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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re Google Phone Litigation	Lead Case No. 5:10-CV-01177-EJD (Consolidated with No. 5:10-CV-03897-EJD) **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS CONSOLIDATED AMENDED COMPLAINT** **Date:** **February 3, 2012** **Time:** **9:00 a.m.** **Dept:** **1** **Judge:** **Hon. Edward J. Davila**

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I. INTRODUCTION

Plaintiffs' Opposition ("Opp.") merely underscores why the motion to dismiss filed by Defendants Google Inc. ("Google") and HTC Corporation ("HTC") should be granted, this time without leave to amend. In their attempt to evade dismissal, Plaintiffs are forced to run away from the actual allegations of their own Consolidated Amended Complaint ("CAC") and seek refuge in new-found assertions in their Opposition that are contradicted by their own pleading and their own counsel's prior statements on the record. Once again, Plaintiffs again have no credible responses to Defendants' many independently dispositive arguments for dismissal.

In accordance with Ninth Circuit law and this Court's own orders in *McKinney* and *Nabors*, Plaintiffs' misrepresentation-based claims under the CLRA and UCL (Second and Third Causes of Action) must be dismissed for failure to satisfy Federal Rule of Civil Procedure 9(b). As before, the CAC fails to plead with particularity any misrepresentations about the Nexus One by Google or HTC, and also fails to plead with particularity facts sufficient to show Plaintiffs' actual reliance thereon. Remarkably, Plaintiffs ignore this Court's Rule 9(b) rulings in this case, and merely repeat, verbatim, the same failed arguments they advanced before.

For multiple reasons, Plaintiffs' "implied warranty of merchantability" claim (First Cause of Action) also must be dismissed. Despite Plaintiffs' rhetoric in their Opposition, the claim pled in the CAC remains preempted under 47 U.S.C. § 332(c)(3) because, as before, it is *inextricably intertwined* with preempted attacks on the sufficiency of T-Mobile's 3G network – a wireless network that, as the CAC continues to allege, "was not designed" to and in fact "did not" provide consistent 3G connectivity for Nexus One users. CAC, ¶¶ 51, 52; *see also id.*, ¶ 58 (alleging that 3G connectivity problems were caused by T-Mobile's deficient network "and/or" the Nexus One device itself). Supported by nothing but their counsel's *ipse dixit*, Plaintiffs pretend that the CAC omits any reference to T-Mobile's 3G network as wholly or partially responsible for the Nexus One's alleged failure to provide consistent 3G connectivity, and that their CAC identifies an actual "defect" in the Nexus One that is solely responsible. Opp. at 1, 5. But these assertions are refuted by the CAC's allegations. The CAC does not plead *any* new and different facts establishing that any "actual defect" in the Nexus One is what caused the alleged 3G connectivity

problems. Rather, it contains the same conclusory allegations as those in prior versions of this claim, which Judge Ware and this Court dismissed on preemption grounds.

Plaintiffs' Opposition also fails to rebut Defendants' other independently dispositive state-law grounds for dismissal of the CAC's implied warranty claim. Indeed, Plaintiffs have no credible response to Defendants' argument that Plaintiffs' attack on the consistency of the Nexus One's "3G" connectivity – as well as related allegations about dropped calls or slower data transfer when the device switches to a 2G/EDGE network because 3G coverage is unavailable – cannot support an implied warranty of merchantability claim. As the CAC alleges, the Nexus One's phone and data functions *still operate* in those instances when the Nexus One switches to a 2G/EDGE network because 3G service is unavailable. *See* CAC, ¶¶ 46, 57. The CAC's allegations also undermine Plaintiffs' new contention that the "heart" of the claim "is that the [Nexus One] does not work *at all*." Opp. at 7 (emphasis in original). This unpled (and untrue) theory also flies in the face of their counsel's own statement on the record to Judge Ware that the claim in this case is "*not* [that] the phone won't operate at all" but "that the phone vacillates between 2G and 3G."[1]

There is no legal merit to Plaintiffs' unprecedented claim that the Nexus One is not "merchantable" to the extent it fails to maintain consistent 3G connectivity, or users experience dropped or lost calls or slower data transfer when the device switches to a 2G network because 3G coverage is unavailable. Neither the *inconvenience* that Plaintiffs allegedly experience from slower data transfer or having to re-initiate a call that is dropped when the device switches to a 2G/EDGE network, nor the fact that the Nexus One does not live up to Plaintiffs' *expectation* that it would maintain consistent 3G connectivity, can support any claim for breach of the implied warranty of merchantability. *See American Suzuki Motor Corp. v. Superior Court* (*Carney*), 37 Cal. App. 4th 1291, 1296 (1995); *Baltazar v. Apple, Inc*., 2011 U.S. Dist. LEXIS 96140, *10 (N.D. Cal. Aug. 26, 2011); *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1142-43 (N.D. Cal. 2010).[2]

[1] Nov. 1, 2010 *McKinney* Hr'g Tr. at 24:3-5 (statements of Plaintiff's counsel; emphasis added).

[2] While smartphones (like the Nexus One and others) are a major technological advance that

Finally, Google's disclaimer of any implied warranties in its Nexus One "Terms of Sale" agreement with Plaintiffs, and Plaintiffs lack of privity with HTC, also require dismissal of the claim. Google's conspicuous disclaimer of any implied warranty of merchantability is entirely enforceable, and no different than comparable disclaimers courts routinely enforce in dismissing implied warranty claims. Further, Plaintiffs do not dispute that they are not in "privity" with HTC, and instead rely on baseless third-party beneficiary arguments that are not even pled in the CAC. As explained further below, Defendants' motion should be granted, with prejudice.

II. ARGUMENT

A. Plaintiffs' Misrepresentation-Based Claims Under The UCL And CLRA Must Be Dismissed, This Time Without Leave To Amend.

Plaintiffs repeatedly have been warned that their misrepresentation-based claims and allegations must be pled with Rule 9(b) particularity or they will be dismissed. One year ago, Judge Ware granted leave to amend only upon Plaintiff counsel's assurance that they would identify with particularity some "representation" actually made by Google and HTC that the Nexus One "will consistently function at 3G all of the time."[3] After Plaintiffs' counsel failed to do so, Google and HTC again filed motions to dismiss Plaintiffs' misrepresentation-based claims under Rule 9(b), which this Court granted in both *McKinney* and *Nabors*. As this Court's orders made clear, Rule 9(b) applies to all claims premised on "misrepresentations" and related omissions under *Kearns v. Ford Motor Co*., 567 F.3d 1120, 1125-27 (9th Cir. 2009), including Plaintiffs' CLRA and UCL claims in this case.[4] The Court then dismissed both claims for failure

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enable users to talk on the phone and use data services with vastly greater mobility than traditional land-based lines and devices, an inconvenience accompanying this innovation is that mobile calls may be dropped or lost at times, as smartphone users have commonly experienced and come to expect from time to time.

[3] Nov. 1, 2010 *McKinney* Hr'g Tr. at 24:24-25:4; *see also* Nov. 16, 2010 *McKinney* Order, at 17.

[4] *See, e.g*., Aug. 30, 2011 *McKinney* Order, at 8 ("Because McKinney's California Consumer Legal Remedies Act ('CLRA') claims are based on alleged misrepresentations, they must be pled with Rule 9(b) particularity."); *id*. at 9-10 (dismissing under Rule 9(b) FAL and UCL claims premised on alleged misrepresentations); *see also* Aug. 30, 2011 *Nabors* Order, at 8-11 (same). "A claim based on a nondisclosure or omission is a claim for misrepresentation," and "must be pleaded with particularity under Rule 9(b)." Aug. 30, 2011 *McKinney* Order, at 7 (citing *Kearns*, 567 F.3d at 1127); Aug. 30, 2011 *Nabors* Order, at 7 (same).

to satisfy Rule 9(b) because Plaintiffs did not plead with particularity *any* misrepresentations by Google or HTC, or facts sufficient to show their actual reliance on any such misrepresentations.[5] Google and HTC again move to dismiss the CAC's misrepresentation-based CLRA and UCL claims because they are *still* not pled with Rule 9(b) particularity. *See* Opening Brief at 8-15.

Given the procedural history in this case, Plaintiffs' Opposition is simply incredible. Plaintiffs literally ignore Defendants' arguments and this Court's Rule 9(b) rulings in its August 30, 2011 orders in *McKinney* and *Nabors*, and just reassert the same failed arguments they advanced before. *Compare* Opp. at 9-14; *with* McKinney Opp. to Defs.' Motion to Dismiss Second Amended Complaint ("SAC") (Doc. No. 88, dated Apr. 4, 2011), at 7-12; Nabors Opp. to Google's Motion to Dismiss First Amended Complaint ("FAC") (Doc. No. 30, dated Apr. 4, 2011), at 7-11.

Plaintiffs' suggestion that their misrepresentation-based claims under the CLRA and UCL are "not subject to Rule 9(b)" (Opp. at 9) is meritless. Plaintiffs' CLRA claim in the CAC is premised *entirely* on Google and HTC's claimed misrepresentations and related omissions in advertisements for the Nexus One, and Plaintiffs' UCL claim attacks the same supposed misrepresentations under section 17200's "fraudulent" prong while also borrowing the CLRA claim in support of its allegation that Google and HTC violated section 17200's "unlawful" and "unfair" prongs. *See* CAC, ¶¶ 97-114; Opening Brief at 8-9. Thus, Rule 9(b) clearly applies to the CAC's misrepresentation-based claims, just as the Ninth Circuit held that the misrepresentation-based CLRA and UCL claims in *Kearns* were governed by Rule 9(b).[6]

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[5] *See* Aug. 30, 2011 *McKinney* Order, at 7-11; Aug. 30, 2011 *Nabors* Order, at 6-11. Along with their other misrepresentation-based claims, Plaintiffs' CLRA and UCL claims were dismissed under Rule 9(b) because, *inter alia*, Plaintiffs "fail[ed] to identify a single advertisement or commercial in which HTC or Google made any statements about the phone and 3G wireless network connections," nor did they plead with particularity facts sufficient to show their actual reliance thereon. *Id.* Plaintiffs "failed to allege any facts showing that [Defendants] actually stated that [the Nexus One] would provide 3G connectivity, much less any consistent level of 3G connectivity"; Plaintiffs "[did] not allege that the phone does not function at least some of the time by connecting to a 3G network"; and Plaintiffs nowhere pled with particularity any instance in which Google or HTC "claimed that the phone would connect to 3G for any specific period of time." Aug. 30, 2011 *McKinney* Order, at 9-11; *accord* Aug. 30, 2011 *Nabors* Order, at 8-11.

[6] Indeed, in its *McKinney* and *Nabors* orders, this Court has already ruled, correctly, that Rule 9(b) applies to Plaintiffs' claims of misrepresentation and related omissions in this case – including their CLRA and UCL claims. *See* p. 3 & n.3, *supra*. The few authorities Plaintiffs

It is equally clear that, as before, Plaintiffs' CLRA and UCL claims in the CAC based on alleged "misrepresentations" and related "omissions" must be dismissed under Rule 9(b). This Court's *McKinney* and *Nabors* orders detailed the multiple ways in which Plaintiffs' conclusory allegations in their prior complaints failed to satisfy Rule 9(b). *See* Aug. 30, 2011 *McKinney* Order, at 8-11; Aug. 30, 2011 *Nabors* Order, at 7-11. The CAC's allegations do not remotely cure any of these deficiencies, or respond to Defendants' arguments why they still fail to satisfy Rule 9(b). *See* Opening Brief at 8-15. Plaintiffs ignore both Defendants' arguments and this Court's prior orders, and merely assert (in the same words as before) that they "have satisfied Rule 9(b)'s pleading requirements" because they supposedly have "discussed adequately the representations made by Defendants" and "made clear that they relied on Defendant's misrepresentations and omissions." Opp. at 9, 11.

It is dispositive that the CAC fails to plead with Rule 9(b) particularity any instance in which either Google or HTC misrepresented that the Nexus One would maintain any particular level of 3G connectivity, let alone "consistent" connectivity to 3G wireless networks, including T-Mobile's 3G wireless network. Nor does the CAC plead with particularity any other misrepresentation by Google or HTC about the Nexus One. Plaintiffs' Opposition simply ignores that – as with their prior complaints – the CAC fails to identify any statement by HTC about the Nexus One, and the only Google statement identified with any particularity in the CAC is the same entirely non-actionable statement from Google's website that Plaintiffs quoted in their prior complaints, which says merely: "Experience Nexus One, the new Android phone from Google." CAC, ¶ 28. As to Plaintiffs' "omission"-based allegations, it is dispositive that the CAC fails to plead with particularity any statement by Google or HTC about the subject matter of the alleged omissions (*i.e.*, the extent of the Nexus One's 3G connectivity), given that "'to be actionable,'" an

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again cite suggest merely that some elements of a common law fraud claim – such as "intent" – need not be pled with Rule 9(b) particularity or at all under the UCL. But, as before, that in no way excuses Plaintiffs' failure to identify and plead with particularity some *actionable misrepresentation* by Google and HTC – as required by Rule 9(b) under this Court's orders, *Kearns*, and the other authorities cited by Google and HTC. As Defendants explained in their Opening Brief, any remaining aspect of the CAC's UCL claim under the "unlawful" or "unfair" prongs fails in accordance with this Court's prior rulings, or falls along with Plaintiffs' legally deficient claim for breach of implied warranty. *See* Opening Brief, at 6, 10, 16-17.

"'omission must be contrary to a representation actually made by the defendant.'" Aug. 30, 2011 *McKinney* Order, at 9 (quoting *Daugherty v. American Honda Motor Co*., 144 Cal. App. 4th 824, 835 (2006)); Aug. 30, 2011 *Nabors* Order, at 8-9 (same); *see also Baltazar v. Apple, Inc*., 2011 U.S. Dist. LEXIS 13187, *11 (N.D. Cal. Feb. 10, 2011).[7]

Finally, the CAC fails to plead with particularity facts sufficient to show that Plaintiffs *actually relied* on any supposed misrepresentation about the Nexus One made by Google or HTC. *See* Opening Brief at 14-16. As before, Plaintiffs "merely assert[] that [they] based [their] decision to buy the [Nexus One] on Google and HTC's misrepresentations but ha[ve] not particularly identified any representation upon which [they] relied or alleged facts showing [their] actual and reasonable reliance on any such representations." Aug. 30, 2011 *McKinney* Order at 8; Aug. 30, 2011 *Nabors* Order at 8 (same). Plaintiffs also have no credible response to Defendants' arguments that the terms and disclaimers in the parties' agreements refute the Plaintiffs' misrepresentation and reasonable reliance allegations. Opening Brief at 15-16.[8]

B. Plaintiffs' Implied Warranty Of Merchantability Claim Also Fails For Multiple Reasons, And Should Be Dismissed With Prejudice.

Unable to plead with Rule 9(b) particularity any actual promise by Google and HTC that

[7] As this Court has ruled, to plead the circumstances of an omission with Rule 9(b) particularity, Plaintiffs must "'describe the content of the omission and where the omitted information should or could have been revealed, as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information.'" Aug. 30, 2011 *McKinney* Order at 7-8 (quoting *Marolda v. Symantec Corp*., 672 F. Supp. 2d 992, 1002 (N.D. Cal. 2009)). Plaintiffs ignore this aspect of the Court's orders as well as Defendants' arguments based on it. *See* Opening Brief at 13.

[8] At most, Plaintiffs argue that the Court should not consider the HTC Limited Warranty because it "was neither referenced in, nor attached to, the complaint or any previous complaint." Opp. at 4. But this argument fails – given that the Ninth Circuit "has extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). It is beside the point, in other words, that Plaintiffs have avoided alleging or attaching the HTC Limited Warranty. Because HTC attached the warranty to Defendants' joint motion to dismiss, Plaintiffs do not contest its authenticity, and, as in *Baltazar*, 2011 U.S. Dist. LEXIS 96140, at *13, the disclaimers therein undermine Plaintiffs' claim, the HTC Limited Warranty is properly before the Court under *Knievel*. Moreover, the "Terms of Sale" with Plaintiffs, which Plaintiffs did attach to their original complaint, itself incorporates by reference the HTC Limited Warranty. *See* Exh. 1 to Opening Brief at 4.

the Nexus One would provide consistent 3G connectivity and never experience any dropped or missed calls, Plaintiffs attempt to *imply* such a guarantee based on the "implied warranty of merchantability." The effort fails for multiple reasons. Indeed, the implied warranty claim pled in the CAC remains preempted by the Federal Communications Act, 47 U.S.C. § 332(c)(3) ("FCA"), and also fails under state law because (i) the CAC fails to allege facts showing that the Nexus One is not merchantable under the governing authorities; (ii) Google's legally enforceable disclaimer of implied warranties undermines the claim; and (iii) Plaintiffs' lack privity with HTC. Opening Brief at 17-21. Plaintiffs' Opposition offers no credible response to these independently dispositive arguments.

1. Plaintiffs' Implied Warranty Claim Remains Preempted.

As pled, the CAC's implied warranty of merchantability claim alleges that the Nexus One is supposedly *defective* because it fails to maintain "consistent" connectivity to T-Mobile's "3G" wireless network, and allegedly results in "a number of missed and dropped phone calls" when the device switches to a slower 2G/EDGE network when T-Mobile's 3G wireless network is unavailable. CAC, ¶¶ 86-87; *see also* Opening Brief at 6. Both Judge Ware and this Court dismissed Plaintiffs' prior claims as preempted under 47 U.S.C. § 332(c)(3), and the CAC's barely modified version of the same claim *remains preempted*. It is inextricably tied to, and inseparable from, FCA-preempted issues related to the alleged insufficiency of T-Mobile's 3G wireless network to provide consistent 3G connectivity. *See* Opening Brief at 17-19.

Plaintiffs' Opposition wrongly asserts that they have "cured the defects in their previous complaints" because – according to Plaintiffs – the CAC "no longer allege[s] that T-Mobile's network" failed to provide sufficient 3G connectivity for Nexus One users, and instead "specifically allege[s] that the 3G connectivity issues are the result of a defect in the phone, and not with T-Mobile's 3G network." Opp. at 1-2 & n.1; *see also id*. at 5. These assertions of Plaintiffs' counsel are unsupported and contradicted by the CAC itself – which indisputably alleges, once again, that (1) "T-Mobile's 3G network" was "*not designed* to provide consistent connectivity to its 3G network for Google Phone users" and in fact "*did not* provide consistent 3G

performance for Google Phone purchasers," CAC, ¶¶ 51,[9] 52 (emphasis added); and (2) the 3G connectivity problems Plaintiffs allegedly experienced were caused by T-Mobile's "inferior" 3G network "and/or" some possible problem with the Nexus One device itself. *Id*., ¶¶ 58, 63. This Court cited these allegations in Plaintiffs' prior complaints as supporting FCA preemption, and they again support preemption of the CAC's implied warranty claim. *See* Opening Brief at 17-18.

Equally baseless is Plaintiffs' contention that the CAC alleges a claim based on an "actual defect" in the Nexus One. Opp. at 6. Plaintiffs added *no new allegations* to the CAC that identify any "actual defect" in the Nexus One, as distinct and separable from the numerous alleged deficiencies in T-Mobile's 3G network, that supposedly caused the device's failure to provide consistent 3G connectivity. Plaintiffs ignore Defendants' extensive showing that the CAC's allegations are either the same or not materially different from the conclusory and insufficient allegations in Plaintiffs' prior preempted versions of the same claim. *See* Opening Brief, at 5-6, 18-19.[10] Thus, Plaintiffs still have nothing but *mere possibilities* to support any claim that there is some identifiable defect in the Nexus One that is even partially responsible – much less independently and entirely responsible – for Plaintiffs' alleged failure to receiving "consistent" connectivity to T-Mobile's 3G network. *Id*. at 18-19; *see also* McKinney Opp. to Mot. to Dismiss SAC (April 4, 2011), at 18 ("it is possible that the [T-Mobile] cellular network was the cause of McKinney's [failure to obtain consistent 3G connectivity]," but "also is possible that her problems were caused by failures of the [Nexus One]"); Nov. 1, 2010 Hr'g Tr. 26:20-27:2) (Plaintiff's counsel does not know "whether or not it was the phone or the network": "It could have been either, … or it could have been both."). Nothing has changed – and the CAC

[9] Plaintiffs' Opposition fastens on a typo in the Opening Brief that cited paragraph 59 instead of 51 of the CAC. *See* Opp. at 5 (claiming that paragraph 59 of their complaint does not challenge T-Mobile's network and that any such allegations were "removed" from the complaint). The precise language Defendants quote appears in paragraph 51. Plaintiffs' suggestion that they "removed" from the CAC *the language Defendants had quoted*, which this Court previously pointed to in support of its FCA preemption ruling, is demonstrably false.

[10] Rather than cite to any new allegations to support their contention, Plaintiffs continue to rely on prior assertions and allegations that have merely been cut and pasted from their prior complaints. *Compare* CAC ¶¶ 1, 8, 21, 43, 47, 48, 50, 57, 86, 99; *with McKinney* SAC ¶¶ 1, 4, 13, 50, 54, 55, 57, 64, 101, 95. *Also compare* CAC ¶¶ 15, 61; *with Nabors* FAC, ¶¶ 7, 62.

most certainly does not include allegations sufficient to state a viable implied warranty claim that is "plausible on its face" and not just a "possibility." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Finally, Plaintiffs' reliance on "complete preemption" cases (Opp. at 4-5) is misplaced. In those cases, courts remanded to state court improperly removed cases because section 332(c)(3) of the FCA does not "completely preempt all state law claims." *Id*. at 4. The "complete preemption" doctrine is not at issue here. It applies when Congress intends the preemptive force of federal law to be so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). As Plaintiffs' cited cases confirm, the "jurisdictional doctrine of complete preemption" is "distinct" from, and "should not be … confused" with, the substantive question of whether a state-law claim is preempted – the precise issue here. *Salsgiver Communs., Inc. v. Consol. Communs. Holdings, Inc.*, 2008 U.S. Dist. LEXIS 50320, **15, 19-20 (W.D. Pa. June 30, 2008). "Even if the complete preemption [doctrine] does not apply, the defendant may nonetheless claim federal preemption as [a] defense" to the state-law claims asserted. *Id.* (citation omitted). Here, *McKinney* was removed to federal court under the Class Action Fairness Act ("CAFA"), and *Nabors* was filed in federal court under CAFA; in neither case does jurisdiction depend upon the presence of a federal question. Thus, Plaintiffs' "complete preemption" cases are inapposite. *Russell v. Sprint Corp.*, 264 F. Supp. 2d 955, 960 (D. Kan. 2003) ("Section 332 and related provisions *do not serve as a basis for removal* under the complete preemption doctrine.") (emphasis added); *Rosenberg v. Nextel Communs.*, 2001 U.S. Dist. LEXIS 19147, *4-5 (N.D. Ill. Nov. 13, 2001) (same).

2. Plaintiffs Fail To Plead Facts Showing The Nexus One Is Not Merchantable.

As Plaintiffs admit, the implied warranty of merchantability guarantees that products have only "a minimum level of quality" and are free of *fundamental* defects "so basic" that they render the product not "merchantable" and "unfit for its ordinary purpose." *American Suzuki Motor Corp.*, 37 Cal. App. 4th at 1295-96; *see also Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir.

2009); *Tietsworth*, 720 F. Supp. 2d at 1142. Plaintiffs' "inconsistent" 3G connectivity allegations cannot support any claim for breach of the implied warranty of merchantability given that, as Plaintiffs admit in the CAC, the Nexus One's phone and data functions *can and do function and operate* when 3G connectivity is unavailable and the device switches to a 2G network. CAC, ¶¶ 46, 57.

Plaintiffs now pretend that the "heart" of the CAC's implied warranty claim is that the Nexus One "does not work at all." Opp. at 7. But the claim pled in the CAC is not that the Nexus One does not work at all; rather, it is that the Nexus One is supposedly defective because it fails to maintain "consistent" connectivity to T-Mobile's "3G" wireless network, and allegedly results in "a number of missed and dropped phone calls" when that network is unavailable and the device switches to a slower 2G/EDGE network. CAC, ¶¶ 86-87.[11] Plaintiffs' revisionist theory that the Nexus One "does not work at all" also flies in the face of their counsel's statement to Judge Ware that their claim is "not the phone won't operate at all" but "that the phone vacillates between 2G and 3G." Nov. 1, 2010 Hr'g Tr. at 24:3-5.

In any event, the fact that the Nexus One switches to a 2G/EDGE network when 3G coverage is unavailable is not a *defect* in the device. Rather, as Plaintiffs admit in the CAC, this is how the Nexus One (like other smartphones) is "designed" to operate. CAC, ¶ 57. As Judge

[11] Likewise, Plaintiffs new-found contention that their claim is based on the Nexus One's complete failure to connect at all to "any wireless network" (Opp. at 6) is contrary to the *consistent 3G connectivity* allegations actually pled in the First Cause of Action, CAC, ¶ 86, and also refuted by countless other allegations in the Consolidated Amended Complaint. *See, e.g.*, CAC ¶ 47 ("Plaintiffs and other members of the Class experience connectivity on the *3G wireless network only a fraction of the time* they are connected to the T-Mobile's 3G wireless network, *or receive no 3G connectivity at all for a significant portion of time*"); ¶ 48 (McKinney has had "*3G service on later Google Phones that can best be described as sporadic and inconsistent*"); ¶ 51 ("T-Mobile's network did not provide *consistent 3G performance for Google Phone purchasers*"); ¶ 52 ("T-Mobile 3G network was not designed to provide *consistent connectivity to its 3G network* for Google Phone users"); ¶ 55 (Nexus One "cannot maintain *consistent 3G service*"); ¶ 63 (class members are "locked" into service plan "with *inferior T-Mobile 3G wireless network connectivity*"); ¶ 72 ("Plaintiffs have received, at best, *sporadic 3G speed or connection to a 3G network* with their respective Google Phones"); ¶ 86 (Nexus One "cannot perform its ordinary and represented purpose because it does not provide *consistent connection to a 3G wireless network*") (emphases added). Moreover, given that both Plaintiffs have used the Nexus One ***only on T-Mobile's cellular network***, they plainly "lack standing" to assert claims and make allegations about the Nexus One's operation on the wireless networks of any *other* cellular providers. Opening Brief at 4 & n.5.

Ware observed, it arguably would be a "weakness in the phone" if the Nexus One was *not* designed to connect to a slower 2G/EDGE network when 3G coverage is unavailable. Nov. 1, 2010 Hr'g Tr. at 24:3-19 (addressing plaintiff's criticism of the Nexus One for "vacillat[ing] between 2G and 3G," and stating that it "might be a weakness in the phone" if it connected only to a 3G network because users may "need 2G" to ensure that they have "consistent connectivity at whatever speed"). This aspect of the Nexus One's design and operation is thus hardly a "defect" – particularly given Plaintiffs' allegations that T-Mobile's 3G network was not designed to and does not provide consistent 3G connectivity for Nexus One users. *See* CAC, ¶¶ 51, 52.

But even if the complained-of aspects of the Nexus One could somehow be construed as a product defect, they do not constitute the sort of "fundamental" defect that renders the Nexus One not "merchantable" under the governing authorities. *Tietsworth*, 720 F. Supp. 2d at 1142; *see also Birdsong*, 590 F.3d at 958; *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 96140, at *10. Even if it were somehow Plaintiffs' subjective *expectation* that the they would receive "consistent" 3G connectivity and that the Nexus One would never have any dropped calls (which no reasonable consumer could expect from the Nexus One or other smartphones), the implied warranty of merchantability does not guarantee that the product will "precisely fulfill the expectation of the buyer." *American Suzuki*, 37 Cal. App. 4th at 1296. Likewise, any *inconvenience* Plaintiffs experience when the Nexus One switches between to 2G and 3G networks and allegedly drops or misses calls cannot support an implied warranty of merchantability claim. *See Baltazar*, 2011 U.S. Dist. LEXIS 96140, at *10 (inconvenience insufficient); *Tietsworth*, 720 F. Supp. 2d at 1142-43 (same).[12] The Nexus One's alleged failure to maintain "consistent" 3G connectivity and resulting dropped/missed calls bear no resemblance to the "moldy beds" in *Stearns v. Select Comfort Retail Corp.*, 2009 WL 1635931, *8 (N.D. Cal.

[12] Contrary to Plaintiffs' assertions, Nexus One users surely can re-initiate any "dropped calls" that they might experience – just as smartphone users do with other wireless devices that necessarily and routinely experience connectivity issues and resulting dropped calls. *Compare Tietsworth*, 720 F. Supp. 2d at 1142-43 (inconvenience in having to "restart" allegedly defective washing machine does not support claim for breach of the implied warranty of merchantability). If Plaintiffs' consistent 3G connectivity and dropped/missed call allegations were sufficient, then virtually every smartphone on the market today would not be "merchantable."

2009), or the "vehicle that smells, lurches, clanks, and emits smoke" due to its "malodorous air-conditioning," "leaking transmission," and "cranking brake problem" in *Isip v. Mercedes-Benz USA, LLC*, 155 Cal. App. 4th 19, 27 (2007). *See* Opp. at 6 (trying to rely by analogy on *Stearns* and *Isip*). No merchantable new bed is moldy, nor does any merchantable new car smell, lurch, clank and emit smoke. But it defies law, logic and experience to say that a smartphone designed to operate on both 2G and 3G networks is only merchantable if users receive consistent 3G connectivity and never experience dropped or missed calls. Accordingly, Plaintiffs' implied warranty of merchantability claim fails as a matter of law.

3. Google's Lawful Disclaimer Of Any Implied Warranty Of Merchantability Also Defeats The Claim.

Google's disclaimer of any implied warranty of merchantability in its "Terms of Sale" agreement with Plaintiffs also defeats the First Cause of Action. As Plaintiffs do not dispute, California law permits merchants to disclaim any implied warranty of merchantability so long as they do so in a conspicuous fashion and specifically mention merchantability. Opening Brief at 22 (citing CAL. COM. CODE § 2316(2)). Courts in this district have repeatedly enforced warranty disclaimers indistinguishable from the one in the Terms of Sale. *See, e.g., Inter-Mark USA, Inc. v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, *21 (N.D. Cal. Feb. 27, 2008); *Long v. Hewlett-Packard Co.*, 2007 U.S. Dist. LEXIS 79262, *16 (N.D. Cal. July 27, 2007). Plaintiffs incorrectly argue that Google's disclaimer should not be enforced because, they say, it is not "conspicuous" enough. Opp. at 8. After a bold "**Disclaimer of Warranties**" heading in larger font, the Terms of Sale "DISCLAIMS ALL WARRANTIES" including specifically "ANY IMPLIED WARRANTIES OF MERCHANTABILITY," in language set forth in contrasting all-capitals font. RFJN, Exh. 1 at p. 4. This comports with the definition of "conspicuous" in the California Commercial Code – which provides that terms are "conspicuous" if they involve "language in the body" of a document "in contrasting type" as compared to its "surrounding text," following "a heading" that is "in contrasting type, font, or color to the surrounding text of the same or lesser size." CAL. COM. CODE § 1201(b)(10). Plaintiffs' assertion that Google's warranty disclaimer cannot be "conspicuous" because it is on "the fourth page of a six page document," Opp. at 8, is

not only unsupported by section 1201(b)(10), but also contrary to law in the Northern District of California. *See Inter-Mark USA, Inc.*, 2008 U.S. Dist. LEXIS 18834, at **22-23 (disclaimer "on the fourth and fifth pages of a ten-page contract" held conspicuous and enforceable); *accord Siemens Credit Corp. v. Newlands*, 905 F. Supp. 757, 764-65 (N.D. Cal. 1994).[13]

While the Opposition asserts that Google's warranty disclaimer is "unconscionable," Opp. at 8, "Plaintiffs have not met their burden of establishing either procedural or substantive unconscionability, both of which are required" by law. *Legrama v. Fremont Inv. & Loan*, 2010 WL 5071600, **17-18 (N.D. Cal. Dec. 7, 2010); *see also In re iPhone Application Litig*., 2011 WL 4403963, *7 (N.D. Cal. Sept. 20, 2011). In fact, Plaintiffs have not even tried to satisfy their burdens on either requirement, much less both, here.[14] Thus, Google's legally enforceable disclaimer of any implied warranty of merchantability defeats Plaintiffs' implied warranty claim.

4. Plaintiffs' Implied Warranty Claim Against HTC Also Fails Because Plaintiffs Lack Privity With HTC.

Plaintiffs argue there is no requirement of vertical privity here because they are third-party beneficiaries "of the relationship between" HTC and Google. Opp. at 8. This exception to the

[13] Plaintiffs' speculation that Google's Terms of Sale might not have been "presented prior to" Plaintiffs' "purchases of their phones" (Opp. at 8) is baseless. As stated on the very first page of the Terms of Sale, Plaintiffs "must first agree to these Terms by checking the box indicating your acceptance of these Terms" to "place an order for the Device" on Google's website (RJN, Exh. 1 at p. 1), and both Plaintiffs allege they bought their Nexus One devices from Google's website, *see* CAC, ¶¶ 6, 14. Moreover, Plaintiffs' counsel themselves attached to McKinney's original state-court complaint the exact copy of the Terms of Sale that is before this Court, and alleged that it constitutes and reflects the "agreement" between Google and Plaintiffs. *See McKinney* Doc. No. 2 (Pl.'s Class Action Complaint (filed Jan. 20, 2010), ¶ 11 & Exh. A).

[14] Nor could Plaintiffs establish that Google's warranty disclaimer is "both procedurally and substantively unconscionable." *Legrama*, 2010 WL 5071600, at *17. Substantive unconscionability requires a showing that the particular provision at issue is so "'overly harsh'" and extraordinary as to "'shock the conscience,'" *In re iPhone Application Litig*., 2011 WL 4403963, at *7 (quoting *Aron v. U-Haul Co. of California*, 143 Cal. App. 4th 796, 808 (2006)) – which the commonly used warranty disclaimer in the Terms of Sale most certainly is not. While this alone is dispositive, Plaintiffs have not established procedural unconscionability either – which demands proof of the sort of "'oppression and surprise'" that is absent from the record here. *Id*. at 8 (emphasizing that the "'availability of alternative sources'" of competing products or services "'defeats any claim of oppression, because the consumer has a meaningful choice,'" including to forego the product or service altogether) (citation omitted). In any event, courts applying California law have repeatedly rejected assertions of unconscionability where – as here – the claimant ignores or fails to establish either element. *See id.* at **7-8; *Legrama*, 2010 WL 5071600, at **17-18; *see also Aron*, 143 Cal. App. 4th at 808-09.

vertical privity requirement, however, applies only when "a plaintiff pleads that he or she is the third-party beneficiary to a contract that gives rise to the implied warranty of merchantability." *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Prac., and Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1185 (C.D. Cal. 2010) (emphasis added). Here, by contrast, the CAC does not allege any such contract between HTC and Google; the best it can do is cite to an online article reporting the Nexus One was "[d]eveloped in partnership with hardware manufacturer HTC." CAC, ¶ 25. Another court in this district dismissed an implied warranty claim against a manufacturer on exactly this basis, rejecting the plaintiffs' argument that no vertical privity was required based on third-party beneficiary principles because the plaintiffs had "failed to allege the existence of a contract involving [the manufacturer] for which Plaintiffs are third party beneficiaries." *In re NVIDIA GPU Litig.*, 2009 WL 4020104, *6-7 (N.D. Cal. Nov. 19, 2009); *see also Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023-24 (9th Cir. 2008) (affirming dismissal of consumer's implied warranty claims against automobile manufacturer, cautioning that "a federal court sitting in diversity is not free to create new exceptions" to the requirement of vertical privity). Accordingly, and because Plaintiffs do not deny that they are not in privity with HTC, the implied warranty claim against HTC must be dismissed.

C. All Of Plaintiffs' Claims Are Preempted Under The FCA.

Finally, Plaintiffs' mere reprise of their prior arguments against preemption at the end of their Opposition fails once again. Plaintiffs' state-law claims still rest upon allegations that – in substance – are inextricably intertwined with issues regarding the adequacy of T-Mobile's 3G network, the determination of which are preempted under the FCA. *Shroyer v. New Cingular Wireless Servs., Inc.* confirms – consistent with the FCC's own interpretation of *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000) – that preemption under section 332(c) turns on the "substance" of the claims at issue, not their "form." 622 F.3d 1035, 1040 (9th Cir. 2010). As *Shroyer* notes, the *Bastien* plaintiffs' claim was preempted because it relied on state consumer protection law in a manner that would embroil the court in assessing the sufficiency of AT&T's cellular network. *Id.* By contrast, the plaintiff's claims in *Shroyer* were not preempted because the adequacy of the challenged service was to be measured only against AT&T's specific

contractual obligations, and other "misrepresent[ations about] the level of service it would provide" that were pled with Rule 9(b) particularity. *Id*. Moreover, "*Bastien* dealt with market entry" while Shroyer's non-preempted claims did not. *Id*.

Here, unlike the non-preempted claims in *Shroyer*, the *substance* of Plaintiff's challenged state-law claims are inextricably intertwined with and cannot be separated from FAC-preempted questions related to the alleged insufficiency of T-Mobile's 3G network to provide consistent 3G connectivity. Plaintiffs' continued inability to plead their misrepresentation-based allegations with Rule 9(b) particularity not only further distinguishes this case from *Shroyer*, but also makes their claims even more like the preempted claims in *Bastien* where the plaintiffs similarly failed to plead any "particular promises or representations" made by the defendant in support of their conclusory "misrepresentation" allegations. *Bastien*, 205 F.3d at 989-90. Moreover, Plaintiffs continue to ignore the CAC's allegations that T-Mobile's 3G network is "not designed to provide consistent connectivity to its 3G network for Google Phone users" and in fact "did not provide consistent 3G performance for Google Phone purchasers." CAC, ¶¶ 51-52. Nor do Plaintiffs refute Google and HTC's argument that the CAC's state-law claims will inescapably result in protracted litigation about the adequacy or inadequacy of T-Mobile's 3G network, and implicate preempted assessments about 3G market entry and rates charged in connection with 3G service and the Nexus One. Opening Brief at 17-19, 23-24. As before, the "substance" (*Shroyer*, 622 F.3d at 1040) of Plaintiffs' claims is what triggers preemption under 47 U.S.C. § 332(c)(3), and Plaintiffs' attempt to elevate form over substance necessarily fails.

II. CONCLUSION

The CAC is the third attempt by Plaintiffs' counsel to state a claim against Google and HTC, but like Plaintiffs' prior complaints, it entirely fails to do so. They should not be allowed yet another – fourth – bite at the apple. Google and HTC's motion to dismiss Plaintiffs' Consolidated Amended Complaint should be granted without leave to amend.

Dated: November 28, 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.