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HTC Corporation

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

17 MARY McKINNEY, et al.,

18 Plaintiff,

19 vs.

20 GOOGLE, INC., a Delaware corporation,
HTC CORP., a Taiwanese corporation, and
21 T-MOBILE USA, INC., a Delaware
corporation,

22 Defendants.

CASE NO. 5:10-CV-01177 JW

**HTC CORPORATION'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL ARBITRATION
AND TO STAY CLAIMS**

Judge: Hon. James Ware
Date: November 1, 2010
Time: 9:00 a.m.
Courtroom: 8, 4th Floor

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND BACKGROUND

3 Plaintiff opposes Defendant HTC Corporation’s (“HTC”) Motion to Compel Arbitration
4 on two grounds. *First*, Plaintiff argues that her arbitration agreement with T-Mobile, upon which
5 HTC’s Motion to Compel Arbitration is based, is unenforceable. *Second*, Plaintiff argues that
6 HTC cannot enforce her arbitration agreement with T-Mobile because HTC is not a third-party
7 beneficiary of that agreement. Both arguments are without merit.

8 All of Plaintiff’s claims are based on her alleged failure to receive “consistent” 3G
9 connectivity when using her Nexus One device on T-Mobile’s wireless network. When Plaintiff
10 activated the T-Mobile service at issue in this case, she entered into a contract with T-Mobile
11 setting forth the terms and conditions of service, including the following arbitration provision
12 (“Arbitration Agreement”):

13 **2. * Dispute Resolution and Arbitration. WE EACH AGREE THAT,**
14 **EXCEPT AS PROVIDED BELOW (AND EXCEPT AS TO PUERTO RICO**
15 **CUSTOMERS), ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU**
16 **AND US IN ANY WAY RELATED TO OR CONCERNING THE**
17 **AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS,**
18 **INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY**
19 **BINDING ARBITRATION, RATHER THAN IN COURT.** This includes any
20 claims against other parties relating to Services or Devices provided or billed to
21 you (such as our suppliers or retail dealers) whenever you also assert claims
22 against us in the same proceeding.

19 Declaration of Andrea Baca (“Baca Decl.”), Docket Entry 33, Ex. A, ¶ 2, filed with T-
20 Mobile’s Motion to Compel Arbitration (emphasis in original). As set forth in T-Mobile’s
21 Motion to Compel Arbitration and all supporting papers (“T-Mobile’s Motion”)¹, the Arbitration
22 Agreement is valid and enforceable. HTC joins and incorporates herein by reference T-Mobile’s
23 Motion, and will not repeat the facts and arguments set forth therein except as necessary to
24 provide context for responding to Plaintiff’s contention that HTC is not a third-party beneficiary
25 of the Arbitration Agreement.

26 For the reasons set forth in HTC’s opening brief and below, HTC is a third-party

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28 ¹ The supporting papers include T-Mobile’s opening and reply memoranda, supporting declarations, and
opposition to Plaintiff’s evidentiary objections.

1 beneficiary of the Arbitration Agreement. Accordingly, this Court should grant HTC's Motion to
2 Compel Arbitration and issue an order compelling Plaintiff to arbitrate her individual claims
3 against HTC.

4 **II. ARGUMENT**

5 **A. HTC Is a Third-Party Beneficiary of the Arbitration Agreement**

6 Plaintiff asserts that the determination whether HTC is a third-party beneficiary of the
7 Arbitration Agreement is governed by California law, not Pennsylvania law, and that, under
8 either state's law, HTC is not a third-party beneficiary of the Arbitration Agreement. Although
9 Plaintiff is correct that California and Pennsylvania law yield the same result, she is wrong about
10 the governing law and wrong about the result. Pennsylvania law governs the determination of
11 HTC's status as a third-party beneficiary pursuant to the choice-of-law provision in Plaintiff's
12 agreement with T-Mobile. *See Duvall v. Galt Medical Corp.*, No. C-07-03714, 2007 WL
13 4207792, *8 (N.D. Cal. Nov. 27, 2007); *see also* Opening Br. at 3. But, regardless of how this
14 choice-of-law issue is resolved, the result is the same because HTC is a third-party beneficiary of
15 the Arbitration Agreement under both Pennsylvania and California law. Opening Br. at 3-4.

16 Under Pennsylvania law, to be deemed a third-party beneficiary, a party must establish:
17 (1) that the contract or circumstances express an intention to benefit the third party; and (2)
18 circumstances demonstrating that the promisee intends to give the third party the benefit of the
19 promised performance. *See Scarpitti v. Weborg*, 609 A.2d 147, 150 (Pa. 1992). Both
20 requirements are met in this case, for reasons that also establish HTC's status as a third-party
21 beneficiary under California law.

22 As to the first prong of Pennsylvania's third-party beneficiary test, the plain language of
23 the Arbitration Agreement demonstrates the parties' intent to allow HTC to arbitrate the claims at
24 issue in this action. In addition to claims against T-Mobile related to Services or Devices, the
25 Arbitration Agreement covers "any claims against other parties relating to Services or Devices
26 provided or billed to [Plaintiff] (such as our suppliers or retail dealers) whenever [Plaintiff] also
27 asserts claims against [T-Mobile] in the same proceeding." Plaintiff does not, and cannot, argue
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1 that her claims against HTC do not “relate to” T-Mobile services or devices provided or billed to
2 her, or that she has not asserted claims relating to T-Mobile services or devices against T-Mobile
3 and HTC in the “same proceeding.” Instead, Plaintiff makes a series of arguments that contradict
4 the plain language of the Arbitration Agreement and defy common sense.

5 *First*, Plaintiff argues that the term “other parties” is too broad to constitute a class of
6 third-party beneficiaries under the Arbitration Agreement. Plaintiff cites no authority to support
7 this contention. She also ignores the explicit limitations in the Arbitration Agreement that serve
8 to narrow the class of third-party beneficiaries. Under the Arbitration Agreement, the right to
9 arbitrate claims is limited to “other parties” who are defending claims “relating to” T-Mobile
10 services or devices in the “same proceeding” as T-Mobile. In other words, the clear and limited
11 intent of the Arbitration Agreement is to allow T-Mobile and third parties who are defending
12 claims related to T-Mobile services or devices in the same proceeding to arbitrate those claims
13 together. Here, HTC clearly falls within this “class” of third-party beneficiaries.

14 *Second*, Plaintiff argues that HTC is not a third-party beneficiary of the Arbitration
15 Agreement because HTC is not included among the examples of “other parties” explicitly
16 identified in the Agreement. This contention also ignores the plain language of the Arbitration
17 Agreement, as well as a common sense understanding of its terms. In describing “other parties,”
18 the Arbitration Agreement includes examples in a parenthetical introduced by the phrase “such
19 as.” According to Plaintiff, because this parenthetical does not include HTC or “manufacturers”
20 generally, the parties did not intend HTC, or any other manufacturer, to be a third-party
21 beneficiary of the Arbitration Agreement. This argument is nonsensical. The phrase “such as” is
22 widely recognized as introducing an illustrative list, rather than a limiting or exhaustive one. *See*
23 *In re Fonash*, 401 B.R. 143, 146 (Bankr. M.D. Pa. 2008) (recognizing that the phrase “such as” in
24 the bankruptcy statutes is not limiting); *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1045
25 (9th Cir. 2002) (noting that the “use of the phrase ‘such as’ [in the Federal Rules of Evidence]
26 implies that the ensuing list is not exhaustive, but is only illustrative”), *overruled on other*
27 *grounds by United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010). That the Arbitration
28 Agreement does not specifically identify HTC or “manufacturers” in its illustrative list of “other

1 parties” does not mean that HTC is not an intended third-party beneficiary of the Arbitration
2 Agreement. Indeed, because the phrase “such as” is illustrative only, it indicates that the parties
3 contemplated that parties other than those specifically identified could enforce the Arbitration
4 Agreement.²

5 *Third*, Plaintiff argues that HTC cannot be a third-party beneficiary of the Arbitration
6 Agreement unless she was using a device manufactured by HTC at the time she entered into the
7 Arbitration Agreement. In other words, Plaintiff contends that the Arbitration Agreement is
8 limited to claims “relating to [T-Mobile] Services or Devices” that *also relate to* the device in use
9 at the time she activated the T-Mobile service at issue in this case. Again, this interpretation of
10 the Arbitration Agreement is inconsistent with its plain language. The only qualification on the
11 requirement that claims “relating to [T-Mobile] Services or Devices” be subject to arbitration is
12 that they be brought in the same proceeding as claims against T-Mobile. There is no requirement
13 that such claims must also relate to the particular device in use when the T-Mobile service at issue
14 was activated, which makes sense given that the Arbitration Agreement is part of Plaintiff’s
15 *service* agreement with T-Mobile. Plaintiff does not, and cannot, dispute that her claims are
16 based on her alleged failure to receive “consistent” 3G connectivity when using her Nexus One
17 device with T-Mobile service, or that the service agreement with T-Mobile that was in effect
18 when she suffered these alleged service failures contained the Arbitration Agreement. Therefore,
19 because her claims “relate to [T-Mobile] devices or services” and were brought in the “same
20 proceeding” as claims against T-Mobile, they are subject to the Arbitration Agreement, regardless
21 of what device she was using at the time she signed up for the T-Mobile service at issue.

22 Turning to the second prong of Pennsylvania’s third-party beneficiary test, Plaintiff claims
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24 ² The above analysis is equally applicable under California law, which requires the same showing of intent
25 to confer benefits on the third party as does Pennsylvania law. *See Spinks v. Equity Residential Briarwood*
26 *Apts.*, 171 Cal. App. 4th 1004, 1023 (2009). Plaintiff’s California authorities simply stand for the
27 unremarkable proposition that a third-party beneficiary may enforce an arbitration agreement. *See, e.g.,*
28 *Bouton v. USAA Cas. Ins. Co.*, 167 Cal. App. 4th 412, 424 (2008) (recognizing that an intended third-party
beneficiary of an arbitration agreement may enforce it); *Spinks*, 171 Cal. App. 4th at 1022 (stating the test
for an intended beneficiary). Even if California law applies, HTC has met its burden of demonstrating that
it is an intended beneficiary of the Arbitration Agreement. *See Neverkovec v. Fredericks*, 74 Cal. App. 4th
337, 348-49 (1999).

1 T-Mobile is not a “promisee” under *Scarpitti* because Plaintiff did not promise to fulfill “the
2 content” of the Arbitration Agreement. This argument simply recasts and regurgitates Plaintiff’s
3 argument that the Arbitration Agreement is unenforceable because she did not assent to its terms.
4 As demonstrated in T-Mobile’s Motion, this argument is without merit. Plaintiff, by assenting to
5 the service contract with T-Mobile, promised T-Mobile (and “other parties” covered by its terms,
6 including HTC) that she would arbitrate claims within its scope.

7 **B. Plaintiff’s Contention That HTC Cannot Enforce the Arbitration**
8 **Agreement Because Her Claims Against HTC and T-Mobile Do Not**
9 **Implicate “Identical Legal Principles” Is Without Merit**

10 Plaintiff argues that, even if HTC is a third-party beneficiary of the Arbitration
11 Agreement, HTC cannot enforce its provisions because her claims against T-Mobile do not
12 implicate “identical legal principles” as those asserted against T-Mobile. Again, this contention is
13 unsupported by case law and inconsistent with the plain language of the Arbitration Agreement.
14 The only case Plaintiff cites supports HTC’s position, instead of her own. *See Dodds v. Pulte*
15 *Home Corp.*, 909 A.2d 348, 350 (Pa. Super. 2006) (enforcing an arbitration agreement even
16 where additional non-contract theories were added to the complaint and a new defendant joined).
17 And, nowhere does the Arbitration Agreement require that T-Mobile and third-party
18 beneficiaries, such as HTC, be subject to claims based on “identical legal principles” in order to
19 arbitrate claims together. To the contrary, Plaintiff agreed to arbitrate claims against T-Mobile
20 and “any claims against other parties relating to Services or Devices provided or billed to [her]
21 (such as our suppliers or retail dealers) whenever [she] also assert[s] claims against [T-Mobile] in
22 the same proceeding.” Baca Decl., Docket Entry 33, Ex. A, ¶ 2. The Arbitration Agreement
23 makes no mention of legal principles, let alone “identical legal principles;” it requires only that
24 third parties seeking to enforce the Arbitration Agreement be subject to claims that “relate to” T-
Mobile services or devices in the “same proceeding” as T-Mobile, as HTC is here.

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