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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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. 5:10-cv-01177-PVT

T-MOBILE USA, INC'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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

The Honorable James S. Ware

I. INTRODUCTION

In this action, Plaintiff Mary McKinney sues Google Inc. ("Google"), HTC Corp. ("HTC") and T-Mobile USA, Inc. ("T-Mobile"), asserting that the Nexus One wireless phone – what she calls the "Google phone" – does not "maintain connectivity" to T-Mobile's 3G wireless network, because the phone or the network or both are "defective and inadequate." *See* First Amended Complaint ¶¶ 1, 55 (Dkt. No. 26) ("FAC"). As regards her claims against T-Mobile, Plaintiff's complaint should be dismissed outright for lack of standing under Fed. R. Civ. P. 12(b)(1) or because Plaintiff has not and cannot assert a claim against T-Mobile that is "plausible on its face" under Fed. R. Civ. P. 12(b)(6). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).[1]

The claims Plaintiff asserts against T-Mobile are fatally flawed for simple reasons. McKinney did not buy the Nexus One phone from T-Mobile; she purchased it from Google. She did not activate T-Mobile service or extend her T-Mobile contract when she bought the Google phone; she had been a T-Mobile subscriber and had used the network for eight years. She does not and cannot allege that T-Mobile made any advertising representations or offered any warranties about the phone. At bottom, Plaintiff here is seeking to assert claims against T-Mobile for a phone it did not sell, did not manufacture, did not warrant, and did not advertise, and regarding a transaction in which she did not buy anything from T-Mobile.

As a result, Plaintiff's complaint should be dismissed for any or all of four independent reasons. ***First,*** Plaintiff fails to show any basis for standing to assert claims against T-Mobile because she bought nothing from T-Mobile in the transaction she challenges – her purchase of the Nexus One phone from Google – and does not allege that T-Mobile made any representations about the phone. ***Second,*** Plaintiff's claims against T-Mobile are not plausible on the merits because she cannot assert warranty claims against a party that did not sell, warrant or manufacture the Google phone. ***Third,*** Plaintiff's state law claims, to the extent

[1] T-Mobile has also filed a Motion to Compel Arbitration (Dkt. No. 30), and brings the present motion in the alternative, and without waiver of its rights to compel arbitration under the Federal Arbitration

they challenge alleged inadequacies of T-Mobile's Third Generation ("3G") network, are expressly preempted under the Federal Communications Act ("FCA"), 47 U.S.C. § 332(c)(3)(A), as improper challenges to market entry and rates, as this Court has concluded in the *Apple iPhone 3G Litigation*. ***Fourth***, concerning Plaintiffs' claim under section 201(b) of the FCA, the Federal Communications Commission ("FCC") has made no determinations of any kind that T-Mobile's 3G network is inadequate or that T-Mobile's representations about its network are misleading, and an FCC determination about the particular practice a plaintiff seeks to challenge is an essential prerequisite to a 201(b) claim under the Ninth Circuit's decision in *North County Comm'cns Corp. v. California Catalog & Tech.*, 594 F.3d 1149, 1159 (9th Cir. 2010).

Plaintiff's claims against T-Mobile in her FAC should be dismissed.

II. ISSUES TO BE DECIDED

Whether Plaintiff's claims in the FAC against T-Mobile should be dismissed because:

1. She has failed to allege and cannot show that she purchased anything from T-Mobile, and therefore has no standing because she did not suffer any injury as a result of any conduct of T-Mobile.

2. She cannot assert claims for breach of warranty against T-Mobile when she purchased nothing from T-Mobile and she has not asserted that T-Mobile made any representations or said anything about the Google phone.

3. Plaintiff's state law warranty claim (which is the predicate for her claim under the Magnuson Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*("MMWA")) is expressly preempted under section 332(c)(3)(A) of the FCA.

4. Plaintiff's claims under section 201(b) of the FCA are not founded on any determination of the FCC that the practices she challenges have been determined to be unjust or unreasonable

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Act, 9 U.S.C. § 1, *et seq.* In addition, Google and HTC have filed a separate motion to dismiss, which T-Mobile also joins.

III. BACKGROUND[2]

A. The Nexus One Is Sold Exclusively by Google.

Google introduced the Nexus One handset on January 5, 2010. *See id.* ¶ 26. Google developed the phone along with HTC, which manufacturers the Nexus One. *Id.* ¶¶ 3, 4, 26.

Google launched the Nexus One with a unique marketing approach. Historically in the United States, wireless phones have been sold by individual carriers, with each phone designed to work on a specific carrier's network. In contrast, the Nexus One is sold exclusively by Google through a web store; it cannot be purchased from T-Mobile or any other wireless carrier and is not sold in stores. *Id.* ¶¶ 45, 34. The Nexus One was designed as an "unlocked" phone, so that it could be used on any GSM wireless carrier's network (including, for example, AT&T's network in the U.S.). *Id.* ¶ 35.

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[2] While this motion relies primarily on the allegations of Plaintiff's FAC, the motion also references and the Court may consider other materials.

The motion is brought under both Rules 12(b)(1) and 12(b)(6). A 12(b)(1) motion addressing the Court's subject matter jurisdiction – such as one challenging whether the plaintiff has standing to pursue her claims – may be either a facial attack (*i.e.*, the complaint does not reflect on its face that the plaintiff has standing) or a factual attack (*i.e.,* the complaint makes factual allegations that are untrue or omits facts that demonstrate that the plaintiff has no standing). *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004). This motion presents both facial and factual challenges under Rule 12(b)(1).

In asserting a 12(b)(1) factual attack the Court may consider evidence beyond the complaint. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003) (doing so does not convert a 12(b)(1) motion into one for summary judgment). If a party moves under Rule 12(b)(1) and presents affidavits or other evidence to show that subject matter jurisdiction is lacking, the party opposing the motion must respond with evidence to satisfy its burden of establishing jurisdiction." *Wolfe*, 392 F.3d at 362; *Safe Air for Everyone*, 373 F.3d at 1039; *Dreier v. United States,* 106 F.3d 844, 847 (9th Cir. 1996) ("[U]like a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court." (internal quotations omitted)). In resolving a factual attack on jurisdiction, the court "need not assume the truthfulness of the plaintiff's allegations." *Safe Air for Everyone,* 373 F.3d at 1039 (citation omitted); *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000); *see generally Farrah v. Monterey Transfer & Storage, Inc.*, 555 F. Supp. 2d 1066, 1067-1068 (N.D. Cal. 2008).

Moreover, under Rule 12(b)(6), the Court may consider materials that are referenced in a plaintiff's complaint or upon which her claims are based, in order to prevent plaintiffs from surviving a dismissal motion by deliberately omitting such documents. *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *see also Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) ("Under the 'incorporation by reference' rule of this Circuit, a court may look beyond the pleadings without

Google marketed the Nexus One at two price points: Consumers can purchase the phone by itself through Google's online web store for $529, or they can buy it at a discounted price of $179 if they activate a new service plan with T-Mobile. *Id.* ¶ 33. Existing T-Mobile customers may receive other "upgrade" discounts if they purchase the Nexus One and extend their T-Mobile service agreements. *Id.* ¶ 37. As commentators said at the time, Google's new model for wireless phone sales was "in some ways, bigger news than the phone itself." *See id.* ¶ 26, (quoting WIRED, "Google Debuts Android-Powered Nexus One 'Superphone'," (Jan. 5, 2010), *available at* http://www.wired.com/gadgetlab /2010/01/google-debuts-android-powered-nexus-one-superphone (last visited July 5, 2010)).[3]

B. Plaintiff Purchased a Nexus One Phone from Google and Bought Nothing from T-Mobile.

Ms. McKinney alleges that she purchased a Nexus One wireless phone "on or about January 9, 2010, through the Google website (google.com/phone)." FAC ¶ 2.[4] At the time, Ms. McKinney had been a T-Mobile subscriber for eight years. Baca Dec. ¶ 3 (she started T-Mobile service in March 2002). She used T-Mobile's network throughout that time, had upgraded and changed phones at least 63 times, and had used a number of different 3G phones on the T-Mobile network. *Id.* ¶¶ 6, 32.

Although Plaintiff purports to represent a class of consumers who purchased the Nexus One phone "in combination with T-Mobile's monthly service plan for access to its 3G network," FAC ¶ 1,[5] she is not such a consumer. Ms. McKinney did not activate or extend

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converting the Rule 12(b)(6) motion into one for summary judgment."); *accord Long v. Hewlett-Packard Co.*, 2007 WL 2994812, *6 (N.D. Cal. July 27, 2007).

[3] Plaintiff's FAC cites and quotes this article from the online magazine, WIRED, but does not attach a copy of the article. The Court may consider the article (*see* note 2, above), a copy of which is attached to the accompanying Declaration of James Grant ("Grant Dec.").

[4] T-Mobile has no records of Ms. McKinney's purchase of the Nexus One phone, but T-Mobile's systems can detect when a specific phone is used on its network. *See* Declaration of Andrea Baca ¶ 34 (Dkt. No. 33) ("Baca Dec."). According to T-Mobile's records, Ms. McKinney began using a Nexus One phone on the T-Mobile network on January 6, 2009. *Id.* ¶ 35.

[5] Elsewhere in the FAC, Plaintiff defines the putative class differently, to encompass all persons who purchased the Google phone and who ***have*** a T-Mobile service plan (regardless of whether they bought

any line of service when she purchased the Nexus One phone. Baca Dec. ¶ 32; *see also id.* ¶ 33 (Ms. McKinney asked about but was not eligible for a discount upgrade offer). Ms. McKinney's two-year contractual commitment for T-Mobile service is not based on her purchase of the Nexus One phone. *See id.* ¶ 26 (McKinney's commitments are based on five other phone upgrades she accepted from December 2008 through November 2009). She paid the full $529 retail price for the Nexus One phone she purchased and so could use it on any GSM network. In short, in the transaction when Plaintiff purchased her Google phone, she bought nothing from T-Mobile.

C. Plaintiff's FAC Contains No Allegations of Any Representations by T-Mobile About the Nexus One Phone.

In many places, Plaintiff's FAC copies from the complaint filed in the *In re Apple Products Liability Litigation*, No. M09-02045 JW (N.D. Cal.) (Dkt. No. 190) ("*iPhone Litigation*"). Plaintiff's counsel here is also the lead counsel for plaintiffs in the *iPhone Litigation*. In the present case, however, Plaintiff's FAC asserts only three claims against Google, HTC and T-Mobile: (1) a federal claim alleging that Defendants' actions are "unjust" and "unreasonable" under section 201(b) of the FCA, 47 U.S.C. § 201(b), *see* FAC ¶¶ 56-59; (2) a state law claim asserting that Defendants allegedly breached an express warranty and breached the implied warranty of merchantability, *see* FAC ¶¶ 60-67; and (3) a federal claim that Defendants' alleged warranty breaches under state law also violate the MMWA, *see* FAC ¶¶ 68-76. The gist of Plaintiff's claims is that the Nexus One does not consistently "maintain connectivity" on the T-Mobile 3G network. *See, e.g., id.* ¶¶ 1, 6, 40, 41.

The FAC contains numerous conclusory allegations that "Defendants" advertised and represented that the Google phone would "consistently perform at a 3G level." *Id.* ¶ 41; *see also id.* ¶¶ 6, 11, 12, 38, 40, 44, 47, 53, 54, 59, 64, 72. However, Plaintiff does not point to any specific representations of T-Mobile about the Google phone (not surprising, given that T-Mobile did not sell or advertise the phone). The only statement of T-Mobile mentioned in

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or extended contracts for T-Mobile service at the time when they purchased the Google phone), and all persons who paid full price for the Google phone for use on another 3G network. FAC ¶ 8.

the FAC is a page on T-Mobile's website describing the benefits of the 3G network. *Id.* ¶ 51. But the page says nothing about the Nexus One, and, as the FAC acknowledges, contains an express disclaimer that 3G coverage is not available in all areas and may be subject to limitations or interruption. *Id.*

Although Plaintiff's FAC alludes to her contract for service with T-Mobile, *see, e.g.,* FAC ¶¶ 46, 48, 53, she avoids mentioning the terms of the contract and does not attach a copy of her contract. In fact, the T-Mobile terms and conditions of service Ms. McKinney accepted provide that she agreed not to assert claims "for problems relating to Service availability or quality":

> **Service Availability.** Coverage maps only approximate our anticipated wireless coverage area outdoors; actual Service area, coverage and quality may vary and change without notice depending on a variety of factors including network capacity, terrain and weather. You agree we are not liable for problems relating to Service availability or quality.

Baca Dec., Ex. A, ¶ 7. The terms and conditions also expressly disclaim warranties:

> **Disclaimer of Warranties.** EXCEPT FOR ANY WRITTEN WARRANTY THAT MAY BE PROVIDED WITH A DEVICE YOU PURCHASE FROM US, AND TO THE EXTENT PERMITTED BY LAW, THE SERVICES AND DEVICES ARE PROVIDED ON AN "AS IS" AND "WITH ALL FAULTS" BASIS AND WITHOUT WARRANTIES OF ANY KIND. WE MAKE NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE CONCERNING YOUR SERVICE OR YOUR DEVICE. WE CAN'T PROMISE UNINTERRUPTED OR ERROR-FREE SERVICE AND DON'T AUTHORIZE ANYONE TO MAKE ANY WARRANTIES ON OUR BEHALF. . . .

Id., Ex. A. ¶ 21.

D. Procedural Background.

Plaintiff originally filed suit in state court, on January 29, 2010 (just twenty days after Ms. McKinney alleges she bought a Nexus One phone), and she served the complaint on Google and T-Mobile on February 18, 2010. Class Action Complaint (Dkt. No. 2-1). Google and T-Mobile removed that complaint to this Court. Notice of Removal (Dkt. No. 1). After this Court granted motions to dismiss in the *iPhone Litigation*, Plaintiff's counsel in this case

indicated that Plaintiff would file an amended complaint. Stipulation (Dkt. No. 20). Plaintiff filed her FAC on June 11, 2010. FAC (Dkt. No. 26). Pursuant to the schedule set by the Court, Order (Dkt. No. 21), T-Mobile now responds to the FAC by filing this motion to dismiss and a separate motion to compel arbitration. T-Mobile also joins in the motions to dismiss filed by Google and HTC.

IV. ARGUMENT

A. Standards for a Motion to Dismiss Under Rules 12(b)(1) and 12(b)(6).

The standards applicable to a motion to dismiss under Rule 12(b)(6) are familiar to the Court and need not be discussed at length here. A 12(b)(6) motion "tests the legal sufficiency of a claim." *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1988). A motion to dismiss should be granted if a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 569 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly,* 550 U.S. at 556). While allegations of material fact are to be accepted as true and construed in a light most favorable to the nonmoving party, *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir. 1996), the Court need not accept conclusory allegations and unwarranted inferences. *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007).

A motion to dismiss under Rule 12(b)(1) challenges the Court's subject matter jurisdiction over the claims asserted. A motion challenging a plaintiff's lack of standing is properly brought under Rule 12(b)(1). *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). Standing addresses whether the plaintiff is the proper party to bring a matter to the Court for adjudication. *Id.* Standing is not a mere pleading requirement, but rather an indispensable part of the plaintiff's case, and therefore the plaintiff bears the burden of establishing each element of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

561 (1992); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (plaintiff bears the burden of establishing subject matter jurisdiction). As noted above, a Rule 12(b)(1) motion challenging a plaintiff's lack of standing may be either a facial attack or a factual attack, and in the latter case, the Court may consider evidence outside of the complaint and need not take the complaint's allegations as true. *See* note 2, above; *Safe Air for Everyone*, 373 F.3d at 1039.

B. Plaintiff Has No Standing to Assert Claims Against T-Mobile.

Because standing is a jurisdictional requirement, it is a fundamental threshold question in any federal suit. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003). This is no less true in a class suit. A representative plaintiff must have standing to proceed on his own claims if he purports to represent a class. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (plaintiff must be a member of the class she seeks to represent).[6] If a named plaintiff lacks standing, the case must be dismissed. *Lierboe*, 350 F.3d at 1022.

The "irreducible constitutional minimum" for federal standing is injury-in-fact, causation, and redressability. *Lujan*, 504 U.S. at 560; *see Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008). Because Article III of the Constitution limits federal court jurisdiction to "cases and controversies," a plaintiff is required "to show, *inter alia*, that ***he has actually been injured by the defendant's challenged conduct***." *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001 (9th Cir. 2001) (emphasis added; citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000)).

On its face, Plaintiff's FAC shows no grounds upon which she can establish standing to assert claims against T-Mobile. Ms. McKinney admits she did not purchase the Nexus One phone from T-Mobile, but rather from Google. FAC ¶ 2. She also admits that T-Mobile did not manufacture the phone, and that it was available exclusively from Google. *Id.* ¶ 1 (phone

[6] A named plaintiff may not establish standing by borrowing it from absent class members. *See Lierboe*, 350 F.3d at 1022; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976); *Allee v. Medrano*, 416 U.S. 802, 829 (1974) ("Standing cannot be acquired through the back door of a class action.") (Burger, C.J., concurring and dissenting; citations omitted).

was "manufactured and marketed by Google and HTC"); ¶ 45 (phone sold exclusively through Google website). She alludes to "Class members who bought a Google Phone and purchased T-Mobile 3G service," *id.* ¶ 9, but the FAC never alleges that Ms. McKinney activated service ***or bought anything*** from T-Mobile in the transaction when she purchased the Nexus One phone.

Plaintiff asserts numerous conclusory allegations about representations and advertising of all "Defendants" lumped together, but such allegations are improper and should be disregarded. *Vasquez*, 487 F.3d at 1249 (conclusory allegations and unwarranted inferences will not defeat an otherwise proper motion to dismiss); *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (complaint must segregate and specify what each defendant allegedly did).[7] Throughout the entire complaint, Plaintiff asserts ***no allegations*** that T-Mobile made any specific representations about the Nexus One– nor, for that matter, does the FAC allege that Ms. McKinney ever saw or relied upon any representations made by anyone. She likewise does not allege that T-Mobile ever provided any warranty for the Nexus One. The FAC on its face thus shows no basis for Plaintiff to assert that she was "actually injured" by any challenged conduct of T-Mobile. *Lee*, 260 F.3d at 1001.

All of these admissions and omissions on the face of Plaintiff's FAC are confirmed by the facts. In fact, Ms. McKinney bought the Nexus One phone from Google, and did not activate or extend her T-Mobile service when she bought the phone. Baca Dec. ¶ 32. T-Mobile made no advertising representations about the Nexus One, and not only did not warrant the phone, but expressly disclaimed any warranties. *Id.*, Ex. A ¶¶ 7, 21. In short, T-Mobile did not manufacture, market, distribute, sell, warrant or say anything about the Nexus One phone. Plaintiff cannot claim to have been injured by T-Mobile as a result of

[7] As noted in Google's and HTC's separate motion to dismiss, because Plaintiff's claims in this action sound in fraud, she was required to plead her claims with particularity under Fed. R. Civ. P. 9(b), but altogether failed to do so. Google/HTC Motion to Dismiss, at 10-12; *see Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2008); *Vess v. Ciba-Giegy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). In addition, the rule that a plaintiff's complaint may not lump together undifferentiated allegations against defendants, without specifying who allegedly did what, applies with equal force

things that T-Mobile did not do. The FAC not only fails on a facial challenge as to Ms. McKinney's standing, but it cannot satisfy standing requirements given the facts involved.

C. Plaintiff's Warranty Claims Should Be Dismissed on the Merits Because She Did Not Buy Any Product from T-Mobile.

Plaintiff's warranty-based claims should be dismissed for a number of reasons, several of which are explained in Google's and HTC's separate motions to dismiss. *See* Google/HTC Motion at 16-20 (Plaintiff's FAC fails to show any affirmations of fact or promises to establish an express warranty); *id.* at 20-23 (Plaintiff's implied warranty of merchantability claim is deficient because she admits the Nexus One did function as a wireless "smart phone"); *id.* at 23-24 (MMWA claim should be dismissed because state-law warranty claims fail). Plaintiff's warranty claims against T-Mobile should be dismissed, as well, for the simple reason that T-Mobile did not sell any product to Ms. McKinney in connection with her purchase of the Google phone.

Under any law,[8] a defendant cannot be held liable for breach of warranty for a product that it did not manufacture, distribute or sell. *See, e.g., Combs v. Stryker Corp.*, 2009 WL 4929110, *3 (E.D. Cal. Dec. 14, 2009) (granting motion to dismiss with prejudice where defendants did not distribute or sell pain medication used in pump inserted in plaintiff's shoulder after surgery, noting "Plaintiffs' allegations do not plead adequate facts for even an inference of Defendants' liability, and their claims against Defendants cannot stand."); *Sherman v. Stryker Corp.*, 2009 WL 2241664, *5 (C.D. Cal. Mar. 30, 2009) (dismissing claims with prejudice where plaintiffs alleged that drug given could have been any of a

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under Rule 8. *See Newman v. Gonzales*, 2009 WL 196353 (E.D. Cal. Jan. 28, 2009) (dismissing complaint under Rule 8).

[8] Plaintiff's FAC purports to invoke California law regarding her state-law breach of warranty claim. *See* FAC ¶ 66 (asserting that alleged breach of express and implied warranties violates Cal. Civ. Code § 1792, the Song Beverly Act). However, Ms. McKinney's relationship with T-Mobile is governed by the law of her home state, Pennsylvania. *See* Baca Dec., ¶¶ 30, 31 & Ex. A, ¶ 25 (under T-Mobile terms and conditions, Plaintiff's contract and her relationship with T-Mobile is governed by the law of the state where her billing address is located, which has always been Pennsylvania); *see also* Motion to Compel Arbitration (Dkt 32) at 6:10-17. Nonetheless, the principles noted in the text above – a plaintiff cannot assert warranty claims against a party that did not manufacture, sell or distribute a challenged product – are the same under Pennsylvania, California or indeed any state or federal law.

number of similar drugs, many of which were not manufactured or sold by defendants, "there are not even enough facts for a reasonable inference of liability"); *Yurcic v. Purdue Pharma, L.P.*, 343 F. Supp. 2d 386, 396 (M.D. Pa. 2004) (granting motion for summary judgment dismissal where defendant "did not make, sell, design, or have anything to do with [the drug] OxyContin other than a limited role of co-promotion of the drug to a limited class of doctors"); *Cox v. Depuy Motech, Inc.*, 2000 WL 1160486, **4-5 (S.D. Cal. Mar. 29, 2000) (granting summary judgment when plaintiff failed to rebut evidence that defendant did not manufacture or sell medical implant); *James v. Southern California Edison Co.*, 1995 WL 902672, *1 (S.D. Cal. June 2, 1995) ("The warranty claims against SCE and SDG&E fail because those defendants were not sellers of any product that was alleged to have injured plaintiff.").[9]

T-Mobile also cannot be held liable for warranty claims because T-Mobile at most provided a ***service*** to Plaintiff, not any tangible or consumer ***product***. Plaintiff's FAC makes clear that the basis for her warranty claims is that the ***Google phone*** allegedly is defective. *See, e.g.,* FAC ¶ 62 (Plaintiff's claim for breach of express and implied warranties states: "The *Google Phone* cannot perform its ordinary and represented purpose because the *Google Phone* does not provide consistent connection to the T-Mobile 3G network in combination with using the *Google Phone*." (emphasis added)). Here again, Plaintiff does not allege that T-Mobile sold her any product, and under any law that might be applicable, warranty claims only extend to products, not services. *See* Cal. Civ. Code § 1791 (Song Beverly Act applies only to sales of consumer products);[10] *Whitmer v. Bell Telephone Co. of Pennsylvania*, 361 Pa. Super. 282,

[9] *See also Moretti v. Wyeth, Inc.*, 2009 WL 749532, *5 (D. Nev. Mar. 20, 2009) (granting summary judgment and dismissing express and implied warranty claims because "Plaintiff admits that [defendants] did not distribute or sell the generic [drug] metoclopramide that allegedly caused her injuries. Therefore, no warranties were ever created, much less breached."); *Platinum Towing Service, Inc. v. Freightliner, LLC*, 2007 WL 1430203, *2 (E.D. Wis. May 11, 2007) (granting summary judgment dismissal of warranty claims under state law and MMWA where defendant showed that it did not manufacture or sell truck that was the subject of plaintiff's claims); *Thompson v. Medtronic, Inc.*, 2006 WL 3544937, *3 (D. Nev. Dec. 8, 2006) (sales representative could not be held liable for allegedly defective diabetes infusion sets he did not sell to plaintiff).

[10] The Song Beverly Act is limited to sales of "consumer goods," defined as products "used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and

522 A.2d 584, 586 (Pa. Sup. Ct. 1987) (telecommunications services do not involve a "transaction in goods" and may not be the basis for a claim under the UCC for breach of the implied warranty of merchantability); 15 U.S.C. §§ 2301(1), 2301(8) (MMWA applies only to written warranties for "consumer products"); 16 C.F.R. § 700.1(h) ("warranties on services are not covered" by MMWA);[11] *Huang v. Garner*, 157 Cal. App. 3d 404, 412 n.5, 203 Cal. Rptr. 800 (1984); ("[T]he well settled rule in California is that where the primary objective of a transaction is to obtain *services*, the doctrines of implied warranty and strict liability do not apply." (emphasis in original; citation and internal quotation omitted)).[12]

Plaintiff cannot assert any warranty claims against T-Mobile when T-Mobile did not sell her any product (and also did not design or manufacture the phone). In essence, Plaintiff's warranty claims against T-Mobile are the equivalent of a consumer who buys a flat screen television at Best Buy or Costco, then sues her cable service provider because she is unhappy with the picture quality of the television. T-Mobile had no involvement in Plaintiff's purchase of a Nexus One phone from Google. Plaintiff has no basis to assert any warranty claims against T-Mobile.

D. Plaintiff's State-Law Claims Challenging T-Mobile's 3G Network Are Preempted Under Section 332 of the FCA.

To the extent Plaintiff's state law claims challenge the adequacy of T-Mobile's 3G network, they are expressly preempted by the section 332(c)(3)(A) of the FCA, as this Court held in the *iPhone Litigation*. *See* Order Granting AT&T Mobility's Motion to Dismiss, *In re*

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consumables." Cal. Civ. Code § 1791; *see also id.* § 1791.1 (definition of implied warranties limited to "consumer goods"), § 1791.2 (definition of express warranties applies to the sale of a "consumer good"); § 1792 (implied warranty of merchantability applies to sales of "consumer goods").

[11] *See, e.g., Russo v. NCS Pearson, Inc.*, 462 F. Supp. 2d 981, 998 (D. Minn. 2006) (dismissing warranty claims challenging scoring of Scholastic Aptitude Tests, because administration of tests was a service and could not be construed as a "consumer product").

[12] *Accord Stuart v. Crestview Mut. Water Co.*, 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543 (1973); *see also Hector v. Cedars-Sinai Medical Center*, 180 Cal. App. 3d 493, 508 & n.3, 225 Cal. Rptr. 595 (1986) (hospital that provided medical services was not engaged in the business of selling pacemakers and could not be held liable under a breach of warranty theory); *Shepard v. Alexian Bros. Hosp.*, 33 Cal. App. 3d 606, 615, 109 Cal. Rptr. 132 (1973) ("since the furnishing of a blood transfusion is, by law, a service and not a sale . . . respondent cannot be held liable under a breach of warranty theory" (citation omitted)).

Apple iPhone 3G Products Liability Litigation, No. C09-02045 JW (April 2, 2010) (Dkt. No. 184) ("*iPhone* Order").[13]

After the Court issued the *iPhone* Order, Plaintiff amended her complaint in this action. *See* Dkt. Nos. 20, 26. Plaintiff omitted some references from the prior complaint challenging T-Mobile's network, but the gravamen of the FAC as regards claims against T-Mobile remains a challenge to "poor quality of service for the price charged," as the Court said about the prior complaint in the *iPhone Litigation*. *See iPhone* Order, at 9. Plaintiff alleges that she was required to pay "increased service plan costs," for "faster . . . data transfer rates" on the 3G network, but that "T-Mobile's network did not provide consistent 3G performance for Google phone purchasers," the network is "equally suspect," and because of the poor performance, consumers are "locked into a two-year service plan with inferior T-Mobile 3G wireless network connectivity," FAC ¶¶ 15, 32, 38, 39, 41, 43, 44, 50, 53, *see also id.* ¶ 54 (Defendants "were trying to sell more Google Phone devices than the existing T-Mobile's [sic] 3G wireless network could handle"); ¶ 55 ("infrastructure of T-Mobile's 3G wireless network [is] defective and inadequate"); ¶ 59 (referring to "T-Mobile premium service plans").

As the Court has recognized, section 332(c)(3)(A) of the FCA is a broad preemption clause. *iPhone* Order, at 7. It provides: "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by an commercial mobile service." 47 U.S.C. § 332(c)(3)(A). In short, state-law claims that concern wireless rates or market entry are preempted because they fall within the exclusive province of federal regulators and courts. *iPhone* Order, at 7 (quoting *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000). Federal regulations expressly dictate the terms under which wireless carriers may enter a market and the FCA makes the FCC responsible for determining the necessary facilities and infrastructure. *Id.*; *Bastien*, 205 F.3d at 987. Likewise, "a complaint that service quality is poor is really an attack on the rates charged for the service . . . ." *Id.* (quoting *Bastien*, 205

[13] The Court also denied the *iPhone* plaintiffs' request for leave to file a motion for reconsideration of the *iPhone* Order. *See* Dkt. No. 198.

F.3d at 288). "The key inquiry is 'the nature of the claims . . . and what the effect of granting the relief requested would be.'" *Id.* (quoting *Bastien*, 205 F.3d at 989).[14]

The Court concluded in the *iPhone Litigation* that the core allegations of the plaintiffs' complaint targeted AT&T's network infrastructure and also implicated the reasonableness of AT&T's rates because plaintiffs alleged they were paying more for 3G service but in fact were receiving only 2G service. *Id.* at 9. The Court held that because the *iPhone* plaintiff's claims attacked AT&T's market entry and rates, they "tread on ground reserved by the FCA" and therefore were preempted by section 332. *Id.*

The Court's reasoning and conclusion in the *iPhone* Order is even more applicable in the present case. As in the *iPhone Litigation*, Plaintiff's claims here challenge T-Mobile's construction and expansion of its newest generation, 3G network across the country, and the claims therefore plainly fall within the market entry preemption of section 332. Plaintiff's FAC also does more than simply implicate the issue of T-Mobile's rates, it expressly seeks "refund[s of] a portion of . . . the increased service plan costs." FAC ¶ 15. Although Plaintiff seeks to dress her claims in vague language about misrepresentation and nondisclosure, in fact the FAC points to only one webpage of T-Mobile about its 3G network, and even then Plaintiff does not allege that she ever saw, much less relied upon the webpage before she bought a Nexus One phone from Google. *See Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (granting 12(b)(6) dismissal where "none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege that the entered into the transaction *as a result of* those advertisements" (emphasis in original)).

As the *iPhone* Order and *Bastien* both demonstrate, it is the substance of a plaintiff's claim, not its form, that determines preemption. Here, the substance of Plaintiff's claims in the FAC concerning T-Mobile is that its 3G network is simply "defective and inadequate."

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[14] *See also Aubrey v. Ameritech Mobile Commc'ns, Inc.*, 2002 WL 32521813, *3 (E.D. Mich. June 17, 2002) (claims concerning Ameritech's conversion from CDMA to TDMA technology preempted under section 332); *Chiarella v. Sprint Spectrum LP*, 921 So.2d 106, 118 (La. App. 2005) (complaint of technical difficulties with service such as dropped calls were related to the market entry of provider and therefore preempted).

See FAC ¶ 55; *see also id.* ¶ 62 ("Whether the problem is with the Google Phone itself or with the T-Mobile 3G network, or a combination of the two, is irrelevant as to [Plaintiff's state law warranty claims]."). But the adequacy of the network and/or the reasonableness of rates charged is the exclusive province of the FCC. Plaintiff's state-law warranty claim should be dismissed under section 332, just as the Court dismissed similar claims (advanced by the same counsel representing Plaintiff here) in the *iPhone Litigation.*

E. Plaintiff's FCA Section 201(b) Claim Should Be Dismissed Under *North County Communications.*

Plaintiff's claim under section 201(b) of the FCA should also be dismissed because Plaintiff cannot point to any prior FCC determination that any challenged practice of T-Mobile is unjust or unreasonable. As the Ninth Circuit held in *North County Comm'cns Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1159 (9th Cir. 2010), Plaintiff has no independent private right of action under the FCA, and such an FCC determination is a necessary predicate for any claim under FCA section 201(b).[15]

In *North County*, a local exchange carrier brought suit against wireless carriers under FCA sections 201(b), 206 and 207,[16] asserting that their failures to pay charges for terminating

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[15] This Court recognized the applicability of *North County* in the *iPhone* Order. *See iPhone* Order, at 15. AT&T Mobility has moved to dismiss the plaintiffs' FCA § 201(b) claim in their second amended complaint in the *iPhone Litigation*, *see* Dkt. No. 209, but the Court has not yet ruled on that motion.

[16] Section 201(b) provides in relevant part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . The [FCC] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

Section 206 provides in part:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . .

Section 207 provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the [FCC] as hereinafter provided for, or

call traffic on North County's network were unjust and unreasonable. The Ninth Circuit affirmed dismissal of the plaintiffs' claims. The Court noted that the FCC is the agency primarily responsible for interpretation and implementation of the FCA, and under the primary jurisdiction doctrine, courts should decline to decide issues that fall within the commission's special competence. 594 F.3d at 1155-56. The Court could find "no showing of Congressional intent to create a private right of action" under section 201(b). *Id.* at 1155. The Court wrote:

> It is arguable that the plain language of § 201(b) contains an implication that private parties may pursue remedies for violations of the statute. However, given the broad language of the statute, a more reasonable interpretation is that it is within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation. *See In re Long Distance Telecomm. Litig.*, 831 F.2d 627, 631 (6th Cir. 1987), *as amended* ("This [charge of unreasonable practices] is a determination that Congress has placed squarely in the hands of the FCC.") . . .

594 F.3d at 1158. But the Court noted that the FCC had not made any determination that the wireless carriers' failures to pay termination charges to North County violated section 201(b). *Id.*

> North County essentially requests that the federal courts fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b). This we decline to do. The district court properly dismissed North County's declaratory judgment claim premised on § 201(b), because entry of a declaratory judgment "would . . . put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of the hands of the Commission."

Id. (quoting *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047, 1053 (9th Cir. 2003)). The Court went on to hold that sections 206 and 207 establish procedures for private parties to pursue claims in federal court but "[do] not establish an independent private right of action for compensation." *Id.* at 1160. Thus, the Court's holding was that before a party may file a private claim under section 201(b) and 207, there must be a "predicate determination from the

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> may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

[FCC]" that the challenged practice of a carrier is in fact "unjust or unreasonable" under the FCA. *Id.* at 1158-59, 1162.[17]

Here, Plaintiff has not shown any predicate determination by the FCC that any challenged conduct of T-Mobile is unjust or unreasonable under section 201(b). The most that Plaintiff can say in her FAC is that the FCC "previously determined" that "false and misleading claims *can* constitute a violation of the FCA," FAC ¶ 59 (emphasis added), but that is a far cry from a determination that "a particular practice constitutes a violation" of section 201(b). *North County*, 594 F.3d at 1158; *see also Carney*, 2010 WL 1947635, at *5 (dismissing section 201(b) claim and noting that prior FCC determination must relate to the particular practice of the defendant at issue). The FCC has not made any determination that T-Mobile's 3G network is "inadequate" or "defective" in any way. The FCC has not determined that any T-Mobile representations about its network are untrue or misleading. Plaintiff simply cannot show a prior FCC determination that is a necessary predicate for her FCA section 201(b) claim in light of *North County*. This claim too should be dismissed.

V. CONCLUSION

For the foregoing reasons, T-Mobile respectfully requests that the Court dismiss Plaintiff's FAC, with prejudice, pursuant to Rules 12(b)(1) and 12(b)(6).

Dated this 12th day of July, 2010.

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[17] District courts throughout the Ninth Circuit have regularly dismissed section 201(b) claims in the five months since *North County* was decided. *See, e.g., Higdon v. Pacific Bell Tel. Co.* 2010 WL 1337712, *4 (N.D. Cal. Apr. 2, 2010); *North County Commc'ns Corp. v. Sprint Spectrum, L.P.*, 2010 WL 2573464, *4 (S.D. Cal. June 24, 2010); *North County Commc'ns Corp. v. Cricket Commc'ns Inc.*, 2010 WL 2490621, *5 (D. Ariz. June 16, 2010); *Carney v. Verizon Wireless Telecom, Inc.*, 2010 WL 1947635, **4-5 (S.D. Cal. May 13, 2010); *North County Commc'ns Corp. v. McLeodUSA Telecommc'ns Servs., Inc.*, 2010 WL 1779445, **3-4 (D. Ariz. May 3, 2010).