statements they never made.

1 CLRA and UCL claims in the Consolidated Amended Complaint, which are pled with no more
2 Rule 9(b) particularity than the ones this Court previously dismissed.

3 “Allegations under Rule 9(b) must be stated with ‘specificity including an account of the
4 time, place, and specific content of the false representations as well as the identities of the parties
5 to the misrepresentations.’” *Mangindin v. Washington Mut. Bank*, 637 F. Supp. 2d 700, 706
6 (N.D. Cal. 2009) (quoting *Swartz v. KPMG LLP*, 467 F.3d 756, 764 (9th Cir. 2007)); *see also*
7 *Marolda*, 672 F. Supp. 2d at 1000-01 (Rule 9(b) “especially” demands specific and detailed
8 identification of “the time, place, and content of” of what defendants actually stated “with
9 particularity”); *accord Baltazar*, 2011 U.S. Dist. LEXIS 96140, at **11-17. Conclusory
10 allegations, general averments, and mere characterizations of plaintiffs’ counsel do not suffice.
11 Instead, Rule 9(b) demands detailed and specific allegations that precisely “articulate the who,
12 what, when, where, and how” of each alleged misstatement as well as the plaintiff’s claimed
13 reliance thereon. *Kearns*, 567 F.3d at 1126. In *Kearns*, for instance, the Ninth Circuit affirmed
14 the Rule 9(b) dismissal of CLRA and UCL claims premised on misrepresentations and related
15 omissions where – as here – the plaintiff failed to “specify” *in detail* “what the defendant’s
16 television advertisements and promotional materials” actually and “specifically stated”; “who”
17 specifically made the alleged statements as well as exactly “when” and “where”; and which
18 precise statements the plaintiff deemed material and actually relied upon. *Id.*

19 Here, as in *Kearns*, Plaintiffs have not pled with Rule 9(b) particularity any potentially
20 actionable misstatements of fact actually made by Google or HTC. For the third time, Plaintiffs
21 continue to rely on the same sort of conclusory averments and general characterizations by
22 Plaintiffs’ counsel that this Court and Judge Ware previously determined to be insufficient.
23 *Compare CAC; with McKinney Second Amended Complaint, and Nabors First Amended*
24 *Complaint*. Once the allegations not pled with Rule 9(b) particularity are “‘disregarded,’ or
25 ‘stripped’ from the claim,” *Kearns*, 567 F.3d at 1124 (citation omitted), it is clear that, once
26 again, Plaintiffs’ CLRA and UCL claims premised on supposed “misrepresentations” about the
27 Nexus One by Google and HTC must be dismissed.

28

1 As before, Plaintiffs’ conclusory “omission” and “non-disclosure” allegations also fail to
2 support any CLRA or UCL claim, and are not pled with the requisite Rule 9(b) particularity. See
3 Aug. 30, 2011 *McKinney* Order, at 8-9; Aug. 30, 2011 *Nabors* Order, at 7-8; see also *Kearns*, 567
4 F.3d at 1126; *Marolda*, 672 F. Supp. 2d at 1002. The omission-based allegations in the
5 Consolidated Amended Complaint are no different than the deficient allegations and claims this
6 Court dismissed in its August 2011 rulings; they also remain just as conclusory as those rejected
7 as insufficient by the Ninth Circuit in *Kearns*, 567 F.3d at 1126-27, and Judge Patel in *Marolda*,
8 672 F. Supp. 2d at 1002. As this Court has ruled, “to plead the circumstances of omission with
9 specificity,” Plaintiffs had to “describe the content of the omission and where the omitted
10 information should or could have been revealed, as well as provide representative samples of
11 advertisements, offers, or other representations that plaintiff relied on to make her purchase and
12 that failed to include the allegedly omitted information.” Aug. 30, 2011 *McKinney* Order, at 7-8
13 (quoting *Marolda*, 672 F. Supp. 2d at 1002); Aug. 30, 2011 *Nabors* Order, at 7 (same). Plaintiffs
14 still do not remotely satisfy that governing standard. But more fundamentally, Plaintiffs’
15 omissions-based theory of misrepresentation continues to fail under *Daughtery v. American*
16 *Honda Motor Corp.*, 144 Cal. App. 4th 824, 835 (2006), because Plaintiffs still do not and cannot
17 identify with particularity “any affirmative representation” about the Nexus One actually made by
18 Google or HTC “concerning the subject of any alleged omissions.” Aug. 30, 2011 *McKinney*
19 Order, at 9; see also *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187, *11 (N.D. Cal. Feb.
20 10, 2011). The most Plaintiffs can do is add entirely conclusory allegations in the Consolidated
21 Amended Complaint that Defendants’ *still-unidentified* “misrepresentations” in advertising and
22 marketing the Nexus One supposedly include *unspecified* “statements about the phone’s 3G
23 connectivity,” CAC, ¶ 15, and *unspecified* “representations made by Defendants about 3G
24 network capabilities, *id.*, ¶ 59 – which are precisely the sort of conclusory allegations that violate
25 Rule 9(b) as a matter of law.¹¹

26
27 ¹¹ Even though this Court squarely and rightly *rejected* Plaintiffs’ various prior excuses for failing
28 to plead their misrepresentation-based claims with the particularity demanded by Rule 9(b) under
settled law – e.g., *McKinney* allegedly does not have a “printer,” Defendants’ websites allegedly

1 Finally, Plaintiffs’ misrepresentation-based CLRA and UCL claims also must be
2 dismissed for failure to plead “actual reliance” with Rule 9(b) particularity. *See* Aug. 30, 2011
3 *McKinney* Order, at 8-11; Aug. 30, 2011 *Nabors* Order, at 8-11. As before, Plaintiffs cannot
4 plead with the requisite specificity that they actually relied on *any* particularly identified
5 misrepresentation in which Google and HTC promised that the Nexus One would maintain
6 consistent 3G connectivity, nor do they plead facts supporting the reasonableness of any such
7 supposed reliance.¹² Rather than plead sufficient details and actual facts supporting the existence
8 of any “bona fide claim of actual reliance,” Plaintiffs continue to “merely assert[] that [they]
9 based [their] decision to buy the [Nexus One] on Google and HTC’s misrepresentations but
10 ha[ve] not particularly identified any misrepresentation upon which [they] relied or alleged facts
11 showing [their] actual and reasonable reliance on any such representations.” Aug. 30, 2011
12 *McKinney* Order, at 8 (citation omitted); Aug. 30, 2011 *Nabors* Order, at 8 (same). For instance,
13 Nabors asserts in conclusory terms that he bought the Nexus One “in reliance on a number of
14 statements by Google in its advertising and marketing of the Google Phone, including statements
15 about the phone’s 3G connectivity.” CAC, ¶ 15. But nowhere does the Consolidated Amended
16 Complaint identify and plead with Rule 9(b) particularity the who, what, where, when and how as

17
18 have been “scrubbed,” or Plaintiffs’ illegitimate assertion that they supposedly need “discovery”
19 before they could satisfy Rule 9(b) – Plaintiffs continue to rest on their same excuses and legally
20 deficient allegations. *Compare* CAC, ¶¶ 31-32; *with* Aug. 30, 2011 *McKinney* Order, at 2-3, 6, 7-
21 11 & n.2; August 30, 2011 *Nabors* Order, at 3. Moreover, one of Rule 9(b)’s many fundamental
22 purposes is to protect defendants from precisely the sort of fishing expedition in “discovery”
23 (*Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)) that Plaintiffs seek here, despite their
24 continued inability to satisfy Rule 9(b)’s bedrock requirements as to any potentially actionable
25 misrepresentation by Google or HTC.

26
27 ¹² Recently, in *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 96140 (N.D. Cal. Aug. 26, 2011),
28 Judge Fogel similarly dismissed the iPad plaintiffs’ misrepresentation-based claims, including
CLRA and UCL claims where – as here – plaintiffs failed to identify any actual Apple iPad
advertisement in support of their allegations of misrepresentation and reliance. *Id.* at **11-17.
The few particularly pled Apple statements did not support plaintiffs’ claims, nor could any
reasonable consumer interpret those particularly identified statements as promising that the iPad
“would operate as [plaintiffs] expected,” *i.e.*, that the iPad “would never shut down” and need
time to cool when used in hot temperatures outdoors. *Id.* Likewise here, Plaintiffs cannot
identify even *one* actual statement by Google or HTC that makes any actionable misstatement,
much less a misrepresentation on which Plaintiffs could reasonably rely in allegedly purchasing
the Nexus One with any alleged “expectation” that the device would maintain “consistent” 3G
connectivity. CAC, ¶¶ 47, 55, 59, 63, 91.

1 to any such “statements” actually made by Google.¹³ This pleading failure not only violates Rule
2 9(b) under settled Ninth Circuit law. It also wrongly prevents the Court from performing its duty
3 to assess the exact statements at issue to determine whether those statements constitute “non-
4 actionable puffery” upon which no reasonable consumer could rely or, rather, involve the sort of
5 concrete and specific assertion of material fact that could support a viable misrepresentation claim
6 under the CLRA or UCL. Aug. 30, 2011 *McKinney* Order, at 8-9 (citing authorities); Aug. 30,
7 2011 *Nabors* Order, at 9 (same); *see also Baltzar*, 2011 U.S. Dist. LEXIS 96140, at **11-17.

8 Moreover, the terms and disclaimers in Plaintiffs’ “agreements” with Defendants (CAC, ¶
9 58) – namely, Google’s Terms of Sale (Exh. 1) and HTC’s Limited Warranty (Exh. 2) – refute
10 Plaintiffs’ misrepresentation and reasonable reliance allegations. The Google Terms of Sale
11 attached to McKinney’s original complaint not only conspicuously disclaims any express or
12 implied warranties other than HTC’s Limited Warranty, but also provides explicitly that “3G
13 network availability may depend on your mobile carrier” (and thus is not guaranteed) and also
14 directs Plaintiffs to check with their mobile carrier to confirm that the device is “compatible with
15 3G coverage in [Plaintiffs’] area.” Exh. 1 (Google Terms of Sale, at pp. 2, 4-5). HTC’s Limited
16 Warranty, in turn, explicitly excludes from coverage any “defects” caused by a “defective
17 function of the cellular network or other system.” Exh. 2. Thus, as in *Baltazar*, Plaintiffs have
18 not only failed to identify with particularity any actionable misstatement by the Defendants, but
19 the terms of Defendants’ disclaimers confirm that any alleged “reliance” by Plaintiffs upon some
20 feigned (and non-existent) “representations” promising consistent 3G connectivity was
21 *unreasonable* as a matter of law. *Baltazar*, 2011 U.S. Dist. LEXIS 96140, at *13 (Apple’s
22 disclaimers refute any allegation that plaintiffs’ claimed reliance on alleged misrepresentations
23
24

25 ¹³ Likewise, McKinney asserts that she based her purchasing decision “on the facts Defendants
26 promoted,” *i.e.*, that the Nexus One was “a true ‘3G’ device” that was “very fast when uploading
27 or downloading data from the Internet” and “would work in a manner that justified the premium
28 price she paid.” CAC, ¶ 7. But these are the same conclusory averments this Court rightly
rejected as insufficient to satisfy Rule 9(b) before. Moreover, like *Nabors*, McKinney fails to
plead with particularity *any* instance in which Google or HTC actually made any such assertions
or representations in any commercial or advertisement or other promotion for the Nexus One.

1 was “reasonable”). Hence, Plaintiffs’ misrepresentation-based CLRA and UCL claims in the
2 Second and Third Causes of Action fail for this reason as well.

3 **2. Any Remaining Aspects Of Plaintiffs’ UCL Claim Also Fail As A**
4 **Matter Of Law.**

5 The foregoing discussion disposes of Plaintiffs’ entire CLRA claim as well their
6 misrepresentation-based UCL claims under the “fraudulent,” “unfair” or “unlawful” prongs. The
7 remaining aspects of Plaintiffs’ claim under the UCL’s “unfair” and “unlawful” prongs fare no
8 better. Indeed, the Consolidated Amended Complaint reprises Plaintiffs’ prior UCL attack on
9 Defendants’ allegedly inadequate “customer service.” See CAC, ¶¶ 1, 8, 12, 16, 53, 61, 107. As
10 before, the claim fails as a matter of law because Plaintiffs still allege no facts showing that any
11 allegedly inadequate customer service “actually caused [McKinney or Nabors] any legally
12 cognizable injury or damage” under the UCL. Aug. 30, 2011 *McKinney* Order, at 11; Aug. 30,
13 2011 *Nabors* Order, at 10-11.¹⁴ To the extent Plaintiffs’ UCL claim purports to be premised on
14 violations of the “unlawful” or “unfair” prongs by reference to Plaintiffs’ “breach of warranty”
15 claim and “implied warranties” theory, see CAC, ¶ 106-07, those remaining aspects of the UCL
16 claim necessarily fail as a matter of law for the multiple reasons why Plaintiff’s First Cause of
17 Action must be dismissed, as set forth below. See also Aug. 30, 2011 *McKinney* Order, at 11
18 (dismissing remaining aspects of UCL claim as either “preempted” by the FCA under 47 U.S.C. §

19 _____
20 ¹⁴ Indeed, Plaintiffs still can identify no economic injury allegedly suffered “as a result” of any
21 alleged inadequate customer service. Instead, Plaintiffs just reprise their same allegations about
22 emotional distress, frustration, and “taxing mental exertion” on account of their alleged customer-
23 service experiences (CAC, ¶ 12) that this Court already rejected because they do not constitute
24 the sort of “legally cognizable injury or damage” required to support a viable claim. Aug. 30,
25 2011 *McKinney* Order, at 3, 10-11. Under California law, emotional distress and inconvenience
26 is not compensable in breach of warranty, contract, and even tort actions involving only economic
27 loss to the plaintiff and not physical injury (see *Kwan v. Mercedes-Benz of North Am., Inc.*, 23
28 Cal. App. 4th 174, 187-92 (1994); *Gravillis v. Coldwell Banker Residential Brokerage Co.*, 143
Cal. App. 4th 761, 777 (2006)) and, clearly, no emotional distress “damages” are recoverable
under the UCL. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144 (2003).
Hence, Plaintiffs’ customer-service/emotional-distress allegations cannot support any viable
claim under the UCL claim or for breach of the implied warranty of merchantability. Moreover,
Plaintiffs still can cite no authority for the proposition that having to wait a few days for an email
response (CAC, ¶ 8) breaches any hypothetical “duty” that was owed to them.

1 332(c)(3), or otherwise failing along with other dismissed claims); Aug. 30, 2011 *Nabors* Order,
2 at 10-11 (same).

3 **B. Plaintiffs’ Implied Warranty Of Merchantability Claim Fails As A Matter Of**
4 **Law For Multiple Reasons (First Cause Of Action).**

5 Unable to plead any claim that Google and HTC *misrepresented* that the Nexus One was
6 guaranteed to maintain consistent 3G connectivity, Plaintiffs are left only with their common law
7 claim for breach of the “implied warranty of merchantability,” which is equally baseless. Under
8 this theory, Plaintiffs contend that the Nexus One is not “merchantable” at all and entirely “unfit”
9 as a smart phone because they allegedly did not receive consistent 3G connectivity to T-Mobile’s
10 wireless network, even though – as Plaintiffs admit – the Nexus One was designed to operate *and*
11 *does operate* on both 2G and 3G wireless networks. For multiple independent reasons, Plaintiffs’
12 First Cause of Action fails as a matter of law and must be dismissed.

13 **1. Plaintiffs’ Implied Warranty Claim Remains Preempted.**

14 Twice now in this action, Plaintiffs’ state-law warranty claims have been dismissed as
15 preempted under the Federal Communication Act (“FCA”)’s preemption provision, 47 U.S.C. §
16 332(c)(3), which mandates that “no State or local government shall have any authority to regulate
17 the entry of or rates charged by any commercial mobile service or any private mobile service.”
18 Both Judge Ware and this Court dismissed Plaintiffs’ previous state-law breach of warranty
19 claims because they were inextricably tied to, and inseparable from, preempted attacks on the
20 sufficiency of T-Mobile’s 3G wireless network infrastructure. *See* Nov. 16, 2010 Order, at 15-16;
21 Aug. 30, 2011 *McKinney* Order, at 4-5; Aug. 30, 2011 *Nabors* Order, at 4-5. Because Plaintiffs’
22 implied warranty claim continues to suffer the same flaws that resulted in dismissal of their prior
23 claims on preemption grounds, it is necessarily preempted as well.

24 Indeed, the Consolidated Amended Complaint’s implied warranty claim is still based on
25 the same core allegations regarding the cause of the alleged 3G connectivity problems as those in
26 the prior complaints that led Judge Ware and this Court to find express FCA preemption – *i.e.*,
27 that the lack of “consistent” 3G connectivity is allegedly caused by deficiencies in T-Mobile’s 3G
28 wireless network infrastructure “and/or” the Nexus One device itself. CAC, ¶ 58 (“the
combination of the phone and/or the network made it difficult ... to receive reliable and sustained

1 connectivity on the 3G wireless network as compared to a slower network”). Plaintiffs do not –
2 and cannot – allege that any 3G connectivity issues are, in fact, “caused” by any “actual defect” in
3 the Nexus One itself, as opposed to and distinct from alleged deficiencies in T-Mobile’s 3G
4 network infrastructure. Aug. 30, 2011 *McKinney* Order, at 5; Aug. 30, 2011 *Nabors* Order, at 5;
5 *see also* Nov. 16, 2010 Order, at 17.¹⁵ On the contrary, as before, other allegations in the
6 Consolidated Amended Complaint still confirm that this claim remains inseparably *based on* T-
7 Mobile’s 3G network, as Plaintiffs continue to allege that “T-Mobile’s network did not provide
8 consistent 3G performance for Google Phone purchasers,” CAC, ¶ 51, and that “the T-Mobile 3G
9 network was not designed to provide consistent connectivity to its 3G network for Google Phone
10 users,” *id.*, ¶ 59. Notably, these same exact words and allegations in Plaintiffs’ prior amended
11 complaints quoted by this Court as supporting express FCA preemption are *realleged verbatim* in
12 the Consolidated Amended Complaint. *See* Aug. 30, 2011 *McKinney* Order, at 5 (quoting
13 *McKinney* SAC, ¶¶ 58, 59, 65); Aug. 30, 2011 *Nabors* Order, at 5 (quoting *Nabors* FAC, ¶¶ 47,
14 48, 54). Consequently, as both this Court and Judge Ware have recognized, Plaintiffs’ state-law
15 warranty claims will result in protracted litigation about the adequacy of T-Mobile’s 3G
16 infrastructure (as well as that of other carriers), and implicate preempted assessments about each
17 carrier’s 3G market entry and rates charged.¹⁶

18 Finally, Plaintiffs still fail to identify any “actual defects” in the Nexus One. Instead, after
19 reprising their prior allegations about the Nexus One’s alleged failure to maintain “consistent 3G

20 ¹⁵ In his November 2010 ruling, Judge Ware dismissed McKinney’s state-law warranty claims as
21 preempted but granted leave to amend so her counsel had the chance to plead – if they could –
22 that there truly existed some “actual defect” in the Nexus One itself that was causally responsible
23 for its alleged failure to maintain consistent 3G connectivity, as opposed to and distinct from
24 alleged deficiencies in T-Mobile’s 3G network infrastructure or that of other wireless carriers.
25 Nov. 16, 2010 Order, at 17. Judge Ware did not determine that there were any “actual defects” in
the Nexus One, nor that Plaintiff’s counsel could in fact plead any such “actual defects” claim.
Judge Ware merely granted leave to amend, while observing that such a hypothesized claim may
escape FCA preemption and explicitly leaving open for resolution Google and HTC’s additional
state-law arguments for dismissal of any such warranty claims.

26 ¹⁶ As before, Plaintiffs’ state-law implied warranty claim triggers both the 3G “market entry” and
27 “rates” charged prongs of express FCA preemption, Nov. 16, 2010 Order, at 17, even though
28 either would suffice under section 332(c)(3), which preempts any state regulation of market entry
“or” rates charged by any commercial mobile service. 47 U.S.C. § 332(c)(3); *see also Ball v.*
GTE Mobilnet of Cal., 81 Cal. App. 4th 529, 543 (2000).

1 connectivity” (which allegedly results in dropped or missed calls), Plaintiffs just assert: “In sum,
2 the Google Phone was sold with actual defects.” CAC, ¶ 88. But this is nothing more than a bare
3 “legal conclusion couched as a factual allegation,” which is insufficient under *Bell Atlantic Corp.*
4 *v. Twombly*, 550 U.S. 544, 555 (2007); *see also id.* (mere “labels,” “conclusions,” and “a
5 formulaic recitation of the elements of a cause of action will not do,” and are insufficient to state
6 a claim for relief that is “plausible on its face”); Aug. 30, 2011 *McKinney* Order, at 3
7 (“conclusory allegations [are] not sufficient” and “plaintiff must plead facts showing that a
8 violation is plausible, not just possible”) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009));
9 Aug. 30, 2011 *Nabors* Order, at 3 (same). Moreover, Plaintiffs rely on the entirely circular
10 assumption that the Nexus One presumably was sold with some sort of “actual defects” *because it*
11 *fails to maintain consistent 3G connectivity. See CAC, ¶¶ 86-88. This underscores Plaintiff*
12 *counsel’s prior concession on the record that the most they can say is that it possible that some*
13 *unidentified defect in the Nexus One might contribute in some unspecified manner to Plaintiffs’*
14 *alleged failure to receive consistent 3G connectivity to T-Mobile’s 3G network.*¹⁷ Hence, as
15 before, Plaintiffs’ claim must be dismissed because, at most, their allegations raise “only a mere
16 possibility that an actual defect [in the Nexus One] caused the inconsistent 3G connection.” Aug.
17 30, 2011 *McKinney* Order, at 5; Aug. 30, 2011 *Nabors* Order at 5 (same).

18 **2. Plaintiffs’ Implied Warranty Claim Clearly Fails As A Matter Of Law**
19 **For Additional Reasons As Well.**

20 **a. Plaintiffs Fail To Plead Facts Showing The Nexus One Is Not**
21 **Merchantable And Unfit For Its Ordinary Purpose.**

22 “Unlike express warranties, which are basically contractual in nature, the implied
23 warranty of merchantability arises by operation of law.” *American Suzuki Motor Corp. v.*
24 *Superior Ct. (Carney)*, 37 Cal. App. 4th 1291, 1295-96 (1995). The implied warranty of
25 merchantability guarantees that products have only “a minimum level of quality” and are free of
26 *fundamental* defects that are “so basic” that they render the item not “merchantable” at all and
27 “unfit for its ordinary purpose.” *Id.* at 1291, 1295-96. As the Ninth Circuit has held, the implied
28 warranty of merchantability is breached in those extreme instances where the defendant’s product

¹⁷ Plaintiff *McKinney’s* Opposition to Google and HTC’s Joint Motion to Dismiss Second Amended Complaint, Docket No. 88, at 17-18.

1 “lacks even the most basic degree or fitness for ordinary use.” *Birdsong v. Waggoner*, 590 F.3d
2 955, 958 (9th Cir. 2009); *see also Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123,
3 1142 (N.D. Cal. 2010) (“mere manifestation of a defect by itself does not constitute a breach of
4 the implied warranty of merchantability” because “there must be a fundamental defect that
5 renders the product unfit for its ordinary purpose”) (citation omitted).

6 Plaintiffs’ claim is premised on the illegitimate notion that all Nexus One devices are not
7 “merchantable” and “unfit” for their ordinary purpose as smart phones unless they operate
8 consistently on a 3G wireless network – even though Plaintiffs admit that the Nexus One was
9 designed to operate, and does operate, on both 2G and 3G wireless networks. Even if it were
10 somehow Plaintiffs’ subjective “expectation” that the Nexus One would provide consistent 3G
11 connectivity, *see CAC*, ¶¶ 91, the implied warranty of merchantability “does not impose a general
12 requirement that goods precisely fulfill the expectation of the buyer” and instead guarantees only
13 “a minimum level of quality.” *American Suzuki*, 37 Cal. App. 4th at 1296. For this reason,
14 plaintiffs have to plead and prove “more than that the alleged defect was ‘inconvenient,’ rather,
15 they ha[ve] to show that the defect renders the defendant’s [products] unfit for their ordinary
16 purpose.” *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 96140, at *10.

17 It is dispositive that Plaintiffs continue to admit that the Nexus One was not only designed
18 to operate on both 2G/EDGE and 3G wireless networks, but that it *can and does function and*
19 *operate* as a smart phone even in those instances when 3G connectivity is unavailable and the
20 device switches to a 2G/EDGE wireless network. *See, e.g., CAC*, ¶ 46 (when “3G connectivity
21 was unavailable, the [Nexus One’s] phone and data operations could still be used”), ¶ 57 (Nexus
22 One “is designed to search for an available 3G radio network connection, and if that is not
23 available, it will connect to a slower network”). Consequently, the Nexus One is entirely
24 merchantable and fit for its ordinary purpose despite Plaintiffs’ desire that it operate more
25 “consistently” on a 3G wireless network than on a 2G/EDGE wireless network.

26 Indeed, courts repeatedly have rejected claims for breach of the implied warranty of
27 merchantability where – as here – they were premised on alleged problems with products that
28 were still operational as to the minimal level of functionality protected by the doctrine of implied

1 warranty of merchantability. In *Baltazar*, for instance, the U.S. District Court for the Northern
2 District of California dismissed an implied warranty of merchantability claim attacking Apple’s
3 iPad for shutting down when being used outdoors on hot days and being inoperable until the
4 device cooled down; as the court ruled, despite the obvious “inconvenience,” the iPad plaintiffs
5 alleged merely “that the iPad does not fulfill the expectations of the named Plaintiffs” but failed
6 to “plead facts tending to show that the device fails to meet ‘a minimum level of quality’ for a
7 tablet computer.” 2011 U.S. Dist. LEXIS 96140, at **9-11. Likewise, in *Birdsong*, the Ninth
8 Circuit affirmed dismissal of an implied warranty of merchantability claim where Apple’s iPod
9 could still function for its ordinary purpose of “listening to music” despite the plaintiff’s product
10 defect allegations related to potential hearing damage from listening to iPod’s music at higher
11 levels. 590 F.3d at 958. And in *Tietsworth*, the U.S. District for the Northern District of
12 California dismissed implied warranty of merchantability claims based on allegations that
13 washing machines allegedly “stopped in mid-cycle,” and required users to “restart” them
14 “sometimes more than once.” 720 F. Supp. 2d at 1142-43. Again, despite the alleged
15 inconvenience to users, the claims failed as a matter of law because the plaintiffs failed to plead
16 facts sufficient to show that the machines were not fit for the ordinary purpose “of washing
17 clothes.” *Id.* Similarly here, even Plaintiffs’ allegations confirm that the Nexus One is
18 merchantable and operational as a smartphone in instances when the device switches from a 3G
19 network to a 2G/EDGE network.¹⁸

20 Finally, as before, McKinney’s red-herring allegations regarding the three Nexus One
21 devices she has owned actually serve to refute (rather than support) any implied warranty of
22 merchantability claim. As McKinney continues to allege, her first two Nexus One devices were

23
24 ¹⁸ Even assuming Plaintiffs’ allegations to be true for purposes of this motion only, the
25 inconvenience Plaintiffs allegedly experienced when the Nexus One operates on 2G rather than
26 3G networks – including any “dropped” calls that had to be reinitiated, CAC, ¶¶ 15, 87 – is no
27 different than the washing machine “stop and start” inconvenience in *Tietsworth* and the iPad
28 “shut down [and cool]” inconvenience in *Baltazar*, which all are insufficient to support any claim
for breach of the implied warranty of merchantability. Moreover, as in *Tietsworth*, Plaintiffs’
allegations that both of them *continue to use* the Nexus One to this day (*see, e.g.*, CAC, ¶ 10)
“believe [their] claim that [the device] failed to serve its ordinary purpose.” 720 F. Supp. 2d at
1142.

1 replaced because she was “unable to obtain phone service or use any of the features” of the
2 devices. CAC, ¶¶ 8-9. In other words, she alleges they were replaced under warranty because
3 they were inoperable on any wireless network, not because they provided inconsistent
4 connectivity to T-Mobile’s 3G wireless network. Even assuming those replaced devices were
5 inoperable, that does not support the implied-warranty claim Plaintiffs assert, which is based on
6 the theory that *all* Nexus One devices are unmerchantable because they allegedly provide
7 “sporadic and inconsistent” 3G connectivity. CAC, ¶¶ 47-48, 86, 90. As Plaintiffs’ counsel has
8 admitted on the record, the claim Plaintiffs wish to pursue on a class-wide basis in this action is
9 “not the phone won’t operate at all” but rather “that the phone vacillates between 2G and 3G” and
10 thereby fails to provide “consistent” 3G connectivity. Nov. 1, 2010 Hr’g. Tr. at 22:13-24:5.¹⁹ As
11 McKinney admits, her current Nexus One device *does* provide “cellular phone and data service.”
12 *Id.*, ¶ 10. Accordingly, the Nexus One is entirely merchantable and fit for its ordinary purpose as
13 a smart phone that operates on both 2G/EDGE and 3G wireless networks.

14 **b. Google’s Lawful Disclaimer Of Any Implied Warranty Of**
15 **Merchantability Also Defeats The Claim.**

16 Plaintiffs’ implied warranty of merchantability claim also fails as a matter of law in light
17 of Google’s legally enforceable disclaimers of *any* implied warranty of merchantability. *See* Exh.
18 1; RJN, Exh. 1 at p. 4. Under settled law, merchants may lawfully disclaim the implied warranty
19 of merchantability so long as they do so in a conspicuous fashion and specifically mention
20 merchantability. *See, e.g.*, Cal. Com. Code § 2316(2). Under section 2316(2), “an implied
21 warranty of merchantability may be excluded in a written document in which the disclaimer is
22 conspicuous and mentions merchantability.” *Inter-Mark USA, Inc., v. Intuit, Inc.*, 2008 U.S. Dist.

23 ¹⁹ As before, McKinney complains that when replacing her first two devices Defendants “passed
24 off” used devices “as equivalent to” a new device. CAC, ¶¶ 11, 62; *compare McKinney SAC*, ¶¶
25 7, 67. This is an unfair and inaccurate characterization of Defendants’ efforts to address issues
26 McKinney claims she had with her first two devices. HTC’s Limited Warranty expressly states
27 that defective devices will be repaired or replaced and such repair or replacement “may involve
28 the use of functionally equivalent reconditioned units.” *See* Exh. 2; Defendants’ RFJN, Exh. 2.
Plaintiffs expressly acknowledged HTC’s Limited Warranty in accepting Google’s Terms of Sale,
and also received a copy of the Limited Warranty in Nexus One packaging. *See* Declaration of
Rosemarie Ring (“Ring Decl.”) at ¶ 2. Far from supporting Plaintiffs’ breach of warranty claims,
these allegations further confirm that Defendants have fully complied with any warranty
obligations.

1 LEXIS 18834, *21 (N.D. Cal., Feb. 27, 2008) (dismissing implied warranty of merchantability
2 claim where plaintiff’s software licensing agreement with defendant contained “a valid disclaimer
3 of any implied warranties”); *accord Long*, 2007 U.S. Dist. LEXIS 79262, at *16. Here, Google’s
4 explicit disclaimer of any “IMPLIED WARRANTIES OF MERCHANTABILITY” is
5 conspicuously set forth in the Google Terms of Sale with Plaintiffs. *See* Exh. 1; RFJN, Exh. 1, at
6 p. 4.²⁰ Because Google’s warranty disclaimer readily satisfies section 2316(2)’s requirements
7 under the governing authorities, Plaintiffs’ implied warranty of merchantability claim against
8 Google fails.

9 **c. Plaintiffs’ Implied Warranty Claim Against HTC Also Fails
10 Because Plaintiffs Lack Privity With HTC.**

11 In addition to the fatal infirmities set forth above, Plaintiffs’ implied warranty claim
12 against HTC fails because they lack privity with HTC. “Vertical privity is a prerequisite in
13 California for recovery on a theory of breach of implied warranties of fitness and
14 merchantability.” *In re NVIDIA GPU Litig.*, 2009 WL 4020104, *6 (N.D. Cal. Nov. 19, 2009)
15 (collecting cases and quoting *All West Elecs., Inc. v. M-B-W, Inc.*, 64 Cal. App. 4th 717, 724
16 (1998)); *Tietsworth v. Sears, Roebuck & Co.*, 2009 WL 1363548, *3 (N.D. Cal. May 14, 2009)
17 (same). Here, Plaintiffs allege that they purchased their Nexus One devices from Google, CAC,

18 ²⁰ After referring to HTC’s limited one-year replacement or repair warranty, Google’s Terms of
19 Sale with Plaintiffs includes the following conspicuous disclaimer:

20 OTHER THAN THE ABOVE AND TO THE MAXIMUM EXTENT
21 PERMITTED BY APPLICABLE LAW, GOOGLE EXPRESSLY DISCLAIMS
22 ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER
EXPRESS OR IMPLIED, REGARDING ANY DEVICES, INCLUDING ANY
IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A
PARTICULAR PURPOSE, OR NON-INFRINGEMENT.

23 Exh. 1, at pp. 4-5. Google’s warranty disclaimer is an enforceable contractual limitation. *See*
24 *Inter-Mark USA, Inc., v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, *8 (N.D. Cal., Feb. 27, 2008);
25 *see also Fogo v. Cutter Labs., Inc.*, 68 Cal. App. 3d 744, 758 (1977) (“clearly” the phrase “[t]he
26 foregoing warranty is exclusive and in lieu of all other warranties” appearing at the end of party’s
27 limited warranty constituted disclaimer). Indeed, Judge Ware in *Long v. Hewlett-Packard Co.*
28 upheld and enforced a comparable disclaimer, which provided: “To the extent allowed by local
law, the above warranties are exclusive and no other warranty or condition, whether written or
oral, is expressed or implied and HP specifically disclaims any implied warranties or conditions
of merchantability, satisfactory quality, and fitness for a particular purpose.” 2007 U.S. Dist.
LEXIS 79262, at **16-17.

1 ¶¶ 6, 14, and, indeed, repeatedly allege that the Nexus One “could not be purchased through
2 Defendant HTC.” *Id.*, ¶ 33, *see also id.* ¶ 24. Because Plaintiffs do not – and cannot – allege that
3 they purchased their Nexus One devices from HTC, their implied warranty claim against HTC
4 also fails as a matter of law for lack of privity.

5 **C. All Of Plaintiffs’ Claims Are Preempted Because They Are Inextricably Tied**
6 **To Preempted Attacks On The Sufficiency Of T-Mobile’s FCC Approved**
7 **“3G” Infrastructure Or That Of Other Mobile Carriers.**

8 Finally, consistent with the FCA preemption rulings in *iPhone* and this Court’s rulings in
9 this case, all of Plaintiffs’ claims are preempted under 47 U.S.C § 332(c)(3). *See In re Apple*
10 *iPhone 3G Prods. Liab. Litig.*, 728 F. Supp. 2d at 1071, 1076 (UCL, CLRA and breach of
11 warranty claims against Apple dismissed as preempted attacks on 3G “market entry” and “rates”
12 charged); *see also* Nov. 16, 2010 Order, at 15-16; Aug. 30, 2011 *McKinney* Order, at 4-5; Aug.
13 30, 2011 *Nabors* Order, at 4-5. Plaintiffs’ continued inability to plead with particularity any
14 *misrepresentation* by Google and HTC regarding the Nexus One’s 3G connectivity, let alone
15 promising “consistent” 3G connectivity, confirms that this case is far more like the preempted
16 infrastructure and market entry claims in *iPhone* and *Bastien v. AT&T Wireless Servs., Inc.*, 205
17 F.3d 983, 989-90 (7th Cir. 2000),²¹ and entirely unlike the genuine misrepresentation claims pled
18 with Rule 9(b) particularity that escaped preemption in *Shroyer v. New Cingular Wireless Servs.,*
19 *Inc.*, 622 F.3d 1035, 1039-42 (9th Cir. 2010), which did not even involve the “market entry”
20 prong of FCA preemption. *Id.* at 1040 (“*Bastien* dealt with market entry, which the states are
21 expressly excluded from regulating by § 332,” but Shroyer’s non-preempted claim based on false
22 promises “does not”). Moreover, *Shroyer* itself confirms – consistent with the FCC’s own
23 interpretation of *Bastien* – that express FCA preemption under section 332(c) turns on the
24 “substance” of the particular claims at issue, and not merely their “form.” 622 F.3d at 1040. As
25 *Shroyer* notes, the plaintiffs’ claim in *Bastien* was preempted because it relied on state consumer
26 protection law in a manner that would embroil the court in determining the sufficiency of
27 AT&T’s network; hence, the *substance* of the claim implicated assessments reserved for the FCC

27 ²¹ As here, the plaintiffs in *Bastien* similarly failed to plead any “particular promises or
28 representations” and “specific instances of the words used” by the defendant in support of
plaintiffs’ conclusory “misrepresentation” allegations. *Bastien*, 205 F.3d at 889-90.

1 alone to make, which triggered preemption. *Id.* Likewise here, as before, the “substance” of
2 Plaintiffs’ state-law claims is what continues to trigger express FCA preemption under 47 U.S.C
3 § 332(c)(3). Consequently, while Plaintiffs’ state-law claims fail for multiple independent
4 reasons, they are all also preempted under Judge Ware’s reasoning in *iPhone* and this action as
5 well as this Court’s own section 332(c)(3) reasoning.

6 **D. Plaintiffs’ Claims Should Be Dismissed Without Leave To Amend.**

7 Both Judge Ware and this Court have granted Plaintiffs leave to amend, affording them
8 more than sufficient opportunity to see if their counsel could fix the fundamental flaws in
9 Plaintiffs’ claims that have repeatedly resulted in their prior dismissal. Plaintiffs cannot cure
10 those defects because they are incurable. Indeed, Plaintiffs continue to assert flawed and legally
11 infirm claims because this lawsuit is fundamentally founded upon promises that Google and HTC
12 never made and implied warranties that do not exist. Accordingly, Plaintiffs have confirmed that
13 they cannot allege facts sufficient to support any claims for relief, and hence further leave to
14 amend would be futile. *See Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Servs.*, 911
15 F.2d 242, 247 (9th Cir. 1990). Google and HTC have expended hundreds of thousands of dollars
16 defending against Plaintiffs’ unfounded legal claims, and the time has come to dismiss this action
17 without leave to amend.

18 **V. CONCLUSION**

19 For the foregoing reasons, Google and HTC’s motion to dismiss Plaintiffs’ Consolidated
20 Amended Complaint should be granted without leave to amend.

21 Dated: October 24, 2011,

Respectfully submitted,

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CERTIFICATION

I, Matthew L. Larrabee, am the ECF User whose identification and password are being used to file this motion. In compliance with General Order 45.X.B., I hereby attest that Steven B. Weisburd and Rosemarie T. Ring have concurred in this filing.