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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,)

5:10-cv-01177-JW

Plaintiff,)

CLASS ACTION

v.)

**PLAINTIFFS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT HTC
CORP.’S MOTION TO COMPEL
ARBITRATION AND STAY CLAIMS**

GOOGLE, INC., a Delaware corporation;)
HTC CORP., a Delaware corporation; and)
T-MOBILE USA, INC., a Delaware)
corporation.)

Date: November 1, 2010

Time: 9:00 A.M.

Courtroom: 8, 4th Floor

Judge: Hon. James Ware

Defendants)

Plaintiff Mary McKinney (“Plaintiff”), on behalf of herself and all others similarly situated, submits this memorandum in opposition to Defendant HTC Corp.’s (“HTC” or “Defendant”) motion to compel individual, non-class arbitration and to stay litigation (the “Motion”):

1 **I. ISSUE PRESENTED**

2 Whether the arbitration provision contained in the T-Mobile service agreement applicable
3 to T-Mobile customers is applicable to Defendant HTC Corp. as a third-party beneficiary under
4 applicable state law, whether California law or Pennsylvania law.

5 **II. SUMMARY OF ARGUMENT**

6 Defendant HTC Corp. cannot enforce the terms of a service agreement purportedly entered
7 into between Plaintiff and Defendant T-Mobile USA, Inc. (“T-Mobile”). The Court should deny
8 Defendant HTC Corp.’s Motion to Compel Arbitration because (1) the arbitration agreement
9 contained in the service agreement between Plaintiff and T-Mobile is unenforceable and invalid;
10 (2) even if the arbitration agreement between Plaintiff and T-Mobile were enforceable by T-
11 Mobile, Defendant HTC Corp. cannot enforce the arbitration agreement. Plaintiff’s claims do not
12 fall within the scope of the arbitration agreement and Defendant HTC Corp. was not an intended
13 third party beneficiary.

14 **III. STATEMENT OF FACTS**

15 Plaintiff purchased a Google Phone, which was marketed by Defendant Google and
16 manufactured by Defendant HTC Corporation. Plaintiff engaged T-Mobile as her wireless service
17 provider. Plaintiff’s First Amended Complaint claims the Google Phone failed to maintain
18 connectivity to T-Mobile’s 3G wireless network and that Defendants Google and T-Mobile lacked
19 sufficient customer support to assist Plaintiff and the Class in coping with this defect.

20 T-Mobile and HTC claim Plaintiff entered into an arbitration agreement regarding
21 Plaintiff’s Google Phone, and that such agreement applies to the instant case. T-Mobile’s
22 arbitration provision contains a class action waiver that bars individuals from bringing
23 representative actions: “We each agree that any dispute resolution proceedings, whether in
24 arbitration or court, will be conducted only on an individual basis and not in a class or
25 representative action or as a member in a class, consolidated or representative action.”
26 Declaration of Andrea Baca In Support of T-Mobile’s Motion to Compel Arbitration and Motion

1 to Dismiss (“Baca Decl.”), Ex. C.¹ However, that provision contains what has been called by at
2 least one court a “self destruction provision,” providing that if “a court or arbitrator determines in
3 an action between [subscriber] and [T-Mobile] that this waiver is unenforceable, the arbitration
4 agreement will be void as to [subscriber].” *Id.*

5 Thus, this is not really an arbitration clause at all, as it would yield the same result if the
6 clause required all litigants to go to small claims court, or any court for that matter. It is an anti-
7 class action waiver clause, which the Ninth Circuit has repeatedly refused to enforce. Thus, the
8 law favoring arbitration has no real applicability under these circumstances. As set forth in
9 Plaintiff’s Opposition to T-Mobile’s Motion to Compel Arbitration and Stay Claims, filed
10 concurrently herein, the arbitration clause between Plaintiff and T-Mobile is unenforceable.

11 **IV. ARGUMENT**

12 **A. The Arbitration Clause Is Unenforceable By T-Mobile And HTC Corp.**

13 For the reasons set forth in Plaintiff’s Opposition to T-Mobile’s Motion to Compel
14 Arbitration, the Arbitration Clause is invalid and unenforceable by T-Mobile. T-Mobile failed to
15 meet its burden of proof that any service agreement containing an arbitration clause was provided
16 to Plaintiff at the time of purchase. Moreover, any purported arbitration clause is unenforceable
17 under California law, Pennsylvania law and federal common law. Where an arbitration agreement
18 is unenforceable between the signatories of the agreement, the arbitration agreement is also
19 unenforceable by purported third party beneficiaries. Thus, the Arbitration Agreement, which is
20 unenforceable by T-Mobile, is also unenforceable by HTC because a prerequisite to a finding
21 there is a third party beneficiary to a contract is finding the contract is enforceable. *Smay v. E.R.*
22 *Stuebner, Inc.*, 864 A.2d 1266, 1270 (Pa. Super., 2004); *McQuirk v. Donnelley*, 189 F.3d 793, 798
23 (9th Cir. 1999)

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26 ¹ In documents filed along with this Memorandum, McKinney disputes the authenticity,
27 validity, reliability, and admissibility of the Baca Declaration. As such, this Court should not
28 consider the Baca Declaration for the proof of the truth of the matters asserted therein.

1 **B. The Determination Whether T-Mobile’s Arbitration Clause Applies to HTC**
2 **Corp. Is Analyzed Under California Law**

3 As fully set forth in Plaintiff’s Opposition to T-Mobile’s Motion to Compel Arbitration
4 and Stay Claims, the Court must analyze the enforceability of the Arbitration Clause under
5 California law. T-Mobile’s Motion to Compel Arbitration concedes in its motion to compel that if
6 California law governs the claims of all Plaintiff in terms of the arbitration clause, its Arbitration
7 Clause is unenforceable, as the Ninth Circuit, this Court and a number of other courts have held.
8 HTC Corp. would also be unable to enforce the Clause as a third party beneficiary because the
9 Clause would be null and void.

10 **C. Defendant HTC Corp. Was Not An Intended 3rd Party Beneficiary Of The T-**
11 **Mobile Arbitration Clause**

12 **(1) HTC Corp. Is Not An Intended Beneficiary Under California Law**

13 “ ‘As a general matter, only signatories to an arbitration agreement may enforce it[.]’”
14 *Bouton v. USAA Cas. Ins. Co.*, 167 Cal.App.4th 412 (Cal. App. 2008) (citing *Rowe v. Exline*, 153
15 Cal.App.4th 1276, 1284 (2007)); *Smith v. Cumberland Group, Ltd.*, 455 Pa.Super.276 (Pa. 1997).
16 However, where a party does not prove it was an intended beneficiary under an arbitration
17 agreement, there is no error in denying the party’s petition for arbitration. *Bouton*, 167
18 Cal.App.4th 412. The intended beneficiary of a contract “ ‘bears the burden of proving that the
19 promise he seeks to enforce was actually made to him personally or to a class of which he is a
20 member.’” *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal.App.4th 1004, 1024
21 (citing *Neverkovek v. Fredericks*, 74 Cal.App.4th 337, 348-89 (1999)). “In making that
22 determination, the court must read the contract as a whole in light of the circumstances under
23 which it was entered. *Neverkovek*, 74 Cal.App. at 349. Here, HTC Corp. does not meet its burden
24 to show the language of the Arbitration Clause demonstrates Plaintiff intended for the Arbitration
25 Clause to apply to HTC Corp.

1 HTC concedes the T-Mobile Service Agreement containing the Arbitration Clause does
2 not specifically name HTC as a party to the agreement. Yet HTC Corp. contends it is a member of
3 a “class” to which Plaintiff intended the Clause to apply. The Arbitration Clause states the assent
4 to arbitrate “includes any claims against other parties relating to Services or Devices provided or
5 billed to you (such as our suppliers or retail dealers) whenever you also assert claims against us in
6 the same proceeding.” (Baca Decl., Ex. A, filed with T-Mobile’s Motion to Compel). The term
7 “other parties” is too overbroad to be considered a “class.” HTC cannot show Plaintiff actually
8 intended for the Arbitration Clause to protect every other party against whom she brings claims, at
9 any time.

10 Even if the class of individuals was limited to T-Mobile’s “suppliers or retailer dealers,”
11 HTC does not demonstrate that Plaintiff would have reasonably contemplated this class to include
12 HTC Corp., the manufacturer of the device. The phone was marketed and distributed by Google,
13 not HTC. HTC does not set forth evidence it supplied the Google Phone to T-Mobile, nor that it
14 was a retail dealer that sold the Google Phone. It is therefore unreasonable to assume Plaintiff and
15 other consumers intended the Clause to apply to a manufacturer, let alone to specifically apply to
16 HTC.

17 Moreover, in viewing the circumstances surrounding the purported assent to arbitrataion,
18 HTC does not even state whether, at the time Plaintiff purported signed the agreement, HTC was
19 an intended beneficiary. T-Mobile contends Plaintiff “accepted contract extensions and renewals
20 [on her T-Mobile account] at least 63 times since she began service in March 2002.” (Baca Decl.
21 at)² If HTC was not the manufacturer of Plaintiff’s phone at the time Plaintiff purportedly
22 assented to the Arbitration Clause, HTC cannot possibly hold itself out as an intended beneficiary.

23 **(2) HTC Corp. Is Not An Intended Beneficiary Under Pennsylvania Law**

24 Even under Pennsylvania law, HTC is required to establish: (1) the recognition of the
25 beneficiary’s right must be appropriate to effectuate the intention of the parties, and (2)

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27 ² Again, Plaintiff objects to the Baca Decl. as lacking personal knowledge, and Plaintiff does not
admit any purported facts in the Baca Decl. as truthful.

1 circumstances indicate the promisee intends to give the beneficiary the benefit of the promised
2 performance. *Scarpitti v. Weborg*, 530 Pa.366, 371-73 (1992). HTC cannot satisfy these
3 requirements.

4 *First*, HTC does not sufficiently establish Plaintiff and T-Mobile intended the Arbitration
5 Clause to benefit HTC. As set forth above, the Clause does not specifically state that a
6 manufacturer of a product utilized by T-Mobile customers, such as HTC, is entitled to enforce the
7 Clause, without regard to whether Plaintiff purchased her Google Phone from T-Mobile or Google
8 directly. If T-Mobile had intended the Clause to bind manufacturers, it would have specifically set
9 forth such. Moreover, there is no intent on behalf of Plaintiff to agree to permit the manufacturer
10 of her telephone, HTC, to enforce an agreement between Plaintiff and her service provider.

11 *Second*, HTC does not demonstrate any circumstances by which a purchaser of services
12 would intend for a manufacturer of a product to be bound by an agreement between the consumer
13 and the service provider. T-Mobile is not a “promisee” because Plaintiff did not promise to fulfill
14 the contents of the Clause. Even if she did, the Clause does not show T-Mobile intended to extend
15 the benefit of arbitration of claims arising out of T-Mobile services and devices to *manufacturers*
16 of the devices. The term “any other party” is much too broad to apply specifically to HTC Corp.
17 If T-Mobile had intended for the Arbitration Clause to apply to HTC it would have specifically
18 named HTC or included an example for “manufacturer.”

19 **(3) Plaintiff’s Claims Against HTC Do Not Implicate Identical Legal**
20 **Principles As Those Asserted Against T-Mobile**

21 Where a claim against one signatory to an arbitration agreement by another signatory of
22 the agreement is distinguishable from the claims against a purported third-party beneficiary, the
23 third-party cannot enforce the arbitration agreement. *See Dodds v. Pulte Home Corp.*, 909 A.2d
24 348, 351-52 (Pa. Super. 2006).

25 Here, Plaintiff’s claims against T-Mobile and HTC Corp. do not implicate identical legal
26 principals. T-Mobile arise out of T-Mobile’s defective 3G network and lack of customer service to
27 assist Plaintiff and members of the Class with their Google Phone problems. On the other hand,

1 Plaintiff's claims against HTC arise out of HTC's manufacturing of the Google Phone. If a trier
2 of fact were to determine it was T-Mobile's 3G network that was defective, whether HTC's
3 manufacture of the Google Phone would be irrelevant to such determination. Likewise, a finding
4 that HTC defectively manufactured the Google Phone has no bearing on whether T-Mobile's 3G
5 network failed to provide proper connectivity, nor whether T-Mobile's customer service, or lack
6 thereof, was insufficient. Therefore, enforcing the Arbitration Clause between T-Mobile and
7 Plaintiff should not be enforceable by HTC Corp.

8 **V. CONCLUSION**

9 For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant
10 HTC Corp.'s Motion to Compel Arbitration in its entirety.

11 DATED: August 25, 2010

Attorneys for Plaintiff Mary McKinney and the
Proposed Class

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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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