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 T-MOBILE USA, INC.
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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

DAVIS WRIGHT TREMAINE LLP

12 MARY MCKINNEY, Individually and on
 13 behalf of All others Similarly Situated,

14 Plaintiff,

15 v.

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

19 Defendants.
 20

Case No. 5:10-cv-01177-PVT

**DEFENDANT T-MOBILE USA, INC'S
 NOTICE OF MOTION AND MOTION
 TO DISMISS**

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

The Honorable James S. Ware

21 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

22 NOTICE IS HEREBY GIVEN that on November 1, 2010, at 9:00 a.m., or as soon
 23 thereafter as counsel may be heard by the Honorable James S. Ware, in the above-entitled
 24 Court, Defendant T-Mobile USA, Inc. ("T-Mobile"), will, and hereby does, move the Court
 25 for an order to dismissing Plaintiffs' "First Amended Coordinated Class Action Complaint."

26 T-Mobile moves the Court to dismiss the FACC, for any or all of the following four
 27 reasons:
 28

1 **First**, Plaintiff has no standing to assert claims against T-Mobile because she bought
2 nothing from T-Mobile in the transaction she challenges – her purchase of the Nexus One
3 phone from Google – and does not allege that T-Mobile made any representations about the
4 phone.

5 **Second**, Plaintiff’s claims against T-Mobile are not plausible on the merits because
6 she cannot assert warranty claims against a party that did not sell her anything and did not
7 warrant or manufacture the Google phone.

8 **Third**, Plaintiff’s state law claims, to the extent they challenge the quality of
9 T-Mobile’s Third Generation (“3G”) network, are expressly preempted under the Federal
10 Communications Act (“FCA”), 47 U.S.C. § 332(c)(3)(A), as improper challenges to market
11 entry and rates, as this Court has concluded in the *Apple iPhone 3G Litigation*.

12 **Fourth**, concerning Plaintiffs’ claim under section 201(b) of the FCA fails because
13 the Federal Communications Commission (“FCC”) has made no determinations of any kind
14 that T-Mobile’s 3G network is inadequate or that T-Mobile’s representations about its
15 network are misleading. An FCC determination about the particular practice a plaintiff seeks
16 to challenge is an essential prerequisite to a 201(b) claim under the Ninth Circuit’s decision
17 in *North County Comm’cns Corp. v. California Catalog & Tech.*, 594 F.3d 1149, 1159 (9th
18 Cir. 2010).

19 The Motion is based on this Notice of Motion and Motion; the concurrently filed
20 Memorandum of Points and Authorities in Support of Motion to Dismiss First Amended
21 Complaint; the concurrently filed Declaration of Andrea Baca, with exhibits; the Declaration
22 of James Grant, with one exhibit, the Declaration of Rebekah Casner; all pleadings and
23 papers on file in this coordinated action and the underlying actions; and upon such oral
24 argument and other matters as may be presented to the Court at the time of the hearing.

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Dated this 12th day of July, 2010.

DAVIS WRIGHT TREMAINE LLP

By: s/ James C. Grant
Joseph E. Addiego III
James C. Grant (admitted *Pro Hac Vice*)
Attorney for Defendant
T-MOBILE USA, INC.

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