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

15)
 16 In re Google Phone Litigation) Lead Case No. 5:10-cv-01177-EJD
) (Consolidated with No.5:10-CV-03897EJD)
 17)
) **CLASS ACTION**
 18)
) **PLAINTIFFS’ MEMORANDUM OF**
 19) **POINTS AND AUTHORITIES IN**
) **OPPOSITION TO DEFENDANTS’**
 20) **MOTION TO DISMISS PLAINTIFFS’**
) **CONSOLIDATED AMENDED**
 21) **COMPLAINT**
)
) Date: February 3, 2012
 22) Time: 9:00 a.m.
) Dept.: 1
 23) Judge: Hon. Edward J. Davila
)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. DEFENDANTS CANNOT SATISFY THE LEGAL STANDARD 3

IV. PLAINTIFFS’ COMPLAINT SHOULD NOT BE DISMISSED 4

 A. Plaintiff’s First Cause Of Action For Breach of Implied Warranty
 Should Not Be Dismissed 4

 i. Plaintiff’s Implied Warranty Claim Is Not Preempted Because It
 Does Not Challenge a Wireless Provider’s Services or Rates 4

 ii. Plaintiff’s Claim for Breach of Implied Warranty Is Well-Pleaded 6

 iii. Google’s Alleged Disclaimer Does Not Defeat Plaintiffs’ Breach
 of Implied Warranty Claim 8

 iv. Plaintiffs’ Breach of Implied Warranty Claim Does Not Fail For
 Lack of Privity with HTC 8

 B. Plaintiffs’ Second And Third Causes Of Action For Violations of the
 CLRA and UCL Should Not be Dismissed 9

 i. Plaintiffs’ CLRA and UCL Claims Are Not Grounded In Fraud
 And Are Therefore Not Subject to Rule 9(b)..... 9

 ii. Plaintiffs Satisfy Rule 9(b) To The Extent It Applies..... 11

 iii. Plaintiffs’ CLRA and UCL Claims Are Well-Pleaded 12

 C. Plaintiffs’ Claims Are Not Preempted 14

V. CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Anunziato v. eMachines, Inc. (C.D. Cal. 2005)
402 F. Supp. 2d 1133 13

Baggett v. Hewlett-Packard Co. (C.D. Cal. 2007)
582 F. Supp. 2d 1261 10

Baltazar v. Apple, Inc. (N.D. Cal. Feb. 10, 2011)
2011 WL 588209 7

Barron v. Reich (9th Cir. 1994)
13 F.3d 1370 3

Bastien v. AT&T Wireless Servs., Inc. (7th Cir.2000)
205 F.3d 983 15, 16

Bell Atlantic Corp. v. Twombly (2007)
550 U.S. 544..... 3

Birdsong v. Waggoner (9th Cir. 2009)
590 F.3d 955 6, 7

Bonfield v. AAMCO Transmissions, Inc. (N.D. Ill. 1989)
708 F. Supp. 867 10

Cortez v. Purolator Air Filtration Prods. Co. (2000)
99 P.2d 706 12, 14

David K. Lindemuth Co. v. Shannon Fin. Corp. (N.D. Cal. 1986)
637 F. Supp. 991 10

Falk v. General Motors Corp. (N.D. Cal. 2007)
496 F. Supp. 2d 1088 10

Gilligan v. Jamco Development Corp. (9th Cir. 1997)
108 F.3d 246 3

Gutierrez v. Givens (S.D. Cal. 1997)
989 F. Supp. 1033 11

Harlow v. Fitzgerald (1982)
457 U.S. 800..... 3

Hill v. City of Santa Barbara (9th Cir. 1986)
833 F.2d 1270 3

1	<i>Iberia Credit Bureau, Inc. v. Cingular Wireless</i> (W.D. La. 2009)	
2	668 F. Supp. 2d 831	17
3	<i>Ileto v. Glock, Inc.</i> (9th Cir. 2003)	
4	349 F.3d 1191	3
5	<i>In re Mattel, Inc.</i> (C.D. Cal. 2008)	
6	588 F. Supp. 2d 1111	13
7	<i>In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and</i>	
8	<i>Products Liability,</i>	
9	754 F. Supp. 2d 1145.....	8
10	<i>Kearns v. Ford Motor Co.</i> (9th Cir. 2009)	
11	567 F.3d 1120	9, 11, 12, 14
12	<i>Lopez v. Smith</i> (9th Cir. 2000)	
13	203 F.3d 1122	3
14	<i>Marcus v. AT&T Corp.</i> (2d Cir. 1998)	
15	138 F.3d 46	17
16	<i>Moore v. Kayport Package Exp., Inc.</i> (9th Cir. 1989)	
17	885 F.2d 531	10
18	<i>Morongo Band of Mission Indians v. Rose</i> (9th Cir. 1990)	
19	893 F.2d 1074	18
20	<i>Multimedia Patent Trust v. Microsoft Corp.</i> (S.D. Cal. 2007)	
21	525 F. Supp. 2d 1200	13
22	<i>Navarro v. Block</i> (9th Cir. 2001)	
23	250 F.3d 729	3
24	<i>Nordberg v. Trilegant Corp.</i> (N.D. Cal. 2006)	
25	445 F. Supp. 2d 1082	13
26	<i>Nvidia GPU Litig., No. 08-4312</i> (N.D. Cal. Nov. 19, 2009)	
27	2009 WL 4020104.....	8
28	<i>Odinma v. Aurora Loan Servs.</i> (N.D. Cal. Mar. 23, 2010)	
	2010 WL 1199886	3
	<i>Phillips v. AT & T Wireless</i> (S.D. Iowa July 29, 2004)	
	2004 WL 1737385	17
	<i>Qarbon.com, Inc. v. eHelp Corp.</i> (N.D. Cal. 2004)	
	315 F. Supp. 2d 1046	13

1	<i>Rhoades v. Powell</i> (E.D. Cal. 1986)	
2	644 F. Supp. 645	10
3	<i>Rosenberg v. Nextel Communs.</i> (N.D. Ill. Nov. 13, 2001)	
4	2001 U.S. Dist. LEXIS 19147.....	4
5	<i>Rubio v. Capital One Bank</i> (9th Cir. 2010)	
6	613 F.3d 119	12
7	<i>Russell v. Sprint Corp.</i> (D. Kan. 2003)	
8	264 F. Supp. 2d 955	4
9	<i>Salsgiver Communs., Inc. v. Consol. Communs. Holdings, Inc.</i> (W.D. Pa. June 30, 2008)	
10	2008 U.S. Dist. LEXIS 50320.....	4
11	<i>Scheuer v. Rhodes</i> (1974)	
12	416 U.S. 232.....	3
13	<i>Shaw v. AT&T Wireless Servs. Inc.</i> (N.D. Tex. 2001)	
14	2001 WL 539650	17
15	<i>Shroyer v. New Cingular Wireless Services, Inc.</i> (9th Cir. 2010)	
16	622 F.3d 1035	14,18
17	<i>Semegen v. Weidner</i> (9th Cir. 1985)	
18	780 F.2d 727	10
19	<i>Seville Indus. Mach. Corp. v. Southmost Mach. Corp.</i> (3d Cir. 1984)	
20	742 F.2d 786	10
21	<i>Shin v. BMW of North America</i> (N.D. Cal. July 16, 2009)	
22	2009 WL 2163509	9
23	<i>State of Minnesota v. Worldcom, Inc.</i> (D. Minn 2000)	
24	125 F.Supp.2d 365	17
25	<i>Stearns v. Select Comfort Retail Corp.</i> (N.D. Cal. June 5, 2009)	
26	2009 WL 1635931	4, 6
27	<i>Tietsworth v. Sears, Robuck & Co.</i> (N.D. Cal. 2010)	
28	720 F. Supp. 2d 1123	7
	<i>U.S. v. Hempfling</i> (E.D. Cal. 2006)	
	431 F. Supp. 2d 1069	10
	<i>Von Saher v. Norton Simon Museum of Art at Pasadena</i> (9th Cir. 2009)	
	578 F.3d 1016	18

1	<i>Vess v. Ciba-Geigy Corp. USA</i> (9th Cir. 2003)	
2	317 F.3d 1097	9, 12, 13
3	<i>Walling v. Beverly Enterprises</i> (9th Cir. 1973)	
4	476 F.2d 393, 397	11
5	<i>Washington v. Baenziger</i> (N.D. Cal. 1987)	
6	673 F. Supp. 1478	10
6	<u>STATE CASES</u>	
7	<i>American Suzuki Motor Corp. v. Superior Ct. (Carney)</i> (1995)	
8	37 Cal.App. 4th 1291	6
9	<i>Bank of the West v. Superior Court</i> (1992)	
10	2 Cal.4th 1254	13, 14
11	<i>Committee on Children’s Tel., Inc. v. General Foods Corp.</i> (1983)	
12	35 Cal.3d 197	13, 14
13	<i>Isip v. Mercedes-Benz USA, LLC</i> (2007)	
14	155 Cal.App.4th 19	6
15	<i>Kasky v. Nike, Inc.</i> (Cal. 2002)	
16	27 Cal.4th 939	12
17	<i>Kwikset Corp. v. Superior Court</i> (Cal. 2011)	
18	51 Cal. 4th 310	12
19	<i>People v. Superior Ct.</i> (1973)	
20	9 Cal.3d 283	13
21	<i>Spielholz v. Superior Court</i> (2001)	
22	86 Cal.App.4th 1366	17
22	<u>FEDERAL STATUTES</u>	
23	Fed. R. Civ. P. 8(a).....	1
24	Fed. R. Civ. P. 8(a)(2).....	3
25	Fed. R. Civ. P. 15(a)(2).....	18
26	47 C.F.R. § 20.15(a).....	17
27	47 C.F.R. §§ 21.1-.903.....	17
28	47 C.F.R. §§ 22.900-.973.....	17

1	47 U.S.C. § 151	16
2	47 U.S.C. § 332(c)(1)(A)	17
3	47 U.S.C. § 332(c)(3).....	5
4		
5	<u>STATE STATUTES</u>	
6	Cal. Bus. & Prof. Code § 17200	12
7	Cal. Bus. & Prof. Code § 17204	9
8	Cal. Civ. Code § 1780(a)	9
9	Cal. Civ. Code § 1792	6
10	Cal. Com. C. §2316(2).....	8
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
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1 Plaintiffs Mary McKinney and Nathan Nabors (collectively, “Plaintiffs”) hereby oppose
2 Defendants Google Inc. and HTC Corporation’s Motion to Dismiss Plaintiffs’ Consolidated
3 Amended Complaint (Dkt. 113) (the “Motion”) as follows:

4 **I. INTRODUCTION**

5 This case is about Defendants Google Inc. and HTC Corporation’s (collectively,
6 “Defendants”) manufacturing and sale of Google’s first smartphone, and its failure to properly
7 function. Specifically, each Plaintiff paid more than \$500 for a mobile smartphone that missed
8 calls, dropped calls, experienced sporadic and inconsistent connectivity and transferred data at
9 slow rates (if it transferred data at all). *See* Plaintiffs’ Consolidated Amended Complaint (Dkt.
10 110) (the “CAC” or “complaint”) at ¶¶ 1, 8, 15, 21, 43, 47, 48, 50, 57, 61, 86, 87 and 99.
11 Defendants improperly recast the facts of this case to be nothing more than Plaintiffs’ failure to
12 receive consistent 3G connectivity to T-Mobile’s wireless network using the Nexus One
13 smartphone.¹ More accurately, the issue in this case is whether Defendants manufactured and sold
14 a smartphone incapable of being used to make, receive and maintain phone calls, use the internet
15 or transfer data (all the things it was advertised to do and that made the phone appealing to
16 Plaintiffs and the Class).

17 Of course, it is well-settled that Plaintiffs need not produce evidence to support their
18 claims at the pleadings stage; rather, they need only provide “a short and plain statement of the
19 claim showing that [they are] entitled to relief.” Fed. R. Civ. P. 8(a). Notwithstanding this clear
20 standard and the fact that Plaintiffs cured the defects in their previous complaints,² Defendants
21 again move for dismissal of this action. In doing so, Defendants rely on a self-serving and
22 inaccurate characterization of Plaintiff’s operative complaint, emphasizing Plaintiffs’ allegations
23 about the lack of 3G connectivity and ignoring Plaintiffs’ allegations regarding missed and
24 dropped calls, sporadic and inconsistent connectivity to *any* network and slow data transfers.
25 Moreover, Defendants inappropriately attempt to have the Court determine at the pleadings stage
26

27 ¹ The Nexus One Phone is referred to in the Consolidated Amended Complaint as the “Google
28 Phone.”

² For example, Plaintiffs no longer seek redress for Defendant Google’s inadequate customer
service, and no longer allege T-Mobile’s network failed to provide the proper 3G infrastructure.

1 that the connectivity problems Plaintiffs experienced resulted from a faulty 3G network, and not
2 the phone itself. Plaintiffs' complaint makes clear that Plaintiffs no longer challenge T-Mobile's
3 3G network in this action, and thus there is no preemption.

4 As set forth below, Plaintiffs' Consolidated Amended Complaint satisfies the federal
5 pleadings standards and Defendants' baseless motion must be denied.

6 **II. STATEMENT OF FACTS**

7 The basic facts underlying claims on behalf of Nabors, McKinney and the Class are
8 simple: Google and HTC together designed and marketed the Google Nexus One smartphone
9 (the "Google Phone" or "the device"), which is a 3G device that is designed to provide superior
10 data transfer rates over earlier model devices. CAC ¶ 34. T-Mobile was the provider of 3G
11 wireless network connectivity for the device, but customers could pay a higher cost for unlocked
12 phones that would work on other networks. CAC ¶¶ 33, 38–39. Google offered purchasers of
13 the device incentives to subscribe to T-Mobile's wireless service or, if they were already T-
14 Mobile customers, incentives to extend their contracts with T-Mobile when purchasing the
15 Google Phone. CAC ¶ 41. Google was the exclusive retailer of the Google Phone, and
16 promoted the phone on its homepage, which is considered some of the most coveted real estate
17 on the Internet. CAC ¶¶ 28–29. Defendants also promoted the phone in the media. CAC ¶¶ 30–
18 33.

19 Plaintiffs understood the term '3G' is commonly understood to mean that it would
20 provide superior data transfer rates over older cell technology. A primary reason Plaintiffs
21 purchased this phone was its advertised 3G capability." CAC ¶¶ 8, 15, 42, 43, 48. Unfortunately
22 for Plaintiffs and the Class, the Google Phone did not operate as a true 3G device. CAC ¶ 47.
23 Despite Defendants' representations to the contrary, the Google Phone did not have the
24 capability of maintaining 3G network connectivity. CAC ¶¶ 44–47, 49–51. Plaintiffs and the
25 Class experienced frequent problems with both calling and data transfer. *Id.* Class members
26 were locked into service agreements with T-Mobile, unable to receive refunds from either their
27 mobile carriers or the architects of the failed Google Phone (Defendants). CAC ¶¶ 56, 63.
28 Nabors himself paid \$230 to break his contract with AT&T in addition to purchasing the Google

1 Phone for \$563.38. CAC ¶¶ 14, 59. McKinney paid \$529.00 for her Google Phone. CAC ¶ 9.
2 Plaintiffs were left with a phone that does not offer the 3G connectivity that they believed they
3 were purchasing, a used Google Phone that was passed off as equivalent to the new phone
4 purchased, and long stretches of time that they were totally without any use for the phone for
5 which they had paid hundreds of dollars. CAC. ¶¶ 7–11, 14–16.

6 **III. DEFENDANTS CANNOT SATISFY THE LEGAL STANDARD**

7 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal
8 sufficiency of the claims asserted in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-2000
9 (9th Cir. 2003). In evaluating a motion to dismiss, the allegations in Plaintiff’s SAC must be
10 accepted as true and construed in the light most favorable to Plaintiff. *See Barron v. Reich*, 13 F.3d
11 1370, 1374 (9th Cir. 1994). There is “a powerful presumption against rejecting pleadings for failure
12 to state a claim.” *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997); see also
13 *Hill v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Indeed, dismissal is appropriate
14 only if there is “no cognizable legal theory or an absence of sufficient facts alleged to support a
15 cognizable legal theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Where pleadings are
16 determined to be deficient, leave to amend should be freely granted. *See Lopez v. Smith*, 203 F.3d
17 1122, 11330 (9th Cir. 2000).

18 A claim for relief must be supported by “a short plain statement showing that the pleader is
19 entitled to relief.” Fed. R. Civ. P. 8(a)(2). Courts “do not require heightened fact pleading of
20 specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*
21 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Thus, in order to state a plausible claim, a plaintiff
22 need only “plead[] factual content that allows the court to draw the reasonable inference that the
23 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).
24 “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to
25 offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (overruled on
26 other grounds by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

27 “On a motion to dismiss, a court normally may not look to matters beyond the complaint
28 without converting the motion into one for summary judgment.” *Odinma v. Aurora Loan Servs.*,

1 2010 WL 1199886, at *1, n.1 (N.D. Cal. Mar. 23, 2010). Defendants seek application of the
2 exception wherein “a court may take judicial notice of material which is either submitted as part of
3 the complaint or necessarily relied upon by the complaint[.]” *Id.* The doctrine of “incorporation by
4 reference” applies only where the documents are “referenced extensively in the complaint and
5 which are accepted by all parties as authentic.” *Stearns v. Select Comfort Retailer Group*, *2 (June
6 5, 2009) (permitting incorporation by reference in ruling on motion to dismiss where language of
7 warranty was incorporated by reference and attached as an exhibit to the complaint). Here, HTC’s
8 Limited Warranty was neither referenced in, nor attached to, this complaint or any previous
9 complaint. Moreover, Defendant HTC presents no evidence that its Limited Warranty was presented
10 to the Plaintiffs at the time they purchased their Google Phones, nor anytime thereafter. Therefore,
11 as set forth more fully in Plaintiffs’ Opposition to Defendants’ Request for Judicial Notice, HTC’s
12 Limited Warranty must not be considered under the incorporation by reference doctrine.

13 **IV. PLAINTIFFS’ COMPLAINT SHOULD NOT BE DISMISSED**

14 **A. Plaintiffs’ First Cause Of Action For Breach of Implied Warranty Should** 15 **Not Be Dismissed**

16 **i. Plaintiff’s Implied Warranty Claim Is Not Preempted Because It** 17 **Does Not Challenge a Wireless Provider’s Services or Rates**

18 Defendants’ contention that Plaintiffs’ implied warranty claim is preempted fails.
19 Federal courts have held that 47 U.S.C. § 332(c)(3) does not completely preempt all state law
20 claims. *See Salsgiver Communs., Inc. v. Consol. Communs. Holdings, Inc.*, 2008 U.S. Dist.
21 LEXIS 50320 (W.D. Pa. June 30, 2008) (“there is no indication that Congress intended to
22 completely preempt state law.”); *see also Russell v. Sprint Corp.*, 264 F. Supp. 2d 955, 961 (D.
23 Kan. 2003); *Rosenberg v. Nextel Communs.*, 2001 U.S. Dist. LEXIS 19147 (N.D. Ill. Nov. 13,
24 2001) (Federal preemption under communications statute did not apply, since claim that wireless
25 communications provider and cellular phone company provided misinformation concerning
26 minutes used did not involve challenge to rates).

27 For instance, a District Court in a similar case held that 47 U.S.C. § 332(c)(3) did not
28 completely preempt a plaintiffs’ claims, despite a telephone company’s argument to the contrary.

1 *Sprint Corp.*, 264 F. Supp. 2d 959, 961. In *Sprint Corp.*, 264 F. Supp. 2d at 959, plaintiffs
2 sought restitution, punitive damages, declaratory relief, injunctive relief, attorneys' fees and costs
3 based on state law claims. *See id.* The cellular phone company, Sprint, argued that 47 U.S.C. §
4 332(c)(3) completely preempted plaintiffs' claims based on the following language: "no State or
5 local government shall have any authority to regulate the entry of or the rates charged by any
6 commercial mobile service, except that this paragraph shall not prohibit a State from regulating
7 the other terms and conditions of commercial mobile service." *Id.* at 959.

8 However, "[b]ased on the intent of Congress, as set forth in [47 U.S.C.] section
9 414 savings clause, as well as in section [47 U.S.C.] 332 itself," the court found that Sprint failed
10 to establish that the court had jurisdiction over the plaintiffs' claims pursuant to the complete
11 preemption doctrine, which it noted to be "a narrow doctrine." *Id.* at 960–61. The court held
12 that by allowing states to regulate "other terms and conditions of commercial mobile services," §
13 332(c)(3) suggested that Congress did not intend for complete preemption. *Id.* at 961.

14 Here, Plaintiffs do not take issue with their monthly service charges by their respective
15 mobile service providers. Rather, they allege that the Google Phone itself is defective. *See* CAC
16 at ¶¶ 1, 8, 15, 21, 43, 47, 48, 50, 57, 61, 86, 87 and 99. Defendants may take the position that the
17 widespread 3G network issues experienced by purchasers was a network problem, but that is an
18 issue for a motion for summary judgment, not an issue to be determined at the pleadings stage in
19 a motion to dismiss. At this point, the limited information available to Plaintiffs, as alleged in
20 the CAC, is to the contrary: "[c]omplaints on the Google's support forum said users were *unable*
21 *to get 3G service in areas where T-Mobile's maps indicated they should get it.*" CAC at ¶51
22 (emphasis added). In other words, Plaintiffs specifically allege that the 3G connectivity issues
23 are the result of a defect in the phone, and not with T-Mobile's 3G network. Moreover,
24 Defendants self-servingly take Plaintiffs' other allegations out of context. For example,
25 paragraph 59 of the CAC does not challenge whether T-Mobile's network was defectively
26 designed. *See* Motion at 18:8-10. Plaintiffs removed those allegations.

27 Accordingly, Plaintiffs' CAC in no way challenges T-Mobile's 3G market entry or the
28 rates charged, and thus there is no preemption.

1 **ii. Plaintiff’s Claim for Breach of Implied Warranty Is Well-Pleaded**

2 As the Court previously held, Plaintiffs “may be able to state an implied warranty claim
3 based on actual defects of the phone.” (Dkt. 106). The Song-Beverly Act provides that “every
4 sale of consumer goods that are sold at retail in this state shall be accompanied by the
5 manufacturer and the retail seller’s implied warranty that the goods are merchantable.” Cal. Civ.
6 Code § 1792. To assert a valid cause of action for breach of implied warranty, a plaintiff must
7 allege there is a fundamental defect that renders the product unfit for its ordinary purpose.
8 However, “this does not mean the alleged defect must preclude use of the product at all.” *Stearns*
9 *v. Select Comfort Retail Corp.*, 2009 WL 1635931*8 (N.D. Cal. June 5, 2009) (quoting *Isip v.*
10 *Mercedes-Benz USA, LLC*, 155 Cal.App.4th 19, 26 (2007) (“We reject the notion that merely
11 because a vehicle provides transportation from point A to point B, it necessarily does not violate
12 the implied warranty of merchantability. A vehicle that smells, lurches, clanks, and emits smoke
13 over an extended period of time is not fit for its intended purpose”)).

14 The cases Defendants cite actually *support* Plaintiffs’ position and mandate denial of the
15 instant motion. Plaintiffs’ CAC alleges the Google Phone “lacks even the most basic degree of
16 fitness for ordinary use.” *Birdsong v. Waggoner*, 590 F.3d 955, 958 (9th Cir. 2009). For example,
17 Plaintiffs clearly state this case arises “out of the failure of the Google Phone to maintain
18 connectivity to a wireless network[,]” meaning any wireless network. CAC ¶ 1. Moreover,
19 Plaintiffs each paid over \$500 for mobile smartphones that did not even meet “a minimum level
20 of quality[,]” as Plaintiff Nabors alleges “he missed numerous phone calls on the phone,
21 experienced many ‘dropped’ calls while using the phone and routinely was unable to connect to
22 the 3G network” and that “the Google Phone did not function properly.” *American Suzuki Motor*
23 *Corp. v. Superior Ct. (Carney)*, 37 Cal.App. 4th 1291, 1295-96 (1995); CAC ¶¶ 15, 61.
24 Likewise, Plaintiff McKinney alleges that the “defects caused McKinney to be unable to use her
25 phone for any purpose for a significant portion of the time she owned the Google Phone.” CAC
26 at ¶48. In sum, a smartphone that cannot be used to receive telephone calls, maintain telephone
27 calls or use the internet (i.e. download data) is far from fit for its ordinary purpose.

28 Finally, Defendants’ argument that the Google Phone was “still operational as to the

1 minimal level of functionality” must be rejected. Motion at 20:27-28. The instant matter is
2 distinguishable from *Baltazar v. Apple, Inc.*, 2011 WL 588209 (N.D. Cal. Feb. 10, 2011). There,
3 the plaintiff merely alleged that the iPad overheats when used outdoors. *Id.* at *1. In dismissing
4 Baltazar’s complaint with leave to amend, Judge Fogel reasoned that the “iPad has many
5 different and independent functions. Plaintiffs must identify with greater specificity which of
6 these functions are the ‘ordinary purpose’ of the iPad and how the device was unfit for that
7 purpose.” *Id.* at *2. Here, Plaintiffs clearly allege the ordinary purpose of the Google Phone was
8 to receive and maintain telephone calls, send e-mails, download documents and applications, and
9 transfer data at high speeds, however the phone could not even maintain telephone calls nor
10 connection to the network. *See* CAC ¶¶ 1, 8, 15, 21, 43, 47, 48, 50, 57, 61, 86, 87 and 99.

11 Likewise, the Google Phone’s inability to connect to the 3G network or receive and
12 sustain telephone calls is unlike a washing machine that stops mid-cycle and requires users to
13 restart the machine more than once. *See Tietsworth v. Sears, Robuck & Co.*, 720 F. Supp. 2d
14 1123, 1142-43 (N.D. Cal. 2010). Here, Plaintiffs were powerless to remedy the defects in their
15 respective Google Phones; they could not just “restart” their phones or press a button to make
16 them operate on the 3G network. There are no allegations in the complaint supporting such
17 possibilities. Indeed, Plaintiff McKinney returned her phone twice and Plaintiff Nabors no longer
18 uses the Google Phone, because these defects could not be resolved. CAC ¶¶ 8, 9.

19 Similarly, the facts in *Birdsong*, 590 F.3d 955 at 958, differ from the factual allegations in
20 instant matter. In *Birdsong*, 590 F.3d 955 at 958, “the plaintiffs recognize that iPods play music,
21 have adjustable volume, and transmit sound through earbuds” and the “district court determined
22 that the danger of hearing loss did not exist unless the consumer decided to use the iPod ‘in an
23 extreme way.’” *Birdsong*, 590 F.3d at 958. Thus, the key issue in *Birdsong*, 590 F.3d 955, is that
24 the device worked *too well* at playing music to the point it could allegedly cause hearing damage.
25 In contrast, the heart of this case is that the Google Phone does not work *at all*, not that it works
26 *too well*. CAC ¶¶ 1, 8, 15, 21, 43, 47, 48, 50, 57, 61, 86, 87 and 99. Unlike *Birdsong*, 590 F.3d
27 955 at 958, Plaintiffs and the Class do not allege they attempted to use their Google Phones in an
28 “extreme way” when they experienced missed and dropped calls – they could not even use the

1 device for its ordinary purpose- which is to use the phone and high speed data transfer
2 capabilities. *Id.*

3 In sum, Plaintiffs adequately allege facts sufficient to state a cause of action for breach of
4 implied warranty, and thus Plaintiff's First Cause of Action should not be dismissed.

5 **iii. Google's Alleged Disclaimer Does Not Defeat Plaintiffs' Breach of**
6 **Implied Warranty Claim**

7 "[T]o exclude or modify the implied warranty of merchantability or any part of it the
8 language must mention merchantability and in case of a writing must be conspicuous[.]" Cal.
9 Com. C. §2316(2). First, as set forth in Plaintiffs' Opposition to Defendants' Request for
10 Judicial Notice, filed concurrently herewith, this Court should not consider the Nexus One
11 Phone-Terms of Sale in ruling on Defendants' Motion to Dismiss. Second, if the Terms of Sale
12 is to be considered, it does not support dismissal of Plaintiffs' Breach of Implied Warranty
13 cause of action because it is not conspicuous and is unconscionable. Burying a disclaimer of
14 implied warranty in the middle of a paragraph on the fourth page of a six page document is not
15 "conspicuous" and therefore does not satisfy section 2316. Third, Defendants provide zero
16 evidence that the Terms of Sale were presented prior to Plaintiffs and the Class' purchases of
17 their phones, if at all. Finally, there is no indication that the HTC Limited Warranty was
18 attached to the Terms of Sale or made available to Plaintiffs and the Class. Accordingly,
19 Defendants' cannot rely on their Terms of Sale to support dismissal of Plaintiffs' Breach of
20 Implied Warranty.

21 **iv. Plaintiffs' Breach of Implied Warranty Claim Does Not Fail For**
22 **Lack of Privity with HTC**

23 So long as plaintiff pleads they are the third party beneficiary of the relationship between
24 the defendants (and since the phones were designed for consumer use, there is no other
25 conceivable beneficiary), no vertical privity of contract between a manufacturer and consumer is
26 required; nor is it required that the manufacturer sell the product directly to the consumer. *Nvidia*
27 *GPU Litig.*, No. 08-4312, 2009 WL 4020104 at *4 (N.D. Cal. Nov. 19, 2009). *See also In re*
28 *Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices and Products Liability,*

1 754 F. Supp. 2d 1145, 1185 (“where a plaintiff pleads that he or she is a third-party beneficiary to a
2 contract that gives rise to the implied warranty of merchantability, he or she may assert a claim for
3 the implied warranty’s breach”).

4 Here, Plaintiffs plead the Google Phone was designed for consumer use, and the Plaintiffs
5 and the Class are the intended beneficiaries of the relationship between Google Inc. and HTC
6 Corp. Even though HTC did not directly sell the phones to Plaintiffs and the Class, but that does
7 not insulate HTC from their liability in designing and manufacturing a defective product.
8 Accordingly, Defendants’ privity argument also fails.

9 **B. Plaintiffs’ Second And Third Causes Of Action For Violations of the CLRA**
10 **and UCL Should Not Be Dismissed**

11 Plaintiffs have satisfied Rule 9(b) pleading requirements for their claims based on
12 Defendants’ conduct. However, where Plaintiffs’ claims are not grounded in fraud, Plaintiffs are
13 subject to and satisfy the requirements of Federal Rule of Civil Procedure 8(a)(2). As noted in
14 *Kearns*, “[w]here fraud is not an essential element of a claim, only those allegations of a
15 complaint which aver fraud are subject to Rule 9(b)’s heightened pleading standard. Any
16 averments which do not meet that standard should be ‘disregarded,’ or ‘stripped’ from the claim
17 for failure to satisfy Rule 9(b). To the extent a party does not aver fraud, the party’s allegations
18 need only satisfy the requirements of Rule 8(a)(2).” *Kearns v. Ford Motor Co.*, 567 F.3d 1120,
19 1124 (9th Cir. 2009) (omitting internal citations and quotations). Here, none of Plaintiffs’ claims
20 are fraud-based.

21 **i. Plaintiffs’ CLRA and UCL Claims Are Not Grounded In Fraud And**
22 **Are Therefore Not Subject to Rule 9(b)**

23 Rule 9(b)’s heightened pleading requirements only apply to allegations describing
24 fraudulent conduct—meaning a cause of action where they underlying cause of action in its
25 entirety is fraud. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003).
26 Accordingly, “Plaintiffs are not required to plead ‘reliance’ and ‘materiality’ with particularity,
27 because those elements are grounded in the UCL’s and CLRA’s ‘as a result’ of language and are
28 thus distinct from the common law fraud element of justifiable reliance.” *Shin v. BMW of North*

1 *America*, No. CV 09-00398 AHM (AJWx), 2009 WL 2163509, at *4 (N.D. Cal. July 16, 2009)
2 (citing Cal. Bus. & Prof. Code § 17204; Cal. Civ. Code § 1780(a); *Kearns v. Ford Motor Co.*,
3 567 F.3d 1120, 1125 (9th Cir. 2009)).

4 As a general rule, a “pleading is sufficient under Rule 9(b) if it identifies “the
5 circumstances constituting fraud so that the defendant can prepare an adequate answer from the
6 allegations.” *Semegen v. Weidner*, 780 F.2d 727, 735 (9th Cir. 1985).³ Plaintiffs need not plead
7 the “date, place or time” of the fraud, so long as they use an “alternate means of injecting
8 precision and some measure of substantiation into their allegations of fraud.” *Seville Indus.*
9 *Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984).

10 Moreover, UCL and CLRA claims based on an omission or concealment “can succeed
11 without the same level of specificity required by a normal fraud claim.” *Baggett v. Hewlett-*
12 *Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007). Indeed, as numerous courts
13 recognize “an actionable omission obviously cannot be particularized as to ‘the time, place and
14 contents of the false representations.’” *Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp.
15 867, 875 (N.D. Ill. 1989); *see also Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal.
16 1987) (“Where the fraud consists of omissions (on the part of the defendants, the plaintiff may
17 find alternative ways to plead the particular circumstances of fraud. [F]or example, a plaintiff
18 cannot plead either the specific time of the omission or the place, as he is not alleging an act, but
19 a failure to act.”).

20 //

21
22 ³ *See also David K. Lindemuth Co. v. Shannon Fin. Corp.*, 637 F. Supp. 991, 993 (N.D. Cal.
23 1986) (“Rule 9 must be read in light of Rule 8(a) requiring averments to be simple, concise and
24 direct.”). Moreover, Rule 9(b)’s requirement is “relaxed “in cases of corporate fraud” where
25 “plaintiffs will not have personal knowledge of all of the underlying facts” such as the identities
26 of particular defendants.” *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir.
27 1989); *see Compl.* ¶¶ 37-38. The standard under Rule 9(b) is also less stringent when the
28 plaintiff alleges fraud by omission that occurred over a period of time. *Falk v. General Motors*
Corp., 496 F. Supp. 2d 1088, 1098-99 (N.D. Cal. 2007); *see also U.S. v. Hempfling*, 431 F.
Supp. 2d 1069, 1075 (E.D. Cal. 2006); *Rhoades v. Powell*, 644 F. Supp. 645, 666 (E.D. Cal.
1986) (noting that when “the timeframe of the alleged wrongdoing is clear from the complaint,”
Rule 9(b) requires “less specificity” in pleading). Thus, McKinney’s omission and
misrepresentation claims cannot be dismissed for failure to precisely state the time and place of
Defendants’ fraudulent conduct. *See Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D.
Cal. 1987).

1 **ii. Plaintiffs Satisfy Rule 9(b) To The Extent It Applies**

2 A claim based on a nondisclosure or omission is a claim for misrepresentation in a cause
3 of action for fraud, and it must be pleaded with particularity under Rule 9(b). *Kearns v. Ford*
4 *Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Although Defendants suggests otherwise,
5 however, “Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary
6 matters.” *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); *see also Gutierrez*
7 *v. Givens*, 989 F. Supp. 1033, 1044 (S.D. Cal. 1997) (explaining that the Rule 9(b) standard is
8 relaxed at the initial stages of litigation since “[b]efore discovery, Plaintiffs cannot aspire to
9 know all of the details of an alleged fraud against them”).

10 Plaintiffs satisfy the applicable pleading standard. Plaintiffs have alleged in the
11 Complaint the circumstances that support their claim. Plaintiffs have discussed adequately the
12 representations made by Defendants in and through the media, as well as their shortcomings in
13 meeting the advertised goals of the Google Phone. For Defendants to say they are unsure which
14 of their representations created the impression that they were selling a 3G device is disingenuous.
15 Google even offered up what was described as “the most valuable ad space on the entire
16 Internet” to see its phone.

17 In addition, Plaintiffs have made clear that they relied on Defendant’s misrepresentations
18 and omissions. Plaintiffs have alleged that they based their purchasing decision on the facts
19 Defendants promoted regarding the Google Phone: namely, that it was a true “3G” device, and
20 that it was very fast when uploading or downloading data from the Internet; and that it would
21 work in a manner that justified the premium price she paid for the Google Phone. Plaintiffs
22 would not have paid a price premium for Defendant’s product but for Defendant’s
23 misrepresentations and material omissions.

24 Moreover, the Complaint alleges the substance of the material omissions and
25 misrepresentations, the identity of the parties responsible for the material omissions and
26 misrepresentations, and the injuries resulting from the material omissions and
27 misrepresentations. The Complaint thoroughly identifies the “who,” “what,” “when,” “where,”
28 and “how.” The “who” are Defendants Google and HTC, both of whom are responsible for the

1 manufacture and sale of the Google Phone, and Plaintiffs McKinney and Nabors, and the
2 proposed class members who were misled and purchased the product. The “what” and “how” is
3 the Google Phone and Defendants’ false and misleading representations and overall marketing
4 scheme implying that the phone would “maintain connectivity” to 3G networks, and would
5 operate as a true 3G device. The “where” are Defendants’ headquarters and/or design,
6 manufacturing, packaging and/or marketing facilities. The “when” is at least from January 2009
7 when the Google Phone was made available for sale. Any further specificity is solely within the
8 control of the Defendants. Thus, Plaintiffs’ allegations in the Complaint are sufficient to satisfy

9 **iii. Plaintiffs’ CLRA and UCL Claims Are Well-Pleaded**

10 “The UCL prohibits, and provides civil remedies for, unfair competition, which it
11 defines as ‘any unlawful, unfair or fraudulent business act or practice.’ Its purpose ‘is to protect
12 both consumers and competitors by promoting fair competition in commercial markets for
13 goods and services.’” *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (Cal. 2011)
14 (quoting Cal. Bus. & Prof. Code § 17200; *Kasky v. Nike, Inc.* 27 Cal.4th 939, 949 (Cal. 2002)).
15 The UCL prohibits “any unlawful, unfair, or fraudulent business act or practice and unfair,
16 deceptive or untrue advertising.” Cal. Bus. & Prof. Code § 17200. “Each of these three
17 adjectives captures ‘a separate and distinct theory of liability.’” *Rubio v. Capital One Bank*,
18 613 F.3d 119, 1203 (9th Cir. 2010) (quoting *Kearns*, 567 F.3d at 1127). Here, Plaintiffs allege
19 Defendants violated all three prongs.

20 First, the UCL requires no showing of scienter and unintentional conduct violates the
21 statute if shown to be fraudulent, unlawful or unfair. *See Cortez v. Purolator Air Filtration*
22 *Prods. Co.*, 99 P.2d 706 (2000). “The text of Rule 9(b) requires only that in ‘all averments of
23 fraud . . . the circumstances constituting fraud . . . shall be stated with particularity.’ The rule
24 does not require that allegations supporting a claim be stated with particularity *when those*
25 *allegations describe non-fraudulent conduct.*” *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104
26 (9th Cir. 2003) (emphasis added, reversing dismissal of UCL claims under Rule 9(b) because
27 those claims did not *solely* depend on averments of fraud).

28 The California Supreme Court has noted that in “drafting [the UCL], the Legislature

1 deliberately traded the attributes of tort law for speed and administrative simplicity. As a result,
2 to state a claim under the Act one need not plead and prove the elements of a tort. Instead, one
3 need only show that ‘members of the public are likely to be deceived.’” *Bank of the West v.*
4 *Superior Court*, 2 Cal.4th 1254, 1266-67 (1992) (internal citations omitted). The California
5 Supreme Court and numerous other courts have consistently interpreted the UCL broadly to
6 sustain consumer protection claims without requiring they be pleaded with Rule 9(b)
7 particularity. *See Committee on Children’s Tel., Inc. v. General Foods Corp.*, 35 Cal.3d 197,
8 211-12 n.11 (1983) (“The requirement that fraud be pleaded with specificity . . . does not apply
9 to causes of action under the consumer protection statutes”); *People v. Superior Ct.*, 9 Cal.3d
10 283, 287-88 (1973) (issues relating to when, where or whom constituted evidentiary facts that
11 need not be pleaded for UCL); *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1118 (C.D. Cal. 2008)
12 (Rule 9(b) did not apply to the plaintiff’s UCL claims where the plaintiffs “merely allege[d] that
13 the representations were likely to deceive and that [p]laintiffs were damaged by the deception;
14 they make no effort to allege common law fraud elements”); *Anunziato v. eMachines, Inc.*, 402
15 F. Supp. 2d 1133, 1138 (C.D. Cal. 2005) (UCL false advertising claims can be asserted without
16 implicating Rule 9(b)); *Nordberg v. Trilegeant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal.
17 2006) (“Rule 9(b) is not strictly applicable to the current action as the CLRA is not a fraud
18 statute. . . . To require that plaintiffs prove more than the statute itself requires would undercut
19 the intent of the legislature in creating a remedy separate and apart from common-law fraud”);
20 *Multimedia Patent Trust v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1217 (S.D. Cal. 2007)
21 (“[T]o the extent that a federal pleading is grounded in fraud, it must meet the requirements of
22 Rule 9(b). . . . [H]owever, the elements of common law fraud law are not essential to a claim
23 under the California unfair competition law.”).

24 In *Vess v. Ciba-Geigy*, the Ninth Circuit held Rule 9(b)’s particularity requirements
25 apply when a claim is entirely “grounded in fraud,” which only occurs when plaintiffs allege “a
26 unified course of fraudulent conduct *and rely entirely on that course of conduct as the basis of a*
27 *claim.*” *Vess*, 317 F.3d at 1103 (emphasis added). Plaintiffs’ claims are based on California’s
28 consumer protection statutes and common law warranty, and thus are not dependent—much

1 less “*entirely dependent*”—on proving “fraudulent” conduct. Plaintiffs’ claims are thus not
2 governed “entirely” by Rule 9(b). *Vess*, 317 F.3d at 1103; *Qarbon.com, Inc. v. eHelp Corp.*,
3 315 F. Supp. 2d 1046, 1052 (N.D. Cal. 2004).

4 Defendants’ citation to *Kearns v. Ford Motor Co.*, is inapposite. *Kearns v. Ford Motor*
5 *Co.*, 567 F.3d 1120 (9th Cir. 2009). In *Kearns*, the Ninth Circuit merely held that Rule 9(b) is
6 applicable to UCL and CLRA claims when a claim based *solely* on fraud is alleged, as the
7 plaintiffs did in that case. *Kearns*, 567 F.3d at 1125 (“[r]eviewing the complaint, Kearns
8 alleges that Ford engaged in a fraudulent course of conduct”). Here, the claims at issue are not
9 based solely on a fraudulent course of conduct, as the elements for a fraud claim need to be
10 shown to establish Defendants’ liability. No cause of action here asserts or relies on a
11 fraudulent course of conduct—and certainly none are based on a fraud theory.

12 The *Kearns* ruling comports with the current state of California law on the matter. *In re*
13 *Tobacco II Cases*, 207 P.3d 20, 35 & n.14 (Cal. 2009) (relying on *Bank of the West* and
14 *Committee on Children’s Television*). Under California law, a UCL “plaintiff need not show
15 that a UCL defendant intended to injure anyone through its unfair or unlawful conduct. The
16 UCL imposes strict liability when property or monetary losses are occasioned by conduct that
17 constitutes an unfair business practice.” *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.
18 4th 163, 181 (Cal. 2000). Even under Defendants’ chosen framework, there still is no intent
19 element, and Plaintiffs have no need to plead any of their claims—or the facts underlying
20 them—beyond the “short and plain statement” required by Rule 8(a).

21 **C. Plaintiffs’ Claims Are Not Preempted**

22 Plaintiffs’ state law claims are not preempted under governing Ninth Circuit law.
23 *Shroyer v. New Cingular Wireless Services, Inc.* presented facts and issues materially similar to
24 those at issue in this case. 622 F.3d 1035, 1038 (9th Cir. 2010). In *Shroyer*, the plaintiff “filed
25 a class action against . . . a corporation resulting from the merger of AT&T Wireless Services,
26 Inc., and Cingular Wireless Corporation. . . . Shroyer had a contract for wireless telephone
27 services with AT&T. He alleged that, immediately following the merger, his cellular phone
28 service was severely degraded.” *Id.* Shroyer alleged that (1) New Cingular breached the

1 existing AT&T contract because it did not provide adequate service coverage; (2) New Cingular
2 required him to sign a new contract if he wanted the service that AT&T contracted in his
3 existing service agreement; (3) New Cingular misrepresented and omitted key facts to the
4 Federal Communications Commission regarding the merger; and (4) the FCC would not have
5 approved the New Cingular merger if it had known that breaches of contract like those Shroyer
6 alleged would occur. *Id.* Shroyer pleaded the following claims: “1) breach of contract; 2) fraud
7 and deceit; 3) unfair competition under Cal. Bus. & Prof. Code §§ 17200-210; and 4) a demand
8 for a declaratory judgment.” *Id.*

9 New Cingular made arguments similar to those that Defendants have made before this
10 Court: “New Cingular would have this court rely on *Bastien v. AT&T Wireless Servs., Inc.*, 205
11 F.3d 983 (7th Cir.2000), to hold that the substance of Shroyer’s claims is really an attack on the
12 post-merger service, and that deciding the case would necessarily involve regulating the modes
13 and conditions under which New Cingular may begin offering service.” *Id.* at 1039. The Ninth
14 Circuit, however, rejected that argument:

15 [T]he FCC rejected this per se argument in *In re Wireless Consumers Alliance*,
16 and so do we. . . . New Cingular attempts to distinguish *In re Wireless Consumers Alliance*
17 by observing that there the FCC was deciding whether an award of damages based on state law
18 breach of contract and fraud claims was preempted by § 332. Here, New Cingular argues, we are
19 confronted with whether the contract and fraud claims themselves are preempted. This difference
20 does not affect our conclusion; if damages are not preempted, neither are the
21 claims under which they are awarded. *Id.* at 1039 & n.3.

22 In *Shroyer*, the only claims that the Court found preempted were based on whether the
23 FCC had accurate facts and would have approved the merger “depend[ed] on the assessment of
24 the public benefit of the merger. That determination has already been made by the FCC, and
25 reexamination of that issue under state law is preempted either by § 332 or by the ordinary
26 principles of conflict preemption.” *Id.* at 1041. This claim was not preempted because it was a
27 UCL claim. It was preempted because it was inextricably intertwined with whether New
28 Cingular and AT&T committed a fraud on the FCC during the merger approval process—a fact
that does not exist in this case.

This Court has concluded previously that if Plaintiffs can allege that the problems or
defects at issue are as a result of a defect in the phone itself, such claims would *not* be

1 preempted under the FCA:

2 For example, Plaintiff may be able to state claims against Google and HTC for
3 actual defects of the Google Phone or its applications. Such claims do not
4 challenge a carrier's rates or market entry and hence would not be preempted.
5 Thus, the Court finds that leave to amend is warranted. Doc. 73 at 17.

6 That is precisely the conduct that has been alleged here. Plaintiffs have alleged
7 that Defendants committed the following unfair acts and practices, among others:

- 8 • Sold Plaintiffs a product that Defendants represented, and Plaintiffs believed,
9 would have 3G connectivity;
- 10 • Sold Plaintiffs a product that Defendants represented, and Plaintiffs believed,
11 would act as a true 3G device; and,
- 12 • Sent Plaintiff McKinney a used Google Phone, even though she had paid full
13 price for her purchase of a "new" (non-working) Google Phone.

14 Plaintiffs' allegations regarding the failures of the phone marketed to her as "essential for web
15 surfing and email" very clear:

16 [McKinney's Google Phone] never had 3G service at any point, and showed an
17 error message regarding the phone's hardware that directed her to contact her
18 mobile service provider. When she contacted T-Mobile, she was told that T-
19 Mobile could not help her and that she should contact Google directly. There
20 was no help line to call Google, and she had to wait on an email reply.
21 McKinney was unable to obtain phone service or use any of the features of the
22 Google Phone during this time, but never received a rebate or other
23 compensation for that time during which her Google Phone was unable to be
24 used for its intended purpose.

25 Absolutely none of those allegations and the claims on which they are based are
26 preempted. Plaintiffs' claims based on the Defendants' false and misleading representations are
27 not preempted because neither the FCA, 47 U.S.C. § 151, *et seq.*, nor any federal regulations
28 promulgated thereunder regulate advertising or the use of the 3G appellation. Unlike the
29 plaintiffs in *Bastien*, where the court held "a complaint that service quality is poor is really an
30 attack on the rates charged for the service" *Bastien v. AT&T Wireless Services, Inc.*, 205
31 F.3d 983, 988 (7th Cir. 2000), Plaintiffs here do not take issue with the service of T-Mobile's

1 network, but rather the fact that Defendant *represented* that its product would perform on a 3G
2 network, when in fact Defendant failed to manufacture a phone that could do so. The portion of
3 the FCA governing mobile services, 47 U.S.C. § 332, does not regulate advertising or the 3G
4 appealation. Nor does the subchapter governing common carriers, 47 U.S.C. §§ 201-276. *See*
5 47 U.S.C. § 332(c)(1)(A) (stating persons engaged in commercial mobile services are to be
6 treated as common carriers subject to subchapter II). Despite the Google Phone being regulated
7 by at least three different parts of Title 47 of the Code of Federal Regulations, none of the
8 regulations govern advertising or the appealation 3G. Part 20 of Title 47 governing commercial
9 mobile radio services (“CMRS”) requires providers to abide by certain parts of subchapter II of
10 the FCA and other regulations, but it does not govern advertising or the 3G appealation. *See* 47
11 C.F.R. § 20.15(a). Under Part 22 of Title 47, the licensing and operation of cellular
12 radiotelephone service is regulated, but conspicuously absent are any regulations governing
13 advertising or the 3G appealation. *See* 47 C.F.R. §§ 22.900-.973. To the extent the Google
14 Phone operates on either narrow or broadband frequencies, the regulations in Part 24 of Title 47
15 do not govern advertising or the 3G appealation. *See* 47 C.F.R. §§ 21.1-.903.

18 “It is well settled that state law claims stemming from state contract or consumer fraud
19 laws governing disclosure of rates and rate practices are not generally preempted under [47
20 U.S.C.] § 332.” *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F. Supp. 2d 831, 839
21 (W.D. La. 2009); *see also Phillips v. AT & T Wireless*, 4:04-CV-40240, 2004 WL 1737385
22 (S.D. Iowa July 29, 2004) (explaining that not all matters affecting wireless providers’ rates are
23 preempted as rate regulation under the FCA). Indeed, it is well established that the FCA *does*
24 *not* govern deceptive advertising, misrepresentations or unfair trade practices. *Marcus v. AT&T*
25 *Corp.*, 138 F.3d 46, 54 (2d Cir. 1998); *Shaw v. AT&T Wireless Servs. Inc.*, No. 3:00-CV-1614,
26 2001 WL 539650, *4 (N.D. Tex. 2001); *Spielholz v. Superior Court*, 86 Cal.App.4th 1366,
27 1374 (2001); *State of Minnesota v. Worldcom, Inc.*, 125 F.Supp.2d 365, 372 (D. Minn 2000).
28 Even the FCC agrees with that proposition. *In re Wireless Consumers Alliance, Inc.*, 15

1 F.C.C.R. 17021, 17035-36 [¶¶ 25-27] (FCC 2000).

2 Under *Shroyer*, therefore, claims regarding *representations* of service are not
3 preempted, even though claims that require second-guessing the FCC's approval of mergers are
4 preempted. 622 F.3d at 1041. Claims that ask a Federal court to prevent a new cellular
5 company from entering a new market (which Defendants have not argued) may be preempted,
6 whereas claims that ask a Federal court to enforce state consumer-protection laws and seek
7 restitution for money paid for a product that did not work for the purpose for which it was
8 intended are not preempted under *Shroyer*. *Id.* at 1039-40.

9 **V. CONCLUSION**

10 For all of the above reasons, Defendants' Motion should be denied and they should be
11 ordered to file Answers to Plaintiffs' Consolidated Amended Complaint.⁴ Moreover,
12 Defendants should be ordered to immediately participate in a Rule 26(f) Conference with
13 Plaintiffs.

14
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16 DATED: November 7, 2011

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25 ⁴ In the alternative, if the Court grants Defendants' Motion in any respect, Plaintiffs
26 respectfully request that the Court grant them leave to amend their Consolidated Amended
27 Complaint to cure any deficiencies. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give
28 leave when justice so requires."). The Ninth Circuit requires this policy favoring amendment be
applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074,
1079 (9th Cir. 1990). *See also Von Saher v. Norton Simon Museum of Art at Pasadena*, 578
F.3d 1016, 1031 (9th Cir. 2009) ("Unless it is clear that the complaint could not be saved by
amendment, dismissal without prejudice and without leave to amend is not appropriate").

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