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GOOGLE INC.

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-JW

DEFENDANTS GOOGLE INC. AND HTC CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 1, 2010
Time: 9:00 a.m.
Dept: 8
Judge: Hon. James Ware

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on November 1, 2010, in Courtroom 8, on the fourth floor of the above-titled United States District Court, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable James Ware, defendants Google Inc. and HTC Corporation, will, and hereby do, move this Court, pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), for an order dismissing plaintiff Mary McKinney's First Amended Complaint for failure to state a claim upon which relief can be granted. This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the Request for Judicial Notice filed concurrently herewith, 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.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND REGUILATIONS

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In her First Amended Complaint ("FAC"), Plaintiff Mary McKinney, a Pennsylvania resident, asserts three claims on behalf of herself and a putative nationwide class against defendants Google Inc. ("Google"), HTC Corporation ("HTC"), and T-Mobile USA, Inc. ("T-Mobile") (collectively referred to as "Defendants"), concerning the Nexus One's alleged "failure to maintain connectivity" to T-Mobile's "3G" wireless network. FAC, ¶ 1. The Nexus One is a "smartphone" designed to operate on both 2G/EDGE and 3G wireless networks using the Android Mobile Technology Platform, and has an array of advanced capabilities including phone, Internet, email, texting and other functions. According to Plaintiff, Defendants have made misrepresentations about the Nexus One, and breached express and implied warranties, because the Nexus One fails to "consistently perform at a 3G level" on T-Mobile's wireless network. *Id*., ¶ 41. Yet Plaintiff does not and cannot identify even a single statement by Defendants about the Nexus One's level of connectivity to T-Mobile's 3G network – much less a statement *representing* and *warranting* "consistent" 3G connectivity – and she ignores the statements that Google and HTC did make in their written contracts with Plaintiff, which contradict and disclaim any such representation or warranty.

Plaintiff purports to assert three claims in her FAC: (1) a federal claim for violation of the Federal Communications Act ("FCA") based on Defendants' alleged "misrepresentations" and "false advertising" about the Nexus One's connectivity to T-Mobile's 3G network; (2) a state-law claim for breaches of "express warranty" and the "implied warranty of merchantability" premised on the Nexus One's alleged failure to provide "consistent" 3G connectivity on T-Mobile's network; and (3) a federal claim under the Moss-Magnuson Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, *et seq*. None states a claim for relief that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Indeed, Plaintiff's claims all fail because they are premised on Plaintiff's subjective expectation that she would receive some higher level of "3G" connectivity to T-Mobile's wireless network than she allegedly did, but which Defendants *never promised* and which is *not required* for the Nexus

One to be fit for its ordinary purpose as a smartphone capable of providing phone and data services when operating on 2G/EDGE and/or 3G networks.

As explained below, Plaintiff's FCA claim (First Cause of Action) fails for several reasons – including (i) the claim sounds in fraud but is not pled with the particularity required by Rule 9(b); (ii) Google and HTC cannot be sued under the FCA because they are not common carriers; and (iii) Plaintiff has failed to comply with the prior "FCC determination" requirement mandated by *North County Commc'ns Corp. v. California Catalog & Technology*, 594 F.3d 1149, 1159 (9th Cir. 2010). Plaintiff's state-law breach of warranty claims (Second Cause of Action) are also fatally flawed. The "express warranty" claim fails because the FAC does not sufficiently allege (i) any affirmation of fact or promise actually made by Defendants promising any level of 3G connectivity to T-Mobile's network, much less "consistent" 3G connectivity; or (ii) that Plaintiff reasonably relied on any such express warranty. The "implied warranty of merchantability" claim fails because the FAC's "3G" connectivity allegations do not and cannot render the Nexus One unfit for its ordinary purpose as a smartphone with multi-functional capabilities that operates, as it was designed to operate, on both 2G/EDGE and 3G wireless networks. Moreover, Google disclaimed any implied warranties of merchantability, and Plaintiff lacks privity with HTC. Plaintiff's federal warranty claim under the MMWA (Third Cause of Action) falls along with her legally defective state-warranty claims.

Finally, Plaintiff's state-law warranty claims are also are preempted by the FCA under 47 U.S.C. § 332(c)(3) for precisely the reasons this Court held that the same plaintiff counsel's state-law warranty and other claims were preempted in the *iPhone* litigation – *i.e.*, they constitute FCA-preempted attacks on both "3G market entry" and the "rates" charged in connection with the Nexus One on T-Mobile's FCC-regulated commercial mobile service. *In re Apple iPhone 3G Prods. Liab. Litig.*, No. 09-02045, slip op. at 9, 12, 14 (N.D. Cal. Apr. 2, 2010) ("*iPhone*"). Given the many other reasons why Plaintiff's warranty claims must be dismissed as defectively pleaded and legally flawed, however, the Court has no occasion even to reach the FCA preemption issue that mandated dismissal of all claims in *iPhone*.

II. SUMMARY OF ALLEGATIONS AND BACKGROUND

The Nexus One is "a multi-functional mobile device" – or "smartphone" – that "operates using the Android Mobile Technology Platform," and has an array of "advanced capabilities" and features including phone, Internet access, email, texting, contacts, calendar, maps, and other audio and video capabilities. FAC, ¶¶ 1, 25, 31-32. It is designed to operate on either a "3G" wireless network or a "2G" wireless network (also known as "GSM/EDGE"), and to switch between networks so that the Nexus One's features can be used when a 3G connection is not available. *Id.*, ¶¶ 31, 39-40, 49. The Nexus One was developed and marketed by Google, manufactured by HTC, and released in the United States on January 5, 2010. *Id.*, ¶¶ 1, 3, 4, 26. It can be purchased online from Google for $529 as an "unlocked" phone usable with any wireless service (*e.g.*, AT&T), or at a discounted price of $179 when purchased with a new two-year contract with T-Mobile's wireless service. *Id.*, ¶¶ 33-34. Existing T-Mobile customers can also upgrade to the Nexus One at a discounted price if they extend their current two-year T-Mobile service contract. *Id.*, ¶ 37.

Plaintiff Mary McKinney, a Pennsylvania resident, alleges that she bought her Nexus One on or about January 9, 2010 over the Internet from Google's website, but has been unhappy with its "failure to maintain connectivity to T-Mobile's 3G wireless network." FAC, ¶¶ 1, 2.[1] Plaintiff complains that her expectations have been frustrated because her Nexus One does not always operate "consistently" on T-Mobile's 3G network, as opposed to T-Mobile's "slower" and less-advanced "2G" or "GSM/EDGE" network. *Id.*, ¶¶ 1, 6, 12, 38-41, 49-50.

According to the FAC, Defendants – Google, HTC, and T-Mobile – *misrepresented*, and expressly or impliedly *warranted*, that the Nexus One device would "consistently perform at a 3G level" on T-Mobile's wireless network. *Id.*, ¶ 41; *see also id.*, ¶¶ 6, 11(a), 12, 38, 40, 44, 47, 52-55, 59, 62-64. Indeed, Defendants supposedly "acted in concert" pursuant to a common scheme of "material misstatements" and related "omissions of material fact" to deceive consumers about whether the Nexus One "would operate as a true 3G device" and provide

[1] While immaterial for purposes of this motion, Google's records indicate that Plaintiff

"consistent" 3G connectivity to what Plaintiff alleges is really an "inferior T-Mobile 3G wireless network." FAC, ¶¶ 52-55; *see also id*., ¶ 6 (alleging "common scheme" to falsely market Nexus One despite its "inability to maintain connectivity to the 3G network"). According to Plaintiff, Defendants "failed to disclose" 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." FAC, ¶ 55; *see also id*., ¶ 50.

But the FAC nowhere identifies a single factual representation made by Defendants in which any of them ever actually stated – whether by affirmation of fact, promise, or otherwise – that the Nexus One would provide "consistent" connectivity to T-Mobile's 3G wireless network. In fact, the FAC identifies no factual representation at all about "3G" connectivity with respect to the Nexus One device generally, or about the Nexus One's operation specifically on T-Mobile's network. Notably, Google's only Nexus One advertising identified and quoted in the FAC makes no reference to "3G" or "3G connectivity" at all, nor does it mention T-Mobile, T-Mobile's "3G" network, or any level of 3G connectivity to T-Mobile's 3G network. Rather, it states merely: "Experience Nexus One, the new Android phone from Google." FAC, ¶ 29. As to HTC, the FAC does not identify or quote any advertising statement about the Nexus One at all. And while the FAC does quote an excerpt from T-Mobile's "website" that generally references T-Mobile's "3G" network, that website excerpt does not even mention the Nexus One, and the FAC nowhere alleges that Plaintiff saw and read this portion of T-Mobile's website and in any way relied on it when purchasing her Nexus One mobile device. *Id.*, ¶ 51.

At bottom, Plaintiff alleges that she is unhappy with her Nexus One mobile device because she is "locked into a two-year service plan with inferior T-Mobile 3G wireless network connectivity." *Id*., ¶53. Plaintiff alleges that she was required to "pay[] more to receive inferior service in relation to what [she] believed [she] had purchased," *id*., ¶ 52, and that Defendants acted wrongly in "trying to sell more Google Phone devices than the existing T-Mobile's 3G wireless network could handle." *Id*., ¶ 54.

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purchased an "unlocked" Nexus One on January 5, 2010 for $529.

The FAC asserts three causes of action. First, it purports to assert a Federal Communications Act ("FCA") claim against all Defendants for alleged violations of 47 U.S.C. § 201(b), pursuant to 47 U.S.C. § 207. *See* FAC, First Cause of Action, ¶¶ 56-59. According to the FAC, each of the Defendants has violated section 201(b) of the FCA because "charges" in connection with the Nexus One on T-Mobile's network should be deemed "unjust" given Defendants' alleged "false advertising" and "misrepresentations" concerning the Nexus One's consistent connectivity to T-Mobile's 3G network. *Id.*, ¶ 59. Even if the Court deems Defendants' charges "reasonable," Plaintiff alleges that they should be liable in "damages" under the FCA for their alleged misrepresentations. *Id.*

Second, the FAC asserts a state-law claim entitled "Breach of Express Warranty and Implied Warranty of Merchantability." *See* FAC, Second Cause of Action, ¶¶ 60-67. Plaintiff alleges that Defendants expressly and impliedly warranted that she would receive "consistent, reliable and sustained connectivity" to T-Mobile's 3G network and "breached" those warranties because 3G connectivity was not "consistently" available and, when it was not available, her Nexus One operated (as it was designed to do) on T-Mobile's 2G/EDGE network. *Id.*, ¶¶ 61-62, 64; *see also id.*, ¶¶ 39, 49. The Second Cause of Action does not, however, identify any instance in which any of the Defendants actually and explicitly made a specific factual representation, affirmation of fact, or promise that supposedly constitutes the "express warranty" on which the claim is based – *i.e.*, that the Nexus One is guaranteed to provide "consistent" 3G connectivity on T-Mobile's network, or any other level of 3G connectivity. Nor does the FAC plead that Plaintiff saw any such representation and reasonably relied on it in purchasing her Nexus One device. Instead, the FAC alleges merely that it was Plaintiff's "expectation" that the "ordinary purpose" of the Nexus One device was "to provide consistent connectivity to a supposedly faster 3G network." *Id.*, ¶¶ 63, 64. But, as the FAC alleges elsewhere, the Nexus One was in fact designed to ensure that its phone and multi-functional capabilities will *still operate* whenever a wireless provider's 3G network is unavailable, by switching in such circumstances to a 2G/EDGE network. *Id.*, ¶¶ 39-40, 49.

Third, the FAC asserts a claim for alleged "Violation of the Moss-Magnuson Warranty

Act." *See* FAC, Third Cause of Action, ¶¶ 68-76. This federal warranty claim is based on the same core allegations as the FAC's state-law warranty claim, and likewise alleges both that (1) Defendants supposedly made "written affirmations of fact, promises and/or descriptions" that the Nexus One would provide "consistent 3G connectivity"; "and/or" (2) that an "implied warranty" that the Nexus One will provide consistent 3G connectivity arises by operation of law under the MMWA. *Id.*, ¶ 72. Defendants allegedly "breached these express and implied warranties," which "caused damages" to Plaintiff. *Id.*, ¶¶ 73, 76.

Based on these allegations and claims, Plaintiff seeks declaratory and injunctive relief, an award of "actual, statutory and/or exemplary damages," disgorgement, restitution, and attorneys fees. FAC, Prayer for Relief. In addition, Plaintiff seeks to certify a nationwide class of "[a]ll persons within the United States who purchased the Google Phone through www.google.com at any time between January 5, 2010 and the present who either (a) have a T-Mobile service plan for access to its 3G wireless network or (b) paid full price for an 'unlocked' Google Phone for use on another 3G network." FAC, ¶ 8.

III. LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss is properly granted unless the complaint alleges "enough" well-pleaded "facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570; *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960 (2009). To survive a Rule 12(b)(6) motion, the "non-conclusory 'factual content'" and reasonable inferences therefrom must be "plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Service*, 572 F.3d 962, 968-70 (9th Cir. 2009) (internal citations omitted). Although allegations of material fact are to be accepted as true and construed in the light most favorable to the nonmoving party, the Court may properly disregard conclusory allegations and unwarranted inferences. *Id.* at 969-70; *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007). Accordingly, this Court may consider only the FAC's well-pleaded allegations, which, as explained below, are insufficient to state any plausible claim for relief.

IV. ARGUMENT

A. Plaintiff's Claim Under Sections 201(b) And 207 Of The Federal Communications Act Must Be Dismissed For Several Independent Reasons Under Controlling Ninth Circuit Authority (First Cause Of Action).

In her First Cause of Action, Plaintiff purports to assert a claim against all Defendants under the Federal Communications Act's private right-of-action provision, 47 U.S.C. § 207, for alleged violation of 47 U.S.C. § 201(b). Section 201(b) declares "unlawful" all charges and practices by a common carrier that are "unjust or unreasonable." 47 U.S.C. § 201(b). Section 207 provides that persons "damaged by any common carrier subject to the provisions of this chapter" can bring suit to recover those "damages for which such common carrier may be liable under the provisions of this Act." 47 U.S.C. § 207. *See also* FAC, ¶¶ 57-58.

Plaintiff purports to premise her FCA claim on misrepresentation and "false advertising" allegations. FAC, ¶ 59. She alleges that "charges" for the Nexus One device and T-Mobile service are "unjust" because what Plaintiff allegedly received in terms of "the quality of the 3G coverage service" for the Nexus One on T-Mobile's commercial mobile service was not what it was allegedly represented – or "misrepresented" – to be. *Id*. The substance of the FCA claim "Against All Defendants" is set forth in paragraph 59 of the FAC, which in full provides:

> Based on the conduct alleged above, Defendants have violated Section 201(b) of the Federal Communications Act, because, as previously determined by the FCC in rulings relating to whether false and misleading claims can constitute a violation of the FCA, their charges for the Google Phone as an internet access device and the companion T-Mobile premium service plans as detailed above that Plaintiff and Class members were required to purchase were unjust based up on the claims they made as compared to what was actually provided. T-Mobile also misrepresented or omitted material facts relating to the quality of the 3G coverage service that would be available to Class Members using the Google Phone. T-Mobile's service was thus not provided in accordance with its terms and conditions or in accordance with the promises included in advertising for the Google Phone, resulting in a material difference between their promises and actual performance. Even if Defendants are found to have been charging a "reasonable rate" for their products and services, they are still subject to a claim for damages for non-disclosure or false advertising of the material facts set forth herein based on its misrepresentations or failing to inform Class members of other material terms, conditions, or limitations on the services provided Class Members.

FAC, ¶ 59.

As a matter of law, Plaintiff's FCA claim must be dismissed as fatally flawed for three independent reasons. First, even though her FCA claim is premised on "false and misleading

claims" about "consistent" 3G connectivity that Defendants supposedly made, *id*., Plaintiff has failed to plead this claim, which sounds in fraud, with the particularity required by F.R.C.P. (9)(b). Second, even though the law is clear that FCA claims may be asserted only against a party that is a "common carrier" and regulated as such by the FCC, Plaintiff has impermissibly asserted her FCA claim against Google and HTC even though they are not common carriers and are not even alleged to be common carriers in the FAC. Third, absent a determination by the Federal Communications Commission ("FCC") that the specific conduct at issue in the FAC violates the FCA, a private plaintiff has no right of action under section 207 to sue for alleged violations of section 201(b) of the FCA, as Plaintiff seeks to do here.

1. Plaintiff's FCA Claim Must Be Dismissed Because It Sounds In Fraud And Is Not Pled With The Particularity Required By F.R.C.P. 9(b).

Plaintiff has not pleaded her FCA claim with the particularity required by F.R.C.P. 9(b) of all claims that "sound in fraud." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2008); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *see also* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake"). Rule 9(b)'s particularity standard applies to *all* misrepresentation and omission claims sounding in fraud – regardless of how the claims are styled, and regardless of whether they are labeled "fraud" claims. *See, e.g*., *Kearns*, 567 F.3d at 1125-1127 (applying Rule 9(b) standard to dismiss unfair competition claims based on alleged "unified course of fraudulent conduct"); *see also Mangindin v. Washington Mut. Bank*, 637 F. Supp. 2d 700, 706-07 (N.D. Cal. 2009) (Ware, J.) (dismissing all claims "sounding in fraud" for failure to satisfy Rule 9(b)'s heightened pleading requirements).

"Allegations under Rule 9(b) must be stated with 'specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Mangindin*, 637 F. Supp. 2d at 706 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)). Rule 9(b) requires plaintiffs to plead with particularity "'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). Consequently, courts routinely invoke

Rule 9(b) to dismiss any and all claims "sounding in fraud" whenever plaintiffs fail to plead with particularity *what* the defendants actually stated, precisely *where* the statement was made, *by whom*, *how* the allegedly deceptive statement was actually made, and *why* it is supposedly false, misleading and fraudulent. *See, e.g.*, *Kearns*, 567 F.3d at 1125-27 (affirming dismissal for failure to comply with Rule 9(b) where plaintiff "failed to articulate the who, what, when, where and how of the misconduct alleged"; complaint failed to specify what defendants' advertisements specifically stated, who specifically made the statements, when they were made and plaintiff was exposed to them, and which statements plaintiff found material and then relied upon in making his purchasing decision); *Vess*, 317 F.3d at 1106-08 (any claims based on "unified course of fraudulent conduct" should be dismissed under Rule 9(b) unless plaintiff alleges "the who, what, when, where, and how" of the wrongful conduct, what is false or misleading about a statement, and why) (internal quotations and citations omitted).

Here, there can be no question that Plaintiff's FCA claim is subject to Rule 9(b)'s heightened pleading requirement as a claim that sounds in fraud. *Kearns*, 567 F.3d at 1125. As pled, the FCA claim that Plaintiff has asserted in her complaint is fundamentally premised on "misrepresent[ations]" and related "omi[ssions]" allegedly made by T-Mobile "relating to the quality of the 3G coverage service that would be available to Class Members using the" Nexus One mobile device. FAC, ¶ 59. Indeed, it is this claimed "false advertising" that allegedly renders the rates charged by all Defendants "unjust" and actionable under the FCA. *Id.*[2]

It is equally plain that the FAC and its FCA claim come nowhere close to satisfying Rule 9(b)'s particularity requirements. Most fundamentally, the FAC fails to plead the "specific content" of any "false representations" actually made by any of the Defendants that could potentially be actionable, or the "identities of the parties to [any such] misrepresentations."

[2] Thus, like the "unfair" business practices claims in *Kearns*, Rule 9(b)'s particularity requirement applies to Plaintiff's FCA claim asserted in her FAC even if Rule 9(b) may not apply to other FCA claims that – unlike the First Cause of Action here – are not premised on alleged misrepresentations and related omissions allegedly constituting false advertising, *see* FAC, ¶59, and thus do not "sound in fraud." 567 F.3d 1125-27; *see also id.* at 1127 (rejecting contention that "nondisclosure" and "failure to disclose" allegations need not be pleaded with particularity under Rule 9(b)).

Swartz, 476 F.3d at 764; *Mangindin*, 637 F. Supp. 2d at 706. Instead, in violation of Rule 9(b), the FAC includes only *conclusory* allegations about some supposed "misrepresentations" by "Defendants," without satisfying Rule 9(b)'s particularity requirement. *See, e.g.*, FAC, ¶¶ 12, 38, 40-41, 53, 64 (conclusory allegations characterizing some supposed "advertis[ing]," "market[ing]," "assertions," "material misrepresentations," and "statements" made by "Defendants"). Nowhere does the FAC plead with particularity *any* representation by any of the Defendants about the Nexus One's allegedly promised "consistent 3G connectivity" to T-Mobile's 3G network, even though that is the core theory on which the FAC is premised. The only Google representation pled with particularity in the FAC, from Google's web search page, is the entirely truthful and non-actionable statement: "Experience Nexus One, the new Android phone from Google." FAC, ¶ 29. The FAC recites no advertising or marketing statements at all by HTC, and the sole quote from T-Mobile's website refers generally to its 3G network without any mention of the Nexus One mobile device, much less any supposed misrepresentation guaranteeing that the Nexus One will provide consistent 3G connectivity to T-Mobile's 3G wireless network. FAC, ¶ 51. Thus, the FAC's First Cause of Action must be dismissed because it is not pled with the particularity required by Rule 9(b) under settled Ninth Circuit authorities.

2. Plaintiff's FCA Claim Against Google And HTC Also Fails Because Neither Defendant Is A "Common Carrier" And, Thus, Neither May Be Sued For Alleged FCA Violations.

Plaintiff's effort to assert a private FCA claim against Google and HTC fails under settled Ninth Circuit law, which confirms that *only* a "common carrier" may be sued in any private right of action under section 207 for alleged violations of section 201(b). *Howard v. America Online Inc.*, 208 F.3d 741, 751-53 (9th Cir. 2000) (affirming dismissal of FCA claim against Internet service provider under section 207 because "AOL is not a common carrier under the Communications Act" and therefore AOL cannot be sued under section 207 for alleged violations of section 201(b)); *Maydak v. Bonded Credit Co.*, 96 F.3d 1332, 1334 (9th Cir. 1996) (affirming dismissal of FCA claim against collection agency that attempted to collect amounts plaintiff owed for 1-900 phone calls because collection agency was not a "common carrier").

Neither Google nor HTC is a "common carrier." In fact, Plaintiff does not even purport

to allege in the FAC that either is a common carrier. *See generally* FAC. Congress in the FCA defined the term "common carrier" to mean "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio in interstate or foreign transmission of energy," 47 U.S.C. § 153(10); and the FCC's regulations instruct that only those "engaged in providing telecommunications facilities or services, for use by the public, for hire" may be deemed a common carrier, 47 C.F.R. § 201.2(a). In this case, only T-Mobile is a "common carrier," and only T-Mobile is regulated as such by the FCC under the FCA. HTC is not a common carrier; rather, it is a "hardware manufacturer" of a variety of electronic devices including smartphones, such as the Nexus One. FAC, ¶ 26. Google is not a common carrier; rather, it specializes in "Internet search and advertising services," and also sells the Nexus One device and provides its operating system/platform and other web-based applications. *See id*., ¶¶ 3, 25.

Notably, the FCC has never remotely determined that either Google or HTC is a "common carrier" subject to the FCC's extensive regulations and regulatory oversight of common carriers under federal communications law. On the contrary, in a recent 2010 report, the FCC addressed competition in the mobile device market, and – like the FAC's allegations – the FCC listed Google as a "platform/operating system" and HTC as a "handset manufacturer." *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 2010 FCC LEXIS 3186 (F.C.C. May 20, 2010), at **564-565 ("FCC 2010 Report").[3] Moreover, in the FCC regulatory context, Google is an "information service" provider, which is defined by Congress to mean those who provide and offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). As the Ninth Circuit has recognized, "information

[3] As the FCC recently noted in its 2010 report, "in January 2010, Google began selling its own version of an Android-based smartphone, the Nexus One": "Android combines and supports Google's web-based applications, including its search engine, Gmail email product, web browser, and mapping application, all of which come pre-loaded on Android devices." FCC 2010 Report, at ¶¶ 141-42. Despite specifically discussing the Nexus One device, the FCC nowhere determined or even suggested that the Nexus One provided any basis somehow to regulate Google or HTC as a "common carrier" under the FCA.

service" providers "are not subject to regulation as telecommunications carriers" by the FCC – *i.e.*, they are *not* "common carriers" under the FCA. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000); *see also Howard*, 208 F.3d at 751-53 (dismissing FCA claims against Internet service provider, which was properly deemed a provider of "information services" or "enhanced services," and not regulated as a "common carrier" by the FCC).

In sum, because neither Google nor HTC is a "common carrier," neither can be sued in any private FCA action under 47 U.S.C. § 207 for alleged violations of 47 U.S.C. § 201(b).

3. Controlling Ninth Circuit Authority Also Requires Dismissal Of Plaintiff's FCA Claim Given The Absence Of Any "FCC Determination" That Defendants' Challenged Conduct Violates Section 201(b).

Plaintiff's FCA claim also must be dismissed because it violates the Ninth Circuit's holding in *North County Commc'ns Corp. v. California Catalog & Technology* that, before any private party can proceed in any private claim under section 207 for alleged violations of section 201(b), there must *first* be an "FCC determination" that the defendant common carrier's challenged practice is in fact "unjust or unreasonable" within the meaning of section 201(b) of the FCA. 594 F.3d 1149, 1159 (9th Cir. 2010) ("*North County*"); *accord Higdon v. Pacific Bell Tel. Co.*, No. 08-03526, 2010 U.S. Dist. LEXIS 40300, at **8-14 (N.D. Cal. April 2, 2010) (dismissing FCA action under *North County* where there was no "threshold FCC determination" that defendant's "challenged practice" in fact constituted a violation of section 201(b)); *Carney v. Verizon Wireless Telecom, Inc.*, No. 09-1854, 2010 U.S. Dist LEXIS 47161, at **11-14 (S.D. Cal. May 13, 2010) (same); *North County Commc'ns. Corp. v. McLeodUSA Telecomm. Servs., Inc.*, No.09-2063, 2010 U.S. Dist. LEXIS 42892, at **9-12 (D. Ariz. May 3, 2010).

As the Ninth Circuit held in *North County*, "an FCC determination" that the defendant common carrier's challenged practice violates section 201(b) "is integral" to and *must precede* any private action under section 207 – because Congress designed the FCA with the intent to put it "within the Commission's purview to determine whether a particular practice constitutes a violation for which there is a private right to compensation." *North County*, 594 F.3d at 1158; *accord Higdon*, 2010 U.S. Dist. LEXIS 40300, at *10; *Carney*, 2010 U.S. Dist LEXIS 47161, at

*12. While mandating that no private FCA action may proceed until the FCC has first made a determination that the challenged "particular practice" in fact violates section 201(b), the Ninth Circuit explicitly rejected the proposition that "federal courts [can] fill the analytical gap stemming from the absence of a Commission determination" in a given case because any other result impermissibly 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." *North County*, 594 F.3d at 1158 (internal quotations and citation omitted).[4]

Here, as in *North County*, *Higdon*, and *Carney*, there exists no FCC determination that the challenged conduct of the defendant common carrier, T-Mobile, in fact violates section 201(b). Nor has there remotely been any FCC determination that the challenged conduct of Google and HTC, who are not even common carriers, violates section 201(b). Plaintiff's FAC does not even purport to allege, in compliance with *North County*, that the FCC has previously determined that any Defendant's challenged conduct violates the FCA's section 201(b).

Indeed, the most the FAC tries to do with respect to the critical "FCC determination" requirement under *North County*, 594 F.3d at 1158-59, is to allege – in an impermissibly generalized fashion – that the FCC has "previously determined" that "false advertising" and "false and misleading claims *can* constitute a violation of the FCA[.]" FAC, ¶ 59 (emphasis added). But that does nothing to establish that the FCC has determined in this particular context that *these Defendants'* challenged practices, and *this* allegedly false advertising, *do in fact* violate section 201(b). *See also Carney*, 2010 U.S. Dist LEXIS 47161, at **13-14 (dismissing private FCA claim for failure to satisfy *North County*'s prior FCC-determination requirement where "there has been no determination by the FCC … that Defendants have committed fraud"; "Plaintiff's allegation of fraud is simply not enough to proceed with the FCA claim" under *North County* and, thus, "Plaintiff has failed to state a valid FCA claim"). *North County* unambiguously requires Plaintiff to identify a prior FCC determination that Defendants'

[4] In reaching its holding, the Ninth Circuit in *North County* was guided by the principles underlying the "primary jurisdiction" doctrine, *see* 594 F.3d 1155-56, 1158, which further support dismissal of Plaintiff's FCA claim here.

practices identified and challenged in FAC in fact violate section 201(b). But Plaintiff does not and cannot allege that the FCC has previously determined that Defendants' challenged "charges" are "unjust" (FAC, ¶ 59) within the meaning and scope of section 201(b). Nor can or does the FAC identify any prior FCC determination that T-Mobile's challenged conduct constitutes "false advertising" and the sort of "false and misleading claims" that the FCC determines "can constitute a violation of the FCA" *Id.* Because the FAC comes nowhere close to satisfying the Ninth Circuit's prior "FCC determination" requirement in *North County*, Plaintiff's FCA claim must be dismissed against all Defendants for this independently dispositive reason as well.

B. Plaintiff's Breach Of Warranty Claims Under State And Federal Law Must Be Dismissed (Second And Third Causes Of Action).

Plaintiff also attempts to assert breach of warranty claims under state and federal law. In her Second Cause of Action, Plaintiff asserts state-law claims for breach of express warranty and breach of the implied warranty of merchantability. FAC, ¶¶ 60-67.[5] In her Third Cause of Action, Plaintiff tries to assert a federal claim under the Magnuson-Moss Warranty Act. *Id.*, ¶¶ 68-76. All of Plaintiff's warranty claims fail as a matter of law.

1. Plaintiff's "Express Warranty" Claim Fails Because She Does Not – And Cannot – Allege Any Factual Statement By Google Or HTC Promising "Consistent" Connectivity To T-Mobile's 3G Network, Or Reasonable Reliance On Any Such Supposed Statement.

In any action for breach of express warranty, the plaintiff must plead and prove facts sufficient to show that the defendants actually and explicitly made "affirmations of fact or promises" that became part of the basis of the bargain, thereby voluntarily undertaking an actual "express warranty." *Pisano v. American Leasing*, 146 Cal. App. 3d 194, 197-98 (1983); *McKinniss v. Sunny Delight Bevs. Co.*, No. 07-02034, 2007 U.S. Dist LEXIS 96108, at **16-17 (C.D. Cal. Sept. 4, 2007); *cf.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992)

[5] Because Plaintiff does not specify the state law under which her warranty claims allegedly arise, Google and HTC assume for purposes of this Motion that California law applies, but do not waive and expressly reserve their respective rights to raise choice-of-law issues in subsequent proceedings. *See, e.g.*, *Keller v. Electronics, Inc.*, No. 09-1967, 2010 U.S. Dist. LEXIS 10719, *26 (N.D. Cal. Feb. 8, 2010) (assuming California law governs claims filed in

(because "an express warranty arises from the manufacturer's statements," it is a "contractual commitment voluntarily undertaken"). Any express warranty claim should be dismissed unless the plaintiff sufficiently alleges "(1) the exact terms of the warranty; (2) reasonable reliance thereon; and (3) a breach of warranty which proximately caused plaintiff's injury." *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 987 (N.D. Cal. 2009); *Avago Techs. United States, Inc. v. Venture Corp.*, No. 08-03248, 2008 U.S. Dist. LEXIS 105528, at **11-12 (N.D. Cal. Dec. 22, 2008) (Ware, J.). The FAC's express warranty claim fails as a matter of law for several reasons.

First, the premise of Plaintiff's claim is that Defendants expressly warranted that the Nexus One device was guaranteed to provide "consistent and reliable 3G network connectivity" to T-Mobile's 3G wireless network. FAC, ¶¶ 61-64; *see also id.*, ¶¶ 38-41. Yet the FAC does not – and cannot – identify and allege any factual representation actually made by any of the Defendants *about Nexus One's connectivity to T-Mobile's 3G network* that could possibly constitute the sort of explicit "affirmation of fact or promise" required to support an "express warranty" claim. This alone is dispositive. No express-warranty claim exists unless the defendants explicitly made a *specific factual representation* constituting the sort of "affirmation of fact or promise" needed to support any claim under this contract-based theory of recovery. *See, e.g., Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997) (affirming rejection of express warranty claim where defendant made "no explicit guarantees" and plaintiff could identify no "specific and unequivocal written statement" sufficient to constitute the requisite "affirmations of fact or promises that became part of the basis of the bargain"); *McKinniss*, 2007 U.S. Dist LEXIS 96108, at **16-17 (dismissing claim where complaint failed to identify any "explicit guarantees" or "specific and unequivocal written statements" that could constitute an actionable "express warranty").[6]

California by out-of-state plaintiff where complaint fails to specify which law governs).

[6] Although Plaintiff alleges that she "entered into agreements with Defendants" and "received uniform warranties in connection with the purchase" of the Nexus One (FAC, ¶¶ 61-62), the FAC *never identifies what statements* Defendants actually made that she claims constitute a legally cognizable express warranty undertaken by Google or HTC or T-Mobile. While the FAC alleges that some unidentified "advertisements" generally "stressed the excellence and reliability" of the Nexus One, (FAC, ¶ 64), any such supposed marketing cannot as a matter of

Second, Plaintiff's failure to plead her own "reasonable reliance" on Defendants' supposed factual representations amounting to an express warranty further requires dismissal of her claim. *Sanders v. Apple, Inc.*, 672 F. Supp. 2d at 988 (dismissing breach of express warranty claim where plaintiff failed to allege "reasonable reliance" on any specific representations actually made by defendant); *see also Moncada v. Allstate Ins. Co.*, 471 F. Supp. 2d 987, 997 (N.D. Cal. 2006) (express warranty claim failed where plaintiff had not read and relied on defendant's representations allegedly constituting express warranties). Here, Plaintiff alleges that she purchased the Nexus One "with the reasonable *expectation*" that she would receive "sustained connectivity" to T-Mobile's 3G network. FAC, ¶ 64 (emphasis added). Plaintiff does not allege that, in forming that claimed expectation, she saw and then reasonably relied upon any specific factual statement made by any of the Defendants promising consistent 3G connectivity (or any particular level of 3G connectivity) to T-Mobile's network – nor could she, because no such statement exists.

Moreover, the terms of Plaintiff's actual contracts with Google and HTC – which are subject to judicial notice[7] – contradict the FAC's allegations that Defendants promised that the Nexus One was guaranteed to provide some certain level of connectivity to T-Mobile's 3G network, much less "consistent" 3G connectivity. Google's "Terms of Sale" – which Plaintiff had to acknowledge and agree to before buying her Nexus One – not only provide that "3G network availability may depend on your mobile carrier" (and, thus, is not guaranteed and

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law constitute an *express warranty* that the Nexus One was specifically guaranteed always to provide consistent 3G connectivity when used on T-Mobile's wireless network. Moreover, imprecise advertising phrases like "excellent" or "reliable" are precisely the sort of vague and highly subjective statements that amount to non-actionable *puffery* as a matter of law. *See, e.g.*, *Sanders*, 672 F. Supp. 2d at 987 (express warranty claims cannot be based on "puffery," which involves "'vague, highly subjective claims as opposed to specific, detailed factual assertions'") (quoting *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994)); *Long v. Hewlett-Packard Co.*, No. 06-02816, 2007 U.S. Dist. LEXIS 79262, *21 (N.D. Cal. July 27, 2007) (Ware, J.) (statements that defendant's computers were a "*reliable* mobile computing solution" held to constitute "non-actionable puffery") (emphasis added); *see also* Cal. Civ. Code § 1791.2(b) ("An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty).

[7] As explained in Defendants' Request for Judicial Notice, both Google's Terms of Sale and HTC's Limited Warranty are properly subject to judicial notice. *See also Knievel v. ESPN*, 393 F.3d 1068, 1077 (9th Cir. 2005); *Long*, 2007 U.S. Dist. LEXIS 79262, at *16 n.3.

warranted), but also direct Plaintiff to check with her mobile carrier to confirm that the device's technical specifications are "compatible with 3G coverage in [Plaintiff's] area." Request For Judicial Notice ("RFJN"), Exh. 1, at p. 2. Further still, the Google Terms of Sale explicitly and conspicuously *disclaim* any express warranty relating to the Nexus One other than HTC's limited one-year repair or replacement warranty:

> 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-INFRINGMENT.

See RFJN, Exh. 1, at pp. 4-5.[8] HTC's express warranty, in turn, explicitly excludes from coverage "defects" caused by "a defective function of the cellular network or other system." *Id.*, Exh. 2. Thus, not only does Plaintiff fail to allege any statement by Google or HTC that could constitute an actionable "express warranty" concerning the Nexus One's 3G connectivity, but the terms of the Defendants' actual written contracts with Plaintiff squarely refute the claim she tries to assert. The explicit terms of the parties' actual written contracts also refute the reasonableness of any claimed reliance by Plaintiff on some feigned (and non-existent) express warranty about the Nexus One's connectivity to T-Mobile's 3G network.

2. Plaintiff's Claim For Breach Of The "Implied Warranty Of Merchantability" Fails As A Matter Of Law.

The FAC's Second Cause of Action also alleges breach of the "implied warranty of merchantability," but this claim fails as a matter of law for multiple reasons as well.

[8] In its Terms of Sale, Google explicitly made clear to Plaintiff and other purchasers that the only express warranty connected to the Nexus One was HTC's limited manufacturer's warranty, and that all other express warranties were disclaimed. RFJN, Exh. 1, at pp. 4-5; *see also Fogo v. Cutter Labs., Inc.*, 68 Cal. App. 3d 744, 758 (1977) ("clearly" the phrase "the foregoing warranty is exclusive and in lieu of all other warranties" that appeared at end of warranty constituted an enforceable disclaimer). This disclaimer is an enforceable contractual limitation. In *Long v. Hewlett-Packard Co.*, this Court upheld and enforced a comparable disclaimer, which provided: "To the extent allowed by local law, the above warranties are exclusive and no other warranty or condition, whether written or oral, is expressed or implied and HP specifically disclaims any warranties of merchantability, satisfactory quality, and fitness for a particular purpose." 2007 U.S. Dist. LEXIS 79262, at **16-17.

a. Plaintiff Fails To Plead Facts Showing That The Nexus One Is Not Merchantable And Unfit For Its Ordinary Purpose.

"Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law." *American Suzuki Motor Corp. v. Superior Ct.*, 37 Cal. App. 4th 1291, 1295 (1995). The implied warranty of merchantability operates to guarantee that products have only "a minimum level of quality" and are free of *fundamental* defects that are "so basic" that they render the item not "merchantable" at all and "unfit for its ordinary purpose." *Id*. at 1295-96 (implied warranty of merchantability "does not impose a general requirement that goods precisely fulfill the expectation of the buyer," but rather guarantees only "a minimum level of quality"); *Tietsworth v. Sears, Roebuck & Co.*, No. 09-00288, 2009 U.S. Dist. LEXIS 98532, at *36 (N.D. Cal. Oct. 13, 2009) ("'mere manifestation of a defect by itself does not constitute a breach of the implied warranty of merchantability" because "there must be a fundamental defect that renders the product unfit for its ordinary purpose'") (citation omitted). Thus, as the Ninth Circuit has explained, the implied warranty of merchantability is breached where defendant's product "lacks even the most basic degree of fitness for ordinary use." *Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 (9th Cir. 2009).

Here, the FAC's own allegations confirm that the Nexus One is entirely merchantable and fit for its *ordinary purpose* as a multi-functional mobile device – or "smartphone" – that operates using the Android Mobile Technology Platform and is capable of providing an array of "advanced capabilities" and features on both 2G/EDGE and 3G wireless networks. FAC, ¶¶ 25, 31, 32.[9] Plaintiff nowhere alleges that the Nexus One she purchased was non-operational or that, when operating on either a 2G/EDGE or 3G wireless network, was incapable of providing these advanced capabilities, including phone, text-messaging, calendar, contacts, maps, camera, music,

[9] As the FAC alleges, the Nexus One is a "smartphone" or "advanced mobile cellular phone" that (1) "operates using the Android Mobile Technology Platform"; (2) is designed to operate, and does operate, on "both" 2G/EDGE and 3G wireless networks; and (3) is capable of operating as a "multi-functional mobile device" with "advanced capabilities" and "various features" – such as a "video and audio player"; "Internet access"; and the capacity to "send and receive email," "download and play media," "share pictures and information via social networking systems," map locations, and an array of other features and capabilities. FAC, ¶¶ 25, 31, 32, 39-40, 49.

video, email, and Internet functionality.

Nonetheless, Plaintiff tries to premise a claim for breach of the implied warranty of merchantability on her "expectation" that the Nexus One's "ordinary purpose" included the particularized purpose of providing "consistent connectivity to a supposedly faster 3G network." *Id.*, ¶¶ 63, 64. In this regard, Plaintiff illegitimately exalts one of the Nexus One's capabilities, 3G connectivity, over all of the device's many other capabilities and functions, and imagines that "consistent" 3G connectivity is the device's essential "ordinary purpose." According to the FAC, the Nexus One is not "merchantable" at all if it sometimes operates on a 2G/EDGE network when a 3G connection is unavailable, because its "ordinary purpose" is supposedly to operate as a device that is technologically and legally *guaranteed* to have a "consistent connection to the T-Mobile 3G network." FAC, ¶ 62. The claim not only fails as a matter of law, but it distorts the implied warranty of merchantability doctrine beyond recognition.

Courts repeatedly have rejected claims for breach of the implied warranty of merchantability where, as here, the plaintiff highlights some claimed "defect" that allegedly impacts product performance but does not render the product incapable of performing its basic function. In *Birdsong*, for instance, the Ninth Circuit affirmed dismissal of a claim for breach of the implied warranty of merchantability where Apple's iPod could still function for its ordinary purpose of "listening to music" despite the plaintiff's hearing-damage allegations related to listening to iPod's music at higher levels. 590 F.3d at 958. Likewise, in *Tietsworth*, U.S. District Judge Fogel in the Northern District of California dismissed implied warranty of merchantability claims based on alleged defects in washing machines that caused them to "stop in mid-cycle," and required users to restart them "sometimes more than once." 2009 U.S. Dist. LEXIS 98532, at **36-37. Despite the significant inconvenience to users, the claim failed as a matter of law because plaintiffs did not allege they "cannot use their Machines at all," and failed to plead facts sufficient to show that the machines were not fit for the ordinary purpose "of washing clothes." *Id.* Similarly here, even the FAC's own allegations confirm that the Nexus One is still entirely merchantable and operational as a smartphone in instances when the device allegedly switches from T-Mobile's 3G network to its 2G/EDGE network when a 3G connection

is unavailable. *See* FAC, ¶¶ 39 (Nexus One "was designed to operate both on the 2G network and a third generation, or 3G, multiple access standard network"); 40 (when 3G connectivity is "unavailable," the Nexus One's phone and data capabilities can "still be used" and function).

Moreover, even assuming *arguendo* that it was Plaintiff's "expectation" and subjective belief that the Nexus One's purpose included "consistent access" to T-Mobile's 3G network, (FAC, ¶ 64), that would not support any claim for breach of implied warranty of merchantability here. *See, e.g.*, *American Suzuki Motor Corp.*, 37 Cal. App. 4th at 1296 (confirming that the implied warranty of merchantability "does not impose a general requirement that goods precisely fulfill the expectation of the buyer," but rather guarantees only "a minimum level of quality"). And even assuming *arguendo* that the Nexus One's switching from 3G to 2G somehow could be considered a product "defect" – which it cannot be – the mere manifestation of some supposed "defect" by itself does not constitute a breach of the implied warranty of merchantability because only a *fundamental* defect that is *so basic* to the essential operation of the product at issue can render that product "unfit for its ordinary purpose." *Id.* at 1295-96; *Birdsong*, 590 F.3d at 958; *Tietsworth*, 2009 U.S. Dist. LEXIS 98532, at **36-37.

In short, Plaintiff's "3G connectivity" allegations cannot, as a matter of law, form the basis of any legally cognizable claim for breach of the implied warranty of merchantability. [10]

b. Google's Disclaimer Of Any Implied Warranty Of Merchantability Also Defeats The Claim.

Plaintiff's meritless merchantability claim also fails in light of Google's legally enforceable disclaimers of any implied warranty of merchantability. *See* RFJN, Exh. 1, at p. 4.

[10] In her Second Cause of Action, Plaintiff includes a conclusory allegation that Defendants violated "Cal. Civ. Code § 1791, *et seq.*" (FAC, ¶ 66), which is California's Song-Beverly Act. By its terms, the Song-Beverly Act explicitly applies only to consumer goods "'sold at retail *in this state*'" – *i.e.*, "purchased … in the state of California." *In re NVIDIA GPU Litig.*, No. 08-04312, 2009 U.S. Dist. LEXIS 108500, *5 (N.D. Cal. Nov. 19, 2009) (quoting Cal. Civ. Code § 1792; emphasis in original). Plaintiff is a Pennsylvania resident who alleges that she bought her Nexus One over the Internet from Google's "website" (FAC, ¶ 2), not at retail in California. So any warranty claim under the Song-Beverly Act fails. *Annunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1142 (C.D. Cal. 2005) (dismissing Song-Beverly claim brought by Massachusetts resident who "purchased the product over the internet"). In any event, the same fundamental defects that doom Plaintiff's common law warranty claims also require dismissal of

Under settled law, merchants may disclaim the implied warranty of merchantability so long as they do so in a conspicuous fashion and specifically mention merchantability. Cal. Comm. Code § 2316(2); *Inter-Mark USA, Inc., v. Intuit, Inc.*, No. 07-04178, 2008 U.S. Dist. LEXIS 18834, at *22 (N.D. Cal. Feb. 27, 2008) (under section 2316(2), "an implied warranty of merchantability may be excluded in a written document in which the disclaimer is conspicuous and mentions merchantability"; dismissing implied warranty of merchantability claim where plaintiff's software licensing agreement with defendant contained "a valid disclaimer of any implied warranties"). Here, the explicit disclaimer of any implied warranty – including any "IMPLIED WARRANTIES OF MERCHANTABILITY" – is conspicuously set forth in the Google Terms of Use (*see* RFJN, Exh. 1, at p. 4), and readily satisfies section 2316(2)'s requirements.

c. Plaintiff's Implied Warranty Claim Against HTC Also Fails Because She Lacks Privity With HTC.

In addition to the fatal defects set forth above, Plaintiff's implied warranty claim against HTC fails because she purchased her Nexus One from Google, (FAC, ¶ 2), and therefore lacks privity with HTC. "California courts have expressed a policy against holding manufacturers liable to end-consumers under a theory of implied warranty where the parties are not in privity." *In re NVIDIA GPU Litig.*, No. 08-04312, 2009 U.S. Dist. LEXIS 108500, at *21 (N.D. Cal. Nov. 19, 2009); *see also Tietsworth*, 2009 U.S. Dist LEXIS 98532, at *36 (citing cases). Because Plaintiff does not, and cannot, allege that she purchased her Nexus One from HTC, her implied warranty claim against HTC also fails as a matter of law.

3. Plaintiff's Federal Claim Under The Magnuson-Moss Warranty Act Fails As A Matter Of Law.

As this Court knows, the Magnuson-Moss Warranty Act merely provides a federal cause of action for actionable state-law warranty claims: it "does not expand the rights available under such warranties, and dismissal of the state law claims requires the same disposition with respect to an associated MMWA claim." *Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2009

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any Song-Beverly Act claim as well. *See, e.g., Birdsong*, 590 F.3d at 958 n.2.

U.S. Dist. LEXIS 112971, at *32 (N.D. Cal. Dec. 4, 2009); *accord, In re Apple iPhone 3G Prods. Liab. Litig.*, No. 09-02045, slip op. at 9 n.10 (N.D. Cal. Apr. 2, 2010) (any "federal claim under the Magnuson-Moss Warranty Act is not viable in the absence of any state law warranty claims"). Because the MMWA does not create any additional or separate rights with respect to the warranties Plaintiff alleges in the FAC, the legally defective nature of Plaintiff's state-law warranty claims requires dismissal of the FAC's federal MMWA claim as well. *Id.*; *see also Birdsong*, 590 F.3d at 958 n.2 (plaintiff with no state-law warranty claim has no federal MMWA claim); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (same).

C. Plaintiff's State-Law Warranty Claims Are Also Expressly Preempted Under 47 U.S.C. § 332(c)(3) As State-Law Attacks On "3G Market Entry" And The Reasonableness Of "Rates Charged" In Connection With Commercial Mobile Service.

Finally, Plaintiff's state-law warranty claims must also be dismissed because they are indistinguishable from the breach of express and implied warranty claims and other claims involving "3G connectivity" in the *iPhone* litigation that this Court held to be expressly preempted by the FCA under 47 U.S.C. § 332(c)(3). *See iPhone*, slip op. at 6-14.

The FCA "contains a broad preemption clause," *id.* at 7, which provides: "[N]o State or local government shall have any authority to regulate *the entry of or the rates charged* by any commercial mobile service." 47 U.S.C. § 332(c)(3)(A) (emphasis added). Here, as in *iPhone*, Plaintiff's state-law warranty claims trigger FCA preemption under *both* the market "entry" *and* the "rates charged" prongs to FCA preemption – even though *either* would suffice for preemption. Slip op. at 9; *see also id.* at 12 (FCA preemption bars state-law claims challenging whether defendants had sufficient "infrastructure" for 3G wireless service at prices charged plaintiffs, which "relate to entry of or rates charged by a CMRS"); *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000) (section 332(c)(3) "completely preempt[s]" state regulation of either "rates" or "market entry"); *Ball v. GTE Mobilnet of Calif.*, 81 Cal. App. 4th 529, 543 (2000) ("section 332(c)(3)(A) prohibits a state from regulating 'the entry of *or* the rates charged by'" any cellular service") (emphasis added; quoting 47 U.S.C. § 332(c)(3)(A)).

Like the claims against AT&T in *iPhone*, Plaintiff's state-law warranty claims against T-

Mobile "are an attack on [the commercial mobile service's] rates and 3G market entry" and, thus, are squarely "preempted by the FCA" under section 332(c)(3). *iPhone*, slip op. at 9. And like the claims against Apple in *iPhone*, the state-law claims against Google and HTC are "inextricably tied" to Plaintiff's FCA-preempted claims against T-Mobile and therefore "preempted" against Google and HTC as well. *Id*. at 14.[11] In fact, Plaintiff's allegations are indistinguishable in all material respects from the allegations and claims this Court held to be preempted in the *iPhone* litigation. *Compare iPhone*, slip op. at 2-4, 8-9, 12, 14; *with* FAC,¶¶ 43-44, 50, 54-55, 62. The *iPhone* plaintiffs' claims were preempted because, regardless of how they were styled, they ultimately "targeted the sufficiency of ATTM's network infrastructure"; they were "based on the core allegation that Defendants knew that ATTM's 3G network was not sufficiently developed to accommodate the number of iPhone 3G users, and that Defendants deceived Plaintiffs into paying higher rates for a service that Defendants knew they could not deliver." *iPhone*, slip op. at 9. Similarly here, Plaintiff alleges that Defendants "should have known … that they were trying to sell more Google Phone devices than the existing T-Mobile 3G wireless network could handle," FAC, ¶ 54; and that Plaintiff "paid more to receive inferior service" given "inferior T-Mobile 3G wireless connectivity," *id.*, ¶¶ 52-53, 59. As in *iPhone*, the FAC alleges Defendants "acted in concert" to deceive Plaintiff about 3G connectivity to sell more devices and plans than they would have. *Compare iPhone*, slip op. at 14; *with* FAC, ¶¶ 5, 50-55.

If anything, FCA preemption applies even more clearly here than in *iPhone*, given the FAC's failure to plead with particularity *any* misrepresentations about the Nexus One's "3G" connectivity on T-Mobile's network. That makes this case even more like the claims held to be preempted in *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989-90 (7th Cir. 2000), and unlike the fraud-based claims pled with particularity that escaped preemption in *Shroyer v. New Cingular Wireless Servs*., No. 08-55028, 2010 U.S. App. LEXIS 10730, at **3-7 (9th Cir. May

[11] Moreover, just as the Court in *iPhone* concluded that AT&T was an "indispensible party" to any litigation of the plaintiff's 3G connectivity claims against Apple, *iPhone*, slip op. at 14-15, it follows, *a fortiori*, that T-Mobile is an indispensible party to any litigation of Plaintiff's 3G

26, 2010). Moreover, any reliance by Plaintiff on *Shroyer* here would also be misplaced because, as the Ninth Circuit emphasized, that case did not involve preemption under the "market entry" prong of section 332(c)(3), as in *Bastien*, *iPhone* and here. *See id*. at *7 ("*Bastien* dealt with market entry, which the states are expressly excluded from regulating by § 332," but Shroyer's claim "does not"). In short, this Court has already recognized that these same plaintiff lawyers' indistinguishable "3G connectivity" claims under state law constitute FCA-preempted challenges to "rates and 3G market entry," and preemption under section 332(c)(3) applies with at least as much force, if not more, here.

V. CONCLUSION

For the foregoing reasons, all of the claims asserted in Plaintiff Mary McKinney's First Amended Complaint should be dismissed without leave to amend.

Dated: July 12, 2010.

Respectfully submitted,

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connectivity claims here against Google and HTC.