McKinney v. Google, Inc. et al Doc. 46

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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*	)))))))))	5:10-cv-01177-JW <u>CLASS ACTION</u> **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION OF GOOGLE INC. AND HTC CORP. MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: November 1, 2010 Time: 9:00 a.m. Courtroom: 8 **Judge: Hon. James Ware**

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

TABLE OF CONTENTS

I. Issues Presented 5

II. Prefatory Statement and Summary of Facts 5

III. Argument 6

A. McKinney Has Adequately Pleaded her FCA Claim, which Is Subject to Rule 8(a)6
McKinney's FCA Claims Are Not Subject to Rule 9(b) 7

B. Defendants' Analogy to the California Unfair Competition Law Fails 7
Even under Rule 9(b), McKinney's Claims are Well-Pleaded 9

C. Google and HTC are Liable under the FCA 9

D. Defendants' Conduct in this Case is Unjust 12

E. McKinney's Warranty Claims Are Well-Pleaded 14

IV. Conclusion 16

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

TABLE OF AUTHORITIES

FEDERAL CASES

Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133 (C.D. Cal. 2005) 8

AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978) 12, 13

Clemens v DaimlerChrysler Corp., 534 F.3d 1017 (9th Cir. 2008) 16

F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979) 11

Global Crossing Telecommuns., Inc. v. Metrophones Telecommuns., Inc., 550 U.S. 45 (2007) 15

Howard v. Am. Online Inc., 208 F.3d 741 (9th Cir. 2000) 11

In re Apple iPhone 3G Prods. Liability Litig., ____ F. Supp. 2d ____, No. M 09-02045, 2010 WL 3059417, at *6 (N.D. Cal. Apr. 2, 2010) 6, 15

In re Mattel, Inc., 588 F. Supp. 2d 1111 (C.D. Cal. 2008) 9

Iowa Telcoms. Servs. v. Iowa Utils. Bd., 563 F.3d 743 (8th Cir. 2009) 11

Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. 2009) 9

Multimedia Patent Trust v. Microsoft Corp., 525 F. Supp. 2d 1200 (S.D. Cal. 2007) 9

National Ass'n of Regulatory Utility Comm'rs v. F.C.C., 525 F.2d 630 (D.C. Cir. 1975) 11

Nordberg v. Trilegeant Corp., 445 F. Supp. 2d 1082 (N.D. Cal. 2006) 9

North County Communications Corp. v. California Catalog & Technology, 594 F.3d 1149 (9th Cir. 2010) 15

Nvidia GPU Litig., 2009 U.S. Dist. LEXIS 108500 (N.D. Cal. Nov. 19, 2009) 15

Qarbon.com, Inc. v. eHelp Corp., 315 F. Supp. 2d 1046 (N.D. Cal. 2004) 9

Time Warner Telecom, Inc. v. F.C.C., 507 F.3d 205 (3d Cir. 2007) 10

Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) 14

Vess v. Ciba-Geigy Corp., 317 F.3d 1097 (9th Cir. 2003) 8, 10

STATE CASES

Anthony v. General Motors, 33 Cal.App.3d 699 (1973) 16

Bank of the West v. Superior Ct., 2 Cal.4th 1254 (1992) 8

Committee on Children's Tel., Inc. v. General Foods Corp., 35 Cal.3d 197 (1983) 9

Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706 (Cal. 2000) 10

In re Tobacco II Cases, 207 P.3d 20 (Cal. 2009) 10

People v. Superior Ct., 9 Cal.3d 283 (1973) 9

FEDERAL STATUTES

27 U.S.C. § 201(b) 6

47 U.S.C. § 153(10) 10

47 U.S.C. § 153(h) 13

47 U.S.C. § 201(b) ... 8
47 U.S.C. § 203 ... 14
47 U.S.C. § 332 ... 16
47 U.S.C. §§ 201-223 ... 13
47 U.S.C. § 153(44) ... 11

FEDERAL RULES

Fed. R. Civ. P. 9(b) ... 8

OTHER AUTHORITIES

In re Joint FCC/FTC Policy Statement for Advertising of Dial-Around and Other Long-Distance Services to Consumers, 15 F.C.C.R. 8654, 8655, 2000 WL 232230 (FCC 2000) ... 14
In re NOS Communications, Inc., 16 F.C.C.R. 8133, 8136 (F.C.C. Apr. 2, 2001) ... 14
In re Personal Communications Indus. Assoc's Broadband Personal Communications Servs. Alliance's Pet. for Forbearance, 13 F.C.C.R. 16857 at ¶ 15 (FCC 1998) ... 13
International Harvester Co., 104 F.T.C. 949, 1059-60 (FTC 1984) ... 14
Multipoint Distribution Service, 45 F.C.C. 2d 616, 618 (1974) ... 11
Resale and Shared Use, Docket 20097, Report & Order, 60 F.C.C.2d 261, 263, 1976 WL 31603 at *2 (1976) ... 12
Thompson Medical Co., 104 F.T.C. 648, 839 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987) ... 14

I. Issues Presented

1. Whether the Amended Complaint has adequately pleaded a cause of action under Sections 201 and 207 of the Federal Communications Act?
2. Whether the breach of warranty and Magnuson-Moss Warranty Act claims in the First Amended Complaint have been adequately pleaded?

II. Prefatory Statement and Summary of Facts

On January 29, Plaintiff Mary McKinney filed suit in California state court against Google, Inc.; T-Mobile USA, Inc; and HTC Corp. based on several violations of California and Federal law. Defendants removed that case to this Court on March 22, 2010, and Plaintiff Mary McKinney, on behalf of herself and others similarly situated, filed a First Amended Complaint ("Complaint") on June 11, 2010. Docs. 24, 26. That Complaint alleged violations of Sections 201(b) and 207 of the Federal Communications Act ("FCA"). 27 U.S.C. §§ 201(b), 207; Compl. ¶¶ 56-59. It also alleged breaches of express warranties and implied warranties of merchantability against all Defendants. Compl. ¶¶ 60-76.

The basic facts underlying McKinney's claims on behalf of herself and the Class are simple: Google and HTC worked in tandem to design and market the Google Nexus One smartphone (the "Google Phone" or "the device"), which is a 3G device that is designed to provide superior data transfer rates over earlier model devices. Compl. ¶¶ 31-32, 38-40. T-Mobile was the exclusive provider of 3G wireless network connectivity for the device, without which the device would have been useless. Compl. ¶ 27. Google offered purchasers of the device incentives to subscribe to T-Mobile's wireless service or, if they were already T-Mobile customers, incentives to extend their contracts with T-Mobile when purchasing the Google Phone. Compl. ¶¶ 33-34, 37. Google offered the device for sale and promoted the device on its homepage, which is some of the most coveted real estate on the Internet. Compl. ¶¶ 30-32. Google, HTC, and T-Mobile also promoted the device in the media.

Unfortunately for McKinney and the Class, the Google Phone did not operate as a true 3G device. Despite T-Mobile's representations to the contrary, *see* Compl. ¶ 51, its network connectivity did not offer the true 3G experience that customers believed that they were

purchasing. Compl. ¶¶ 38, 40-44. Class members experience frequent problems with both calling and data transfer. Compl. ¶ 49. Although both Google and HTC were aware of the problems that their customers faced, there was a total failure of customer service and technical support provided to their customers:

> ***A spokesperson for HTC, the manufacturer of the Nexus One phone sold by Google and deployed thus far on T-Mobile's GSM network, told Betanews late Monday evening that it is aware of the magnitude of 3G connectivity problems reported by customers nationwide since last week.*** As of Monday evening, several hundred messages were posted to Google's support Web site, many reporting essentially the same problem: For the most part, their 3G connections are spotty and variable; and for some, 3G is non-existent.
>
> Contrary to reports, however, HTC is not acknowledging a problem with the phone. ***As of now, the T-Mobile network remains equally suspect, especially amid the complete lack of much news whatsoever, including to its customers, from Google.***

Compl. ¶ 43 (emphasis added); *see also* Compl. ¶¶ 45, 48.

Now, Class members are locked into service agreements with T-Mobile, unable to get refunds from either their carrier (T-Mobile) or the architects of the failed Google Phone (HTC and Google), and they face unreasonably high termination fees should they desire to sign up for another device or a service plan with another carrier. Compl. ¶¶ 46, 48, 52-55, 59, 62, 64. McKinney and the Class members were injured in fact and lost money or property as a result of Defendants' material misstatements and omissions of material fact, because they paid more to receive inferior service in relation to what they believed they had purchased. Compl. ¶ 52. Such conduct is unjust and violates Section 201(b) of the FCA.

III. Argument

A. McKinney Has Adequately Pleaded her FCA Claim, which Is Subject to Rule 8(a).

McKinney has not pleaded California state law consumer protection claims in the Complaint. Rather, she pursues relief under Sections 201 and 207 of the Federal Communications Act.[1] Nevertheless, Defendants Google and HTC have cited several lines of cases concerning

[1] In a different case, this Court previously determined that such state law claims are preempted under Section 332 of the FCA. *In re Apple iPhone 3G Prods. Liability Litig.*, ____ F. Supp. 2d ____, No. M 09-02045, 2010 WL 3059417, at *6 (N.D. Cal. Apr. 2, 2010) (Ware, J.).

California statutes, primarily the Unfair Competition Law (UCL). They then contend that, under caselaw interpreting an entirely different statutory framework, McKinney's claims are inadequately pleaded. That argument fails for three reasons.

1. McKinney's FCA Claims Are Not Subject to Rule 9(b).

First, HTC and Google have not cited a single case applying the heightened pleading requirements of Rule 9(b) to claims made under Sections 201 and 207 of the FCA. Fed. R. Civ. P. 9(b). Def. Google & HTC Mem. at 8-10. McKinney also has not uncovered a single instance in which a district court dismissed a claim under those sections for failure to plead fraud with particularity—to be sure, that is because the plain language of the FCA does not require such averments. The statutory elements require only that "[a]ll 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." 47 U.S.C. § 201(b). There is no intent element, let alone a description of fraudulent conduct. Certainly if a body of caselaw existed that required heightened pleading for FCA claims, Google and HTC could have presented those cases in their briefing.

2. Defendants' Analogy to the California Unfair Competition Law Fails.

Second, even accepting the Defendants' analogy to the California UCL as the relevant legal framework—and, to be sure, it is not—their argument still fails. "The text of Rule 9(b) requires only that in 'all *averments of fraud* . . . the circumstances constituting fraud . . . shall be stated with particularity.' The rule does not require that allegations supporting a claim be stated with particularity *when those allegations describe non-fraudulent conduct*." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104 (9th Cir. 2003) (emphasis added, reversing dismissal of UCL claims under Rule 9(b) because those claims did not *solely* depend on averments of fraud).

The California Supreme Court has noted that in "drafting [the UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the Act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" *Bank of the West v. Superior* Court, 2 Cal.4th 1254, 1266-67 (1992) (internal citations omitted). The California

Supreme Court and numerous other courts have consistently interpreted the UCL broadly to sustain consumer protection claims without requiring they be pleaded with Rule 9(b) particularity. *See Committee on Children's Tel., Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211-12 n.11 (1983) ("The requirement that fraud be pleaded with specificity . . . does not apply to causes of action under the consumer protection statutes"); *People v. Superior Ct.*, 9 Cal.3d 283, 287-88 (1973) (issues relating to when, where or whom constituted evidentiary facts that need not be pleaded for UCL); *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1118 (C.D. Cal. 2008) (Rule 9(b) did not apply to the plaintiff's UCL claims where the plaintiffs "merely allege[d] that the representations were likely to deceive and that [p]laintiffs were damaged by the deception; they make no effort to allege common law fraud elements"); *Anunziato v. eMachines, Inc.,* 402 F. Supp. 2d 1133, 1138 (C.D. Cal. 2005) (UCL false advertising claims can be asserted without implicating Rule 9(b)); *Nordberg v. Trilegeant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006) ("Rule 9(b) is not strictly applicable to the current action as the CLRA is not a fraud statute. . . . To require that plaintiffs prove more than the statute itself requires would undercut the intent of the legislature in creating a remedy separate and apart from common-law fraud"); *Multimedia Patent Trust v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1217 (S.D. Cal. 2007) ("[T]o the extent that a federal pleading is grounded in fraud, it must meet the requirements of Rule 9(b). . . . [H]owever, the elements of common law fraud law are not essential to a claim under the California unfair competition law.").

Kearns v. Ford Motor Co., relied on by Google and HTC, is not to the contrary. *Kearns v. Ford Motor Co.,* 567 F.3d 1120 (9th Cir. 2009). In *Kearns*, the Ninth Circuit merely held that Rule 9(b) is applicable to UCL and CLRA claims when a claim based *solely* on fraud is alleged, as the plaintiffs did in that case. *Kearns,* 567 F.3d at 1125 ("[r]eviewing the complaint, Kearns alleges that Ford engaged in a fraudulent course of conduct"). Here, the claims at issue are not based solely on a fraudulent course of conduct, as the elements for a fraud claim need to be shown to establish Defendants' liability. No cause of action here asserts or relies on a fraudulent course of conduct—and certainly none is solely "fraud based".

In *Vess v. Ciba-Geigy*, the Ninth Circuit held Rule 9(b)'s particularity requirements apply when a claim is "grounded in fraud," which only occurs when plaintiffs allege "a unified course of fraudulent conduct *and rely entirely on that course of conduct as the basis of a claim*." *Vess*, 317 F.3d at 1103 (emphasis added). McKinney's claims are based on the FCA and warranty, and thus are not dependent—much less "*entirely dependent*"—on proving "fraudulent" conduct. McKinney's claims are thus not governed "entirely" by Rule 9(b). *Vess*, 317 F.3d at 1103; *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1052 (N.D. Cal. 2004).

That comports entirely with the current state of California law on the matter. *In re Tobacco II Cases*, 207 P.3d 20, 35 & n.14 (Cal. 2009) (relying on *Bank of the West* and *Committee on Children's Television*). Under California law, a UCL "plaintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct. The UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 717 (Cal. 2000). Even under Defendants' chosen framework, there still is no intent element, and McKinney has no need to plead any of her claims—or the facts underlying them—beyond the "short and plain statement" required by Rule 8(a).

3. Even under Rule 9(b), McKinney's Claims are Well-Pleaded.

McKinney satisfies any applicable pleading standard. She has alleged in her Complaint the circumstances that support her claim. She has discussed adequately the representations made by Defendants in and through the media, as well as their shortcomings in meeting the advertised goals of the Google Phone. For Defendants to say they are unsure which of their representations created the impression that they were selling a 3G device is erroneous. Google even offered up what was described as "the most valuable ad space on the entire Internet" to see its phone. Compl. ¶¶ 29-30.

B. Google and HTC are Liable under the FCA.

The FCA defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire[.]" 47 U.S.C. § 153(10); *Time Warner Telecom, Inc. v. F.C.C.,* 507 F.3d 205, 210 (3d Cir. 2007). Section 153(43) defines "telecommunications"

as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Section 153(46) defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." Further, 47 U.S.C. section 153(44) defines "telecommunications carrier[s]" as "provider[s] of telecommunications services." The FCC has held that the term "telecommunications carrier" has essentially the same meaning as the term "common carrier" under the FCA. *See Iowa Telcoms. Servs. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009) (citing *AT&T Submarine Sys., Inc.,* 13 F.C.C.R. 21585, 21587-88 ¶ 6 (1998); *Cable & Wireless, PLC,* 12 F.C.C.R. 8516, 8522 ¶ 13 (1997); *V.I. Tel. Corp. v. F.C.C.,* 198 F.3d 921, 925 (D.C. Cir. 1999)).

"Federal regulations describe a common carrier as 'any person engaged in rendering communication service for hire to the public.'" *Howard v. Am. Online Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) (quoting 47 C.F.R. § 21.2). As the Supreme Court has noted, "[a] common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'" *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (quoting Report and Order, Industrial Radiolocation Service, No. 16106, 5 F.C.C.2d 197, 202 (1966)); *see also National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 992, (1976); *Multipoint Distribution Service*, 45 F.C.C. 2d 616, 618 (1974).

As alleged in the Complaint, Google first sold the Google Phone exclusively through its online store, and marketed the device heavily online. Compl. ¶¶ 26, 29, 30, 34, 36. Those devices are activated for sale to the general public either on T-Mobile's network, or as "unlocked" devices for use on the AT&T Mobility network at a significantly higher price. Compl. ¶ 33-35. There is no evidence that Google and HTC discriminated among purchasers of the device. The Google Phone also has capabilities that HTC and Google worked in tandem to create and support, including the following: exclusive Gmail access from the device's desktop, which is run exclusively by Google at all levels; syncing with the proprietary "Google Calendar" function,

which is run by Google at all levels; downloadable applications from the Android marketplace, many of which are developed by Google and/or HTC; GPS directions provided through the Google maps function, which is developed and run by Google; and most importantly, access to the traditional Google search function for searching a user's contacts, desktop, and the Internet. Google and HTC's packaging for the device did not mention any limitations on the device's capabilities. In fact, its spare, white box was intended to mimic the minimalist features for which the Google homepage is known. Cell Phone Technology, *Christmas Present—Images of the Google Nexus One Unboxing*, Dec. 23, 2009, http://www.puzi8.com/christmas-present-images-of-the-google-nexus-one-unboxing.html/ (last visited Aug. 24, 2010).

Even HTC's own product overview describes the Google Phone as featuring "active noise suppression by Audience™, a large high resolution 3.7-inch display for a truly vivid visual experience, as well as a 1GHz Snapdragon processor for super fast response. It runs Android 2.1 with key enhancements such as the car dock mode to optimize the Google Maps Navigation experience while driving and the clock mode to offer a practical desk clock with quick access to the alarm clock, music player and multimedia gallery." HTC, *Nexus One Product Overview* at http://www.htc.com/www/product/nexusone/overview.html (last visited Aug. 24, 2010). HTC continues to describe the Google Phone as having 3G download speeds. HTC, *Nexus One Product Specifications* at http://www.htc.com/www/product/nexusone/specification.html (last visited Aug. 24, 2010) ("7.2 Mbps down-link speeds"). It still does not mention the limitations of the product's speed and data transfer rates.

At best, Google and HTC are "resellers" of communications services for other mobile companies (in this instance, T-Mobile unless purchasers bought an "unlocked" Google Phone). *See* Compl. ¶¶34-37. "Resale is the subscription to communications services and facilities by one entity and the reoffering of communications services and facilities to the public (with or without 'adding value') for profit." *Resale and Shared Use*, Docket 20097, Report & Order, 60 F.C.C.2d 261, 263, 1976 WL 31603 at *2 (1976), *recon.*, 62 F.C.C.2d 588, 1977 WL 38811 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). That act of "reselling," however, still makes both HTC and Google common carriers within the meaning of

the FCA. The FCC has held that "the resale of communications service is common carrier activity within the meaning of § 3(h) of the Communications Act, 47 U.S.C. § 153(h), and that those engaged in such resale are subject to the regulatory provisions of Title II of the Act, which deals with communication common carriers, 47 U.S.C. §§ 201-223." *Am. Tel. & Tel. Co. v. F.C.C.*, 572 F.2d 17, 24 (2d Cir. 1978). There is no material difference between Defendants here, who sold exclusive mobile phone service plans with their devices, and the IXCs of old who sold long distance phone service on a network that they did not build.

C. Defendants' Conduct in this Case is Unjust.

The practices challenged in this case are described succinctly in First Cause of Action in the Complaint: Defendants' "charges for the Google Phone as an internet access device and the companion T-Mobile premium service plans . . . that Plaintiff and Class Members were required to purchase were unjust based upon the claims they made as compared to what was actually provided. . . . . 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." Compl. ¶ 59. Such conduct plainly violates the consumer protections of the FCA:

> Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis. These sections set out broad standards of conduct, requiring the provision of interstate service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory. . . . The Commission gives the standards meaning by defining practices that run afoul of carriers' obligations, either by rulemaking or by case-by-case adjudication. The existence of the broad obligations, however, is what gives the Commission the power to protect consumers by defining forbidden practices and enforcing compliance. Thus, sections 201 and 202 lie at the heart of consumer protection under the Act.

In re Personal Communications Indus. Assoc's Broadband Personal Communications Servs. Alliance's Pet. for Forbearance, 13 F.C.C.R. 16857 at ¶ 15 (FCC 1998). "The FCC has found

that unfair and deceptive marketing practices by interstate common carriers may constitute unjust and unreasonable practices under section 201(b)." *In re NOS Communications, Inc.*, 16 F.C.C.R. 8133, 8136 (F.C.C. Apr. 2, 2001) (concluding that misleading disclosures of common carrier violated Section 201(b)).

In fact, the FCC has even drawn on the large body of administrative and regulatory law developed by the Federal Trade Commission to combat false and misleading advertising by common carriers: "The FCC has found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b). Principles of truth-in-advertising law developed by the FTC under Section 5 of the FTC Act provide helpful guidance to carriers regarding how to comply with section 201(b) of the Communications Act in this context." *In re Joint FCC/FTC Policy Statement for Advertising of Dial-Around and Other Long-Distance Services to Consumers*, 15 F.C.C.R. 8654, 8655, 2000 WL 232230 (FCC 2000). That large body of law has been approved by the FCC as expressly requiring two fundamental concepts be obeyed: "1) advertising must be truthful and not misleading; and 2) before disseminating an ad, advertisers must have adequate substantiation for all objective product claims." *In re Joint FCC/FTC Policy Statement for Advertising*, 15 F.C.C.R. at 8655, ¶ 5; *see also generally Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 *et seq.* (1984); *Advertising Substantiation Policy Statement, appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Information necessary to prevent consumers from being deceived on matters that are important to them must be disclosed. *International Harvester Co.*, 104 F.T.C. 949, 1059-60 (FTC 1984).

To the extent that HTC and Google contend case law requires that the FCC must previously have determined their conduct challenged in the complaint violates Section 201(b), that argument is belied by the plain language of the FCA and common sense. Defendants and their industry cohorts have actively sought a deregulated environment in which the FCC takes a hands-off approach to the mobile phone industry, preferring to let market forces work. 47 U.S.C. § 203; *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003). Therefore, under Sections 201(b) and 207, private rights of action are expressly authorized to remedy conduct that violates the FCA.

Plaintiffs are allowed to press their claim on run-of-the-mill matters, such as false or misleading advertising, in the courts.

North County Communications Corp. v. California Catalog & Technology, 594 F.3d 1149 (9th Cir. 2010), is absolutely consistent with that result—as are the later cases on which Defendants rely. In *North County*, the Ninth Circuit faced a highly technical regulatory question and stated that, because the FCC "has not determined that the CMRS providers' lack of payment to CLECs like North County violates § 201(b)," it would not wade into that controversy in the first instance. 594 F.3d at 1158. As the Supreme Court stated in *Global Crossing*, on which *North County* depends, "the FCC has long implemented § 201(b) through the issuance of rules and regulations. This is obviously so when the rules take the form of FCC approval or prescription for the future of rates that exclusively are reasonable." *Global Crossing Telecommuns., Inc. v. Metrophones Telecommuns., Inc.*, 550 U.S. 45, 52-53 (2007). The question faced here is a much simpler one than the *North County* court faced, and is supported by a broad range of FCC cases, which expressly refer to FTC advertising regulation caselaw and rulemaking. This Court would not need any specialized technical knowledge to resolve this case. It presents a "bedrock" consumer protection case, which this Court is well suited to resolve.

D. McKinney's Warranty Claims Are Well-Pleaded.

Because McKinney's claims are subject only to Rule 8(a), this Court should examine her allegations regarding the Google Phone warranties under a notice pleading standard. Without the benefit of discovery, McKinney has relied only on publicly available information regarding the Google Phone, which was exclusively sold online during the period of her purchase.

McKinney's search for information regarding the representations Defendants made to the public, without the benefit of discovery, has been complicated by the fact that Defendants' have ceased sale of the Google Phone. Suzanne Choney, *Google Will Stop Selling Nexus One Phones in US*, msnbc.com, July 19, 2010, *at* http://www.msnbc.msn.com/id/38309866 (last visited Aug. 24, 2010). Now, Google's online store presents a message of "sorry" when the public searches for information regarding the device. *See* www.google.com/phone (last visited Aug. 24, 2010).

Nevertheless, McKinney's warranty claims are well-pleaded.[2] McKinney and all Class Members who purchased the defective Google Phone "in the state of California," can pursue state-law breach of warranty claims against Defendants. See *Nvidia GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *17 (N.D. Cal. Nov. 19, 2009). While discovery will address this issue, it is likely such transactions took place in California. Because all purchases were limited to the Google website for many months of sales, those sales likely occurred "in the state of California" through Google's Mountainview, California headquarters. Google and HTC consistently represented to consumers that they were going to receive a state-of-the-art smartphone that provided 3G coverage, and Defendants worked together to achieve their sales based on those representations. Compl. ¶ 6. They also failed to fully apprise consumers regarding the harsh terms of the deal into which they were induced, so the consumers would be unaware of the penalties that Defendants would assess if consumers were displeased with their defective device. Compl. ¶¶ 45-47.

To the extent that Defendants assert that McKinney has no privity with HTC, they are wrong. The "plain language of the Song-Beverly Act," wrote this Court in *Nvidia*, "does not require vertical contractual privity between a manufacturer and a consumer." *Nvidia,* 2009 U.S. Dist. LEXIS 108500, at *15. The Ninth Circuit has stated that an exception to the privity requirement "arises when the plaintiff relies on written labels or advertisements of a manufacturer." *Clemens v DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008); *Anthony v. General Motors*, 33 Cal.App.3d 699, 706 (1973). Representations that McKinney was getting a state-of-the-art smartphone with 3G connectivity when she completed her transaction were a substantial factor in her purchasing decision.

Moreover, even after the device was released, both Google and HTC representatives continued to make statements regarding the fitness of the Google Phone. Compl. ¶¶ 42-47.

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[2] McKinney recognizes that this Court has previously found state law warranty and Magnuson-Moss Warranty Act claims preempted by Section 332 of the FCA, 47 U.S.C. § 332. *In re Apple iPhone 3G Prods. Liability Litig.*, 2010 WL 3059417, at *6 & n.10, *10. Although she maintains that these claims are not preempted, she recognizes that this Court previously has ruled to the contrary.

Because McKinney's state law warranty claims are well-pleaded, her Magnuson-Moss claim stands, as well.

IV. Conclusion

For the reasons addressed above, this Court should deny the Motion to Dismiss of the Defendants Google and HTC in all respects. This case should proceed quickly through discovery and into trial.

DATED: August 25, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of August 2010, served via the Court's electronic filing system, a true and correct copy of the above and foregoing on counsel as follows:

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