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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. 5:10-CV-01177-JW

DEFENDANTS GOOGLE INC. AND HTC CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: November 1, 2010
Time: 9:00 a.m.
Dept: 8
Judge: Hon. James Ware

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In multiple respects, the opposition ("Opp.") filed by plaintiff Mary McKinney ("Plaintiff") serves only to confirm that the Rule 12(b)(6) motion to dismiss filed by defendants Google Inc. ("Google") and HTC Corporation ("HTC") should be granted. Indeed, Plaintiff entirely fails to respond to many of Google and HTC's independently dispositive arguments, and the few arguments that Plaintiff does offer are either demonstrably wrong or merely raise additional reasons for dismissal under the governing authorities.[1]

I. ARGUMENT

A. Plaintiff's FCA Claim Must Be Dismissed For Multiple Reasons.

In their opening brief ("Op. Br."), Google and HTC argued that Plaintiff's First Cause of Action under the Federal Communication Act ("FCA") for alleged violations of 47 U.S.C. § 201(b) must be dismissed because (1) Plaintiff's FCA claim is critically dependent on false advertising and misrepresentation allegations that sound in fraud but are not pled with the particularity required by Rule 9(b); (2) FCA claims cannot be asserted against parties that are not "common carriers," such as Google and HTC; and (3) Plaintiff has failed to satisfy the Ninth Circuit's prior "FCC determination" requirement under *North County Commc'ns Corp. v. California Catalog & Tech. Co.*, 594 F.3d 1149, 1159 (9th Cir. 2010). The responses Plaintiff offers in her opposition are without merit.

1. Plaintiff's Rule 9(b) Arguments Are Demonstrably Incorrect.

First, Plaintiff incorrectly argues that Rule 9(b)'s heightened pleading requirements cannot apply to any FCA claim, including hers, because "the plain language of the FCA" does not demand proof of "fraud" or "fraudulent conduct." Opp. at 7. While it is true that fraud or fraudulent conduct is not an essential element of *all* FCA claims, *Plaintiff's FCA claim* is dependent on allegations that sound in fraud, misrepresentation, and false advertising – which triggers Rule 9(b)'s requirements under Ninth Circuit law. *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103-06 (9th Cir. 2003); *Kearns* v. *Ford Motor Corp.*, 567 F.3d 1120, 1125-27 (9th

[1] As used herein, "Defendants" refers collectively to Google, HTC, and T-Mobile USA, Inc. ("T-Mobile").

Cir. 2009); Op. Br. 7-10 (citing cases).[2] Indeed, the particular FCA claim that Plaintiff chose to assert and plead in this case is *critically premised* on supposed "false advertising," "misrepresentations," and related "non-disclosure" of "omitted material facts," about the quality of the Nexus One's "3G coverage" on T-Mobile's wireless network. FAC, ¶ 59. Indeed, it is those supposed misrepresentations and false promises that allegedly render Defendants' charges "'unjust'" in claimed violation of the FCA's section 201(b). *Id.* (citing 47 U.S.C. § 201(b)); *see also* Op. Br. at 7, 9. Plaintiff's citation and discussion of UCL cases is plainly inapposite, especially given that the FAC asserts no UCL claim. At most, it simply shows that not all UCL claims need be based on "fraudulent conduct," Opp. at 7-9, which is true for FCA claims as well. What matters here is that, as her opposition confirms, *Plaintiff's FCA claim* is critically premised on fraud-based allegations of "material misstatements and omissions of material fact." Opp. at 6; *accord* FAC, ¶ 59. Thus, Rule 9(b)'s heightened pleading requirement clearly applies here.

In an effort to evade Rule 9(b), Plaintiff misreads the Ninth Circuit's decisions in *Vess* and *Kearns*. *See* Opp. 8-9.[3] In *Vess*, the Ninth Circuit confirmed that "Rule 9(b) applies to 'averments of fraud' in all civil cases in federal district court," including "cases in which fraud is not an essential element of the claim." 317 F.3d at 1103 (Rule 9(b) applies in "cases where fraud is not a necessary element" of the claim whenever the "plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct"). If a plaintiff relies entirely on a "unified course of fraudulent conduct" as the basis of a claim for which fraud is not otherwise an essential element, the entire claim is grounded in fraud and must be pled with Rule 9(b) particularity. *Id.* at 1103-04. "In other cases, however, a plaintiff may choose not to allege a

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[2] The mere fact that Plaintiff's FCA claim does not use the words "fraud" or "fraudulent conduct" (Opp. at 8-9) is immaterial. As the Ninth Circuit has repeatedly stressed: "Fraud can be averred by specifically alleging fraud, *or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used).*" *Vess*, 317 F.3d at 1105 (emphasis added); *see also Kearns*, 567 F.3d at 1124 (quoting *Vess*).

[3] According to Plaintiff, *Kearns* "merely held that Rule 9(b) is applicable" when "a claim based *solely* on fraud is alleged," Opp. at 8 (emphasis in original); and *Vess* held that a claim is grounded in fraud triggering Rule 9(b) "only" when plaintiffs allege "'a unified course of fraudulent conduct *and rely entirely on that course of conduct as the basis of the claim.*'" Opp. at 9 (emphasis in original, quoting *Vess*, 317 F.3d at 1103). The decisions themselves refute Plaintiff's suggestion that *Vess* and *Kearns* do not support Rule 9(b)'s applicability here.

unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct," and, in such cases, all misrepresentation and fraud-based averments "are subject to Rule 9(b)'s heightened pleading requirements." *Id.* at 1104 (emphasis added). As *Vess* holds, "if particular averments of fraud are insufficiently pled under Rule 9(b), a district court should 'disregard' those averments, or 'strip' them from the claim," and "then examine the allegations that remain to determine whether they state a claim." *Id.* at 1105.

In *Kearns*, the Ninth Circuit reaffirmed its holding in *Vess*: "Where fraud is not an essential element of a claim, only those allegations of a complaint which aver fraud are subject to Rule 9(b)'s heightened pleading standard," and "[a]ny averments which do not meet that standard should be 'disregarded,' or 'stripped' from the claim for failure to satisfy Rule 9(b)." 567 F.3d at 1124 (quoting *Vess*, 317 F.3d at 1105). *Kearns* then holds that where plaintiff alleges that a product manufacturer made "misrepresentations" and related "nondisclosure[s]" about its product, in the context of a statutory consumer protection claim for which fraud is not an essential element, both the misrepresentation and non-disclosure allegations must be pled with specificity or the claim is subject to dismissal under Rule 9(b). *Id.* at 1125-27.

Plaintiff's contention that she has satisfied Rule 9(b)'s particularity requirement, and "has discussed adequately the representations made by Defendants in and through the media" (Opp. at 9), is absurd on its face. Plaintiff *nowhere* pleads the "who, what, when, where and how" as to any supposed statement about Nexus One's 3G connectivity, *Vess*, 317 F.3d at 1106, much less the sort of statement on which this case depends, *i.e.*, that the Nexus One would "consistently perform at a 3G level" on T-Mobile's wireless network. FAC, ¶ 41; *see also* Op. Br. at 3-4, 8-10. Nor does Plaintiff plead the "specific content" of any "false representations" made by any of the Defendants that could be actionable, or the "identities of the parties to [any such] misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007); *see also* Op. Br. at 3-4, 8-10. Plaintiff ignores that the only Google representation pled with any particularity is the truthful and non-actionable statement, "Experience Nexus One, the new Android Phone from Google." FAC, ¶ 29. Plaintiff ignores that she pleads no advertising or marketing statements by HTC at all. Plaintiff also ignores that the FAC's sole quoted reference by T-Mobile to its "3G"

network, on its website, does not even mention the Nexus One, and Plaintiff does not allege that she saw and relied upon that snippet from T-Mobile's website in purchasing her Nexus One. *See* Op. Br. at 4, 10.

Under *Kearns* and *Vess*, Plaintiff's FCA claim should be dismissed for failure to plead its "misrepresentation," "nondisclosure," and other related averments sounding in fraud with the particularity required of Rule 9(b). At a minimum, *Kearns* and *Vess* direct the Court to disregard or strip those insufficiently pled allegations from Plaintiff's First Cause of Action – but without those allegations, there is *no claimed basis* to find any alleged conduct and charges "unjust" in claimed violation of 47 U.S.C. § 201(b). Consequently, Plaintiff's FCA claim must be dismissed.

2. FCA Claims Can Be Asserted Only Against A "Common Carrier," And Neither Google Nor HTC Is A Common Carrier.

As Plaintiff does not dispute, any FCA claim under 47 U.S.C. §§ 201(b) and 207 can be asserted only against a "common carrier," *Howard v. America Online Inc.*, 208 F.3d 741, 751-53 (9th Cir. 2000), and Plaintiff nowhere alleges in her complaint that Google or HTC are common carriers. *Compare* Op. Br. at 10-11, *with* FAC. Nevertheless, Plaintiff tries to salvage her FCA claims against Google and HTC by arguing that this Court should deem them "common carriers" under Plaintiff's unfounded theory that Google and HTC are "resellers" of T-Mobile's common carrier services. Opp. at 11-12 (citing *AT&T Co. v. FCC*, 572 F.2d 17, 24 (2d Cir. 1978)). But Plaintiff fundamentally misconstrues the authority on which her argument depends, and the novel "reseller" theory she raises in her opposition actually provides another reason for dismissal.

First, Plaintiff's suggestion that Google and HTC can be sued under the FCA as common carriers rests on her misapplication of authority in which the FCC and Second Circuit narrowly reasoned only that those "middlemen" who acted entirely as "resellers" of so-called "private line services" are treated by the FCC as the same as the common carriers whose services they first subscribed to and then resold to the public. *AT&T Co.*, 572 F.2d at 19-20, 24; *see also* FCC Report & Order, 60 F.C.C.2d 261, 263 (1976) (cited by Plaintiff, *see* Opp. at 11). Plaintiff wildly extrapolates from this entirely inapposite scenario to her contention that Google and HTC should likewise be deemed "common carriers" under the FCA because, according to Plaintiff, there

supposedly is "no material difference" between them and "the IXCs of old who sold long distance phone service on a network that they did not build." Opp. at 12. Plaintiff's argument is legally unfounded and, indeed, irresponsible. As the Second Circuit and FCC make clear in the very authority Plaintiff cites for her baseless argument, the narrow type of "'Resale'" at issue in that inapposite scenario "is defined by the FCC as 'an activity wherein one entity *subscribes* to the communication services and facilities of another entity and *then re-offers* communications service and facilities to the public.'" *AT&T Co.*, 572 F.2d at 20 n.4 (emphasis added; quoting FCC Report & Order, 60 F.C.C.2d at 271). Here, Plaintiff does not even argue – and her FAC most certainly does not allege – that Google or HTC "subscribed" to T-Mobile's services and facilities, "and then re-offer[ed]" T-Mobile's services to the public. Rather, Plaintiff alleges that HTC manufactures and Google markets and sells the Nexus One, which is a smartphone that can be used on T-Mobile's network as well as other communication networks.[4] That does *not* make Google or HTC a "common carrier," subject to FCC regulation and suit under the FCA, under the inapplicable authority Plaintiff cites, or any other authority. Plaintiff's contrary argument is wrong as a matter of law.[5]

Second, the fact that the FCC has never determined that either Google or HTC is a "common carrier," nor adopted Plaintiff's novel "reseller" analogy in this entirely different context, in itself provides another basis for dismissal of Plaintiff's FCA claim under *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008). There, the viability of the plaintiff's federal statutory claim turned on whether the defendant's digital phone services using "Voice over Internet Protocol" technology made the defendant cable company a "telecommunications

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[4] Moreover, Plaintiff's effort to analogize this case to the inapposite "reseller" scenario at issue in her cited FCC and Second Circuit authority is also contradicted by her own admission that Nexus One purchasers can and do buy "unlocked" phones as well. Opp. at 11 (even Plaintiff admits her strained analogy fails as to those putative class members who "bought an 'unlocked' Google phone"). In fact, Plaintiff herself purchased an unlocked phone (*see* Op. Br. n.1), so her counsel's assertions about how putative class members are supposedly "locked into service agreements with T-Mobile" (Opp. at 6) is untrue and does not even apply to Plaintiff.

[5] Apparently Plaintiff would have the Court conclude that virtually all mobile phone manufacturers and marketers are "common carriers" because they too would fall within Plaintiff's broad and legally illegitimate "reseller" theory, and thus would also be subject to FCC regulation and sued under the FCA for supposed violations of section 201(b). That is not the law.

carrier" (or common carrier) that could properly be sued for violating the anti-"slamming" prohibition under 47 U.S.C. § 258(a). *Id.* at 1113-15. Because section 258(a) violations could be committed only by "telecommunications carriers," and the FCC had yet to determine the regulatory "question of first impression" raised by the plaintiff's novel argument in that case, the Ninth Circuit affirmed *dismissal* of the claim under the primary jurisdiction doctrine until the FCC resolved the question.[6] Likewise here, if the Court does not reject out of hand Plaintiff's unpled and unfounded "common carrier" argument as to Google and HTC – which it should – then the Ninth Circuit's holding in *Clark* instructs that the Court should dismiss Plaintiff's FCA claim under the primary jurisdiction doctrine. *See* 523 F.3d at 1112, 1116.[7]

3. Plaintiff's Failure To Satisfy *North County*'s Prior "FCC Determination" Requirement Is Fatal.

Plaintiff does not and cannot dispute that her FAC fails to satisfy the Ninth Circuit's legal requirement that those asserting private FCA claims must plead the existence of a threshold "FCC determination" that the defendant common carrier's "challenged practice" actually violates 47 U.S.C. § 201(b), or face dismissal. *North County*, 594 F.3d at 1158-59. Unable to satisfy *North County*'s prior "FCC determination" requirement, Plaintiff simply rejects it because she thinks that such a requirement "is belied by the plain language of the FCA and common sense." Opp. at 13. The district courts in the Ninth Circuit have consistently applied this requirement to dismiss

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[6] As the district court recognized, the question whether the defendant was a common carrier or "telecommunications carrier" not only "fell within the FCC's rulemaking authority," but the district court's "own decision could jeopardize the uniform administration of the FCC's regulatory scheme." *Clark*, 523 F.3d at 1114-15. The same is true of Plaintiff's unfounded and unpleaded argument that Google and HTC can be deemed "common carriers" on the ground that they are supposedly "resellers" of T-Mobile's communication services.

[7] Plaintiff's suggestion that various features or programs developed for and offered with the Nexus One – such as email, maps, calendar synching, noise suppression program, and large screen – constitute "communication services" that should transform Google and HTC into common carriers (Opp. at 10-11), is frivolous. At most, such programs constitute "information services" or "enhanced services" under settled Ninth Circuit law, which holds that providers of such information services or enhanced services "are not subject to regulation as telecommunications carriers" by the FCC – *i.e.*, they are *not* "common carriers" under the FCA. *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000); *Howard*, 208 F.2d at 751-53 (dismissing FCA claims against internet service provider, which was properly deemed a provider of "information services" or "enhanced services," and not regulated as a "common carrier" by the FCC).

FCA claims since *North County* was decided (*see* Op. Br. 12-13),[8] and it applies with full force here.

Whether Google and HTC are "common carriers" within the meaning of the FCA, as well as whether any alleged manufacturing or marketing of the Nexus One constitutes "unjust" and "unreasonable" practices in violation of section 201(b), are *precisely* the sort of regulatory questions that must be determined in the first instance by the FCC under *North County*'s holding. *See also* Op. Br. at 12-14 (citing cases). Hence, Plaintiff's suggestion that *North County*'s prior FCC-determination requirement should not apply because this case raises only "simpler" questions (Opp. at 14) is facetious. Moreover, Plaintiff's argument that this Court can disregard the Ninth Circuit's prior FCC-determination requirement here and itself decide the many issues implicated by Plaintiff's FCA claim flies in the face of *North County*'s unequivocal *rejection* of the argument that "federal courts [can] fill the analytical gap stemming from the absence of a Commission determination" that the defendants' challenged conduct in fact violates section 201(b), because that impermissibly would "put interpretation of a finely-turned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of the hands of the Commission" charged by Congress to interpret and administer the law. 594 F.3d at 1158. In sum, because there is no prior FCC determination that Google and HTC are common carriers, and also no prior FCC determination that their challenged conduct violates 47 U.S.C. § 201(b), Plaintiff's FCA claim must be dismissed under *North County*.

B. Plaintiff's State-Law Warranty Claims Must Be Dismissed For Multiple Reasons.

1. Plaintiff's Express Warranty Claim Must Be Dismissed.

Plaintiff's express warranty claim fails because her FAC does not allege any statement by Google or HTC that could constitute an actionable express warranty about the Nexus One's connectivity to T-Mobile's 3G wireless network, nor does it allege Plaintiff's reasonable reliance

[8] *See, e.g., Higdon v. Pacific Bell Tel. Co.*, 2010 U.S. Dist. LEXIS 40300, at **8-14 (N.D. Cal. Apr. 2, 2010); *Carney v. Verizon Wireless Telecom, Inc.*, 2010 U.S. Dist. LEXIS 47161, at **11-14 (S.D. Cal. May 13, 2010); *North County Commc'ns Corp. v. McLeodUSA Telecomm. Servs., Inc.*, 2010 U.S. Dist. LEXIS 42892, at **9-12 (D. Ariz. May 3, 2010).

on any such supposed express warranty. *See* Op. Br. at 14-17.[9]

In order adequately to plead "the exact terms of the warranty," *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 987 (N.D. Cal. 2009), Plaintiff's FAC had to allege facts sufficient to show that Google and HTC actually made some "explicit guarantees" and "specific and unequivocal written statement[s]" about the consistency of the Nexus One's 3G connectivity on T-Mobile's 3G network that could qualify as the sort of "affirmation of fact or promise" required to constitute an actionable "express warranty." *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997); *accord McKinniss v. Sunny Delight Beverages Co.*, 2007 U.S. Dist. LEXIS 96108, at **16-17 (C.D. Cal. Sept. 4, 2007). Plaintiff's FAC does not meet this threshold requirement, and her opposition just confirms that she is impermissibly trying to premise her express warranty claim on some subjective expectation or "impression" that Plaintiff apparently harbored (Opp. at 9) and not on any actual and specific factual assertion by Google or HTC about the Nexus One's level of connectivity to T-Mobile's 3G wireless network.[10] Plaintiff's argument that she needs "discovery" to identify some factual statement that might amount to an express warranty because Google recently stopped selling the Nexus One online (Opp. at 14) makes no sense. Google did not stop selling the Nexus One online until about six months *after* Plaintiff filed her original complaint, and one month after she filed her FAC. Moreover, Plaintiff obviously needs no discovery to know what factual representations she actually saw and supposedly relied upon – which are facts uniquely within Plaintiff's knowledge and possession. The inescapable fact is that neither Google nor HTC made any statements promising "consistent" connectivity or any other particular level of connectivity to T-Mobile's 3G wireless network that could constitute an actionable *express warranty*, so Plaintiff's defectively pleaded claim must be dismissed.

Plaintiff's claim also fails because she cannot establish "reasonable reliance" on any

[9] Plaintiff's contention that she has adequately pled her claim under Rule 8's "notice pleading standard" (Opp. at 14) fails because her FAC simply does not contain "enough" well-pleaded "facts to state a claim" for breach of express warranty "that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Moss v. U.S. Secret Service*, 572 F.3d 962, 968-70 (9th Cir. 2009).

[10] Moreover, Plaintiff offers no response to Google and HTC's dispositive argument that, at worst, any statements about the Nexus One that they are alleged to have made constitute "non-actionable *puffery* as a matter of law." Op. Br. at 15-16 n.6 (emphasis in original; citing cases).

express warranty actually made by Google or HTC, which is not surprising given that neither made any such express warranty. Op. Br. at 16 (citing cases). In her opposition, Plaintiff asserts that some unpled "representations" that the Nexus One was a state-of-the-art smartphone that provides "3G" connectivity were a substantial factor in her purchasing decision (Opp. at 15) – but Plaintiff completely ignores Google and HTC's argument that any "expectation" that she might have had about whether the Nexus One would provide consistent connectivity or any other particular level of connectivity to T-Mobile's 3G wireless network cannot be based on *anything* they actually stated. Op. Br. at 16. Moreover, Plaintiff also ignores Google and HTC's dispositive argument that the terms and disclaimers in their actual contracts with Plaintiff contradict her allegations and squarely refute the reasonableness of Plaintiff's conclusory and meritless reliance contentions here. *Id.* at 16-17.

2. Plaintiff's Implied Warranty Of Merchantability Claim Must Be Dismissed.

Plaintiff's implied warranty of merchantability claim fails because (1) the FAC fails to allege facts showing that the Nexus One is not merchantable under the governing California authorities; (2) Google's disclaimer of implied warranties bars the claim under California law; and (3) Plaintiff lacks privity with HTC. *See* Op. Br. at 17-21.

On points (1) and (2), which are independently dispositive, Plaintiff offers *no response* to Google and HTC's legal arguments and cited authorities. *Compare* Op. Br. at 18-21, *with* Opp. at 14-16. Thus, Plaintiff has not only conceded by her silence that this claim must be dismissed, but also waived any contrary arguments. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1154 n.16 (N.D. Cal. 2003) (where plaintiffs "do not respond" to a motion-to-dismiss argument, "the implication of this lack of response is that any opposition to th[at] argument is waived"); *accord Montes v. Quality Loan Serv. Corp.*, 2010 U.S. Dist. Lexis 48410, at **6-7 (C.D. Cal. Jan. 5, 2010); *see also FDIC v. Gardner*, 126 F.3d 1138, 1145 (9th Cir. 1997).

As to point (3), Plaintiff does not dispute that she lacks privity with HTC, or that privity is required to state a claim for breach of implied warranty under California law. *In re NVIDIA GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *21 (N.D. Cal. Nov. 19, 2009). Instead, Plaintiff argues

that she falls within an "exception" to the privity requirement that applies when "plaintiff relies on written labels or advertisements of a manufacturer." Opp. at 15. Because Plaintiff does not allege any statement by HTC about the Nexus One's connectivity to T-Mobile's 3G network appearing on written labels, in advertising, or anywhere else, and therefore obviously could not have relied on any such statement, this exception does not apply.

3. Plaintiff's Arguments Based On The Song-Beverly Act Do Not And Cannot Save Her Warranty Claims From Dismissal.

Unable to respond to Google and HTC's dispositive arguments requiring dismissal of her express and implied warranty claims, Plaintiff attempts to save these claims by offering up arguments based on the "Song-Beverly Act." Opp. at 15. Specifically, Plaintiff confusingly argues merely that her claims for breach of express and implied warranty are "well-pleaded" because, under the Song-Beverly Act, her purchase of the Nexus One should be deemed to have taken place in California and privity is not required. Plaintiff has it backwards. To state any claim under the Song-Beverly Act, Plaintiff must *first* state a claim for breach of warranty under state law. *See, e.g., Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009) (Song-Beverly Act claims "require [a] plaintiff[] to plead successfully a breach of state warranty law"). As Google and HTC explained in their opening brief, however, "the same fundamental defects that doom Plaintiff's common law warranty claims also require dismissal of any Song-Beverly claim as well." Op. Br. at 20-21 n.10 (citing *Birdsong*). Neither of the Song-Beverly Act arguments Plaintiff advances alters this result. First, Plaintiff's suggestion that any and all Internet purchases of the Nexus One throughout the world "took place in California," Opp. at 15, is contrary to *Anunnziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133 (C.D. Cal. 2005), which confirmed that non-California residents (like Plaintiff here) who "purchased the product over the internet" cannot pursue Song-Beverly Act claims. *Id.* at 1142. Second, as to Plaintiff's lack privity with HTC, although Plaintiff does not dispute that privity is required to state a claim for breach of implied warranty under state law, she simply ignores authority holding that privity is also required for breach of implied warranty claims under the Song-Beverly Act. *See Tietsworth v. Sears, Roebuck & Co.*, 2009 U.S. Dist. LEXIS 98532, at *36 (N.D. Cal. Oct. 13, 2009).

4. Plaintiff's State-Law Warranty Claims Are Also Preempted.

Even assuming *arguendo* that Plaintiff's state-law warranty claims did not so clearly fail for other reasons, they must be dismissed because they are expressly preempted under 47 U.S.C. § 332(c)(3). Op. Br. at 22-24. As Plaintiff admits, this Court in *iPhone* ruled that "state law warranty" claims akin to the claims at issue here were preempted under section 332(c)(3). Opp. at 15, n.2. Plaintiff asserts that she "maintains that these claims are not preempted," *id.*, but that is neither a legal argument in opposition to Google and HTC's motion, nor an adequate preservation of whatever arguments Plaintiff might have otherwise tried to advance. *McNearney v. U.S. Bankcorp. Inc.*, 2006 U.S. Dist. LEXIS 36479, at *6 (E.D. Cal. June 2, 2006) ("Bare contentions, unsupported by explanation or authority, are deemed waived."); *see also City of Arcadia*, 265 F. Supp. 2d at 1154 n.16; *Montes*, 2010 U.S. Dist. Lexis 48410, at **6-7.

C. Plaintiffs' Federal Warranty Claim Under The MMWA Must Be Dismissed.

Finally, Plaintiff's MMWA claim necessarily falls along with her legally deficient state warranty claims. *See* Op. Br. at 21-22. Plaintiff includes a confused reference to the MMWA in her footnote 2, which says that this Court held in *iPhone* that MMWA claims were preempted and notes her disagreement. Opp. at 15 n.2. The Court's *iPhone* ruling, however, did not hold that the federal MMWA claim was preempted, but rather that it failed along with the plaintiffs' legally defective and preempted state-law warranty claims. The same is true here and, consequently, Plaintiff's MMWA claim must be dismissed.

II. CONCLUSION

For the foregoing reasons, as well as those set forth in Google and HTC's opening brief, Plaintiff's First Amended Complaint should be dismissed in its entirety with prejudice.

Dated: September 22, 2010,

Respectfully submitted,

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