

1 Joseph E. Addiego III (CA SBN 169522)  
 2 JAMES C. GRANT (*Pro hac vice*)  
 3 DAVIS WRIGHT TREMAINE LLP  
 4 505 Montgomery Street, Suite 800  
 5 San Francisco, CA, 94111-6533  
 Telephone: (415) 276-6500  
 Facsimile: (415) 276-6599  
 Email: joeaddiego@dwt.com

6 Attorneys for Defendant  
 7 T-MOBILE USA, INC.

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN JOSE DIVISION

11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

DAVIS WRIGHT TREMAINE LLP

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. CV 10-01177 JW

**DECLARATION OF ANDREA BACA IN  
 SUPPORT OF T-MOBILE'S MOTION  
 TO COMPEL ARBITRATION and  
 MOTION TO DISMISS**

Date: November 1, 2010  
 Time: 9:00 a.m  
 Dept.: 8

The Honorable James S. Ware

Andrea Baca declares and states as follows:

1. I am employed as a Paralegal in the Legal Affairs Department of T-Mobile  
 USA, Inc. ("T-Mobile"), in Albuquerque, New Mexico. During the course of my  
 employment with T-Mobile, I have also worked as an Executive Customer Relations  
 Specialist in T-Mobile's Customer Care group.

2. I make this declaration on the basis of personal knowledge and the business  
 records of T-Mobile, and I am competent to testify to the matters stated herein.

1           **A. Ms. McKinney's Activation of T-Mobile Service**

2           3. According to T-Mobile's records, Mary McKinney originally activated two  
3 lines of T-Mobile service on March 6, 2002, through an Internet dealer, InPhonic, Inc. (the  
4 "25" and "18" lines on her account).<sup>1</sup>

5           4. On December 6, 2003, Ms. McKinney added three additional lines on her  
6 account, in a transaction at a T-Mobile retail store in Deptford, New Jersey (the "08," "03,"  
7 and "79" lines). Since this time, Ms. McKinney has maintained all five lines of service.

8           5. Ms. McKinney entered into contracts with T-Mobile each time she activated a  
9 line of service on her account. All customers who purchased T-Mobile service through  
10 InPhonic's website were required to accept T-Mobile's Terms and Conditions of service  
11 ("Terms & Conditions"). Likewise, customers who activate service directly with T-Mobile  
12 – whether in a T-Mobile store, by calling T-Mobile Customer Care or through the T-Mobile  
13 website – must also accept the Terms & Conditions.

14           **B. Ms. McKinney's Acceptance of Handset Upgrade Offers and**  
15           **Contract Extensions**

16           6. T-Mobile's records reflect that Ms. McKinney has accepted contract  
17 extensions and renewals on the various lines on her account at least 63 times since she began  
18 service in March 2002. In most instances, Ms. McKinney agreed to extend her T-Mobile  
19 contract because she accepted offers to receive handset upgrades at discounted prices.

20           7. T-Mobile offers handset upgrades to reward customer loyalty, allowing them  
21 to obtain new handsets at discounted prices. For example, long-term customers may be  
22 entitled to receive new handsets at no charge, if they agree in exchange to extend their  
23 T-Mobile contracts for a line of service for two years. In other instances, T-Mobile may  
24 offer a significantly discounted price on handsets (*e.g.* for more advanced "smart phones"),  
25 again with contract extensions.

26           <sup>1</sup> To protect Ms. McKinney's privacy, I will not include the full phone numbers for the lines of  
27 service on her account, but will refer to them by the last two digits of each wireless phone number.  
28 Ms. McKinney has also changed phone numbers several times. The references I use in this  
declaration are to the current numbers for each line of service on the account, because it would be

1           8.       For many of her 63 upgrades, Ms. McKinney accepted partial discount offers,  
2 agreeing to contract extensions in exchange for discounts on handset prices.

3           9.       In the 18-month period prior to January 5, 2010 (the date when the Nexus One  
4 handset was introduced), Ms. McKinney took advantage of handset upgrade offers 21 times.  
5 She obtained phone upgrades on July 10, 2008; September 28, 2008; November 23, 2008;  
6 December 5, 2008 (two phones); February 12, 2009; February 24, 2009; March 15, 2009;  
7 March 18, 2009; March 25, 2009; April 6, 2009; May 20, 2009; May 26, 2009; July 10,  
8 2009; August 13, 2009; October 5, 2009 (two phones); October 14, 2009; November 10,  
9 2009; November 16, 2009; and January 2, 2010.

10           **C.       Ms. McKinney's Repeated Acceptance of the T-Mobile Terms &**  
11           **Conditions of Service and the Arbitration Provision**

12           10.       Each time she accepted a discount offer, Ms. McKinney was required to  
13 accept the T-Mobile Terms & Conditions. In all instances when customers renew or extend  
14 their T-Mobile service agreements in response to handset upgrade offers or for other reasons,  
15 T-Mobile asks customers to confirm that they accept the Terms & Conditions that govern  
16 their service. Attached hereto as *Exhibit A* is a true and correct copy of the T-Mobile Terms  
17 & Conditions of service that are applicable to Ms. McKinney's account.

18           11.       Because Ms. McKinney made purchases, took upgrade offers and accepted  
19 contract extensions through different sales channels, she accepted the T-Mobile Terms &  
20 Conditions in a variety of ways.

21           12.       When activating lines of service in a company-owned store, T-Mobile's  
22 practice is that customers are required to sign written Service Agreements. When Ms.  
23 McKinney activated three lines of service in the Deptford, New Jersey T-Mobile store on  
24 December 6, 2003, she would have signed a Service Agreement. Attached as *Exhibit B* is a  
25 true and correct copy of a Service Agreement used in T-Mobile stores in 2003.

26  
27  
28 \_\_\_\_\_  
confusing to recount and attempt to track all the number changes on the various lines.

1           13.     On occasions when customers obtain discount handset upgrades by calling  
2 T-Mobile Customer Care, they are required to affirmatively indicate in response to scripted  
3 queries that they accept the contract extension and the Terms & Conditions.

4           14.     When Ms. McKinney performed handset upgrade transactions in T-Mobile  
5 stores, she would have been required to sign agreements – again accepting the Terms &  
6 Conditions – either in hardcopy or by using an electronic signature-capture device. Ms.  
7 McKinney’s in-store upgrade transactions in 2009-10 occurred at stores located in  
8 Philadelphia, Pennsylvania and in North Carolina.

9           15.     For Internet transactions on T-Mobile’s website, [www.t-mobile.com](http://www.t-mobile.com), Ms.  
10 McKinney had to indicate her acceptance of the Terms & Conditions by clicking a check  
11 box. The Terms & Conditions are available on T-Mobile’s website, [www.t-mobile.com](http://www.t-mobile.com)  
12 (link to Terms & Conditions at the bottom of each page).

13           **D.     Ms. McKinney Was Allowed a Trial Period and Used It Repeatedly**  
14           **to Return Handsets and Cancel Upgrades.**

15           16.     Each time Ms. McKinney activated a T-Mobile line of service or took a  
16 discount handset offer, she was allowed a trial period of at least 14 days to review the Terms  
17 & Conditions and try out the service and handset. The trial period is reflected in paragraph 4  
18 of the Terms & Conditions. *See Exhibit A, ¶ 4; see also Exhibit B, at 1 (also mentioned in*  
19 *Service Agreement).*

20           17.     The trial period under T-Mobile’s Terms & Conditions allowed that if Ms.  
21 McKinney was dissatisfied for any reason after activating a line of service, purchasing a new  
22 phone or otherwise extending her contract, she could cancel the activation, purchase, or  
23 extension with no early termination fee or other obligation (except for services used up to  
24 the date of cancellation), and could receive a full refund for the purchase price of any  
25 handset, if she returned it in its original condition. *See Exhibit A, ¶ 4.*

26           18.     Ms. McKinney’s dealings with T-Mobile demonstrate that she was aware of  
27 the trial period, because she returned handsets within the trial period numerous times.  
28 During the 18-month period prior to January 2010 alone, Ms. McKinney returned handsets

1 within the trial period 10 times, including handset upgrades she purchased on February 12,  
2 2009; February 24, 2009; March 15, 2009; March 18, 2009; March 25, 2009; May 20, 2009;  
3 July 10, 2009; August 13, 2009; October 5, 2009; and November 10, 2009. In several of  
4 these instances, Ms. McKinney claimed that handsets she received did not work properly.  
5 Often when this happened, Ms. McKinney ordered new handsets (again accepting upgrade  
6 offers) the same day or shortly afterward.

7 19. Ms. McKinney has also returned phones for warranty exchanges several  
8 times, claiming that handsets she received were defective. Again looking at the 18-month  
9 period prior to January 5, 2010, she performed warranty exchanges 9 times – on February  
10 26, 2009; March 16, 2009; March 25, 2009; June 13, 2009; September 12, 2009; September  
11 13, 2009; October 22, 2009; March 1, 2010; and March 14, 2010.

12 **E. The Arbitration Agreement in T-Mobile’s Terms & Conditions and**  
13 **Service Agreements**

14 20. T-Mobile’s customer contracts have included a provision calling for  
15 individual arbitration of disputes since 2001. Each time Ms. McKinney accepted, renewed  
16 and/or extended her T-Mobile service and accepted the T-Mobile Terms & Conditions again,  
17 she confirmed her agreement to arbitrate.

18 21. The Terms & Conditions and the arbitration agreement are provided to  
19 customers and disclosed in several places. For example, the 2003 version of the Service  
20 Agreement stated immediately above the line for customer signature: “All disputes are  
21 subject to mandatory arbitration in accordance with paragraph 3 of the Terms and  
22 Conditions.” *See Exhibit B*, at 1. The second page of the Service Agreement set forth the  
23 arbitration agreement in full, beginning in capitalized type:

24 3. Mandatory Arbitration; Dispute Resolution. . . . INSTEAD OF SUING IN  
25 COURT, YOU AGREE THAT ANY CLAIM [defined as ANY CLAIM OR  
26 DISPUTE BETWEEN YOU AND US IN ANY WAY RELATED TO OR  
27 CONCERNING THE AGREEMENT, OR OUR PROVISION TO YOU OF  
28 GOODS, SERVICE, OR UNITS] MUST BE SUBMITTED TO FINAL,  
BINDING ARBITRATION . . . .

Exhibit B, ¶ 3, at 2 (emphasis in original).

1           22.     The arbitration agreement is also set forth in the Terms & Conditions, which  
2 are included in the box with every wireless phone sold by T-Mobile. At various times, the  
3 Terms & Conditions have been included in a Welcome Guide or by themselves in a  
4 pamphlet. Attached hereto as *Exhibit C* is a true and correct copy of the pamphlet  
5 containing the Terms & Conditions that was packaged with wireless handsets sold by  
6 T-Mobile during 2009.

7           23.     When signing Service Agreements in stores, customers acknowledge that they  
8 have received the Terms & Conditions and agree to be bound by them. *See* Exhibit B, at 1  
9 (stating above the customer signature line: “You also acknowledge you have received and  
10 reviewed the T-Mobile Terms and Conditions, and agree to be bound by them.”).

11           24.     Customers also have been alerted to the Terms & Conditions and the  
12 arbitration agreement by a sticker sealing handset boxes sold by T-Mobile. The sticker,  
13 which had to be broken to open the box, appears as follows (shown in actual size):

**IMPORTANT**

Read the enclosed T-Mobile  
Terms & Conditions. By using  
T-Mobile service, you agree to  
be bound by the Terms  
& Conditions, including the  
mandatory arbitration and early  
termination fee provisions

14  
15  
16  
17  
18  
19  
20           **F.     The June 2008 Terms & Conditions Applicable to Ms. McKinney’s  
Account.**

21           25.     The current version of the Terms & Conditions, dated applies to all accounts  
22 and lines of service activated or renewed after June 28, 2008. This is the contract applicable  
23 to Ms. McKinney and all of the lines of service on her account, because she agreed to  
24 contract extensions on all five of her lines of service after June 28, 2008.

25           26.     Ms. McKinney’s most recent contract extensions for each line of service are  
26 as follows: For the “25” line, on November 16, 2009, she took an upgrade offer to obtain a  
27 MyTouch 3G handset and agreed to extend her contract for that line through November 16,  
28

1 2011. For the “08” line, on October 14, 2009, she took an upgrade to obtain a Touch Pro 2  
2 handset, agreeing to an extended contract through October 14, 2011. For the “03” line, she  
3 upgraded to obtain the T-Mobile G1 on October 5, 2009 and extended her contract through  
4 October 5, 2011. For the “18” line, Ms. McKinney upgraded to an HTC Touch handset on  
5 May 26, 2009, and accepted a contract extension through May 26, 2011. Finally, Ms.  
6 McKinney upgraded the “79” line on December 8, 2008, accepting a contract extension  
7 through December 8, 2010.

8 27. The arbitration agreement is mentioned at the outset of the Terms &  
9 Conditions:

10 **Please read these T&Cs carefully.** They cover important information about  
11 all T-Mobile services provided to you (“Service”) and your T-Mobile phone,  
12 handset, device, SIM card, data card, or other equipment (“Device”). These  
13 T&Cs include **fees for early termination** and late payments, limitations of  
14 liability, privacy and **resolution of disputes by arbitration instead of in**  
15 **court.**

16 See Exhibit A, at 1 (emphasis in original).

17 28. The arbitration provision itself appears in the second numbered paragraph of  
18 the Terms & Conditions, again in emphasized type:

19 **2. \* Dispute Resolution and Arbitration. WE EACH AGREE THAT,**  
20 **EXCEPT AS PROVIDED BELOW . . . ANY AND ALL CLAIMS OR**  
21 **DISPUTES BETWEEN YOU AND US IN ANY WAY RELATED TO**  
22 **OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES**  
23 **OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE**  
24 **RESOLVED BY BINDING ARBITRATION, RATHER THAN IN**  
25 **COURT.** This includes any claims against other parties relating to Services  
26 or Devices provided or billed to you (such as our suppliers or retail dealers)  
27 whenever you also assert claims against us in the same proceeding.

28 Exhibit A, ¶ 2 (emphasis in original). The agreement goes on to explain the arbitration  
process and procedure, including that T-Mobile pays all fees and expenses of arbitration for  
all claims up to \$75,000, subscribers may obtain any relief on their individual claims that  
would be available in court and they may also recover attorneys’ fees if they prevail in  
arbitration.

1           **G. Ms. McKinney Was Entitled to Opt Out of Arbitration.**

2           29. In addition to allowing actions in small claims court instead of arbitration, the  
3 Terms & Conditions also allow subscribers to opt out of the arbitration agreement  
4 altogether:

5           **YOU MAY CHOOSE TO PURSUE YOUR CLAIM IN COURT AND**  
6           **NOT BE ARBITRATION if . . . YOU OPT OUT OF THESE**  
7           **ARBITRATION PROCEDURES WITHIN 30 DAYS FROM THE DATE**  
8           **YOU ACTIVATED THAT PARTICULAR LINE OF SERVICE . . . .**

9           *Id.* T-Mobile provides easy mechanisms to opt out, either by calling a toll free number or  
10 completing a simple form available online. *See also* www.t-mobiledisputeresolution .com.

11           **H. Ms. McKinney’s T-Mobile Contract Is Governed by Federal and**  
12           **Pennsylvania Law.**

13           30. Paragraph 25 of the Terms & Conditions sets forth the governing law for each  
14 subscriber, as follows:

15           This Agreement is governed by the Federal Arbitration Act, applicable federal  
16 law, and the laws of the state in which your billing address in our records is  
17 located, without regard to conflicts of laws rules of that state. . . .

18           Exhibit A, ¶ 25.

19           31. Throughout the time that Ms. McKinney has been a T-Mobile subscriber, her  
20 billing address has always been located in Philadelphia Pennsylvania. For taxing purposes,  
21 the Terms & Conditions designate this as the “place of primary use” for service on her  
22 account. *See* Exhibit A, ¶ 11.

23           **I. Plaintiff’s Use of a Nexus One Handset.**

24           32. Our records reflect that Ms. McKinney did not activate or extend any line of  
25 service in connection with purchase of a Nexus One handset. As noted above, Ms.  
26 McKinney has been a T-Mobile subscriber for more than eight years. She has used several  
27 devices that make use of T-Mobile’s 3G network during that time, including the Motorola  
28 Cliq, the HTC Touch Pro 2, the T-Mobile G1 with Google, and the myTouch 3G.

          33. On January 5, 2010, the day the Nexus One handset was introduced for sale,  
Ms. McKinney contacted T-Mobile Customer Care, asking why she could not order the



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

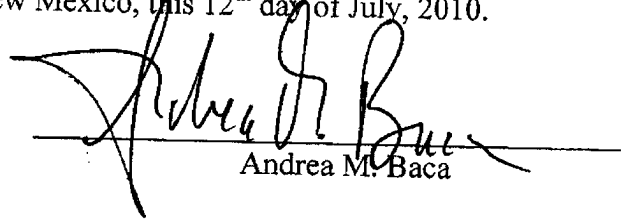
phone from Google at the \$179 discounted price, with a two-year contract extension. She was told that she did not qualify for this discount pricing because she had used the upgrade process too recently in the past.

34. Each handset has a unique identification number, referred to as the IMEI number (IMEI stands for "International Mobile Equipment Identity"). T-Mobile's network systems can detect when a subscriber's SIM card is used in a handset that is recognized by the network. The first seven digits of the IMEI identify the phone model.

35. T-Mobile's records reflect that Ms. McKinney began using a handset with an IMEI showing that it was a Nexus One on January 6, 2010. The handset was used on Ms. McKinney's "25," line of service until February 2, 2010. A different Nexus One handset was used on Ms. McKinney's "25," "03," and "79" lines of service at various times during the period from February 2 to 26, 2010.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED at Albuquerque, New Mexico, this 12<sup>th</sup> day of July, 2010.

  
Andrea M. Baca