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

15 MARY MCKINNEY, Individually and on
behalf of All Others Similarly Situated,

16 Plaintiff,

17 v.

18 GOOGLE, INC., a Delaware Corporation;
19 HTC CORP., a Delaware Corporation; and T-
MOBILE USA, INC., a Delaware Corporation.

20 Defendants.

Case No. :10-cv-01177-JW

CLASS ACTION

**EVIDENTIARY OBJECTIONS TO
DECLARATIONS PROVIDED IN
SUPPORT OF T-MOBILE’S MOTION TO
COMPEL ARBITRATION AND MOTION
TO DISMISS**

Date: November 1, 2010

Time: 9:00 am (Dept. 8)

Judge: Hon. James S. Ware

23 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

24 Plaintiff Mary McKinney, on behalf of herself and all others similarly situated (“Plaintiff”),
25 hereby objects to, and requests that the Court strike, the evidence submitted by Defendant T-Mobile
26 USA, Inc. (“T-Mobile” or “Defendant”) in connection with its Motion to Compel Arbitration and
27 Motion to Dismiss, filed July 12, 2010 and set for hearing on November 1, 2010.

28 **EVIDENTIARY OBJECTIONS TO DECLARATION OF ANDREA BACA IN SUPPORT OF
T-MOBILE’S MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS**

1 Plaintiff objects to Defendant’s evidence on the grounds that the specific items objected to below do
 2 not comply with the Federal Rules of Civil Procedure or the Federal Rules of Evidence for evidence
 3 submitted in connection with a Motion to Dismiss or a Motion to Compel Arbitration. Plaintiff
 4 objects to Defendants’ declarations on numerous grounds . Numerous paragraphs are inadmissible
 5 because they contain only conclusory statements of fact or law, or allegation and contentions that
 6 lack required evidentiary facts. *See also Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th
 7 Cir.1989) (conclusory allegations in affidavit not based on fact); *Thornhill Publ'g Co., Inc. v. Gen.*
 8 *Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir.1979) (conclusory and speculative statements in
 9 affidavit not based on personal knowledge).

10 Certain parts of the Declaration of Andrea Baca In Support of T-Mobile’s Motion to Compel
 11 Arbitration and Motion to Dismiss (“Baca Decl.”), being nothing more than hearsay, conclusions,
 12 argument, opinion, unfounded statements, must be stricken based on the objections stated herein.

EVIDENTIARY OBJECTIONS

No.	Evidentiary Fact	Objection(s)
No. 1	Baca Decl. <i>in toto</i>	Plaintiff objects to the entire declaration of Andrea Baca as hearsay under Federal Rule of Evidence 802. This declaration is information from T-Mobile’s records which are written assertions, not made by the declarant, being offered to prove the truth of the matter asserted in the account records. <i>See Fed. R. Evid. 801(a)-(c)</i> (providing definitions for the terms “statement”, “declarant”, and “hearsay”).
No. 2	Baca Decl. <i>in toto</i>	Ms. Baca’s Declaration, and the exhibits attached to it, also suffers from the fatal flaw of an improper foundation under Federal Rule of Evidence 602. Baca has insufficiently explained such essential items as the chain of custody of records, document storage, security measures taken to prevent fraud, and other vital elements to validate the veracity of the information she declares and documents she

		attaches as exhibits.
No. 3	Baca Decl. ¶ 1	<p>These statements are objected to as they seek to establish Ms. Baca’s ability to provide lay testimony as to scientific, technical, or other specialized knowledge. Fed. R. Evid. 701. If defendants seek to qualify Ms. Baca as an expert, they must meet the stricter requirements for expert testimony, which defendants have failed to do. Fed. R. Evid. 702, Fed. R. Civ. P. 26(a)(2). Insofar as these paragraphs are not an improper attempt to establish Ms. Jacobs as an expert, they are objected to on the ground that they are irrelevant. Fed. R. Evid. 402.</p>
No. 4	Baca Decl. ¶ 2	<p>These statements are objected to as they seek to establish Ms. Baca’s ability to provide lay testimony as to scientific, technical, or other specialized knowledge. Fed. R. Evid. 701. If defendants seek to qualify Ms. Baca as an expert, they must meet the stricter requirements for expert testimony, which defendants have failed to do. Fed. R. Evid. 702, Fed. R. Civ. P. 26(a)(2). Insofar as these paragraphs are not an improper attempt to establish Ms. Jacobs as an expert, they are objected to on the ground that they are irrelevant. Fed. R. Evid. 402.</p>
No. 5	Baca Decl. ¶ 3	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how she knows Plaintiff herself activated an account.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How and when Plaintiff activated her T-Mobile lines is irrelevant to the challenged misrepresentations or</p>

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		damage calculations.
No. 6	Baca Decl. ¶ 4	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when plaintiff added lines to her account.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How and when Plaintiff added T-Mobile lines is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 7	Baca Decl. ¶ 5	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of InPhonic and its policies, procedures or practices.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How Plaintiff activated service is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 8	Baca Decl. ¶ 6	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of whether Plaintiff agreed to extend her contract to receive upgrades at discount prices.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How and when Plaintiff purportedly accepted contract extensions and renewals is irrelevant to the challenged misrepresentations or damage calculations.</p>

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No. 9	Baca Decl. ¶ 7	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of how, when, where and why T-Mobile purportedly offers handset upgrades.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How when, where and why T-Mobile purportedly offers handset upgrades is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 10	Baca Decl. ¶ 8	<p>This statement is objected to on the ground of lack of personal knowledge. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of how, when, where and why Plaintiff “accepted” discounts.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. How when, where and why Plaintiff purportedly accepted discounts is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 11	Baca Decl. ¶ 9	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of whether “Ms. McKinney took advantage of handset upgrades”.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402 Whether “Ms. McKinney took advantage of handset upgrades” is irrelevant to the challenged misrepresentations or damage calculations.</p>

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		These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.
No. 12	Baca Decl. ¶ 10	This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of whether Ms. McKinney confirmed she accepted T-Mobile’s Terms and Conditions and whether Ms. McKinney actually received the Terms & Services purportedly applicable to her account.
No. 13	Baca Decl. ¶ 11	This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of whether Ms. McKinney actually accepted the Terms & Services. These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402 Whether “Ms. McKinney took advantage of handset upgrades” is irrelevant to the challenged misrepresentations or damage calculations.
No. 14	Baca Decl. ¶ 12	This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of T-Mobile’s policies, procedures and practices regarding whether a customer is required to sign written Service Agreements, nor how Ms. Baca has personal knowledge that Ms. McKinney actually signed any Agreement. These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That there is a particular Service

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		<p>Agreement Ms. McKinney “would have signed” is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of authenticity. Fed. R. Evid. 602. No document signed by Ms. McKinney is attached.</p>
No. 15	Baca Decl. ¶ 13	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of T-Mobile’s policies, procedures and practices regarding handset upgrades obtained by calling T-Mobile Customer Care.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That T-Mobile has a policy, procedure or practice in place does not indicate the policy, procedure or practice was followed with respect to Ms. McKinney is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 16	Baca Decl. ¶ 14	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of T-Mobile’s policies, procedures and practices regarding handset upgrades obtained by calling T-Mobile Customer Care.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That T-Mobile has a policy, procedure or practice in place does not indicate the policy, procedure or practice was followed with respect to Ms. McKinney is irrelevant to the challenged misrepresentations or damage calculations.</p>

1	No. 17	Baca Decl. ¶ 15	This statement is objected to on the ground of lack of personal
2			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
3			established how Ms. Baca has knowledge of T-Mobile's policies,
4			procedures and practices regarding handset upgrades obtained
5			through the T-Mobile website.
6			
7			These statements are objected to on the ground that they are
8			irrelevant. Fed. R. Evid. 402. That T-Mobile has a policy, procedure
9			or practice in place does not indicate the policy, procedure or practice
10			was followed with respect to Ms. McKinney is irrelevant to the
11			challenged misrepresentations or damage calculations.
12	No. 18	Baca Decl. ¶ 16	This statement is objected to on the ground of lack of personal
13			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
14			established how Ms. Baca has knowledge of T-Mobile's policies,
15			procedures and practices regarding a trial period for handset
16			upgrades.
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18			These statements are objected to on the ground that they are
19			irrelevant. Fed. R. Evid. 402. That T-Mobile has a policy, procedure
20			or practice in place does not indicate the policy, procedure or practice
21			was followed with respect to Ms. McKinney is irrelevant to the
22			challenged misrepresentations or damage calculations.
23	No. 19	Baca Decl. ¶ 17	This statement is objected to on the ground of lack of personal
24			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
25			established how Ms. Baca has knowledge of T-Mobile's policies,
26			procedures and practices regarding a trial period for handset
27			upgrades.
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		<p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That T-Mobile has a policy, procedure or practice in place does not indicate the policy, procedure or practice was followed with respect to Ms. McKinney is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 20	Baca Decl. ¶ 18	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when, why or how Ms. McKinney purportedly returned handsets at any time.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That Ms. McKinney may have purportedly returned handsets is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 21	Baca Decl. ¶ 19	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when, why or how Ms. McKinney purportedly returned handsets at any time.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That Ms. McKinney may have purportedly returned handsets is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 22	Baca Decl. ¶ 20	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of T-Mobile’s Terms & Conditions or whether Ms. McKinney “confirmed her agreement to arbitrate.”</p>

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No. 23	Baca Decl. ¶ 21	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when, why or how purported arbitration agreements are provided to consumers, including Ms. McKinney.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That a 2003 Service Agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 24	Baca Decl. ¶ 22	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when, why or how purported arbitration agreements are provided to consumers, including Ms. McKinney.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That a 2003 Service Agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>

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No. 25	Baca Decl. ¶ 23	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of whether customers acknowledge they received Terms & Conditions.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That a Service Agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself. The document is not signed by Ms. McKinney.</p>
No. 26	Baca Decl. ¶ 24	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of particular terms in any Service Agreement.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That a Service Agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself. The document is not signed by Ms. McKinney.</p>

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No. 27	Baca Decl. ¶ 25	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established she has personal knowledge of whether Ms. McKinney received a copy of the 2008 agreement.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That a 2008 Service Agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 28	Baca Decl. ¶ 26	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how Ms. Baca has knowledge of when, why or how Ms. McKinney took upgrades.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That Ms. McKinney upgraded her handset or service at any time s is irrelevant to the challenged misrepresentations or damage calculations.</p>
No. 29	Baca Decl. ¶ 27	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established whether she has personal knowledge of the purported term was actually included in any contract actually provided to Ms. McKinney.</p>

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		<p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That an agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 30	Baca Decl. ¶ 28	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established whether she has personal knowledge of the purported term was actually included in any contract actually provided to Ms. McKinney.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That an agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 31	Baca Decl. ¶ 29	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established whether has personal knowledge of the purported term was actually included in any contract actually provided to Ms. McKinney.</p>

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		<p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That an agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 32	Baca Decl. ¶ 30	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established has personal knowledge of whether the purported term was actually included in any contract actually provided to Ms. McKinney.</p> <p>These statements are objected to on the ground that they are irrelevant. Fed. R. Evid. 402. That an agreement may contain particular terms is irrelevant to the challenged misrepresentations or damage calculations.</p> <p>These statements are objected to on the ground of relevance. Fed. R. Evid. 402. Ms. Baca is explaining written documents. Each document speaks for itself.</p>
No. 33	Baca Decl. ¶ 31	<p>This statement is objected to on the ground of lack of personal knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not established how she has knowledge of Ms. McKinney's billing address.</p> <p>These statements are objected to on the ground that they are</p>

1			irrelevant. Fed. R. Evid. 402. Ms. McKinney's billing address is
2			irrelevant to the challenged misrepresentations or damage
3			calculations.
4			
5			These statements are objected to on the ground of relevance. Fed. R.
6			Evid. 402. Ms. Baca is explaining written documents. Each
7			document speaks for itself.
8	No. 34	Baca Decl. ¶ 32	This statement is objected to on the ground of lack of personal
9			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
10			established how Ms. Baca has personal knowledge of McKinney's
11			activation, extension or use of any particular handset at any time.
12			
13			These statements are objected to on the ground that they are
14			irrelevant. Fed. R. Evid. 402. That Ms. McKinney's account
15			purportedly reflects she used more than one handheld device is
16			irrelevant to the challenged misrepresentations or damage
17			calculations.
18	No. 35	Baca Decl. ¶ 33	This statement is objected to on the ground of lack of personal
19			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
20			established how Ms. Baca has personal knowledge of purported
21			communications between Ms. McKinney and T-Mobile or its agents.
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23			These statements are objected to on the ground that they are
24			irrelevant. Fed. R. Evid. 402. That Ms. McKinney purportedly had
25			contact with T-Mobile or its agents is irrelevant to the challenged
26			misrepresentations or damage calculations.
27	No. 36	Baca Decl. ¶ 34	This statement is objected to on the ground of lack of personal
28			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not

1			established how Ms. Baca has personal knowledge of IMEI, T-
2			Mobile's network system or SIM cards.
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4			These statements are objected to on the ground that they are
5			irrelevant. Fed. R. Evid. 402. That a handset purportedly has a SIM
6			card or IMEI irrelevant to the challenged misrepresentations or
7			damage calculations.
8	No. 37	Baca Decl. ¶ 35	This statement is objected to on the ground of lack of personal
9			knowledge and lack foundation. Fed. R. Evid. 602. Ms. Baca has not
10			established how Ms. Baca has personal knowledge of McKinney's
11			line of service or any particular handset at any time.
12			
13			These statements are objected to on the ground that they are
14			irrelevant. Fed. R. Evid. 402. That Ms. McKinney's account
15			purportedly reflects particular handsets were used on any service line
16			is irrelevant to the challenged misrepresentations or damage
17			calculations.
18	No. 38	Baca Decl.,	Lack of foundation as to authenticity of T-Mobile Terms &
19		Exhibit A	Conditions of Service, attached as Exhibit A . Fed. R. Evid. 602.
20	No. 1	Baca Decl.,	Lack of foundation as to authenticity of T-
21		Exhibit B	Mobile Service Agreement used in T-Mobile
22			stores in 2003, attached as Exhibit B . Fed. R.
23			Evid. 602.
24	No. 39	Baca Decl.,	Lack of foundation as to authenticity of T-Mobile pamphlet
25		Exhibit C	purportedly containing the Terms & Conditions, attached as Exhibit
26			C . Fed. R. Evid. 602.
27	No. 40	Casner Decl. <i>in</i>	Plaintiff objects to the declaration of Rebekah Casner as hearsay
28		<i>toto</i>	under Federal Rule of Evidence 802. This declaration is information

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		from T-Mobile's records which are written assertions, not made by the declarant, being offered to prove the truth of the matter asserted in the account records. See Fed. R. Evid. 801(a)-(c) (providing definitions for the terms "statement", "declarant", and "hearsay"). Accordingly, the Casner declaration should not be considered by this Court when ruling on Defendant's motion.
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CONCLUSION

Plaintiff respectfully requests the Court to sustain the above objections and to strike the evidence referred to above.

DATED: August 25, 2010

Attorneys for Plaintiff, Mary McKinney:

By: /s/ Sara D. Avila
MILSTEIN, ADELMAN & KREGER, LLP
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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:

Edith M. Kallas
Email: ekallas@wdklaw.com

James Condon Grant
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