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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16
17 MARY McKINNEY, et al.,

18 Plaintiff,

19 vs.

20 GOOGLE, INC., a Delaware corporation,
HTC CORP., a Taiwanese corporation, and
21 T-MOBILE USA, INC., a Delaware
corporation,

22 Defendants.
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CASE NO. 5:10-CV-01177 JW

**HTC CORPORATION'S NOTICE OF
MOTION AND MOTION TO COMPEL
ARBITRATION AND TO STAY CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF.**

**[PROPOSED] ORDER FILED
CONCURRENTLY**

Judge: Hon. James Ware
Date: November 1, 2010
Time: 9:00 a.m.
Courtroom: 8, 4th Floor

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 1, 2010, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable James Ware of the above-entitled United States District Court, located at 280 South 1st Street, San Jose, CA 95113, Defendant HTC Corporation will and hereby does move this Court, pursuant to 9 U.S.C. §§ 4 and 5, for an Order to compel Plaintiff Mary McKinney to arbitrate her individual claims in this action against HTC Corporation and to stay this action. HTC Corporation joins in, and incorporates by reference, the Motion To Compel Arbitration And To Stay Claims filed by Defendant T-Mobile USA, Inc., on July 12, 2010.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, T-Mobile's Motion To Compel Arbitration And To Stay Claims and supporting Memorandum of Points and Authorities, all records on file with this Court, and such further oral and written argument as may be presented at, or prior to, the hearing on this matter.

DATED: July 12, 2010

MUNGER, TOLLES & OLSON LLP

HENRY WEISSMANN
ROSEMARIE T. RING
SARALA V. NAGALA

By: /s/ Rosemarie T. Ring
ROSEMARIE T. RING

Attorneys for Defendant
HTC CORPORATION

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND BACKGROUND**

3 Defendant HTC Corporation (“HTC”) joins Defendant T-Mobile USA, Inc. (“T-Mobile”)
4 in moving to compel arbitration and to stay this action pursuant to Plaintiff’s arbitration
5 agreement with T-Mobile. HTC joins, and incorporates herein by reference, T-Mobile’s Motion
6 To Compel Arbitration And To Stay Claims and supporting Memorandum of Points And
7 Authorities (“T-Mobile’s Motion”), and will not repeat the facts and arguments set forth therein
8 except as necessary to provide context for the issue addressed in this motion: HTC’s right to
9 enforce Plaintiff’s arbitration agreement with T-Mobile as a third-party beneficiary. For the
10 reasons set forth below, and in T-Mobile’s Motion, the Court should issue an order compelling
11 Plaintiff to arbitrate her individual claims against HTC because (1) Plaintiff’s claims against HTC
12 in this action fall within the scope of the arbitration agreement; (2) the arbitration agreement is
13 valid and enforceable; and (3) HTC is a third-party beneficiary of the arbitration agreement.

14 In her First Amended Complaint (“FAC”), Plaintiff Mary McKinney, a Pennsylvania
15 resident, asserts claims on behalf of herself and a putative nationwide class against Defendants
16 Google Inc., HTC, and T-Mobile, based on the alleged failure of her Nexus One mobile device
17 (referred to in the FAC as the “Google Phone”) to “maintain connectivity to T-Mobile’s 3G
18 wireless network.” FAC, ¶ 1. Plaintiff alleges that the Nexus One was developed, marketed and
19 sold by Google, manufactured by HTC, and is used on T-Mobile’s 2G/EDGE and 3G wireless
20 networks. FAC, ¶¶ 3-6, 12, 39. According to Plaintiff, connectivity to T-Mobile’s 3G network is
21 not “consistent” because of deficiencies in “the infrastructure of T-Mobile’s 3G wireless network
22 and/or the Google Phone.” *Id.*, ¶ 55; *see also id.*, ¶¶ 41, 44, 50. Thus, all of Plaintiff’s claims
23 challenge T-Mobile’s service and/or use of the Nexus One on T-Mobile’s wireless network.

24 Plaintiff has T-Mobile service and entered into a contract with T-Mobile that contains the
25 following arbitration provision (“Arbitration Agreement”):

26 **2. * Dispute Resolution and Arbitration. WE EACH AGREE THAT,**
27 **EXCEPT AS PROVIDED BELOW (AND EXCEPT AS TO PUERTO RICO**
28 **CUSTOMERS), ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU**

1 **AND US IN ANY WAY RELATED TO OR CONCERNING THE**
2 **AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS,**
3 **INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY**
4 **BINDING ARBITRATION, RATHER THAN IN COURT.** This includes any
5 claims against other parties relating to Services or Devices provided or billed to
6 you (such as our suppliers or retail dealers) whenever you also assert claims
7 against us in the same proceeding.

8 Declaration of Andrea Baca (“Baca Decl.”), Ex. A, ¶ 2, filed with T-Mobile’s Motion (emphasis
9 in original). As set forth below, and in T-Mobile’s Motion, the Arbitration Agreement covers
10 Plaintiff’s claims against HTC in this action, the Arbitration Agreement is valid and enforceable,
11 and HTC has a right to enforce the Arbitration Agreement as a third-party beneficiary. Therefore,
12 in response to the FAC, HTC brings this motion to compel arbitration and to stay claims. HTC is
13 concurrently filing a motion to dismiss the FAC for failure to state a claim under Federal Rules of
14 Civil Procedure 9(b) and 12(b)(6), and, in doing so, does not waive and expressly reserves its
15 right to compel arbitration, including all appellate rights, under the FAA. *See* 9 U.S.C. § 16.

16 **II. ARGUMENT**

17 **A. Plaintiff’s Claims In This Action Against HTC Fall Within The Scope of The**
18 **Arbitration Agreement**

19 As set forth in T-Mobile’s Motion, Plaintiff’s claims in this action are well within the
20 scope of the Arbitration Agreement because they “directly challenge services, devices or
21 products.” *See* T-Mobile Motion at 10-11. Under the Arbitration Agreement, all such claims
22 “against other parties” are subject to arbitration “whenever [a plaintiff] also assert claims against
23 [T-Mobile] in the same proceeding.” Baca Decl., Ex. A, ¶ 2. Accordingly, Plaintiff’s claims
24 against HTC fall within the scope of the Arbitration Agreement because they challenge T-
25 Mobile’s “service” and/or use of the Nexus One “device” on T-Mobile’s wireless network and
26 Plaintiff has asserted the same claims against T-Mobile in this action.

1 **B. The Arbitration Agreement Is Valid and Enforceable.**

2 The Arbitration Agreement is valid and enforceable for the reasons set forth in T-Mobile's
3 Motion. T-Mobile's Motion at 8-18. Pennsylvania law applies in determining the enforceability
4 of the Arbitration Agreement. *Id.* at 10-13. Under Pennsylvania law, the Arbitration Agreement
5 is valid and enforceable and therefore requires Plaintiff to arbitrate individuals claims within its
6 scope. *Id.* at 13-18.

7 **C. HTC Has A Right To Enforce The Arbitration Agreement As A Third-Party**
8 **Beneficiary.**

9 HTC is a third-party beneficiary of the Arbitration Agreement and therefore has a right to
10 enforce its terms. A non-signatory to an arbitration agreement can enforce its terms under
11 traditional principles of contract and agency law, including the third-party beneficiary doctrine.
12 *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006), *citing E.I. DuPont de Nemours &*
13 *Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir. 2001).
14 Pennsylvania law applies in determining whether HTC is a third-party beneficiary of the
15 Arbitration Agreement. *See* T-Mobile's Motion at 11-14; *Duvall v. Galt Medical Corp.*, No. C-
16 07-03714 JCS, 2007 WL 4207792, *8 (N.D. Cal. Nov. 27, 2007) (holding that under California
17 choice of law rules, the state law set forth in choice of law provision in the applicable agreement
18 applies to the determination of whether a party is a third-party beneficiary of the agreement).
19 Under Pennsylvania law, to be deemed a third-party beneficiary, a party must establish: (1) that
20 the contract or circumstances express an intention to benefit the third party; and (2) circumstances
21 demonstrating that the promisee intends to give the third party the benefit of the promised
22 performance. *Scarpitti v. Weborg*, 530 Pa. 366, 372-73, 609 A.2d 147, 150 (1992). Both
23 requirements are met here.

24 *First*, the broad language of the Arbitration Agreement demonstrates the intention of the
25 parties to allow non-signatories to enforce its terms. This court must apply general state law
26 principles of contract interpretation¹ when determining whether parties have agreed to arbitrate a

27 ¹ Under Pennsylvania law, a court interpreting a contract must ascertain the intent of the parties to the
28 contract. *Kripp v. Kripp*, 578 Pa. 82, 90, 849 A.2d 1159, 1163 (2004). When contract terms are clear and
unambiguous, the intent of the parties is determined by the contract language itself. *Id.*

1 dispute and must give “due regard to the federal policy in favor of arbitration by resolving
2 ambiguities as to the scope of arbitration in favor of arbitration.” *Mundi v. Union Sec. Life Ins.*
3 *Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009). In addition to requiring arbitration of claims against T-
4 Mobile challenging “services, devices or products,” the Arbitration Agreement states that the
5 agreement to arbitrate “includes any” such claims brought against “other parties” when T-Mobile
6 is a party in the same proceeding. Here, the term “other parties” must be broadly construed, both
7 to effectuate the intent of the contracting parties and to align with the federal policy of resolving
8 ambiguities in contractual arbitration provisions in favor of arbitration. *See Mundi*, 555 F.3d at
9 1044. As the manufacturer of the Nexus One, which Plaintiff alleges fails to provide “consistent”
10 connectivity to T-Mobile’s 3G network either because of deficiencies in T-Mobile’s service or the
11 device, HTC falls squarely within the class of “other parties” for which the Arbitration
12 Agreement expressly provides a right of arbitration. Because Plaintiff has asserted claims against
13 T-Mobile in this action, the other contractual prerequisite for requiring arbitration of claims
14 against third parties is also satisfied.

15 *Second*, the promisee to the Arbitration Agreement—T-Mobile—clearly intended to give
16 third parties the benefit of the Arbitration Agreement. *See Scarpitti*, 530 Pa. at 372-73, 609 A.2d
17 at 150. “Promisee” is defined as “one to whom a promise is made.” BLACK’S LAW DICTIONARY
18 (8th ed. 2004). Here, T-Mobile is the promisee because Plaintiff, by assenting to the Arbitration
19 Agreement, promised T-Mobile that she would arbitrate claims covered by its terms. By drafting
20 the Arbitration Agreement to cover claims challenging “services, devices or products,” including
21 any such claims against “third parties” sued in the same action, T-Mobile demonstrated its
22 intention, as the promisee, to extend the benefits of the Arbitration Agreement to third parties.

23 Accordingly, the plain language of the Arbitration Agreement demonstrates the intention
24 of the parties to allow HTC to enforce its terms and T-Mobile’s intention, as the promisee, to give
25 HTC the benefit of defending against the claims brought by Plaintiff in an arbitral forum.²

26 ² Even if California law applied to the determination of whether HTC is a third-party beneficiary of T-
27 Mobile’s arbitration provision, the result would be the same. In California, a party is a third-party
28 beneficiary if the intent to benefit it appears from the terms of the contract—that is, if it is an intended,
rather than an incidental beneficiary. *Spinks v. Equity Residential Briarwood Apts.*, 171 Cal. App. 4th
1004, 1021-22 (2009). “Ultimately, the determination turns on the manifestation of intent to confer a

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III. CONCLUSION

For the foregoing reasons, HTC respectfully requests that the Court issue an order compelling Plaintiff to arbitrate her individual claims against HTC and staying this action until the conclusion of arbitration.

DATED: July 12, 2010

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benefit on the third party.” *Id.* at 1023. Here, as explained above, there is a clear intent to allow third parties, including HTC, to enforce the arbitration provision in T-Mobile’s agreement with Plaintiff.