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SUPERIOR COURT IN THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

MARY MCKINNEY, Individually and on
behalf of All Others Similarly Situated,

Plaintiff,

v.

GOOGLE, INC., a Delaware Corporation;
HTC CORP., a Delaware Corporation; and T-
MOBILE USA, INC., a Delaware Corporation.

Defendants.

Case No. **110CV162678**

CLASS ACTION COMPLAINT

1. FALSE AND MISLEADING
ADVERTISING IN VIOLATION OF CAL.
BUS. & PROF. C. §§ 17200, *et seq.*
2. FALSE AND MISLEADING
ADVERTISING IN VIOLATION OF CAL.
BUS. & PROF. C. §§ 17500, *et seq.*
(Unfair Competition Law)
3. VIOLATION OF CAL. CIV. C. §§ 1750, *et*
seq. (Consumer Legal Remedies Act)
4. BREACH OF EXPRESS WARRANTY AND
IMPLIED WARRANTY OF
MERCHANTABILITY
5. VIOLATION OF THE MAGNUSON-MOSS
WARRANTY ACT
6. NEGLIGENCE
7. COMMON COUNTS AND UNJUST
ENRICHMENT
8. NEGLIGENT MISREPRESENTATION
9. FRAUD AND DECEIT
10. DECLARATORY RELIEF

DEMAND FOR JURY TRIAL

BY FAX

UCS

FILED Santa Clara Co

01/29/10 3:01pm

David H. Yamasaki

Chief Executive Officer

By: dwendel DTSCIY010

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Case: 1-10-CV-162678

D. Wendel

1 Plaintiff MARY MCKINNEY ("PLAINTIFF"), on behalf of herself and all others similarly
2 situated, by her attorneys, brings this complaint against GOOGLE, INC. ("Google"), HTC
3 CORP. ("HTC") and T-MOBILE USA, INC. ("T-Mobile") (collectively, "Defendants"), and Does 1
4 through 10, and alleges:

5 INTRODUCTION

6 1. This is a class action against Defendants on behalf of Plaintiff and a class of all
7 consumers who purchased the Nexus One mobile device (the "Google Phone") manufactured and
8 marketed by Google and HTC and sold in combination with T-Mobile's monthly service plan for
9 access to its 3G wireless network (the "Class") for the Google Phone not maintaining connectivity to
10 T-Mobile's 3G wireless network, and for Defendants' lack of customer support to assist Google
11 Phone customers in resolving this defect.

12 THE PARTIES

13 2. Plaintiff is, and at all relevant times hereto has been, a resident of the State of
14 Pennsylvania.

15 3. Defendant Google is a Delaware corporation that was, at all relevant times, doing
16 business in the State of California, with its principal place of business located in Mountain View,
17 California, which is in this judicial district. Google develops brands, promotes, markets, distributes
18 and/or sells the Google Phone throughout the United States.

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

21 5. Defendant T-Mobile is a Delaware corporation with its principal place of business
22 located at 12920 SE 38th Street, Bellevue, WA 98006. T-Mobile, a subsidiary of Germany-based
23 Deutsche Telekom's T-Mobile International business, provides wireless voice and data
24 communications services to subscribers in the U.S., including California. At all relevant times, T-
25 Mobile was, and still is, the exclusive provider of the telephone and data service plans for the
26 Google Phone throughout the U.S., including California. T-Mobile owns, operates and/or maintains
27 a 3G network in this County and State and has other significant contact with HTC and Google in this
28

1 judicial district, including entering into service and provisioning contracts with Google and/or HTC
2 that are to be performed in this County.

3 6. The true names and capacities, whether individual, corporate, associate,
4 representative, alter ego or otherwise, of defendants and/or their alter egos named herein as DOES 1
5 through 10 inclusive are presently unknown to Plaintiff at this time, and are therefore sued by such
6 fictitious names pursuant to California Code of Civil Procedure § 474. Plaintiff will amend this
7 Complaint to allege the true names and capacities of DOES 1 through 10 when the same have been
8 ascertained.

9 7. Plaintiff is informed and believes and based thereon alleges that at all times relevant
10 herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate, partner,
11 assignee, successor-in-interest, alter ego or other representative of each of the remaining Defendants
12 and was acting in such capacity in doing the things herein complained of and alleged. In committing
13 the unlawful and wrongful acts as alleged herein, Defendants planned and participated in and
14 furthered a common scheme by means of selling a manufacturing, marketing and selling the Google
15 Phone with T-Mobile's monthly service plan for access to its 3G network, despite Google Phone's
16 inability to maintain connectivity to the 3G network. Further, Defendants failed to provide adequate
17 customer service to Plaintiff and the Class in resolving this defect. Defendants knew or should have
18 known that this conduct would violate California law. Nonetheless, Defendants did not give notice
19 of this defect or take reasonable steps to assist customers in resolving this defect. Defendants further
20 aided and abetted and knowingly assisted each other in breach of their respective duties as herein
21 alleged.

22 JURISDICTION

23 8. This Court has jurisdiction in this action under Article VI, section 10 of the California
24 Constitution and § 410.10 of the California Code of Civil Procedure. Jurisdiction is also proper
25 under Civil Code § 1750, *et seq.*, and Business & Professions Code § 17200, *et seq.*

26 9. Plaintiff does not assert any claims arising under the laws of the United States of
27 America. The amount in controversy does not exceed \$75,000.00 per class member; in the
28 alternative, class members hereby waive any damages in excess of \$75,000.

10. Jurisdiction over Defendants is proper because each has purposely availed itself of the privilege of conducting business activities in California, and/or has generally maintained systematic and continuous business contacts with this state. In addition, Google is headquartered in, and maintains its principal place of business in California.

11. Moreover, jurisdiction is proper because the Terms of the Sale agreement between the Google Phone customers, including Plaintiff, and Google requires that any legal matters shall be submitted to the courts located within the county of Santa Clara. See Nexus One Phone – Terms of Sale, attached hereto as Exhibit A.

12. Venue is proper in this Court pursuant to California Code of Civil Procedure § 395. Defendants have thousands of customers who are residents of the State of California and this County, and who do business with Defendants through hundreds of retail locations across the state and this County, as well as through interactive websites of Google and T-Mobile, which permits consumers to purchase the Google Phone online across the State and this County.

13. Venue also is proper in this County because Google is headquartered in, and maintains its principal place of business within, this County, and HTC and T-Mobile have done business and continue to do business in this County.

14. Google is an American public corporation specializing in Internet search and advertising services and recently, entered the retail business when it decided to develop and sell smartphones, which are multi-functional mobile devices with advanced capabilities. Smartphones have become a lucrative market for companies, who are scrambling for market share in this highly competitive field.

15. On January 5, 2010, the Google Phone was released throughout the United States. It is designed and manufactured by HTC and developed, branded and sold by Google. Currently, in the United States, T-Mobile is the only wireless carrier that allows the Google Phone to be used on a 3G wireless network. An estimated 20,000 Google Phones were sold during the first week of the phone's release.

1 16. The Google Phone is an advanced mobile cellular phone which operates using the
2 Android Mobile Technology Platform and includes various features, such as video and audio player,
3 and an Internet device which provides email and Internet access on the 3G Network. The Google
4 Phone's primary competitor is Apple's popular iPhone 3G, a cellular device very similar to the
5 Google Phone that also uses the 3G wireless network.

6 17. The "3G" technology is alleged to feature faster peak data transfer rates over previous
7 networks of up to 7.2 Mbps (megabytes per second).

8 18. The Google Phone is only available through an online purchase and if customers
9 desire to use the 3G wireless service on their Google Phone, they have no option but to purchase the
10 Google Phone with a two-year commitment to T-Mobile.

11 19. Without an accompanying wireless service and the 3G network, the Google Phone
12 costs \$529. With a new T-Mobile wireless network service plan, which is a two year contract, the
13 customer pays \$179 for the Google Phone plus the additional monthly charge for the T-Mobile
14 wireless service, which may be upwards of \$100 per month. An existing T-Mobile customer may
15 also upgrade to purchase the Google Phone, requiring the customer to pay the difference between the
16 \$529 price of the phone and any upgrade credit allotted to the customer's account, and also requiring
17 the customer to extend the contract for another two years.

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

26 21. Defendants failed to warn Plaintiff and Class members of the bandwidth limitations
27 associated with using the Google Phone or its internal understanding that its 3G network was not
28 designed to provide consistent connectivity to its 3G network for Google Phone users.

1 22. Moreover, Defendants do not provide adequate customer service to assist Google
2 Phone customers in helping resolve the issues. When the customer contacts T-Mobile, their wireless
3 carrier, to request assistance, the customer is provided with only an email address to contact Google
4 directly. The customer will then have to wait for several days for a response. In a January 13, 2010
5 article in the New York Times entitled "Hey Google, Anybody Home?," Google vice president
6 Andy Rubin was quoted admitting that "We have to get better at customer service." See Exhibit B,
7 attached hereto.

8 23. Further, if the customer buys a subsidized Google Phone when entering into a new
9 two year contract with T-Mobile, and the customer chooses to terminate the contract during the first
10 120 days, the customer is liable for not only the termination fees to T-Mobile, but also must pay
11 Google the difference between the full price of the Google Phone and the subsidized price, which
12 may be upwards of \$350. See "Maintaining Carrier Service" section of Exhibit A.

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

16 25. Moreover, Defendants are not offering refunds to consumers who purchased the
17 Google Phone expecting it to operate properly on the 3G wireless network, when it has not, after the
18 standard 14-day period following the purchase.

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

23 27. While the strain on the T-Mobile's 3G wireless network was foreseeable, based on
24 how the Google Phone is set up and designed, the combination of the phone and/or the network
25 made it difficult for Class members to receive reliable and sustained connectivity on the 3G wireless
26 network as compared to a slower network.

27 //

28 //

28. Plaintiff, and other members of the Class, were injured in fact and lost money or property as a result of Defendants' material misstatements and omissions of material fact, paying more to receive essentially the same, if not inferior, service.

30. Defendants acted in concert to sell the Google Phone and either knew, should have known, or were obligated to understand that they were trying to sell more Google Phone devices than the existing T-Mobile's 3G wireless network could handle, and the Google Phone itself suffered from defective hardware and/or software. Plaintiff and other Class members were injured, either directly or indirectly, in response to the representations, advertising and/or other promotional materials that were prepared and approved by Defendants and disseminated on the face of the product and/or through assertions that contained the representations regarding the Google Phone and T-Mobile's 3G wireless network. Had the true facts been disclosed, Plaintiff and other Class members would not have purchased the Google Phone at the prices and under the terms and conditions to which they were and are subjected.

31. Defendants failed to disclose at the time of making their false and misleading statements to Plaintiff and the Class that the infrastructure of T-Mobile's 3G wireless network and/or the Google Phone itself were defective and inadequate to provide the represented performance and speed, resulting in injury to the Plaintiff and the Class.

32. Pursuant to California Code of Civil Procedure § 382 and California Civil Code § 1781, Plaintiff brings this action on behalf of herself and the following Class of individuals:

All consumers within the United States who purchased the Google Phone in combination with T-Mobile's monthly service plan for access to its 3G wireless network at any time between January 5, 2010 and the present.

1 Excluded from both the Class are Defendants, any parent, subsidiary or affiliate of Defendants, and
2 their officers, directors and employees who are or have been employed by Defendants between
3 January 5, 2010 and the present, and any judicial officer who may preside over this cause of action.
4 Said definitions of the Class may be further defined or amended by additional pleadings, evidentiary
5 hearings, class certification hearing, and/or orders of this Court.

6 33. The requirements for maintaining this action as a class action are satisfied.

7 34. Defendants' practices and omissions were applied uniformly to all members of the
8 Class, so that the questions of law and fact are common to all members of the Class. All putative
9 Class members were and are similarly affected by having purchased the Google Phone and the T-
10 Mobile 3G wireless service as promoted, marketed, advertised, packaged and labeled by Defendants
11 as set forth in detail throughout this Complaint, and the relief sought herein is for the benefit of
12 Plaintiff and other members of the Class. Plaintiff alleges that the Class is so numerous that joinder
13 of all members would be impractical.

14 35. Class members are ascertainable and can be ascertained and identified from, among
15 other things, Defendants' records. These records include, but are not limited to, contracts for service
16 between Class members and Defendants. Upon certification, notice can be efficiently and
17 effectively accomplished via, among other things, direct first class mail to all members of the Class
18 to provide notice of the class action.

19 36. Questions of law and fact common to the Class exist and predominate over questions
20 affecting only individual members, including, *inter alia*:

- 21 a. Whether Defendants' acts and practices in connection with the promotion, marketing,
22 advertising, packaging, labeling, distribution and sale of the Google Phone were
23 deceptive or unfair in any respect, thereby violating California Business and
24 Professions Code § 17200, *et seq.*, California Business and Professions Code §
25 17500, *et seq.*, and California Civil Code § 1750, *et seq.*;
- 26 b. Whether Defendants violated the Consumers Legal Remedies Act, California Civil
27 Code § 1750, *et seq.*;
- 28

- c. Whether Defendants breached express and implied warranties in its sale of the Google Phone, thereby causing harm to Plaintiff and other Class members;
- d. Whether Defendants breached express and implied warranties in the sale of the Google Phone in violation of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*;
- e. Whether Defendants were negligent in manufacturing, designing, promoting and/or selling the Google Phone;
- f. Whether Defendants misrepresented or omitted material facts in connection with the promotion, marketing, advertising, packaging, labeling and sale of the Google Phone;
- g. Whether Defendant acted fraudulently or were deceitful in connection with the promotion, marketing, advertising, packaging, labeling and sale of the Google Phone;
- h. Whether Defendants' acts and practices in connection with the promotion, marketing, advertising, packaging, labeling and sale of the Google Phone unjustly enriched Defendants at the expense of, and to the detriment of, Plaintiff and other Class members; and
- i. Whether Defendants' conduct as set forth above injured consumers and if so, the extent of the injury.

37. The claims asserted by Plaintiff in this action are typical of the claims of other Class members as the claims arise from the same course of conduct by Defendants, and the relief sought is common.

38. Plaintiff will fairly and adequately represent and protect the interests of the Class members. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

39. Certification of this class action is appropriate under California Civil Code §1781, California Code of Civil Procedure §382 because the questions of law or fact common to the respective Class members predominate over questions of law or fact affecting only individual members. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims. Absent a class action remedy, it would be highly unlikely that the representative Plaintiff or any other Class member would be able to protect their

own interests because the cost of litigation through individual lawsuits might exceed expected recovery. Certification is also appropriate because Defendants acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole. Further, given the large number of Google Phone customers, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

40. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

FIRST CAUSE OF ACTION

FOR UNLAWFUL, UNFAIR, AND FRAUDULENT BUSINESS PRACTICES IN VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE §17200, *ET SEQ.*

(By Plaintiff and the Class as Against All Defendants)

41. Plaintiff realleges and incorporates herein by reference each of the foregoing paragraphs.

42. The Unfair Competition Law, California Business and Professions Code § 17200, *et seq.*, defines unfair competition to include any "unfair," "unlawful," or "fraudulent" business act or practice.

43. Defendants violated, and continues to violate, California Business and Professions Code § 17200, *et seq.*, by misrepresenting the actual speed and performance of the Google Phone

1 and T-Mobile's 3G wireless network as well as Defendants' customer service to assist Google Phone
2 customers in resolving connectivity issues.

3 44. By engaging in the above described acts and practices, Defendants have committed
4 an unfair business practice within the meaning of California Business and Professions Code § 17200,
5 *et seq.* Consumers suffered substantial injury they could not reasonably have avoided other than by
6 not purchasing the product, and there was no countervailing benefit to consumers from Defendants'
7 unsupported claims and premature release of the Google Phone.

8 45. Defendants' acts and practices have deceived and/or are likely to deceive Class
9 members and the public and thus constitute a fraudulent business practice as the Google Phone does
10 not properly operate on T-Mobile's 3G wireless network but instead connects to the Internet using a
11 slower network a significant part of the time and/or results in a significant number of dropped calls
12 as the Google Phone searches for an available 3G network path.

13 46. The acts and practices of Defendants are an unlawful business act or practice because
14 they violate the laws identified in this Complaint, including Negligence, Breach of Express and
15 Implied Warranty of Merchantability, the Magnuson-Moss Warranty Act, Fraud and Deceit,
16 Negligent Misrepresentation, the Consumers Legal Remedies Act, and California Business &
17 Professions Code § 17500, as described below.

18 47. As discussed above, Plaintiff and members of the Class purchased the Google Phone
19 and the T-Mobile 3G wireless service plan directly from Google and/or T-Mobile and/or their
20 authorized agents. Plaintiff and members of the Class were injured in fact and lost money or
21 property as a result of such acts of unfair competition.

22 48. Defendants received the funds paid by Plaintiff and the members of the Class.
23 Defendants profited enormously by misrepresenting the speed and performance of the Google Phone
24 and not disclosing material problems and limitations with the Google Phone and its interaction with
25 T-Mobile's 3G wireless network as well as not providing adequate customer service to assist Google
26 Phone customers in resolving these issues. Defendants' revenues attributable thereto are thus
27 directly traceable to the millions of dollars paid out by Plaintiff and the Class for the Google Phone,
28 the required service plans and the associated fees.

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

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

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

SECOND CAUSE OF ACTION

**FALSE AND MISLEADING ADVERTISING IN VIOLATION OF
CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17500, ET SEQ.**

(By Plaintiff and the Class as Against All Defendants)

52. Plaintiff incorporates by reference each and every preceding paragraph as though fully set forth herein.

53. Defendants' acts and practices as described herein have deceived and/or are likely to deceive members of the Class and the public. Defendants have promoted the Google Phone as being able to operate with a 3G wireless network. In reality, the Google Phone connects over a slower network a significant amount of the time and/or drops a significant number of calls while searching for limited 3G network resources. Marketing the phone by claiming it connects to a 3G network would lead reasonable consumers, including Plaintiff, to believe they regularly can obtain 3G network connectivity and significantly higher data transfer rates. Defendants have also failed to provide adequate customer service to Google Phone customers, including the Plaintiff and the Class, as they have to wait for numerous days to receive a response to an email inquiry, which is the only

1 way to contact Google, and during that time, their Google Phone can not make use of T-Mobile's 3G
2 wireless network as originally promised.

3 54. T-Mobile uniformly advertises and sells 3G network data plans for the Google Phone
4 and requires Class members to pay higher rates for such plans. For a significant amount of time,
5 Plaintiff and Class members are unable to access a 3G network and cannot consistently get 3G
6 connectivity and data transfer rates despite Defendants uniformly assertions of this characteristic and
7 selling it to them at a premium.

8 55. By their actions, Defendants are disseminating uniform advertising concerning their
9 products and services, which by its nature is unfair, deceptive, untrue, or misleading within the
10 meaning of California Business & Professions Code §17500, *et. seq.*

11 56. Such assertions are likely to deceive, and continue to deceive, the consuming public
12 for the reasons detailed above.

13 57. The above-described false, misleading, and deceptive assertions Defendants
14 disseminated continues to have a likelihood to deceive in that Defendants have failed to disclose the
15 true and actual performance of the Google Phone based on its interaction with T-Mobile's
16 insufficient 3G infrastructure. Defendants have failed to instigate a public information campaign to
17 alert consumers of these deficiencies, which continues to create a misleading perception of the
18 Google Phone's speed, performance and enhanced network and operating connectivity.

19 58. In making and disseminating the statements alleged herein, Defendants should have
20 known their advertisements were untrue and misleading in violation of California Business &
21 Professions Code § 17500, *et seq.* Plaintiff and the Class members based their decisions to purchase
22 the Google Phone in substantial part on Defendants' misrepresentations and omitted material facts.
23 The revenues to Defendants attributable to products sold in those false and misleading assertions
24 amount to millions of dollars for the Google Phone and the required service plans. Plaintiff and
25 Class members were injured in fact and lost money or property as a result. Plaintiff and the Class
26 suffered injury in fact and lost money and property as a result of Defendants' unlawful conduct.

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- 1 c. Advertising goods and services with the intent not to sell them as advertised (Cal.
- 2 Civ. Code § 1770(a)(9));
- 3 d. Representing a transaction involves rights, remedies or obligations that it does not
- 4 have or involve (Cal. Civ. Code § 1770(a)(14)); and
- 5 e. Representing the goods and services have been supplied in accordance with a
- 6 previous representation when they have not (Cal. Civ. Code § 1770(a)(16)).

7 65. Pursuant to Section 1782 of the CLRA, Plaintiff is notifying Defendants in writing of
8 the particular violations of Section 1770 of the CLRA (the Notice) and is demanding, among other
9 things, that Defendants cease engaging in the wrongful conduct alleged herein and that Defendants
10 provide restitution to California residents who are beneficiaries of Defendant's Gift Certificates.
11 Plaintiff is sending Notice by means of by certified mail, return-receipt requested, to Defendants at
12 their principal places of business concurrent with the service of this Complaint. If Defendants fail to
13 respond to Plaintiff's demand within thirty days of receipt of the Notice, pursuant to section 1782(a)
14 and (d) of the CLRA, plaintiff will amend this Complaint to request statutory damages, actual
15 damages, plus punitive damages, interest and attorney's fees. Plaintiff requests that this Court enter
16 such orders or judgments as may be necessary to restore any person in interest any money which
17 may have been acquired by means of such unfair business practices, and for such relief as provided
18 in Civil Code § 1780 and the Prayer for Relief.

19 66. Plaintiff and the Class suffered injury in fact and lost money and property as a result
20 of Defendants' unlawful conduct.

21 67. Pursuant to Cal. Civ. Code § 1780(a)(2), Defendants should be enjoined from
22 continuing to employ the unlawful methods, acts and practices alleged herein to prevent any future
23 harm to Plaintiff and other members of the Class.

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FOURTH CAUSE OF ACTION
BREACH OF EXPRESS WARRANTY AND IMPLIED WARRANTY OF
MERCHANTABILITY

(By Plaintiff and the Class as Against All Defendants)

68. Plaintiff incorporates by reference each and every preceding paragraph as though fully set forth herein.

69. Plaintiff and Class members purchased the Google Phone and used them for their ordinary and intended purpose of providing consistent, reliable and sustained access to the supposedly faster 3G network, and entered into agreements with Google and/or T-Mobile or their agents and received uniform warranties in connection with the purchase of such phones.

70. The Google Phone cannot perform its ordinary and represented purpose because it does not provide consistent connection to T-Mobile's 3G wireless network in combination with using the Google Phone. Whether the problem is with the Google Phone itself or with T-Mobile's 3G, or a combination of the two, is irrelevant as to whether the warranty was breached.

71. Moreover, Defendants do not provide adequate customer service for Google Phone customers who are forced to wait for numerous days to receive a response to an email inquiry, which is the only way to contact Google, and during that time, their Google Phone can not make use of T-Mobile's 3G wireless network as originally promised.

72. When Defendants placed the Google Phone into the stream of commerce, they knew, reasonably should have known, or were obligated to understand that the intended and ordinary purpose of their phone was to provide consistent connectivity to a supposedly faster 3G network and that users would expect regular 3G connectivity and materially faster data transfer rates.

73. Plaintiff and the Class purchased their Google Phone with the reasonable expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G network. Defendants' assertions that the Google Phone has 3G network capability constitutes a warranty that the product would operate as promoted during their useful life, upon which Plaintiff and the Class reasonably acted. The Google Phone is not fit for its warranted, advertised, ordinary and intended

1 purpose of providing reliable 3G network connectivity and is in fact defective, or would not pass
2 without objection in the trade or industry in terms of being unable to provide consistent and reliable
3 3G network connectivity. This defect has manifested for all Plaintiff and Class members as they do
4 not consistently receive 3G network connectivity using their Google Phone.

5 74. Defendants' breach of the warranty described above also constitutes a violation of
6 Cal. Civ. Code §1792, *et seq.*

7 75. Plaintiff and the Class request relief as described below as appropriate for this Cause
8 of Action.

9 **FIFTH CAUSE OF ACTION**

10 **VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT**

11 **(By Plaintiff and the Class as Against All Defendants)**

12
13 76. Plaintiff incorporates by reference each and every preceding paragraph as though
14 fully set forth herein.

15 77. Plaintiff and Class members are "consumers" within the meaning of the Magnuson-
16 Moss Act.

17 78. Defendants are "suppliers" and "warrantors" within the meaning of the Magnuson-
18 Moss Act. The Google Phone is a "consumer product" within the meaning of the Magnuson-Moss
19 Act.

20 79. Defendants' written affirmations of fact, promises and/or descriptions as alleged
21 herein are each a "written warranty" as to the Google Phone providing consistent 3G network
22 connectivity and/or there exists an implied warranty for the sale of such products within the meaning
23 of the Magnuson-Moss Act.

24 80. For the reasons detailed above, Defendants breached these express and implied
25 warranties, as the Google Phone did not perform as Defendants represented or were not fit for their
26 intended use. Defendants have refused to remedy such breaches, and their conduct caused Plaintiff
27 and members of the Class to suffer economic loss and injury in fact.
28

1 81. The amount in controversy meets or exceeds the sum or value of \$50,000 (exclusive
2 of interest and costs) computed on the basis of all claims to be determined in this suit.

3 82. As a result of Defendants' breaches of warranty, Plaintiff and Class members have
4 sustained economic losses and injury in fact, in an amount to be determined at trial.

5
6 **SIXTH CAUSE OF ACTION**

7 **NEGLIGENCE**

8 **(By Plaintiff and the Class as Against All Defendants)**

9 83. Plaintiff incorporates by reference each and every preceding paragraph as though
10 fully set forth herein.

11 84. At all times mentioned herein, Defendants undertook a duty to properly manufacture,
12 design, test, produce, assemble, inspect, distribute, market, package, prepare for use and sell the
13 Google Phone to function as advertised and represented on T-Mobile's 3G network. Defendants'
14 duties alleged herein applied to Plaintiff and the Class.

15 85. The Google Phone, either alone or by acting in combination with T-Mobile's 3G
16 network with which it exclusively operates, was negligently tested, manufactured, built and/or
17 designed, which causes Plaintiff and the Class to fail to receive reliable and sustained connectivity to
18 T-Mobile's 3G network.

19 86. Moreover, Defendants did not provide adequate customer service for Google Phone
20 customers who are forced to wait for numerous days to receive a response to an email inquiry, which
21 is the only way to contact Google, and during that time, their Google Phone can not make use of T-
22 Mobile's 3G wireless network as originally promised.

23 87. Defendants, by the conduct detailed above, breached their duty to properly
24 manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use, or
25 sell the Google Phone to function as advertised.

26 88. Defendants knew or should have known that Plaintiff and the Class would suffer
27 foreseeable injuries and harm as a result of Defendants' failure to exercise reasonable ordinary care
28 as alleged. Defendants' negligence was a direct, substantial, legal and proximate cause of the

1 injuries, damages, harm and economic loss that Plaintiff and the Class suffered, and will continue to
2 suffer, as described herein.

3 89. As a proximate result of Defendants' negligence, Plaintiff and the Class suffered
4 separate economic damages and loss from the purchase of the Google Phone itself, as alleged herein.

5
6 **SEVENTH CAUSE OF ACTION**

7 **NEGLIGENT MISREPRESENTATION**

8 **(By Plaintiff and the Class as Against All Defendants)**

9
10 90. Plaintiff incorporates by reference each and every preceding paragraph as though
11 fully set forth herein.

12 91. Defendants represented that the Google Phone and the required T-Mobile's 3G
13 service plan would provide customers with sustained and reliable connectivity to the 3G network,
14 thereby obtaining materially faster data transfer rates.

15 92. Defendants had no reasonable grounds for believing their representations were true
16 because the Google Phone has consistently had issues with providing reliable 3G network
17 connectivity, and T-Mobile's 3G network could not provide consistent 3G network connectivity to
18 customers who purchased service for their Google Phone 3G, based on T-Mobile's overburdened
19 and under-supported 3G network. Defendants should have known, or had a duty to learn, about the
20 true facts that contradicted their representations.

21 93. In making these representations to Plaintiff and the Class, Defendants intended to
22 induce Plaintiff and the Class to purchase the Google Phone.

23 94. At all times herein, Plaintiff and the Class were unaware of the falsity of Defendants'
24 statements.

25 95. Plaintiff and the Class reasonably acted in response to the statements made by
26 Defendants when they purchased a Google Phone and were required to also sign up for T-Mobile's
27 3G network service plan and other increased costs.

96. As a proximate result of Defendants' negligent misrepresentations, Plaintiff and Class members purchased a Google Phone and are locked into a two-year service plan with T-Mobile for 3G network connectivity that is spotty at best and for which Plaintiff and Class members pay a premium.

1 suppressed the material fact that T-Mobile's 3G network could not handle the influx of users and
2 bandwidth demands as a result of the marketing and sale of the Google Phone.

3 102. When Defendants made the foregoing misrepresentations, they knew or recklessly
4 disregarded them to be false and/or had no reasonable basis for believing them to be true.

5 103. The misrepresentations and concealment of material facts were made and conducted
6 by Defendants with the intent to mislead and induce Plaintiff and the Class to purchase the Google
7 Phone and the required T-Mobile 3G service plan, and had the effect of doing so.

8 104. In affirmative response to the false, fraudulent and/or willful misrepresentations and
9 concealment of material facts by Defendants, Plaintiff and Class members were induced to and did
10 purchase the Google Phone and were required to pay for a premium T-Mobile 3G service plan.

11 105. Plaintiff and other Class members reasonably based their decision to purchase these
12 phones and plans on the misrepresentations and omissions of material fact by Defendants, and
13 suffered economic losses and were injured in fact.

14 106. Defendants' acts were done willfully, maliciously, with fraudulent intent and with
15 deliberate disregard of the rights of Plaintiff and the Class. Accordingly, Plaintiff and the Class
16 request appropriate relief as described below.

17
18 **NINTH CAUSE OF ACTION**

19 **COMMON COUNTS AND UNJUST ENRICHMENT**

20 **(By Plaintiff and the Class as Against All Defendants)**

21
22 107. Plaintiff incorporates by reference each and every preceding paragraph as though
23 fully set forth herein.

24 108. Defendants have benefited from their unlawful conduct as detailed above by
25 receiving millions of dollars in revenues and profits derived from the sale of the Google Phone and
26 access to T-Mobile's 3G network. Defendants appreciated the benefit of the receipt of such
27 revenues and profits.

1 109. Because Defendants were unjustly enriched and have received this excessive revenue
2 at the expense of Plaintiff and the Class based on false and misleading statements regarding the
3 Google Phone, its capacity, and its ability to perform its stated functions, it would be inequitable for
4 Defendants to retain the benefits they gained from purchases by Plaintiff and the Class of the Google
5 Phone and the exclusive, required service plans from T-Mobile.

6 110. Plaintiff and other Class members are entitled to the establishment of a constructive
7 trust consisting of the benefit conferred upon Defendants in the form of the excess revenues and
8 profits derived from the sale of these products and services and the return of any monies by which
9 Defendants were unjustly enriched.

10
11 **TENTH CAUSE OF ACTION**

12 **DECLARATORY RELIEF**

13 **(By Plaintiff and the Class as Against All Defendants)**

14
15 111. Plaintiff incorporates by reference each and every preceding paragraph as though
16 fully set forth herein.

17 112. An actual controversy over which this Court has jurisdiction now exists between
18 Plaintiff, the Class and Defendants concerning their respective rights, duties and obligations for
19 which Plaintiff desires a declaration of rights under the applicable claims asserted herein.

20 113. Plaintiff and Class members may be without adequate remedy at law, rendering
21 declaratory relief appropriate in that:

- 22 a. damages may not adequately compensate the Class members for the injuries suffered,
23 nor may other claims permit such relief;
24 b. the relief sought herein in terms of ceasing such practices or providing a full and
25 complete corrective disclosure may not be fully accomplished by awarding damages;
26 and

1 c. if the conduct complained of is not enjoined, harm will result to Class members and
2 the general public because Defendants' wrongful conduct is continuing and persons
3 are entitled to the direct monies taken from them.

4 114. Plaintiff requests a judicial determination and declaration of the rights of Class
5 members, and the corresponding responsibilities of Defendants. Plaintiff also requests an order
6 declaring Defendants are obligated to pay restitution to all members of the Class as appropriate and
7 otherwise pay over all funds Defendants wrongfully acquired either directly or indirectly because of
8 the illegal conduct by which Defendants were unjustly enriched.

9 115. A judicial declaration is necessary and appropriate at this time under the
10 circumstances so the parties may ascertain their respective rights and duties.

11 116. Class members will be irreparably harmed unless the unlawful actions of the
12 Defendants are enjoined, because Defendants will continue to advertise their false and misleading
13 statements regarding the Google Phone. To that end, Plaintiff requests an order compelling
14 disclosures and/or disclaimers on the outside of the Google Phone boxes and/or T-Mobile service
15 plan contracts. Absent injunctive relief, Defendants will continue to market, distribute, and sell the
16 Google Phone to the detriment of their customers.

17 117. Plaintiff has not previously asked for such injunctive relief from the Court.
18

19 **PRAYER FOR RELIEF**

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

- 23 1. An order certifying this case as a class action and appointing Plaintiff and her
24 counsel to represent the Class;
25 2. A temporary, preliminary and/or permanent order for injunctive relief
26 enjoining Defendants from pursuing the policies, acts and practices
27 complained of herein;
28

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Santa Monica, California 90405

3. A declaratory judgment stating that Defendants may not pursue the policies, acts and practices complained of herein;
4. A temporary, preliminary and/or permanent order for injunctive relief requiring Defendants to undertake an informational campaign to inform members of the general public as to the wrongfulness of Defendants' practices;
6. An order requiring disgorgement of Defendants' ill-gotten gains by requiring the payment of restitution to Plaintiff and members of the Class, as appropriate for the particular Causes of Action;
7. Reasonable attorneys' fees;
8. All related costs of this suit;
9. Pre- and post-judgment interest; and
10. Such other and further relief as the Court may deem necessary or appropriate.

DATED: January 29, 2010

Attorneys for Plaintiff, Mary McKinney:

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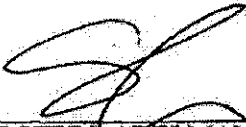
JURY TRIAL DEMANDED

Plaintiff demands a jury trial on all triable issues.

DATED: January 29, 2010

Attorneys for Plaintiff, Mary McKinney:

By:


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EXHIBIT A

Nexus One Phone - Terms of Sale

Terms of Sale for Nexus Device *Effective: November 17, 2009* [Print](#)

The following Terms of Sale ("Terms") govern the relationship between you and Google, and once concluded, form a legally binding contract in relation to your purchase of a Nexus wireless handheld device and any associated accessories whether packaged with the handheld device or sold separately (together referred to as the "Device"). "Google" means Google Inc., a Delaware corporation whose principal place of business is at 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States.

To place an order for the Device, you must first agree to these Terms by checking the box indicating your acceptance of these Terms. By checking the box, you agree that these Terms apply to your order, so please read these Terms carefully. Your order represents an offer to purchase the Device from Google, which is accepted by Google upon shipment of the Device, as explained below.

You understand that the manufacturer of the Device is HTC Corporation, whose principal place of business is at 23 Xinghua Road, Taoyuan 330, Taiwan, R.O.C. ("HTC").

Account Creation; Number of Devices Purchased

To place an order for the Device on this site, you must register for a free Google Checkout account if you do not already have one. You agree to abide by the applicable [Google Checkout Terms of Service](#).

You agree that you may place a maximum of five (5) orders for Nexus handheld devices. If you order more than one Nexus handheld device, your order comprises a series of offers for each device individually.

Ordering Devices

By placing an order for a Device, you are making an offer to purchase the Device from Google. After you place an order for a Device, you will receive an email confirming receipt of the order and containing order details. Any email confirmation from Google acknowledging receipt of your order is simply an acknowledgement that your order has been received by Google and does not indicate acceptance of your order. Please note that Google reserves the right to reject your offer to purchase the Device.

Google's shipment of the Device will constitute Google's acceptance of your offer to purchase the Device. Any delivery dates provided by Google or a delivery agent in an email confirming shipment are estimates only and are not guaranteed.

You agree that Google will authorize the credit card, debit card or other payment method specified by you in the amount of your order at the time the order is placed. You authorize Google to charge the credit card, debit card or other payment method specified by you in the amount of your order at the time the order is shipped. All prices on the website are displayed in United States dollars. If you are making a purchase with a credit card issued in another currency, you agree that the amount charged to your credit card is subject to change due to currency fluctuations between the time you place your order and the time your credit card is charged. Google will have no

liability for any claim arising from such currency fluctuations or any additional fees charged by your credit card issuer.

Product Information

You understand that the Device will only work on GSM networks and that 3G network availability may depend on your mobile carrier. Please contact your mobile carrier to confirm that it offers a GSM network and that the Device's technical specifications are compatible with 3G coverage in your area.

Google tries to ensure that all Device product information and prices appearing on the website are correct at the time you place your order, however, Google is not responsible for any errors. If an error has been discovered in the price of the Device you have ordered, we will inform you as soon as reasonably possible, and you will be given the option of re-confirming your order at the correct price or cancelling your order.

Sales Tax; Shipping and Handling

If the Device is shipped to you in the United States, you may be charged sales tax depending on the address to which the Device is delivered. There is an additional charge for shipping and handling, unless indicated at the time of ordering that you have qualified for free shipping.

If the Device is shipped to you outside the United States, you may be subject to taxes, customs duties and fees levied by the destination country ("Import Charges"). You agree to be the importer of record in the destination country and that you are responsible for all Import Charges. By placing your order, you authorize Google and/or the Device manufacturer to designate a courier to clear the Device through Customs and pay the Import Charges on your behalf. You agree that the courier will charge you separately for the payment of these Import Charges. You agree that any Customs Declarations will be made in your name and on your behalf by the designated courier. A list of estimated Import Charges that may apply can be found at:

<http://www.google.com/support/android/bin/answer.py?answer=166585>. Please be advised that these are estimated, not exact, fees that are subject to change from time to time, and that your actual Import Charges will be determined and charged to you separately by the courier.

EXPORT RESTRICTIONS. THE DEVICE MAY BE SUBJECT TO UNITED STATES EXPORT LAWS AND REGULATIONS. YOU MUST COMPLY WITH ALL DOMESTIC AND INTERNATIONAL IMPORT AND EXPORT LAWS AND REGULATIONS THAT APPLY TO YOUR USE OF THE DEVICE. THESE LAWS INCLUDE RESTRICTIONS ON DESTINATIONS, USERS AND END USE.

Maintaining Carrier Service

If you choose to enroll in a carrier's wireless service plan, you must agree to the carrier's terms and conditions, which will be presented during the enrollment process.

If you do not wish to keep the wireless plan, it is your responsibility to contact the carrier to cancel your wireless plan account. You should contact the carrier directly regarding any activation fees, monthly usage costs, taxes, and/or early termination fees that may be owed.

You agree to pay Google an equipment subsidy recovery fee (the "Equipment Recovery Fee") equal to the difference between the full price of the Nexus handheld device without service plan and the price you paid for the

Nexus handheld device if you cancel your wireless plan prior to 120 days of continuous wireless service. For example, if the full price of the Nexus handheld device without service plan was \$529 USD and the price you paid for the Nexus handheld device was \$179 USD with a service plan, the Equipment Recovery Fee you pay will be \$350 USD in the event you cancel within the first 120 days of carrier service. The Equipment Recovery Fee is equal to the line item in your confirmation email setting forth the discount on the full priced Nexus handheld device related to your carrier service plan activation. You authorize Google to charge the Equipment Recovery Fee directly to your credit card, or other payment method used to purchase the Nexus handheld device, upon cancellation of your wireless plan. You will not be charged the Equipment Recovery Fee if you return your Nexus handheld device to Google within the 14 day Return Policy period as set forth below.

You agree that the Equipment Recovery Fee is not a penalty but is for liquidated damages Google will incur as a result of such cancellation. These damages may include, but are not limited to, loss of compensation and administrative costs associated with such cancellation or changing of wireless service provider(s), market changes, and changes in ownership. **Please note that the Equipment Recovery Fee is imposed by Google and not your chosen carrier and is in addition to any early termination fees that may be charged by your chosen carrier in connection with termination of your wireless plan prior to fulfillment of your chosen carrier's service agreement term.**

Return/Refund Policy; Right of Cancellation

If you are not satisfied with your Device for any reason, you have up to fourteen (14) days from the date the Device is delivered to you to cancel these Terms with Google (Please note that residents of California, USA have up to thirty (30) days from the date the Device is delivered to cancel these Terms). In order to cancel these Terms and return your Device, please follow the detailed instructions on our Return Page at <http://www.google.com/support/android/bin/answer.py?answer=167258> or call the HTC customer care center at the number listed in the Service & Repair section of the HTC website (<http://www.htc.com>). An HTC customer care agent will provide you with an RMA (Returned Merchandise Authorization) ticket number and provide instructions for returning the Device. If you cancel these Terms, Google will refund the full amount of your initial payment, minus the initial shipping charge and any applicable fees set forth in these Terms. You agree to return the Device in its original packaging and in like-new condition with all of the original included accessories. You agree to pay all costs of return shipping as specified by the Return instructions.

You may not cancel this contract and return a Device that has been engraved with a personal message of any sort. Due to costs associated with processing the return and refurbishing the returned Device, you will be charged a one-time fee of \$45 USD (which will be deducted from your refund) if you decide to cancel this contract and return your Nexus device within the 14 day period. A refurbishing fee of \$15 USD will apply to the return of separately-purchased accessories. Additional deductions to your refund may be made for damage to the Device or missing components. You authorize Google to deduct these amounts from your refund in the event you cancel the contract and return your Device within the 14 day period. Please note that you will not be charged any refurbishing fees for the return of Device in its original condition and in unopened packaging within the 14 day period.

Due to costs associated with processing a return and refurbishing the returned Device, you will be charged a one-time restocking/refurbishing fee of \$45 USD (which will be deducted from your refund) if you decide to cancel these Terms and return your Device within the return period. Additional deductions to your refund may be made for damage to the Device or missing components. You authorize Google to deduct these amounts from

your refund in the event you cancel these Terms and return your Device within the fourteen day period. Please note that you will not be charged the restocking/refurbishing fee if you return the Device in its original condition and in unopened packaging within the fourteen day period.

You may not cancel these Terms and return a Device that has been engraved with a personal message of any sort regardless of where you reside.

Devices that were not successfully delivered to you will be returned to Google and Google will issue a refund to the credit card or other payment method originally charged for the order. The amount of the refund will be the original purchase amount, minus shipping charges and any refurbishing fees associated with engraving. Specifically, returned delivery of Devices that have been engraved with a personal message will result in a \$45 USD engraving fee.

Please be advised that returning the Device does not cancel your wireless plan, so you must contact any wireless carrier (and any other applicable service provider(s)) directly to cancel service(s). Your service provider may charge you for usage and other fees that Google does not control.

Special Note for Residents of the European Union: Google's return policy is in accordance with your right to cancel a contract formed at a distance under the EU Distance Selling Directive. In order to exercise your right to cancel these Terms, please follow the procedures at <http://www.google.com/support/android/bin/answer.py?answer=167258> describing the fourteen day Return Policy. Residents of the EU will not be charged the \$45 USD restocking/refurbishing fee when cancelling these Terms within the fourteen-day period and will be refunded the shipping fees paid for initial delivery of the Device. With the exception of the restocking/refurbishing fee and the refund of initial shipping charges, all other terms related to this Return Policy apply to your cancellation of these Terms. Nothing within these Terms affects your rights under law.

Privacy

You agree to the collection and use of your personal information provided hereunder in accordance with the Google Phone Webstore Privacy Policy provided at http://www.google.com/phone/static/en_US-privacy_policy.html.

Warranties; Disclaimer of Warranties

You agree that Google is not the manufacturer, but the seller, of the Device. You acknowledge that HTC is the manufacturer of the Device and provides the Limited Warranty for repairs and service of the Device. Please refer to <http://www.google.com/support/android/bin/answer.py?answer=166519> or the warranty card in the Device package for details on the HTC Limited Warranty terms and how to make a claim under the HTC Limited Warranty. If you are a purchaser of the Device in the EU, you are entitled to a two-year warranty for parts, labor, and service. If you are a purchaser of the Device outside of the EU, you are entitled to a one-year warranty for parts, labor, and service. These warranties are in addition to and do not affect your legal rights as a consumer.

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

INFRINGEMENT.**Limitation of Liability**

YOU EXPRESSLY UNDERSTAND AND AGREE THAT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, GOOGLE AND ITS SUBSIDIARIES AND AFFILIATES (COLLECTIVELY, "GOOGLE PARTIES") SHALL NOT BE LIABLE TO YOU UNDER ANY THEORY OF LIABILITY (WHETHER CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE) FOR ANY INDIRECT, INCIDENTAL, SPECIAL CONSEQUENTIAL OR EXEMPLARY DAMAGES THAT MAY BE INCURRED BY YOU IN CONNECTION WITH THE DEVICE OR THESE TERMS, INCLUDING ANY LOSS OF DATA, WHETHER OR NOT A GOOGLE PARTY OR ITS REPRESENTATIVES HAVE BEEN ADVISED OF OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF ANY SUCH LOSSES ARISING. YOU EXPRESSLY UNDERSTAND AND AGREE THAT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE GOOGLE PARTIES' TOTAL LIABILITY IN CONNECTION WITH THE DEVICE OR THESE TERMS WILL NOT EXCEED THE AMOUNT ACTUALLY PAID BY YOU TO GOOGLE UNDER THESE TERMS.

Despite the limitations above, Google does not in any way limit its liability to you for death or personal injury caused by Google's negligence.

General Legal Terms

Governing Law; Jurisdiction. These Terms and your relationship with Google under these Terms shall be governed by the laws of the State of California without regard to its conflict of laws provisions. You and Google agree to submit to the exclusive jurisdiction of the courts located within the county of Santa Clara, California to resolve any legal matter arising from these Terms. Notwithstanding this, you agree that Google shall still be allowed to apply for injunctive remedies (or an equivalent type of urgent legal relief) in any jurisdiction. Certain laws of the jurisdiction in which you reside may confer rights and remedies and imply terms into these Terms that cannot be excluded. Those rights, remedies, and implied terms are not excluded by these Terms. To the extent that the relevant laws permit Google to limit their operation, Google's liability under those laws will be limited at its option, to the cost of replacing the goods, acquiring the equivalent goods or having the goods repaired.

Changes to the Terms. The Terms in effect at the time you place an order for the Device will apply to such order. Google reserves the right to make changes to these Terms from time to time, and any such changes will apply to future orders. Notwithstanding the foregoing, you agree that Google may change these Terms applicable to an order to the extent such change is required by law or government authority.

No Assignment. You may not assign the benefit of these Terms or otherwise subcontract or transfer any of your rights or obligations hereunder, without the prior written approval of Google. Google may assign the benefit or otherwise sub-contract or transfer its rights and obligations hereunder, to any third party without notice to your consent.

Events Beyond Google's Reasonable Control. Google will not be responsible for any delay or failure to comply with these Terms if the delay or failure arises from any cause which is beyond Google's reasonable control, including but not limited to, strikes, labor disputes, regulations or orders of governmental authorities, civil disorder, disasters, acts of war, acts of God, fires, flood or other emergency conditions.

1/19/2010

Nexus One Phone - Terms of Sale

No Waiver. You agree that if Google does not exercise or enforce any legal right or remedy which is contained in the Terms (or which Google has the benefit of under any applicable law), this will not be taken to be a waiver of Google's rights and that those rights or remedies will still be available to Google.

Severability. If any court of law, having the jurisdiction to decide on this matter, rules that any provision of the Terms is invalid, then that provision will be removed from the Terms without affecting the rest of the Terms. The remaining provisions of the Terms will continue to be valid and enforceable.

Entire Agreement. These Terms constitute the entire legal agreement between you and Google and govern your purchase of the Device and completely replaces any prior agreements between you and Google in relation to your purchase of the Device.

[Print](#)

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EXHIBIT B

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January 13, 2010

Hey Google, Anybody Home?

By JENNA WORTHAM and MIGUEL HELFT

Google's celebrated algorithms may power the Web's most popular search engine, but they have not yet been programmed to answer a call when a customer has a problem.

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

Unlike other phones that run on Android, like the Motorola Droid or the T-Mobile G1, the Nexus One was developed and branded by Google and is sold directly by the company to customers.

But ever since the phone went on sale Jan. 5, customer forums have been filled with a cacophony of gripes about the Nexus One. And Google, more accustomed to providing minimal support for its free services, has been unprepared to deal with the higher service expectations of customers who are paying as much as \$529 for its high-end smartphone.

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

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

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

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

"So far, I have yet to hear from an actual person," said Mr. Konathala, who first contacted Google for help on Jan. 6. "All I've gotten are canned replies."

1/15/2010

Google Hurt by Inadequate Customer S...

Katie Watson, a Google spokeswoman, said no one was available to speak about the service problems. But in an e-mail statement, she said, "Solving customer support issues is extremely important to us."

She added that Google was working to address problems quickly. "We're flexible and prepared to make changes to our processes and tools, as necessary, for an optimal customer support experience," she wrote.

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

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

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

A spokesman for T-Mobile, David Henderson, said that although the Nexus One was not being sold through T-Mobile retail stores, sales representatives knew enough about the family of Android-powered devices to help customers with some questions.

T-Mobile, which addressed the connectivity problems in its support forums, said it was working with HTC and Google to determine the root cause of the problems some Nexus One users were reporting.

Google is not unfamiliar with the business of charging for products. More than a million businesses pay to place ads on Google's search engine or on Google's vast network for publishing partners.

But the Nexus One is Google's first foray into selling hardware directly to consumers.

Relying heavily on automated responses and Internet forums to handle customer service queries may not be sufficient for that kind of device, said Soumen Ganguly, a principal at Altman Vilandrie & Company, a Boston consulting firm that specializes in the communications industry.

"Selling someone a piece of consumer electronics is a very different ballgame," Mr. Ganguly said. "If you're a cellphone user and this is your primary phone, waiting one to two days for a response is a long time."

1/15/2010

Google Hurt by Inadequate Customer S...

With the Nexus One, Google aims to extend the reach of its Android operating system for mobile phones. And it hopes to eventually change the retail model of the cellphone market in the United States by becoming a major seller of Android phones made by various manufacturers.

But if that is the goal, it will need to impose a better customer support strategy, Mr. Ganguly said. "Right now, they're leaving troubleshooting up to the customer," he said.

Some analysts said the early missteps were fixable. But a black eye from customer complaints could hurt Google's longer-term goals.

"Having a consumer backlash because of their lack of customer support is not going to help its cause," said Youssef Squali, an analyst with Jefferies & Company.

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