McKinney v. Google, Inc. et al Doc. 5

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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.

Case No. C 10-01177 JW

T-MOBILE USA, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

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

The Honorable James S. Ware

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I. INTRODUCTION

T-Mobile's Motion to Dismiss (Dkt. No. 38) (Mot.) demonstrated that Plaintiff's claims in this action should be dismissed on multiple grounds, specifically:

Under Fed. R. Civ. P. 12(b)(1) because:

(1) Plaintiff lacks standing to assert any claims against T-Mobile given that she did not buy the Google phone or anything else from T-Mobile in the transaction that is the subject of her claims;

And under Fed. R. 12(b)(6) because:

(2) Plaintiff cannot assert warranty claims against T-Mobile when T-Mobile did not sell, market, manufacture or warrant the Google phone;

(3) Plaintiff's state law warranty claim against T-Mobile is expressly preempted under section 332(c)(3)(A) of the Federal Communications Act (FCA); and

(4) Plaintiff cannot assert claims under FCA section 201(b) because the Federal Communications Commission (FCC) has not made any prior determination that any conduct of T-Mobile is unjust or unreasonable.

Plaintiff's Opposition (Dkt. No. 47) (Opp.) fails to rebut any of these grounds for dismissal. Plaintiff does not dispute that she did not buy anything from T-Mobile when she purchased the Google phone, but asserts that she has standing because her complaint proposes a class definition that would include her. However, the law is clear that a named plaintiff must establish standing for her own claims; she may not "borrow" standing from absent class members.

Plaintiff contends that T-Mobile's motion is somehow improper because it supposedly "asks [the] Court to resolve the ultimate issue of the case on a motion to dismiss." The portion of T-Mobile's motion based on Rule 12(b)(1) does not, however, ask the Court to decide "[w]hether McKinney is subject to unjust charges and practices." Rather, T-Mobile's motion asks the Court to assess standing, and more specifically whether Plaintiff has shown that her alleged injury was caused by T-Mobile. Plaintiff's arguments confuse the law. The Court not

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only can address this issue on a 12(b)(1) motion, but must do so to ensure proper exercise of its jurisdiction under the "case or controversy" limitation of Article III.

Plaintiff maintains that she may sue T-Mobile for breach of warranty, yet admits that this Court held previously that state law warranty and Magnuson-Moss Warranty Act (MMWA) claims are preempted by section 332 of the FCA. *In re Apple iPhone 3G Products Liability Litig.*, 2010 WL 3059417, **6, 10 (N.D. Cal. Apr. 2, 2010). Plaintiff additionally fails to say anything about how she can possibly assert warranty claims against T-Mobile, when the company did not sell, manufacture, advertise or warrant the Google phone.

Finally, Plaintiff seeks to avoid the Ninth Circuit's ruling in *North County Commc'ns Corp. v. California Catalog & Tech. Co.*, 594 F.3d 1149, 1159 (9th Cir. 2010), and dismissal of her FCA 201(b) claim by pointing to certain guidelines issued by the FTC and FCC. However, the guidelines Plaintiff cites have nothing to do with wireless carriers or service and do not have the force of law in any event. Moreover, this is a far cry from the predicate showing required under *North County* that the ***particular practice*** that is the subject of a plaintiff's section 201(b) claim has been considered and determined by the FCC to be unjust or unreasonable. The FCC has made no such determinations about any practices or representations of T-Mobile.

II. ARGUMENT

A. Plaintiff Lacks Standing to Assert Claims Against T-Mobile, and Her Complaint Should Be Dismissed under Fed. R. Civ. P.12(b)(1).

In her opposition, Plaintiff contends that T-Mobile's motion to dismiss her claims under Rule 12(b)(1) for lack of standing should be denied because the motion "controverts the specific allegations pleaded in the Complaint." Opp. at 6. Of course, T-Mobile ***is*** entitled to challenge Plaintiff's allegations on a 12(b)(1) motion.

T-Mobile's motion presented both a facial challenge regarding standing (*i.e.*, the complaint does not reflect on its face that Plaintiff has standing) and a factual challenge (*i.e.*, the complaint omits facts that demonstrate that Plaintiff has no standing). *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th

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Cir. 2004). As a result, the Court may consider evidence beyond the complaint, *Savage v. Glendale Union High School*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003), and need not assume that Plaintiff's allegations are true, *Safe Air for Everyone*, 373 F.3d at 1039. Because T-Mobile provided declarations showing that Ms. McKinney did not purchase anything from T-Mobile when she bought the Google phone and cannot show causation, Plaintiff was required to respond with evidence to satisfy her burden of establishing jurisdiction. *Wolfe*, 392 F.3d at 362; *Safe Air for Everyone*, 373 F.3d at 1039. But Plaintiff offered no evidence.

Rather than presenting evidence, Plaintiff purports to challenge the evidentiary basis of T-Mobile's motion. Opp. at 6-7. This argument is unclear, however, because Plaintiff begins by asserting that "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." Opp. at 6. T-Mobile did not submit any request for judicial notice in support of its motion.[1]

Plaintiff next "vigorously disputes the legitimacy of T-Mobile's proffered evidence," Opp. at 6, meaning the supporting declaration T-Mobile offered recounting Ms. McKinney's account history; that she purchased, renewed and extended her T-Mobile service 68 times before she purchased the Google phone; and that she did not purchase or extend her T-Mobile service when she bought the Google phone from Google. Plaintiff offers only vague and generalized challenges about the declarations, none of which have merit. *See* T-Mobile's Opposition to Plaintiff's Evidentiary Objections, filed herewith. Again, however, Plaintiff offered no evidence disputing the facts stated in the declaration.

The crux of Plaintiff's argument about standing is that because she falls within the class definition she crafted in her First Amended Complaint (FAC), she therefore has standing.[2] This is not the law. "A class action cannot confer standing to sue on a named

[1] Plaintiff apparently confuses T-Mobile's motion with the motion filed by Google and HTC, which was accompanied by a request for judicial notice, asking the Court to take into account the actual terms of service Plaintiff accepted with Google and the limited warranty provided by HTC. (Dkt. No. 41).

[2] The FAC actually proposes two different class definitions. The first would encompass all consumers who purchased the Google phone "in combination with T-Mobile's monthly service plan for access to its 3G network." FAC ¶ 1. Later, the FAC proposes a class encompassing all persons who purchased the Google phone and who ***have*** a T-Mobile service plan (regardless of whether they bought or

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plaintiff who seeks to represent a class." 1 NEWBERG ON CLASS ACTIONS § 1.2 (4th ed. 2010). A named plaintiff must establish standing in her own right. "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring and dissenting; citations omitted); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the prerequisite of a case or controversy with defendants, none may seek relief on behalf of himself or any other member of the class."). Plaintiff cannot create standing simply by pleading an overbroad class definition.[3]

Ms. McKinney did not purchase the Google phone from T-Mobile. She did not purchase or extend service or anything else from T-Mobile in connection with that transaction. T-Mobile did not manufacture the phone. T-Mobile did not sell the phone (to anyone). T-Mobile did not warrant the phone. T-Mobile did not market or advertise the phone. Ms. McKinney has not alleged that she relied upon (or even saw) any representations by T-Mobile in purchasing the Google phone. Plaintiff disputes none of this. On these unrebutted facts, Ms. McKinney has not shown and cannot show that she was actually injured by any conduct of T-Mobile in connection with her purchase of the Google phone. *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001 (9th Cir. 2001) (to establish standing, a plaintiff is required "to show, *inter alia*, that he has actually been injured by the defendant's challenged conduct").

Plaintiff points to only one fact that she alleges gives her standing to sue T-Mobile: "[S]he has used her Google Phone on the T-Mobile network." Opp. at 7. But Ms. McKinney was not required to purchase the Google phone from Google nor to use it with her T-Mobile

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extended T-Mobile service when they purchased the Google phone) and all persons who paid full price for the Google phone for use on another 3G network. FAC ¶ 8. Plaintiff's opposition brief cites only the latter definition. Opp. at 7. As discussed above, however, ultimately it makes no difference because Plaintiff cannot create standing simply by the class definition she proposes.

[3] Standing is not a mere pleading requirement, but rather an indispensable part of the plaintiff's case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (because standing is a jurisdictional requirement, it is a fundamental threshold question in any federal suit); *Aloe Vera of Am., Inc. v. United States*, 2010 WL 3034527, *4 (D. Ariz. Aug. 3, 2010) (In response to a 12(b)(1) motion presenting a factual attack, "Plaintiffs, as the parties asserting jurisdiction, bear the burden of *proving*, not alleging jurisdiction." (emphasis in original)).

service. By this rationale, Ms. McKinney could purchase phones from any of scores of other vendors[4] and then proceed to sue T-Mobile if she was dissatisfied with any of the phones. Similarly, Plaintiff presumably could take the Google phone she purchased, use it with AT&T service, and then bring suit against AT&T. In short, Plaintiff's choice to purchase and use the Google phone does nothing to establish standing.

B. The Court Need Not Resolve an "Ultimate Issue" to Determine that Plaintiff Has No Standing.

Plaintiff contends that, by asking the Court to examine her lack of standing, "T-Mobile essentially asks this Court to resolve the ultimate issue of the case on a motion to dismiss." Opp. at 7. Plaintiff's argument makes little sense and is based on inapposite authority.

Plaintiff cites *Safe Air for Everyone*, 373 F.3d at 1040, and contends that it precludes dismissal of this action because "the jurisdictional facts and substantive facts of the case are intertwined." Opp. at 8. *Safe Air* involved a different situation. In that case, the plaintiff, an environmental group, brought suit under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) (RCRA), alleging that burning of grass residue by bluegrass farmers violated the Act. The district court dismissed the complaint under Rule 12(b)(1), concluding that it was without jurisdiction to resolve Safe Air's RCRA claim because grass residue did not constitute "solid waste" under the Act. *Id*. at 1038. The Ninth Circuit held that the district court erred in its characterization of the dismissal, although the Ninth Circuit agreed with the result. Determining whether grass residue constituted "solid waste" went to the merits of the plaintiff's claim under RCRA, and therefore, the Ninth Circuit held, the district court's dismissal should have been by way of summary judgment rather than on jurisdictional grounds under Rule 12(b)(1). *Id.* at 1040, 1047.

Here, contrary to Plaintiff's assertion, the portion of T-Mobile's dismissal motion that is premised on Rule 12(b)(1) does not ask the Court to decide the "ultimate issue" of [w]hether McKinney is subject to unjust charges and practices, within the meaning of Section 201(b) of

[4] Customers are not required to purchase phones from T-Mobile; they may use any GSM-compatible handset with their T-Mobile service.

the [FCA]." Opp. at 7. T-Mobile's 12(b)(1) motion is premised on Plaintiff's lack of standing. It does not require the Court to interpret what practices are or are not unjust or unreasonable under the FCA. Rather, the motion asks the Court to assess the threshold jurisdictional issue of whether Plaintiff has shown causation (*i.e.*, whether her alleged injury was actually caused by any conduct of T-Mobile), one of the three "irreducible constitutional minimum" requirements for standing in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255 (9th Cir. 2008).[5] This is a determination the Court not only ***can*** make, but in fact ***must*** make, to ensure it does not exceed the limits of Article III to hear only "cases and controversies."[6]

In all, because Plaintiff has failed to allege or prove that she was actually injured by any conduct of T-Mobile, all of her claims should be dismissed under Rule 12(b)(1). *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (if named plaintiff lacks standing, the case must be dismissed).

C. Plaintiff Offers No Opposition to T-Mobile's Showing that Her Warranty Claims are Preempted by Section 332(c)(3)(A) of the FCA.

T-Mobile's motion demonstrated that Plaintiff's breach of warranty claims under state law are preempted under FCA section 332(c)(3)(A), 47 U.S.C. § 332(c)(3)(A), because they directly challenge the adequacy of T-Mobile's 3G network and therefore implicate the reasonableness of T-Mobile's rates and market entry. Mot. at 12-15. Plaintiff concedes that this was the Court's holding in the *iPhone Litigation*. Opp. at 8, n.1; *see* Order Granting

[5] Causation is also an element of any claim under sections 201, 206 and 207 of the FCA. *See North County*, 594 F.3d at 1161 ("Section 207 refers to damages caused by a common carrier." (internal quotation omitted)); 47 U.S.C. § 206 (common carriers may be held liable "to the person or persons ***injured thereby*** for the full amount of damages ***sustained in consequence*** of any such violation of the provisions of this chapter . . . ." (emphasis added)); 47 U.S.C. § 207 (allows suit to be brought by persons "claiming to be damaged"); *Conboy v. AT&T Corp.*, 241 F.3d 242, 250-51 (2d Cir. 2001); *Net2Globe Int'l, Inc. v. Time Warner Telecom of N.Y.*, 273 F. Supp. 2d 436, 461 (S.D.N.Y. 2003).

[6] T-Mobile's motion separately and alternatively seeks dismissal of Plaintiff's FCA claim on the merits under 12(b)(6). To the extent this is what Plaintiff means in asserting that the Court is being asked to decide an "ultimate issue," that is, of course, entirely permissible under Rule 12(b)(6), because Plaintiff's FCA claim is not based on a cognizable legal theory and is not "plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

AT&T Mobility's Motion to Dismiss, *In re Apple iPhone 3G Products Liability Litigation*, No. C09-02045 JW (April 2, 2010) (Dkt. No. 184) ("*iPhone* Order"); Order Denying Plaintiff's Motion for Leave to File Motion for Reconsideration (May 25, 2010) (Dkt. No. 198). Plaintiff "maintains that these claims are not preempted," but offers no substantive argument on this score. Opp. at 8, n.1. Accordingly, the Court should adhere to its ruling in the *iPhone Litigation*, and should dismiss Plaintiff's warranty claims.[7]

D. Plaintiff Offers No Rebuttal to T-Mobile's Showing that She Cannot Assert Warranty Claims.

T-Mobile's motion also showed that under any applicable law, a defendant cannot be liable for breach of warranty for a product that it did not manufacture, distribute, market or sell. *See* Mot. at 10-12. The motion cited eight cases in support of this fundamental proposition. *Id.* at 10-11 & n.9. Plaintiff says nothing about any of these cases. Instead, she asserts only that "McKinney's warranty claims against T-Mobile are well-pleaded." Opp. at 8.

Plaintiff cites a handful of cases under various states' laws attempting to show that "pleading a breach of express warranty does not require a plaintiff to provide precise detailed allegations concerning the warranty or its breach." Opp. at 8. Regardless of whether Plaintiff accurately states this proposition, it is beside the point. All of Plaintiff's cases involve parties that manufactured or sold products.[8] None address T-Mobile's argument that it cannot be

[7] In fact, Plaintiff's state-law warranty claim (and her MMWA claim, which is based on her state-law claim) is even more clearly preempted under section 332(c)(3)(A) than the claims against AT&T in the *iPhone Litigation*. AT&T ***did*** market and sell the iPhone 3G. T-Mobile never marketed or sold the Google phone, and Plaintiff bought nothing from T-Mobile when she purchased the Google phone from Google. She asserts that she is entitled to sue T-Mobile now simply because she chose to use the Google phone on her pre-existing T-Mobile service. Plaintiff's claims against T-Mobile are nothing but an attack on T-Mobile's rates and the adequacy of its network.

[8] Plaintiff cites the following cases, *see* Opp. at 8-9, which all concern manufacturers, distributers, dealers or other sellers of products or others who entered into express contracts with plaintiffs: *Huber v. Howmedica Osteonics Corp.*, 2008 WL 5451072 (D.N.J. Dec. 31,2008) (suit against manufacturer of hip implant device); *Bell v. Manhattan Motorcars, Inc.*, 2008 WL 2971804 (S.D.N.Y. Aug. 4, 2008) (suit against auto dealership that sold a Porsche to plaintiff); *Gonzalez v. Drew Indus., Inc.*, 2007 U.S. Dist. LEXIS 35952 (C.D. Cal. May 10, 2007) (suit against manufacturers of bathtub and manufactured home in which the bathtub was installed); *Butcher v. DaimlerChrysler Co., LLC*, 2008 WL 2953472 (M.D.N.C. July 28, 2008) (suit against auto manufacturer); *Irwin v. Country Coach, Inc.*, 2006 WL 278267 (E.D. Tex. Feb. 3, 2006) (suit against manufacturer, converter, and dealer of motor coach); *Promuto v. Waste Mgt.,Inc.*, 44 F. Supp. 2d 628, 642 (S.D.N.Y. 1999) (suit by plaintiff against seller of business, noting that requirements for breach of warranty claim under New York law included that

liable for breach of warranty when it did not manufacture, distribute, sell, market, warrant or make any representations about the Google phone. Plaintiff's warranty claims should be dismissed on this basis as well.

E. Plaintiff's FCA Section 201(b) Is Barred Under *North County*.

T-Mobile's motion urged that Plaintiff's claim under FCA section 201(b) must be dismissed because Plaintiff cannot point to any prior FCC determination that any challenged practice of T-Mobile is unjust or unreasonable, as required by the Ninth Circuit's holding in *North County*, 594 F.3d at 1159. *See* Mot. at 15-17. Plaintiff's opposition does not address the holding of *North County*, but instead contends that certain guidelines issued by the Federal Trade Commission (FTC) and the FCC constitute the predicate FCC determination required by *North County*. Opp. at 10. Plaintiff's argument is wrong in several respects.

First, the guidelines Plaintiff cites relate to advertising of ***long distance services***. *See* Opp. at 10 (citing *In e 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 (2000)). These guidelines do not apply to wireless service, and so are irrelevant here.

Second, the guidelines Plaintiff cites are just that – ***guidelines***. They do not have the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (agency interpretations contained in policy statements, agency manuals, and enforcement guidelines, all lack the force of law and do not warrant *Chevron*-style deference); *Landin-Molina v. Holder*, 580 F.3d 913, 920 (9th Cir. 2009) (interpretations in administrative agency opinion letters, policy statements, agency manuals and enforcement guidelines all lack the force of law and are entitled to respect only to the extent they are persuasive).

Third, and most fundamentally, for a plaintiff to pursue a private right of action under section 201(b), *North County* requires that the FCC must have made a prior determination that

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"plaintiff and defendant entered into a contract . . . containing an express warranty by the defendant); *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 229 Cal. Rptr. 605 (1986) (suit against manufacturer and seller of juice in glass bottles); *Dewitt v. Eveready Battery Co.*, 355 N.C. 672, 565 S.E.2d 140 (2002) (suit against battery manufacturer); *Moraca v. Ford Motor Co.*, 132 N.J. Super. 117, 332 A.2d 607 (1974) (suit against automobile dealer and manufacturer).

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"a ***particular practice*** constitutes a violation" of section 201(b). *North County*, 594 F.3d at 1158 (emphasis added); *see also Carney v. Verizon Wireless Telecom, Inc.*, 2010 WL 1947635, *5 (S.D. Cal. May 13, 2010) (dismissing section 201(b) claim and noting that prior FCC determination must relate to the particular practice of the defendant at issue in the action). General guidelines about advertising in a completely different context do not satisfy this test. The FCC has not made any determination of any kind that T-Mobile's 3G network is inadequate or that anything T-Mobile has represented about it network is unjust or unreasonable.

Finally, Plaintiff suggests in her opposition to T-Mobile's motion to dismiss that, "in sharp contrast to *North County*, [this case] involves absolutely no technical intricacy at all [but] merely requires this Court to evaluate whether the charges and practices of T-Mobile . . . were just, a simple consumer protection issue that this Court is well suited to resolve." Opp. at 10. At the same time, Plaintiff asserts in her opposition to T-Mobile's motion to compel arbitration that her action will "call for an expert in the field of mobile networking, an expert to scrutinize the software associated with the Google phone, an expert to inspect T-Mobile's High Speed Packet Access/Universal Mobile Telephone System (HSDPA/UMTS) technology, and/or an expert to value or assess the damages to Google Phone users." Plaintiff's Opposition to Motion to Compel Arbitration and Stay Claims, at 22 (Dkt. No.49). Plaintiff cannot have it both ways. She cannot plausibly contend that her action does not implicate any expertise or issues that fall within the FCC's primary jurisdiction, while simultaneously arguing that the case involves complex issues concerning subjects that fall within the FCC's expertise.

For all these reasons, Plaintiff's claims under the FCA are precluded under *North County* and should be dismissed as well.

III. CONCLUSION

For the foregoing reasons, T-Mobile urges that the Court should dismiss Plaintiff's FAC, with prejudice, pursuant to Rules 12(b)(1) and 12(b)(6).

Dated this 22nd day of September, 2010.

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