McKinney v. Google, Inc. et al Doc. 47

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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

CLASS ACTION

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION OF T-MOBILE TO DISMISS FIRST AMENDED COMPLAINT

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

Judge: Hon. James Ware

Dockets.Justia.com

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I. Issues Presented

1. Whether the Amended Complaint is well-pleaded under the requirements of Rule 8(a)?
2. Whether T-Mobile may ask this Court to decide the ultimate issue of this case—based on no reliable, undisputed evidence—or whether this Court will reject T-Mobile's challenges under Rule 12(b)(1)?
3. Whether breach of warranty claims in the Amended Complaint are well-pleaded?
4. Whether T-Mobile is may avoid its liability under Sections 201(b) and 207 of the Federal Communications Act?

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. Adding insult to injury was the lack of customer service and technical support that T-Mobile provided to its customers. Compl. ¶ 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. Such conduct is unjust and violates Section 201(b) of the FCA.

III. Argument

A. Standards for Denying Motions to Dismiss.

This Court is, without question, familiar with the standards for denying a motion to dismiss. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Moreover, a court "may not generally consider materials outside the pleadings." *Rosal v. First Federal Bank of Cal.*, 671 F. Supp. 2d 1111, 1120 (N.D. Cal. 2009) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.2001)). A district court also cannot determine a Rule 12(b)(1) motion that conflates subject matter jurisdiction and the merits of the case, as T-Mobile here requests. *Visioneer v. KeyScan, Inc.*, 626 F. Supp. 2d 1018, 1023 (N.D. Cal. 2009).

B. T-Mobile's Challenge under Rule 12(b)(1) Fails.

After stating several basic propositions of the law on constitutional standing requirements, T-Mobile brazenly asserts that McKinney has no standing to bring her claim because McKinney never "activated service ***or bought anything*** from T-Mobile in the transaction when she

purchased the Nexus One phone." T-Mobile Mem. at 9. That argument controverts the specific allegations pleaded in the Complaint. It, therefore, fails for the following reasons.

First, T-Mobile has asked this Court to take judicial notice of an evidentiary proffer that does not fit within the limited scope of judicial notice. Such a request is an improper invitation to invited error. Courts within the Ninth Circuit have a limited range of documents of which they may take judicial notice: records of state administrative bodies, other lawsuits, court records, and other documents that are ***undisputed*** matters of public record. Fed. R. Evid. 201; *Disabled Rights Action Cmte. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 (9th Cir. 2004) (judicial notice of state contracts); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (court may judicially notice matters of public record unless the matter is a fact subject to reasonable dispute); *Kottle v. N.W. Kidney Ctrs.*, 146 F.3d 1056, 1064 n.7 (9th Cir.1998) (state health department records were properly judicially noticed); *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (court may take judicial notice of records and reports of state administrative bodies), *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1120, 1121 (N.D. Cal. 2009) (taking judicial notice of court dockets and recorded deeds). McKinney disputes the authenticity of the documents proffered and assertions made by T-Mobile's attorneys and representatives. Even setting aside for a moment McKinney's factual disputes, not one shred of the evidence T-Mobile purports to be worthy of judicial notice falls within the extraordinarily narrow limits that the Ninth Circuit has identified. There is not one single agency ruling or public document among those submitted by T-Mobile. There is no other judicial proceeding that T-Mobile asserts as persuasive. As such, this Court should not take judicial notice of any alleged fact that T-Mobile has proffered.

Second, McKinney vigorously disputes the legitimacy of T-Mobile's proffered evidence. Mem. Opp. Req. Jud. Notice ¶¶ 2-4; Evid. Obj. to Dec. of Baca ¶ 1. As stated in the evidentiary objections submitted with this Memorandum, there are multiple reasons that the proffered evidence does not meet acceptable standards for reliance by this Court. Among those are the authenticity of the documents provided; that the documents attached to the declarations (and the

statements in the declarations themselves) are hearsay; that there is an improper foundation; and other fatal defects. *Lee,* 250 F.3d at 689-90.

Third, even under the terms of T-Mobile's own unreliable evidentiary proffer, McKinney has standing to press her claim. The class definition expressly includes customers like McKinney: "All persons within the United States who purchased the Google Phone through www.google.com at any time between January 5, 2010 and the present ***and who either (a) have a T-Mobile service plan for access to its 3G wireless network or (b) paid the full price for an 'unlocked' Google phone for use on another 3G network.*** " Compl. ¶ 8 (emphasis added). Even under T-Mobile's inventive standing argument, they admit that she has used her Google Phone on the T-Mobile network under her subscriber agreement. Doc. 33, Baca Declaration ¶¶ 33-35 ("Baca Decl."). Setting aside for a moment both the unreliability of the evidentiary proffer and its impropriety at the motion to dismiss stage of the case, T-Mobile disputes neither of the facts that make McKinney a suitable representative for the Class. In what can only be termed a bizarre argument, T-Mobile wants to turn the Complaint on its head and read the Class definition directly out of the Complaint.

C. T-Mobile Has Asked this Court to Resolve the Ultimate Issue of the Case on its Motion.

In its memorandum, T-Mobile essentially asks this Court to resolve the ultimate issue of the case on a motion to dismiss: Whether McKinney is subject to unjust charges and practices, within the meaning of Section 201(b) of the Federal Communications Act? *See* T-Mobile Mem. at 8-10. T-Mobile admits in its illegitimate evidentiary proffer that McKinney is a T-Mobile customer who has used her Google Phone on their network. Baca Decl. ¶¶ 33-35. T-Mobile, essentially, asks this Court to determine that their conduct was just and reasonable within the meaning of Section 201(b) without any discovery or reliable, relevant evidence. That argument is improper.

In *Safe Air for Everyone*, one of the cases on which T-Mobile relies, the Ninth Circuit stated that "[w]hether Safe Air alleged a claim that comes within RCRA's reach goes to the merits of Safe Air's action." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004) (citing

Sun Valley Gas., Inc. v. Ernst Enters., 711 F.2d 138, 140 (9th Cir. 1983) ("[t]he ability of [the plaintiff] to allege a claim that comes within the definitional reach of the [Petroleum Marketing Practices Act] is a matter that goes to the merits of the action.")). "The question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" Safe Air for Everyone, 373 F.3d at 1039 (quoting *Sun Valley*, 711 F.2d at 1139). As alleged in the Complaint, this Court has subject matter jurisdiction based on the Federal question presented under the FCA. 27 U.S.C. § 207 ("Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may . . . bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction."); *see also* Compl. ¶¶ 21, 58. In this case, the jurisdictional facts and substantive facts of the case are intertwined. As Judge Patel stated in *Visioneer, Inc. v. KeyScan, Inc.*, the jurisdictional issue presented must be "separable from the merits of the case." 626 F. Supp. 2d 1018, 1023 (N.D. Cal. 2009). Here, the jurisdictional "facts" on which T-Mobile relies are not separable from the merits of the case, and the motion to dismiss of T-Mobile under Rule 12(b)(1) should be denied.

D. McKinney Properly May Sue T-Mobile for Breach of Warranty.

McKinney's warranty claims against T-Mobile are well-pleaded.[1] Numerous courts have held that pleading a breach of express warranty does not require a plaintiff to provide precise detailed allegations concerning the warranty or its breach. *See, e.g., Huber v. Howmedica Osteonics Corp.*, No. 07-2400, 2008 U.S. Dist. LEXIS 106479, at *12-14 (D.N.J. Dec. 30, 2008); *Bell v. Manhattan Motorcars, Inc.*, No. 06-4972, 2008 U.S. Dist. LEXIS 58648, at *10-11 (S.D.N.Y. Aug. 4, 2008) ("Any affirmation of fact or promise which relates to the goods, or any description of the goods at issue, which is made part of the basis of the bargain creates an express

[1] 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.*, ____ F. Supp. 2d ____, No. M 09-02045, 2010 WL 3059417, at *6 & n.10, *10 (N.D. Cal. Apr. 2, 2010) (Ware, J.). Although she maintains that these claims are not preempted, she recognizes that this Court previously has ruled to the contrary.

warranty that the goods shall conform to the affirmation, promise or description."); *Gonzalez v. Drew Indus.*, No. 06-8233, 2007 U.S. Dist. LEXIS 35952, at *34-35 (C.D. Cal. May 10, 2007) (filing of first complaint provided notice under Song-Beverly Act); *Butcher v. DaimlerChrysler Co.*, No. 08-207, 2008 U.S. Dist. LEXIS 57679, at *6-8 (M.D.N.C. July 29, 2008); *Irwin v. Country Coach Inc.*, No. 05-145, 2006 U.S. Dist. LEXIS 35463, at *17 (E.D. Tex. Feb. 1, 2006) (plaintiffs alleged misrepresentation based on promotional materials).

Under the notice pleading standard of Rule 8(a), it is sufficient to allege: (1) the offer and sale of the product to establish the warranties; (2) the product did not perform as intended; (3) plaintiffs wanted the product for a specific purpose and relied on the seller's superior knowledge when purchasing; and (4) defendants were on notice of the defect. Fed. R. Civ. P. 8(a); *Promuto v. Waste Mgmt., Inc.*, 44 F. Supp. 2d 628, 642-46 (S.D.N.Y. 1999); *Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142-43 (1986); *Moraca v. Ford Motor Co.*, 332 A.2d 607, 611 (N.J. Sup. Ct. App. Div. 1974); *DeWitt v. Eveready Battery Co.*, 562 S.E.2d 140, 151-53 (N.C. 2002). McKinney has met those elements. *See* Compl. ¶ 27 (T-Mobile offered exclusive 3G wireless experience); ¶¶ 41-43 (Google Phone did not offer consistent 3G connectivity as intended); ¶¶ 12, 53 (McKinney and other Class members wanted the Google Phone to operate as a true 3G device); ¶ 51 (T-Mobile touts its 3G network capabilities for smartphones); ¶ 42-43 (defendants aware week of Google Phone Launch that device was not offering true 3G connectivity).

E. *North County* Does Not Bar McKinney's Claims under the FCA.

As discussed more fully in the Memorandum in Opposition to the Motions to Dismiss of HTC and Google, McKinney has a private right of action to enforce Section 201(b) of the FCA. *See* Mem. Opp. Mot. to Dismiss at III.C. Contrary to the argument made by T-Mobile, which relies almost entirely on a handful of cases against one litigant (*see* T-Mobile Mem. at 16-17 & n.17), there is a robust body of law in which the FCC has determined that misleading claims by common carriers violate Section 201(b).

Section 201(b) establishes "the bedrock consumer protection obligations of a common carrier, [and has] represented the core concepts of federal common carrier regulation dating back over a hundred years." *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). "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) ("Joint FCC/FTC Policy Statement for Advertising).

T-Mobile has run square into those prohibitions by relying on the disclaimer on its website. T-Mobile Mem. at 9. The *Joint FCC/FTC Policy Statement for Advertising* contained stated, *inter alia*, as follows with regard to disclaimers:

> When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, that information should be presented clearly and prominently so that it is actually noticed and understood by consumers. Disclosures should be effectively communicated to consumers. A fine-print disclosure at the bottom of a print ad, a disclaimer buried in a body of text unrelated to the claim being qualified, a brief video superscript in a television ad, or a disclaimer that is easily missed on an Internet Web site is not likely to be effective. To ensure that disclosures are effective, advertisers should use clear and unambiguous language, avoid small type, place any qualifying information close to the claim being qualified, and avoid making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.

See In re Joint FCC/FTC Policy Statement for Advertising, 15 F.C.C.R. at 8662-69, 2000 WL 232230 at ¶ 20. The FCC issued at least twenty examples of disclosure situations in that policy statement. T-Mobile cannot claim with any credibility that *North County* requires this Court to wait until the FCC determines that *this specific case of false and/or misleading advertising* violates Section 201(b) before McKinney can make use of the private right of action both Congress and the FCC have granted to her. This case stands in sharp contrast to *North County*, because it involves absolutely no technical intricacy at all. This case merely requires this Court to evaluate whether the charges and practices T-Mobile imposed on the Class were just, a simple consumer protection issue that this Court is well suited to resolve.

IV. Conclusion

For the reasons stated above, T-Mobile's Motion to Dismiss should be denied. In the alternative, Plaintiff should be allowed to amend the Complaint to cure any deficiencies this Court determines are present.

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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