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13  
14 **UNITED STATES DISTRICT COURT**  
15 **NORTHERN DISTRICT OF CALIFORNIA – 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. 10-cv-01177-JW

) CLASS ACTION COMPLAINT

) **DECLARATION OF SARA D. AVILA**  
) **IN SUPPORT OF UNOPPOSED**  
) **ADMINISTRATIVE**  
) **MOTION TO CONSIDER WHETHER**  
) **CASES SHOULD BE RELATED**

1 I, Sara D. Avila, declare as follows:  
2

3 1. I am a member in good standing of the California State Bar and an attorney at the law  
4 firm of Milstein, Adelman & Kreger LLP, counsel of record for Plaintiff in *Mary McKinney v.*  
5 *Google Inc., et al.*, Case No 10-cv-01177-JW. I make this declaration based on my personal  
6 knowledge, and if called to testify to the contents, I could and would competently do so.

7 2. Attached as Exhibit A is a true and correct copy of the class action complaint filed on  
8 August 31, 2010 in *Nathan Nabors v Google Inc.*, Case No. 10-cv-03897-HRL.

9 3. Attached as Exhibit B is a true and correct copy of the class action complaint filed on  
10 March 22, 2010 in *Mary McKinney v. Google Inc., et al.*, Case No 10-cv-01177-JW, and assigned to  
11 the Honorable James Ware.

12 4. On September 30, 2010 I spoke with France Jaffe, counsel for Google, Inc. regarding the  
13 instant motion. Counsel informed me Google does not oppose the instant motion to the extent  
14 Plaintiff seeks an order of this Court that the *McKinney* and *Nabors* cases be deemed related.

15 I declare under penalty of perjury that the foregoing facts are true and correct and that this  
16 declaration was executed this 4th day of October, 2010, in Santa Monica, California.  
17

18  
19 By:       /s/ Sara D. Avila        
20 Sara D. Avila  
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# **EXHIBIT A**

ORIGINAL  
FILED

2010 AUG 31 P 1:30

RICHARD W. HENNING  
CLERK, U.S. DISTRICT COURT  
N.D. CALIF. SAN JOSE

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NATHAN NABORS, Individually and on )  
behalf of all others similarly situated, )

*Plaintiff,* )

v. )

GOOGLE, INC., a Delaware corporation, )

*Defendant* )

CV 10-03897

CLASS ACTION COMPLAINT

HRL

1. Violation of the Federal Communications Act;
2. Breach of Express Warranty and Implied Warranty of Merchantability; and
3. Violation of the Magnuson-Moss Warranty Act.

DEMAND FOR JURY TRIAL

Plaintiff Nathan Nabors, on behalf of himself and all others similarly situated, brings this complaint against Google, Inc. ("Defendant"), and alleges as follows:



1 **CLASS ACTION ALLEGATIONS**

2 5. Plaintiff brings this action on behalf of himself and all other persons similarly  
3 situated within the states of Florida and California. Under Federal Rule of Civil Procedure  
4 23(b)(1), (b)(2), and (b)(3), the proposed class is both ascertainable and shares a well-defined  
5 community of interest in common questions of law and fact.

6 6. The Florida Class is currently defined as follows:

7 **All persons within the State of Florida who purchased the**  
8 **Google Phone through www.google.com at any time between**  
9 **January 5, 2010 and the present.**

10 **Excluded from the Class are governmental entities, Defendant,**  
11 **any entity in which Defendant has a controlling interest, and**  
12 **Defendant's officers, directors, affiliates, legal representatives,**  
13 **employees, co-conspirators, successors, subsidiaries, and**  
14 **assigns. Also excluded from the Class is any judge, justice, or**  
15 **judicial officer presiding over this matter and the members of**  
16 **their immediate families and judicial staff.**

17 7. The California Class is currently defined as follows:

18 **All persons within the State of California who purchased the**  
19 **Google Phone through www.google.com at any time between**  
20 **January 5, 2010 and the present.**

21 **Excluded from the Class are governmental entities, Defendant,**  
22 **any entity in which Defendant has a controlling interest, and**  
23 **Defendant's officers, directors, affiliates, legal representatives,**  
24 **employees, co-conspirators, successors, subsidiaries, and**  
25 **assigns. Also excluded from the Class is any judge, justice, or**  
26 **judicial officer presiding over this matter and the members of**  
27 **their immediate families and judicial staff.**

28 8. A. **Numerosity**

Class members are so numerous that individual joinder of all members is impracticable. While the precise number of Class members has not been determined at this time, and the facts to determine that number presently are within Google's sole control, based on public

1 reports Plaintiff believes the number of Class members who bought a Google Phone and  
2 purchased T-Mobile 3G service during the class period is well over one hundred thousand people.

3 10. Class members are readily ascertainable. Google's sales records contain  
4 information as to the number and location of all Class members. Because Google should have  
5 accurate and detailed sales and service information regarding individual Class members and up-  
6 to-date contact information, including their e-mail or SMS addresses, an easy and accurate method  
7 is available for identifying and notifying Class members of the pendency of this action.

8 **B. Commonality**

9 11. Common questions of law and fact predominate over questions affecting individual  
10 Class members. These common questions of law and fact include the following:

- 11 (a) Whether Google advertised and sold the Google Phone by promoting the  
12 characteristics of 3G speed and performance, when in fact the actual performance  
13 was materially different, and worse, than the promises and claims made by  
14 Google;
- 15 (b) Whether Google failed to disclose material facts about limitations in the speed  
16 and performance characteristics of the Google Phone to consumers, and;
- 17 (c) Whether Google's forum selection clause applies the law of California to all  
18 Class members; and,
- 19 (d) Whether Google forced Class members to pay unjust charges for the goods and  
20 services they were sold, as well as whether that failure violates statutory and  
21 common law prohibitions against such conduct, as detailed more fully below.

22 **C. Typicality**

23 12. Plaintiff's claims are typical of the claims of the Class. Plaintiff sustained injury  
24 and a loss of money or property arising from, and as a result of, Google's unlawful common  
25 course of conduct. Plaintiff purchased the Google Phone based in substantial part on the uniform  
26 advertised claim of the phone having the characteristics of increased data transfer speed and  
27 greater performance than was actually provided. Those representations were a substantial factor  
28 in the decision to purchase the Google Phone. Plaintiff received, at best, sporadic 3G speed or

1 connection to a 3G network with her Google Phone. He did not receive any disclosures from  
2 Google before or after purchase explaining the material limitations in the Google Phone and how  
3 its interaction with T-Mobile 3G network materially reduced its performance such that, for a  
4 significant period of time, the phones do not in fact provide 3G capability and access.

5 **D. Adequacy of Representation**

6 13. Plaintiff can fairly and adequately represent and protect the Class's interests.  
7 Plaintiff's claims are both typical of the Class's claims and are based on facts that are common to  
8 the Class. The Class representative has suffered similar injuries and damages arising from  
9 Google's conduct. As such, Plaintiff can adequately represent the Class because he seeks the  
10 same or similar remedies that would be available to other Class members. No irreconcilable  
11 conflicts exist between the positions of Plaintiff and those of the Class members.

12 14. Plaintiff retained attorneys who are competent and experienced in litigating  
13 significant class actions to represent their interests and that of the Class. Counsel have significant  
14 experience in handling class actions and the types of claims asserted herein, and have been  
15 appointed as class counsel by courts in other actions. Plaintiff and his counsel already have done  
16 significant work in identifying and investigating the potential claims in this action, and are willing  
17 to devote the necessary resources to vigorously litigate this action. Plaintiff and his counsel are  
18 aware of their fiduciary responsibilities to the Class to represent fairly and adequately the Class  
19 and are determined to discharge those duties by seeking the maximum possible recovery for the  
20 Class based on the merits of these claims and the available resources.

21 15. Plaintiff has standing to represent a California Class and Florida Class by virtue of  
22 the choice of law clause in Google's forum selection clause in its Nexus One Phone – Terms of  
23 Sale, which states the terms and relationship between consumers and Google "shall be governed  
24 by the laws of the State of California."

25 **E. Superiority of a Class Action**

26 16. A class action is a superior method for resolving the claims herein alleged as  
27 compared to other available group-wide methods for adjudicating these issues. The remedy to  
28 resolve the common classwide issues regarding the issues detailed herein would be to refund a



1 portion of the cost of the Google Phone and/or the increased service plan costs. Because of the  
2 nearly-certain low individual damage amount, which is less than \$1,000 per Class member in  
3 almost every conceivable circumstance, individual Class members would have little incentive to  
4 prosecute such claims on an individual basis. Such individual actions are not cost-effective or  
5 practical, as the costs associated with proving a *prima facie* case would exceed the obtainable  
6 recovery.

7 17. Important interests are served by addressing the issues raised in the Complaint in a  
8 class action. Adjudication of individual claims would result in a great expenditure of court and  
9 public resources. Resolving the claims on a classwide basis results in significant cost savings.  
10 Class action treatment allows similarly situated persons to litigate their claims in the manner that  
11 is most efficient and economical for the parties and the judicial system.

12 18. There is a substantial likelihood of inconsistent verdicts, which would frustrate the  
13 resolution of these legal issues for Google and force them to comply with inconsistent legal  
14 standards.

15 19. The trial and litigation of Plaintiff's claims are manageable. Individual litigation of  
16 the legal and factual issues raised by Google's conduct would increase delay and expense to all  
17 parties and the court system. The class action device presents far fewer management difficulties  
18 and provides the benefits of a single, uniform adjudication, economies of scale, and  
19 comprehensive supervision by a single court. Moreover, Google's application of California law to  
20 all of its consumers provides for a Florida and California class, both to be adjudicated under  
21 California law.

22 20. Failure to certify a class would make it impossible for a great many of the Class  
23 members to seek relief. For those who seek judicial relief, there is a strong likelihood that  
24 separate court rulings would lead to inconsistent verdicts, working a substantial prejudice on  
25 Google, especially, as in this case, where equitable relief is being sought. A class action presents  
26 fewer management difficulties and provides the benefits of single adjudication, economy of scale,  
27 and comprehensive supervision by a single court.

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1 terms into these Terms that cannot be excluded. Those rights, remedies, and  
2 implied terms are not excluded by these Terms. To the extent that the relevant law  
3 permits Google to limit their operation, Google's liability under those laws will be  
4 limited at its opinion, to the cost of replacing the goods, acquiring he equivalent  
5 goods or having the goods repaired.

6  
7 26. Because Google sold all of the Google Phones through its web site, essential acts  
8 consummating the sale of each and every Google Phone occurred in this District.

9  
10 **STATEMENT OF FACTS**

11 27. Google is an American public corporation specializing in Internet search and  
12 advertising services and recently, entered the retail business when it decided to develop and sell  
13 smartphones, which are multi-functional mobile devices with advanced capabilities. Smartphones  
14 have become a lucrative market for companies, who are scrambling for market share in this highly  
15 competitive field.

16 28. The Google Phone was “[d]eveloped in partnership with hardware manufacturer  
17 HTC,” according to WIRED magazine, and was released throughout the United States on January  
18 5, 2010. Matthew Honan, *WIRED*, “Google Debuts Android-Powered Nexus One ‘Superphone’,”  
19 Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/)  
20 [one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/) (last visited June 8, 2010).

21 29. In the Unites States, T-Mobile was the exclusive wireless carrier that allowed the  
22 Google Phone to be used on a 3G wireless network.

23 30. An estimated 20,000 Google Phones were sold during the first week of the phone's  
24 release.

25 31. The Google Phone was advertised widely. Perhaps the most important ad portal  
26 for the Google Phone, however, was the Google.com homepage itself. Upon its release, Google  
27 changed its homepage to be viewed as follows:  
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# Google™

Google Search

I'm Feeling Lucky



Experience Nexus One, the new Android phone from Google

Jason Kincaid, "The Nexus One Gets A Priceless Ad On Google's Homepage," *Tech Crunch*, Jan. 6, 2010, at <http://techcrunch.com/2010/01/06/nexus-one-google-homepage/> (last visited June 8, 2010).

32. One commentator said as follows regarding that ad: "This is the kind of advertising that money can't buy, because it simply isn't for sale. And because Google almost never features ads on the page, you can be sure it's going to be catching quite a few eyeballs. Last time an ad popped up here John Gruber called it 'the most valuable ad space on the entire Internet.'" *Id.* Based on Google's approximately *88 billion* searches run each month during 2009, that statement has concrete validity.

33. The Google Phone is an advanced mobile cellular phone which operates using the Android Mobile Technology Platform and includes various features, such as video and audio player, and an Internet device which provides email and Internet access on the 3G Network. The Google Phone's primary competitor is Apple's popular iPhone 3G, a cellular device very similar to the Google Phone that also uses the 3G wireless network.

34. The "3G" technology is alleged to feature faster peak data transfer rates over previous networks of up to 7.2 Mbps (megabytes per second). These data transfer rates are especially important to many smartphone users who employ their devices to run and store

1 applications; send and receive email; download and play media; and share pictures and  
2 information via social networking systems.

3 35. Without purchasing a wireless service plan through T-Mobile for 3G network  
4 access, the Google Phone costs \$529. With a new T-Mobile wireless network service plan, which  
5 is a two-year contract, a customer pays \$179 for the Google Phone plus the additional monthly  
6 charge for the T-Mobile wireless service, which may exceed \$100 per month.

7 36. Initially, the Google Phone was only available through an online purchase and if  
8 customers desired to use the 3G wireless service on their Google Phone without paying the full  
9 cost of \$529 for an “unlocked” phone, they have no option but to purchase the Google Phone with  
10 a two-year commitment to T-Mobile.

11 37. “Unlocked” Google Phones could be used on the network provided by AT&T  
12 Mobility, LLC (for \$529 per phone, not including data plan) beginning on March 16, 2010. Both  
13 Sprint and Verizon announced initially that they would offer their network capability options for  
14 purchasers of the Google Phone, but both later reversed course.

15 38. Recently, Google announced that it was shifting from an online-only retail strategy  
16 to a “bricks-and-mortar” sales option. Tom Krazit, *cNet*, “Google turns Nexus One strategy  
17 upside down,” May 14, 2010, at [http://news.cnet.com/8301-30684\\_3-20005015-265.html](http://news.cnet.com/8301-30684_3-20005015-265.html) (last  
18 visited June 8, 2010). Google, therefore, has opened new avenues of sales and service to later-  
19 arriving customers that it refused to provide to “early adopters.”

20 39. An existing T-Mobile customer may also upgrade to purchase the Google Phone,  
21 but this requires the customer to pay the difference between the \$529 price of the phone and any  
22 upgrade credit allotted to the customer’s account. Those customers also are required to extend  
23 their T-Mobile contract for an additional two years.

24 40. Google consistently advertised the Google Phone, working in tandem with the T-  
25 Mobile network, as providing 3G data transfer rates. For consumers the appellation “3G” is  
26 commonly understood to provide superior data transfer rates over older cell technology, which  
27 worked on an “EDGE” standard.

28

1           41. Second generation multiple access standards known as GSM/EDGE, which are  
2 commonly understood as working on 2G or 2.5G levels, have a maximum data transfer rate of 237  
3 kbps (kilobytes per second). The Google Phone was designed to operate both on the 2G network  
4 and a third generation, or 3G, multiple access standard network. According to Google, 3G  
5 technology features faster peak data transfer rates over previous networks.

6           42. The Google Phone was designed to operate, and marketed to operate, on a 3G  
7 level. If, however, 3G connectivity was unavailable, the phone and data operations could still be  
8 used, but at a substantially lower data transfer rate than the 3G level that was advertised.

9           43. Contrary to Google's assertions, Plaintiff and other members of the Class  
10 experience connectivity on the 3G wireless network only a fraction of the time they are connected  
11 to the T-Mobile's 3G wireless network, or receive no 3G connectivity at all for a significant  
12 portion of time. The lack of 3G connectivity also causes Plaintiff and other members of the Class  
13 to experience a significant number of dropped calls when the Google Phone cannot locate an  
14 available 3G network connection. Google either knew, reasonably should have known, or was  
15 obligated to understand that the Google Phone could not consistently perform at a 3G level,  
16 contrary to the Google's representations.

17           44. These problems were apparent only days after the launch of the Google Phone. On  
18 January 11, 2010, cNet—a trusted technology website—noted as follows: "If you bought a Nexus  
19 One, there's a chance you may be experiencing issues with connecting to T-Mobile's 3G network,  
20 but the good news is that you're not alone. *The bad news is, well, you're not getting 3G.*" Bonnie  
21 Cha, *cNet*, Jan. 11, 2010, "T-Mobile acknowledges 3G issues on Nexus One" at  
22 [http://www.cnet.com/8301-19736\\_1-10432087-251.html](http://www.cnet.com/8301-19736_1-10432087-251.html) (last visited June 8, 2010).

23           45. Google has not provided satisfactory answers with regard to the defects  
24 experienced by Plaintiff and Class members:

25           A spokesperson for HTC, the manufacturer of the Nexus One phone  
26 sold by Google and deployed thus far on T-Mobile's GSM network,  
27 told Betanews late Monday evening that it is aware of the magnitude of  
28 3G connectivity problems reported by customers nationwide since last  
week. As of Monday evening, several hundred messages were posted to  
Google's support Web site, many reporting essentially the same  
problem: For the most part, their 3G connections are spotty and

variable; and for some, 3G is non-existent.

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*Contrary to reports, however, HTC is not acknowledging a problem with the phone. As of now, the T-Mobile network remains equally suspect, especially amid the complete lack of much news whatsoever, including to its customers, from Google.*

“While the majority of Nexus One owners have been thrilled with their experience, HTC is aware that some owners have reported having some technical issues with their Nexus One devices,” the spokesperson told Betanews. HTC, Google, and T-Mobile take all such reports very seriously, and are working closely together to determine what issues may be behind these reports.”

\*\*\*\*

But although blogs today reported that this thread was an admission of problems with T-Mobile’s network, actually, T-Mobile made no such admission. It merely acknowledged the issue and its personnel (unlike Google’s) are interacting with customers in search of a resolution.

Customers who did manage to get through to HTC support personnel report having been told that a software patch of some sort is in the works; some who received that message last week were told they would receive a patch as soon as today. It does not appear certain that such a patch, if it exists, specifically addresses this problem.

All that Google will say on the subject is as follows: “We are investigating this issue and hope to have more information for you soon. We understand your concern and appreciate your patience.”

Scott M. Fulton III, *Betanews*, “HTC admits customers have Nexus One 3G trouble, not yet blaming the phone”, Jan. 11, 2010, at <http://www.betanews.com/article/HTC-admits-customers-have-Nexus-One-3G-trouble-not-yet-blaming-the-phone/1263265252> (last visited June 8, 2010).

Even areas where T-Mobile’s limited 3G coverage was represented to exist, T-Mobile’s network did not provide consistent 3G performance for Google Phone purchasers. “Complaints on Google’s support forum said users were unable to get 3G service in areas where T-Mobile’s maps indicated they should get it. Google doesn’t have a solution for the problem yet, [Google spokesperson Carolyn Penner] said.” *San Jose Mercury News*, “Hype, complaints top sales so far for Google’s Nexus One phone,” Jan. 21, 2010, at <http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986> (last visited June 8, 2010).

1           46. Google failed to warn Plaintiff and Class members of the limitations associated  
2 with using the Google Phone or its internal understanding that the T-Mobile 3G network was not  
3 designed to provide consistent connectivity to its 3G network for Google Phone users.

4           47. Moreover, Google did not provide adequate customer service to assist Google  
5 Phone customers in helping resolve the issues. When customers, including Plaintiff, contacted T-  
6 Mobile to request assistance, the customer was provided with only an email address to contact  
7 Google directly. The customer then had to wait for several days for a response:

8           New owners of the Nexus One, the latest touch-screen smartphone to run on  
9 Android, Google's mobile operating system, have found themselves at a loss  
10 when it comes to resolving problems with the handset. They cannot call Google  
11 for help, and the company warns that it may take up to 48 hours to respond to e-  
12 mail messages.

13           \*\*\*\*

14           Early buyers of the device, like Kiran Konathala, a 27-year-old database  
15 programmer in Long Branch, N.J., have complained of dropped calls, plodding  
16 download speeds and connectivity snags. "The hardware is great, but the software  
17 is a mess," he said. "It's not been a happy experience so far."

18           The phone presents a puzzle for users like Mr. Konathala: Who do you call when  
19 you have a problem?

20           Most people use the phone on T-Mobile's network, which offers a subsidy if a  
21 customer buys a contract, and the phone is made by HTC, a major Taiwanese  
22 manufacturer. But it is sold exclusively by Google through a special Web-based  
23 store.

24           Despite its central role in the process, Google does not appear to have built a  
25 significant infrastructure to provide customer support. There is no phone number  
26 for support, for example, and customers who send an e-mail message may wait  
27 for days to hear back.

28           \*\*\*\*\* Andy Rubin, Google vice president for engineering in charge of Android  
technology, acknowledged last week that the company needed to improve. "We  
have to get better at customer service," Mr. Rubin said during an on-stage  
interview at the Consumer Electronics Show in Las Vegas. Instead of taking three  
days to respond to e-mail messages, he said, "We have to close that three-day gap  
to a couple of hours." But Mr. Rubin said that the release of the Nexus One had  
gone smoothly.



1 Some analysts said that Google appeared to have misjudged the service demands  
2 that come with being in the business of selling sophisticated gadgets.

3 “They may have been clouded by their own personal experience and way of  
4 thinking about how they deal with technology,” said Charles S. Golvin, an analyst  
5 with Forrester Research. “They’ve got a long way to go in terms of understanding  
6 all the components of the retail process — not just selling phones but the after-  
7 sales care — to be as skilled in this endeavor as they are in the rest of their  
8 endeavors.”

9 Jenna Wortham & Miguel Heft, *N.Y. Times*, “Hey Google, Anybody Home?,” Jan. 13, 2010, at  
10 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,  
11 2010).

12 48. Further, if the customer buys a subsidized Google Phone when entering into a new  
13 two year contract with T-Mobile, and the customer chooses to terminate the contract during the  
14 first 120 days, the customer is liable for not only the termination fees to T-Mobile, but also must  
15 pay Google the difference between the full price of the Google Phone and the subsidized price,  
16 which may be upwards of \$350.

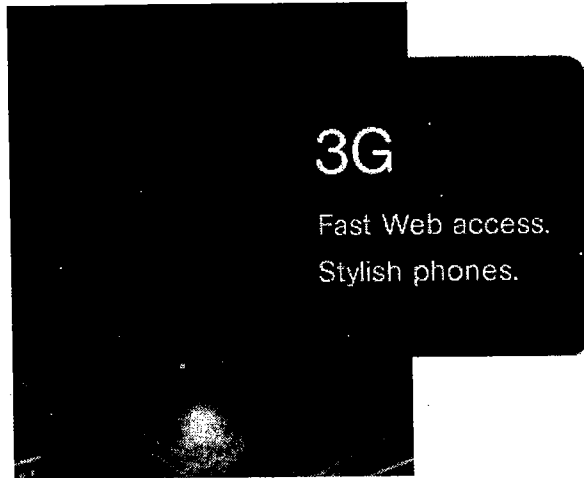
17 49. Despite knowledge that the Google Phone cannot maintain consistent 3G service  
18 and that they do not provide adequate customer service, Google continued to manufacture, design,  
19 promote and and/or sell the Google Phone as being able to operate on a 3G wireless network.

20 50. Moreover, Google did not offer refunds to consumers who purchased the Google  
21 Phone expecting it to operate properly on the 3G wireless network, when it has not, after the  
22 standard 14-day period (or 30-day period in California) following the purchase.

23 51. The Google Phone is designed to search for an available 3G radio network  
24 connection, and if that is not available, it will connect to a slower network. It is common for  
25 Google Phone users to be on the 3G network for only a few minutes before their Google Phone  
26 switches over to a slower network, or simply lose connectivity altogether.

27 52. While the strain on the T-Mobile’s 3G wireless network was foreseeable, based on  
28 how the Google Phone is set up and designed, the combination of the phone and/or the network  
made it difficult for Class members to receive reliable and sustained connectivity on the 3G  
wireless network as compared to a slower network.

1 53. On its website, T-Mobile touts its 3G network as offering several advantages:  
2  
3  
4



Enjoy the Internet on the go: Web pages download faster

Multi-task: Browse the Web, send messages, or find movie times—all while talking

Send photos faster to friends and family

Watch YouTube™ and other video files

Do more with your phone

- Send e-mail with large attachments
- Download documents, applications, and music faster
- Upload and share large files (photos, videos, presentations)
- Browse and download the online information you need—fast

13 2.

14 [http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro\\_Pro\\_Go3G](http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_Go3G) (last visited  
15 June 8, 2010). Unfortunately, in an inconspicuous place in minute font at the bottom of that page,  
16 T-Mobile offers the following qualifying language:

17  
18 3G coverage is available only in certain markets. To provide the best network  
19 experience for all our customers we may temporarily reduce data throughput for a  
20 small fraction of customers who use a disproportionate amount of bandwidth. Your  
21 data session, plan, or service may be suspended, terminated, or restricted for  
22 significant roaming or if you use your service in a way that interfaces with our  
network or ability to provide quality service to other users. Some devices require  
specific data plans; if you do not have the right plan for your device, you may not  
be able to use data services. Additional charges may apply. Domestic use only.

23 54. Plaintiff and other members of the Class were injured in fact and lost money or  
24 property as a result of Google's material misstatements and omissions of material fact, paying  
25 more to receive inferior service in relation to what they believed they had purchased.

26 55. As a result of Google's material misrepresentations and omissions of material  
27 facts, Plaintiff and other members of the Class are locked into a two-year service plan with  
28

1 inferior T-Mobile 3G wireless network connectivity. A substantial factor in entering into those  
2 agreements was the representation that the Google Phone would operate as a true 3G device.

3 56. Google and DOE defendants acted in concert to sell the Google Phone and either  
4 knew, should have known, or were obligated to understand that they were trying to sell more  
5 Google Phone devices than the existing T-Mobile's 3G wireless network could handle, and the  
6 Google Phone itself suffered from defective hardware and/or software. Plaintiff and other Class  
7 members were injured, either directly or indirectly, in response to the representations, advertising  
8 and/or other promotional materials that were prepared and approved by Google and disseminated  
9 on the face of the product and/or through assertions that contained the representations regarding  
10 the Google Phone and T-Mobile's 3G wireless network. Had the true facts been disclosed,  
11 Plaintiff and other Class members would not have purchased the Google Phone at the prices and  
12 under the terms and conditions to which they were and are subjected.

13 57. Google failed to disclose at the time of making their false and misleading  
14 statements to Plaintiff and the Class that the infrastructure of T-Mobile's 3G wireless network  
15 and/or the Google Phone itself were defective and inadequate to provide the represented  
16 performance and speed, resulting in injury to the Plaintiff and the Class.

17 58. Plaintiff paid \$230 to break his then-contract with AT&T so he could use the T-  
18 Mobile network in order to get a Google Phone. Plaintiff paid \$563.38 for the phone. Plaintiff  
19 purchased the Google Phone directly from Google online.

20 59. **Plaintiff did not have a contract with T-Mobile so it was a month-to-month**  
21 **service with no contract. Plaintiff was missing calls and the Google Phone did not function**  
22 **correctly. When Plaintiff called T-Mobile, T-Mobile said the phone's malfunctions were not**  
23 **their problem. When Plaintiff attempted to speak to Google, they said the same thing.**

24 //

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1 **FIRST CAUSE OF ACTION**

2 ***Against All Google and DOE Defendantss***

3 **(Violation of the Federal Communications Act, 47 U.S.C. §§ 201 and 207)**

4 60. Plaintiff incorporates by reference each and every preceding paragraph as though  
5 fully set forth herein.

6 61. Pursuant to the Federal Communications Act, 47 U.S.C. section 201(b), “[a]ll  
7 charges, practices, classifications, and regulations for and in connection with such communication  
8 service, shall be just and reasonable, and any such charge, practice, classification, or regulation  
9 that is unjust or unreasonable is declared to be unlawful.”

10 62. Pursuant to 27 U.S.C. section 207, Plaintiff has a private right of action to enforce  
11 the rights granted under Section 201(b) in this Court. “Any person claiming to be damaged by  
12 any common carrier subject to the provisions of this chapter may . . . bring suit for the recovery of  
13 the damages for which such common carrier may be liable under the provisions of this chapter, in  
14 any district court of the United States of competent jurisdiction.”

15 63. Based on the conduct alleged above, Defendant has violated Section 201(b) of the  
16 Federal Communications Act, because, as previously determined by the FCC in rulings relating to  
17 whether false and misleading claims can constitute a violation of the FCA, their charges for the  
18 Google Phone as an internet access device and the companion T-Mobile premium service plans as  
19 detailed above that Plaintiff and Class Members were required to purchase were unjust based  
20 upon the claims they made as compared to what was actually provided. T-Mobile also  
21 misrepresented or omitted material facts relating to the quality of the 3G coverage service that  
22 would be available to Class Members using the Google Phone. T-Mobile’s service was thus not  
23 provided in accordance with its terms and conditions or in accordance with the promises included  
24 in advertising for the Google Phone, resulting in a material difference between their promises and  
25 actual performance. Even if Google is found to have been charging a “reasonable rate” for its  
26 products and services, it is still subject to a claim for damages for non-disclosure or false  
27 advertising of the material facts set forth herein based on its misrepresentations or failing to

1 inform Class Members of other material terms, conditions, or limitations on the services provided  
2 Class Members.

3  
4 **SECOND CAUSE OF ACTION**

5 *Against All Google and All Defendants*

6 **(Breach of Express Warranty and Implied Warranty of Merchantability)**

7 64. Plaintiff incorporates by reference each and every preceding paragraph as though  
8 fully set forth herein.

9 65. Plaintiff and Class members purchased their Google Phones and used them for  
10 their ordinary and intended purpose of providing consistent, reliable and sustained access to the  
11 supposedly faster 3G network, and entered into agreements with Google or its agents and received  
12 uniform warranties in connection with the purchase of such phones.

13 66. The Google Phone cannot perform its ordinary and represented purpose because  
14 the Google Phone does not provide consistent connection to the T-Mobile 3G network in  
15 combination with using the Google Phone. Whether the problem is with the Google Phone itself  
16 or with the T-Mobile 3G network, or a combination of the two, is irrelevant as to whether the  
17 warranty was breached.

18 67. When Google placed the Google Phone into the stream of commerce, it knew,  
19 reasonably should have known, or was obligated to understand that the intended and ordinary  
20 purpose of its phone was to provide consistent connectivity to a supposedly faster 3G network and  
21 that users would expect regular 3G connectivity and materially faster data transfer rates than other  
22 devices designed for EDGE compatibility.

23 68. Plaintiffs and the Class purchased their Google Phones with the reasonable  
24 expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G  
25 network. The advertisements Google disseminated that stressed the excellence and reliability of  
26 the Google Phone constitute a warranty that the products would operate as advertised during their  
27 useful life, upon which Plaintiffs and the Class reasonably acted. The Google Phone is not fit for  
28 its warranted, advertised, ordinary and intended purpose of providing reliable 3G network



- 1           3.     A declaratory judgment stating that Google may not pursue the policies, acts and  
2 practices complained of herein;
- 3           4.     A temporary, preliminary and/or permanent order for injunctive relief requiring  
4 Google to undertake an informational campaign to inform members of the general public as to  
5 the wrongfulness of Google's practices;
- 6           5.     An award of actual, statutory and/or exemplary damages, as appropriate for the  
7 particular Causes of Action;
- 8           6.     An order requiring disgorgement of Google's ill-gotten gains by requiring the  
9 payment of restitution to Plaintiff and members of the Class, as appropriate for the particular  
10 Causes of Action;
- 11           7.     Reasonable attorneys' fees;
- 12           8.     All related costs of this suit;
- 13           9.     Pre- and post-judgment interest; and
- 14           10.    Such other and further relief as the Court may deem necessary or appropriate.

15 DATED: August 26, 2010

Attorneys for Plaintiff Nathan Nabors and the  
Proposed Class

16  
17  
18  
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**JURY DEMAND**

Plaintiff and the Class demand a trial by jury on all claims so triable.

DATED: August 26, 2010

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# **EXHIBIT B**

ORIGINAL  
FILED

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CLERK, U.S. DISTRICT COURT  
SANTA MONICA, CALIFORNIA

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15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

17 MARY MCKINNEY, Individually and on )  
behalf of all others similarly situated, )  
18 )  
*Plaintiff,* )

5:10-cv-01177-JW

CLASS ACTION

FIRST AMENDED COMPLAINT

19 v. )  
20 )  
21 GOOGLE, INC., a Delaware corporation; )  
HTC CORP., a Delaware corporation; and )  
22 T-MOBILE USA, INC., a Delaware )  
corporation. )

1. Violation of the Federal Communications Act;
2. Breach of Express Warranty and Implied Warranty of Merchantability; and
3. Violation of the Magnuson-Moss Warranty Act.

23 *Defendants*

Judge: Hon. James Ware

DEMAND FOR JURY TRIAL.

BY FAX

1 Plaintiff Mary McKinney, on behalf of herself and all others similarly situated, brings this  
2 complaint against Google, Inc.; HTC Corp. (“HTC”); and T-Mobile USA, Inc. (collectively,  
3 “Defendants”), and alleges as follows:

4 **INTRODUCTION**

5 1. This is a class action against Defendants on behalf of Plaintiff and a class of all  
6 consumers who purchased the Nexus One mobile device (the “Google Phone”) manufactured and  
7 marketed by Google and HTC and sold in combination with T-Mobile’s monthly service plan for  
8 access to its 3G wireless network (the “Class”) arising out of the Google Phone failure to maintain  
9 connectivity to T-Mobile’s 3G wireless network, and for Defendants’ lack of customer support to  
10 assist Google Phone customers in coping with this defect.

11 **THE PARTIES**

12 2. Plaintiff is, and at all relevant times hereto has been, a resident of the State of  
13 Pennsylvania. She purchased her Google Phone on or about January 9, 2010, through the Google  
14 website (google.com/phone).

15 3. Defendant Google is a Delaware corporation that maintains its principal place of  
16 business in Mountain View, California. Google develops brands, promotes, markets, distributes  
17 and/or sells the Google Phone throughout the United States.

18 4. Defendant HTC is a Taiwanese corporation that, at all relevant times, was doing  
19 business in the State of California. HTC designed and manufactured the Google Phone.

20 5. Defendant T-Mobile is a Delaware corporation with its principal place of business  
21 in Bellevue, Washington. T-Mobile, a subsidiary of Germany-based Deutsche Telekom’s T-  
22 Mobile International business, provides wireless voice and data communications services to  
23 subscribers in the U.S., including California. T-Mobile was the exclusive provider of the  
24 telephone and data service plans for the Google Phone throughout the U.S., including California,  
25 until very recently. T-Mobile owns, operates and/or maintains a 3G network here and has other  
26 significant contact with HTC and Google here.

27 //  
28

1 6. Plaintiff is informed and believes and based thereon alleges that at all times  
2 relevant herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate,  
3 partner, assignee, successor-in-interest, alter ego or other representative of each of the remaining  
4 Defendants and was acting in such capacity in doing the things herein complained of and alleged.  
5 In committing the unlawful and wrongful acts as alleged herein, Defendants planned and  
6 participated in and furthered a common scheme by means of manufacturing, marketing and selling  
7 the Google Phone with T-Mobile's monthly service plan for access to its 3G network, despite  
8 Google Phone's inability to maintain connectivity to the 3G network. Further, Defendants failed  
9 to provide adequate customer service to Plaintiff and the Class to cope with this defect.

10 **CLASS ACTION ALLEGATIONS**

11 7. Plaintiff brings this action on behalf of herself and all other persons similarly  
12 situated within the United States of America, or such states as the Court determines to be  
13 appropriate. Under Federal Rule of Civil Procedure 23(b)(1), (b)(2), and (b)(3), the proposed  
14 class is both ascertainable and shares a well-defined community of interest in common questions  
15 of law and fact.

16 8. The Class is currently defined as follows: "All persons within the United States  
17 who purchased the Google Phone through www.google.com at any time between January 5, 2010  
18 and the present and who either (a) have a T-Mobile service plan for access to its 3G wireless  
19 network or (b) paid the full price for an 'unlocked' Google phone for use on another 3G network."

20 **A. Numerosity**

21 9. Class members are so numerous that individual joinder of all members is  
22 impracticable. While the precise number of Class members has not been determined at this time,  
23 and the facts to determine that number presently are within Defendants' sole control, based on  
24 public reports Plaintiff believes the number of Class members who bought a Google Phone and  
25 purchased T-Mobile 3G service during the class period is well over one hundred thousand people.

26 10. Class members are readily ascertainable. Defendants' sales, service plan and  
27 subscription records contain information as to the number and location of all Class members, a  
28 significant number of whom are likely still under service contracts with T-Mobile. Because

1 Defendants Google and T-Mobile should have accurate and detailed sales and service information  
2 regarding individual Class members and up-to-date contact information, including their e-mail or  
3 SMS addresses, an easy and accurate method is available for identifying and notifying Class  
4 members of the pendency of this action.

5 **B. Commonality**

6 11. Common questions of law and fact predominate over questions affecting individual  
7 Class members. These common questions of law and fact include the following:

- 8 (a) Whether Defendants advertised and sold the Google Phone by promoting the  
9 characteristics of 3G speed and performance, when in fact the actual performance  
10 was materially different, and worse, than the promises and claims made by  
11 defendants;
- 12 (b) Whether Defendants failed to disclose material facts about limitations in the  
13 speed and performance characteristics of the Google Phone to consumers, and;
- 14 (c) Whether Defendants forced Class members to pay unjust charges for the goods  
15 and services they were sold, as well as whether that failure violates statutory and  
16 common law prohibitions against such conduct, as detailed more fully below.

17 **C. Typicality**

18 12. Plaintiff's claims are typical of the claims of the Class. Plaintiff sustained injury  
19 and a loss of money or property arising from, and as a result of, Defendants' unlawful common  
20 course of conduct. Plaintiff purchased the Google Phone based in substantial part on the uniform  
21 advertised claim of the phone having the characteristics of increased data transfer speed and  
22 greater performance than was actually provided. Those representations were a substantial factor  
23 in the decision to purchase the Google Phone. Plaintiff has received, at best, sporadic 3G speed or  
24 connection to a 3G network with her Google Phone. She did not receive any disclosures from  
25 Defendants Google or T-Mobile before or after purchase explaining the material limitations in the  
26 Google Phone and how its interaction with T-Mobile 3G network materially reduced its  
27 performance such that, for a significant period of time, the phones do not in fact provide 3G  
28 capability and access.

1           **D. Adequacy of Representation**

2           13. Plaintiff can fairly and adequately represent and protect the Class's interests.  
3 Plaintiff's claims are both typical of the Class's claims and are based on facts that are common to  
4 the Class. The Class representative has suffered similar injuries and damages arising from  
5 Defendants' conduct. As such, Plaintiff can adequately represent the Class because she seeks the  
6 same or similar remedies that would be available to other Class members. No irreconcilable  
7 conflicts exist between the positions of Plaintiff and those of the Class members.

8           14. Plaintiff has retained attorneys who are competent and experienced in litigating  
9 significant class actions to represent their interests and that of the Class. Counsel have significant  
10 experience in handling class actions and the types of claims asserted herein, and have been  
11 appointed as class counsel by courts in other actions. Plaintiff and her counsel already have done  
12 significant work in identifying and investigating the potential claims in this action, and are willing  
13 to devote the necessary resources to vigorously litigate this action. Plaintiff and her counsel are  
14 aware of their fiduciary responsibilities to the Class to represent fairly and adequately the Class  
15 and are determined to discharge those duties by seeking the maximum possible recovery for the  
16 Class based on the merits of these claims and the available resources.

17           **E. Superiority of a Class Action**

18           15. A class action is a superior method for resolving the claims herein alleged as  
19 compared to other available group-wide methods for adjudicating these issues. The remedy to  
20 resolve the common classwide issues regarding the issues detailed herein would be to refund a  
21 portion of the cost of the Google Phone and/or the increased service plan costs. Because of the  
22 nearly-certain low individual damage amount, which is less than \$1,000 per Class member in  
23 almost every conceivable circumstance, individual Class members would have little incentive to  
24 prosecute such claims on an individual basis. Such individual actions are not cost-effective or  
25 practical, as the costs associated with proving a *prima facie* case would exceed the obtainable  
26 recovery.

27           16. Important interests are served by addressing the issues raised in the Complaint in a  
28 class action. Adjudication of individual claims would result in a great expenditure of court and

1 public resources. Resolving the claims on a classwide basis results in significant cost savings.  
2 Class action treatment allows similarly situated persons to litigate their claims in the manner that  
3 is most efficient and economical for the parties and the judicial system.

4 17. There is a substantial likelihood of inconsistent verdicts, which would frustrate the  
5 resolution of these legal issues for Defendants and force them to comply with inconsistent legal  
6 standards.

7 18. Failure to certify a class would make it impossible for a great many of the Class  
8 members to seek relief. For those who seek judicial relief, there is a strong likelihood that  
9 separate court rulings would lead to inconsistent verdicts, working a substantial prejudice on  
10 Defendants, especially, as in this case, where equitable relief is being sought. A class action  
11 presents fewer management difficulties and provides the benefits of single adjudication, economy  
12 of scale, and comprehensive supervision by a single court.

13 19. Plaintiff are unaware of any insurmountable difficulties in the management of this  
14 action to preclude its maintenance as a class action and believe their claims can all be established  
15 at trial on a classwide basis.

#### 16 **JURISDICTION AND VENUE**

17 20. This Court has jurisdiction over the subject of this Complaint under the Class  
18 Action Fairness Act, 18 U.S.C. § 1332(d). In the aggregate, the damages suffered and sought to  
19 be recovered by Plaintiff and the Class exceed the Court's jurisdictional minimum for a class  
20 action. The exact amount of damages caused to Class members cannot be precisely determined  
21 without access to Defendants' records.

22 21. Claims arising under the Federal Communications Act create a Federal question  
23 that this Court must determine, 18 U.S.C. § 1331.

24 22. This Court has jurisdiction over each Defendant because each Defendant is either a  
25 corporation or an association organized under the laws of California, a foreign corporation or  
26 association authorized to do business in California and registered with the California Secretary of  
27 State, or does sufficient business in or has sufficient minimum contacts with California, or  
28 otherwise intentionally avails itself of the California markets through the promotion, marketing,



1 advertising and/or sales of their products and services in California to render the exercise of  
2 jurisdiction by California courts permissible under traditional notions of fair play and substantial  
3 justice.

4 23. Under 28 U.S.C. section 1391, venue is proper in this District because Google is  
5 headquartered in, and maintains its principal place of business within, this District, and HTC and  
6 T-Mobile have done business and continue to do business in this District. Moreover, a substantial  
7 portion of the acts and practices underlying this Complaint occurred here.

8 24. Because Google sold all of the Google Phones through its web site, essential acts  
9 consummating the sale of each and every Google Phone occurred in this District.

10 **STATEMENT OF FACTS**

11 25. Google is an American public corporation specializing in Internet search and  
12 advertising services and recently, entered the retail business when it decided to develop and sell  
13 smartphones, which are multi-functional mobile devices with advanced capabilities. Smartphones  
14 have become a lucrative market for companies, who are scrambling for market share in this highly  
15 competitive field.

16 26. The Google Phone was “[d]eveloped in partnership with hardware manufacturer  
17 HTC,” according to WIRED magazine, and was released throughout the United States on January  
18 5, 2010. Matthew Honan, *WIRED*, “Google Debuts Android-Powered Nexus One ‘Superphone,’”  
19 Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/)  
20 [one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/) (last visited June 8, 2010).

21 27. In the Unites States, T-Mobile was the exclusive wireless carrier that allowed the  
22 Google Phone to be used on a 3G wireless network.

23 28. An estimated 20,000 Google Phones were sold during the first week of the phone’s  
24 release.

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1           32.     The “3G” technology is alleged to feature faster peak data transfer rates over  
2 previous networks of up to 7.2 Mbps (megabytes per second). These data transfer rates are  
3 especially important to many smartphone users who employ their devices to run and store  
4 applications; send and receive email; download and play media; and share pictures and  
5 information via social networking systems.

6           33.     Without purchasing a wireless service plan through T-Mobile for 3G network  
7 access, the Google Phone costs \$529. With a new T-Mobile wireless network service plan, which  
8 is a two-year contract, a customer pays \$179 for the Google Phone plus the additional monthly  
9 charge for the T-Mobile wireless service, which may exceed \$100 per month.

10          34.     Initially, the Google Phone was only available through an online purchase and if  
11 customers desired to use the 3G wireless service on their Google Phone without paying the full  
12 cost of \$529 for an “unlocked” phone, they have no option but to purchase the Google Phone with  
13 a two-year commitment to T-Mobile.

14          35.     “Unlocked” Google Phones could be used on the network provided by AT&T  
15 Mobility, LLC (for \$529 per phone, not including data plan) beginning on March 16, 2010. Both  
16 Sprint and Verizon announced initially that they would offer their network capability options for  
17 purchasers of the Google Phone, but both later reversed course.

18          36.     Within the last month, Google announced that it was shifting from an online-only  
19 retail strategy to a “bricks-and-mortar” sales option. Tom Krazit, *cNet*, “Google turns Nexus One  
20 strategy upside down,” May 14, 2010, at [http://news.cnet.com/8301-30684\\_3-20005015-265.html](http://news.cnet.com/8301-30684_3-20005015-265.html)  
21 (last visited June 8, 2010). Google, therefore, has opened new avenues of sales and service to  
22 later-arriving customers that it refused to provide to “early adopters.”

23          37.     An existing T-Mobile customer may also upgrade to purchase the Google Phone,  
24 but this requires the customer to pay the difference between the \$529 price of the phone and any  
25 upgrade credit allotted to the customer’s account. Those customers also are required to extend  
26 their T-Mobile contract for an additional two years.

27          38.     Defendants consistently advertised the Google Phone, working in tandem with the  
28 T-Mobile network, as providing 3G data transfer rates. For consumers the appellation “3G” is

1 commonly understood to provide superior data transfer rates over older cell technology, which  
2 worked on an “EDGE” standard.

3 39. Second generation multiple access standards known as GSM/EDGE, which are  
4 commonly understood as working on 2G or 2.5G levels, have a maximum data transfer rate of 237  
5 kbps (kilobytes per second). The Google Phone was designed to operate both on the 2G network  
6 and a third generation, or 3G, multiple access standard network. According to Defendants, 3G  
7 technology features faster peak data transfer rates over previous networks.

8 40. The Google Phone was designed to operate, and marketed to operate, on a 3G  
9 level. If, however, 3G connectivity was unavailable, the phone and data operations could still be  
10 used, but at a substantially lower data transfer rate than the 3G level that was advertised.

11 41. Contrary to Defendants’ assertions, Plaintiff and other members of the Class  
12 experience connectivity on the 3G wireless network only a fraction of the time they are connected  
13 to the T-Mobile’s 3G wireless network, or receive no 3G connectivity at all for a significant  
14 portion of time. The lack of 3G connectivity also causes Plaintiff and other members of the Class  
15 to experience a significant number of dropped calls when the Google Phone cannot locate an  
16 available 3G network connection. Defendants either knew, reasonably should have known, or  
17 were obligated to understand that the Google Phone could not consistently perform at a 3G level,  
18 contrary to the Defendants’ representations.

19 42. These problems were apparent only days after the launch of the Google Phone. On  
20 January 11, 2010, cNet—a trusted technology website—noted as follows: “If you bought a Nexus  
21 One, there’s a chance you may be experiencing issues with connecting to T-Mobile's 3G network,  
22 but the good news is that you’re not alone. *The bad news is, well, you’re not getting 3G.*” Bonnie  
23 Cha, *cNet*, Jan. 11, 2010, “T-Mobile acknowledges 3G issues on Nexus One” at  
24 [http://www.cnet.com/8301-19736\\_1-10432087-251.html](http://www.cnet.com/8301-19736_1-10432087-251.html) (last visited June 8, 2010).

25 43. Google, HTC, and T-Mobile have not provided satisfactory answers with regard to  
26 the defects experienced by Plaintiff and Class members:

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A spokesperson for HTC, the manufacturer of the Nexus One phone sold by Google and deployed thus far on T-Mobile's GSM network, told Betanews late Monday evening that it is aware of the magnitude of 3G connectivity problems reported by customers nationwide since last week. As of Monday evening, several hundred messages were posted to Google's support Web site, many reporting essentially the same problem: For the most part, their 3G connections are spotty and variable; and for some, 3G is non-existent.

*Contrary to reports, however, HTC is not acknowledging a problem with the phone. As of now, the T-Mobile network remains equally suspect, especially amid the complete lack of much news whatsoever, including to its customers, from Google.*

"While the majority of Nexus One owners have been thrilled with their experience, HTC is aware that some owners have reported having some technical issues with their Nexus One devices," the spokesperson told Betanews. HTC, Google, and T-Mobile take all such reports very seriously, and are working closely together to determine what issues may be behind these reports."

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But although blogs today reported that this thread was an admission of problems with T-Mobile's network, actually, T-Mobile made no such admission. It merely acknowledged the issue and its personnel (unlike Google's) are interacting with customers in search of a resolution.

Customers who did manage to get through to HTC support personnel report having been told that a software patch of some sort is in the works; some who received that message last week were told they would receive a patch as soon as today. It does not appear certain that such a patch, if it exists, specifically addresses this problem.

All that Google will say on the subject is as follows: "We are investigating this issue and hope to have more information for you soon. We understand your concern and appreciate your patience."

Scott M. Fulton III, *Betanews*, "HTC admits customers have Nexus One 3G trouble, not yet blaming the phone", Jan. 11, 2010, at <http://www.betanews.com/article/HTC-admits-customers-have-Nexus-One-3G-trouble-not-yet-blaming-the-phone/1263265252> (last visited June 8, 2010).

Even areas where T-Mobile's limited 3G coverage was represented to exist, T-Mobile's network did not provide consistent 3G performance for Google Phone purchasers. "Complaints on Google's support forum said users were unable to get 3G service in areas where

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1 T-Mobile's maps indicated they should get it. Google doesn't have a solution for the problem yet,  
2 [Google spokesperson Carolyn Penner] said." *San Jose Mercury News*, "Hype, complaints top  
3 sales so far for Google's Nexus One phone," Jan. 21, 2010, at  
4 [http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986)  
5 [nexus-one-phone/1066986](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986) (last visited June 8, 2010).

6 44. Defendants failed to warn Plaintiff and Class members of the limitations associated  
7 with using the Google Phone or its internal understanding that the T-Mobile 3G network was not  
8 designed to provide consistent connectivity to its 3G network for Google Phone users.

9 45. Moreover, Defendants did not provide adequate customer service to assist Google  
10 Phone customers in helping resolve the issues. When customers contacted T-Mobile to request  
11 assistance, the customer was provided with only an email address to contact Google directly. The  
12 customer then had to wait for several days for a response:

13 New owners of the Nexus One, the latest touch-screen smartphone to run on  
14 Android, Google's mobile operating system, have found themselves at a loss  
15 when it comes to resolving problems with the handset. They cannot call Google  
16 for help, and the company warns that it may take up to 48 hours to respond to e-  
17 mail messages.

18 \*\*\*\*\*

19 Early buyers of the device, like Kiran Konathala, a 27-year-old database  
20 programmer in Long Branch, N.J., have complained of dropped calls, plodding  
21 download speeds and connectivity snags. "The hardware is great, but the software  
22 is a mess," he said. "It's not been a happy experience so far."

23 The phone presents a puzzle for users like Mr. Konathala: Who do you call when  
24 you have a problem?

25 Most people use the phone on T-Mobile's network, which offers a subsidy if a  
26 customer buys a contract, and the phone is made by HTC, a major Taiwanese  
27 manufacturer. But it is sold exclusively by Google through a special Web-based  
28 store.

Despite its central role in the process, Google does not appear to have built a  
significant infrastructure to provide customer support. There is no phone number  
for support, for example, and customers who send an e-mail message may wait  
for days to hear back.

\*\*\*\*\*

1 Andy Rubin, Google vice president for engineering in charge of Android  
2 technology, acknowledged last week that the company needed to improve. "We  
3 have to get better at customer service," Mr. Rubin said during an on-stage  
4 interview at the Consumer Electronics Show in Las Vegas. Instead of taking three  
5 days to respond to e-mail messages, he said, "We have to close that three-day gap  
6 to a couple of hours." But Mr. Rubin said that the release of the Nexus One had  
7 gone smoothly.

8 Some analysts said that Google appeared to have misjudged the service demands  
9 that come with being in the business of selling sophisticated gadgets.

10 "They may have been clouded by their own personal experience and way of  
11 thinking about how they deal with technology," said Charles S. Golvin, an analyst  
12 with Forrester Research. "They've got a long way to go in terms of understanding  
13 all the components of the retail process — not just selling phones but the after-  
14 sales care — to be as skilled in this endeavor as they are in the rest of their  
15 endeavors."

16 Jenna Wortham & Miguel Heft, *N.Y. Times*, "Hey Google, Anybody Home?," Jan. 13, 2010, at  
17 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,  
18 2010).

19 46. Further, if the customer buys a subsidized Google Phone when entering into a new  
20 two year contract with T-Mobile, and the customer chooses to terminate the contract during the  
21 first 120 days, the customer is liable for not only the termination fees to T-Mobile, but also must  
22 pay Google the difference between the full price of the Google Phone and the subsidized price,  
23 which may be upwards of \$350.

24 47. Despite knowledge that the Google Phone cannot maintain consistent 3G service  
25 and that they do not provide adequate customer service, Defendants continue to manufacture,  
26 design, promote and and/or sell the Google Phone as being able to operate on a 3G wireless  
27 network.

28 48. Moreover, Defendants are not offering refunds to consumers who purchased the  
Google Phone expecting it to operate properly on the 3G wireless network, when it has not, after  
the standard 14-day period (or 30-day period in California) following the purchase.

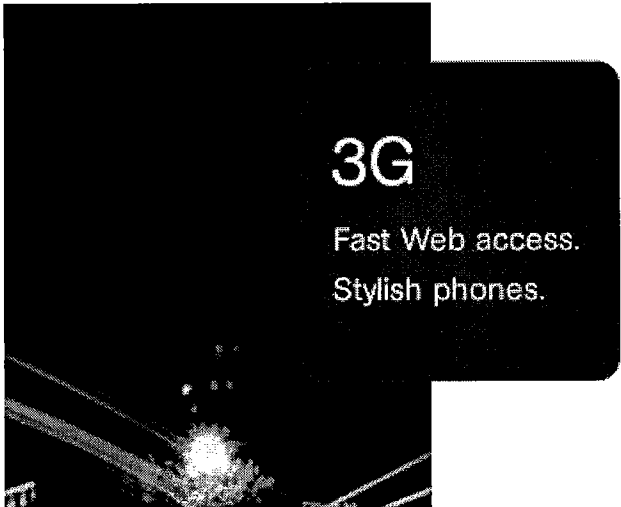
49. The Google Phone is designed to search for an available 3G radio network  
connection, and if that is not available, it will connect to a slower network. It is common for

1 Google Phone users to be on the 3G network for only a few minutes before their Google Phone  
2 switches over to a slower network, or simply lose connectivity altogether.

3 50. While the strain on the T-Mobile's 3G wireless network was foreseeable, based on  
4 how the Google Phone is set up and designed, the combination of the phone and/or the network  
5 made it difficult for Class members to receive reliable and sustained connectivity on the 3G  
6 wireless network as compared to a slower network.

7 51. On its website, T-Mobile touts its 3G network as offering several advantages:

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Enjoy the Internet on the go: Web pages download faster

- Multi-task: Browse the Web, send messages, or find movie times—all while talking
- Send photos faster to friends and family
- Watch YouTube™ and other video files
- Do more with your phone

- Send e-mail with large attachments
- Download documents, applications, and music faster
- Upload and share large files (photos, videos, presentations)
- Browse and download the online information you need—fast



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[http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro\\_Pro\\_Go3G](http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_Go3G) (last visited June 8, 2010). Unfortunately, in an inconspicuous place in minute font at the bottom of that page, T-Mobile offers the following qualifying language:

3G coverage is available only in certain markets. To provide the best network experience for all our customers we may temporarily reduce data throughput for a small fraction of customers who use a disproportionate amount of bandwidth. Your data session, plan, or service may be suspended, terminated, or restricted for significant roaming or if you use your service in a way that interfaces with our network or ability to provide quality service to other users. Some devices require specific data plans; if you do not have the right plan for your device, you may not be able to use data services. Additional charges may apply. Domestic use only.

52. Plaintiff and other members of the Class were injured in fact and lost money or property as a result of Defendants' material misstatements and omissions of material fact, paying more to receive inferior service in relation to what they believed they had purchased.

53. As a result of Defendants' material misrepresentations and omissions of material facts, Plaintiff and other members of the Class are locked into a two-year service plan with inferior T-Mobile 3G wireless network connectivity. A substantial factor in entering into those agreements was the representation that the Google Phone would operate as a true 3G device.

54. Defendants acted in concert to sell the Google Phone and either knew, should have known, or were obligated to understand that they were trying to sell more Google Phone devices than the existing T-Mobile's 3G wireless network could handle, and the Google Phone itself suffered from defective hardware and/or software. Plaintiff and other Class members were injured, either directly or indirectly, in response to the representations, advertising and/or other promotional materials that were prepared and approved by Defendants and disseminated on the face of the product and/or through assertions that contained the representations regarding the Google Phone and T-Mobile's 3G wireless network. Had the true facts been disclosed, Plaintiff and other Class members would not have purchased the Google Phone at the prices and under the terms and conditions to which they were and are subjected.



1 included in advertising for the Google Phone, resulting in a material difference between their  
2 promises and actual performance. Even if Defendants are found to have been charging a  
3 “reasonable rate” for their products and services, they are still subject to a claim for damages for  
4 non-disclosure or false advertising of the material facts set forth herein based on its  
5 misrepresentations or failing to inform Class Members of other material terms, conditions, or  
6 limitations on the services provided Class Members.

7  
8 **SECOND CAUSE OF ACTION**

9 ***Against All Defendants***

10 **(Breach of Express Warranty and Implied Warranty of Merchantability)**

11 60. Plaintiff incorporates by reference each and every preceding paragraph as though  
12 fully set forth herein.

13 61. Plaintiff and Class members purchased their Google Phones and used them for  
14 their ordinary and intended purpose of providing consistent, reliable and sustained access to the  
15 supposedly faster 3G network, and entered into agreements with Defendants or their agents and  
16 received uniform warranties in connection with the purchase of such phones.

17 62. The Google Phone cannot perform its ordinary and represented purpose because  
18 the Google Phone does not provide consistent connection to the T-Mobile 3G network in  
19 combination with using the Google Phone. Whether the problem is with the Google Phone itself  
20 or with the T-Mobile 3G network, or a combination of the two, is irrelevant as to whether the  
21 warranty was breached.

22 63. When Defendants placed the Google Phone into the stream of commerce, they  
23 knew, reasonably should have known, or were obligated to understand that the intended and  
24 ordinary purpose of their phone was to provide consistent connectivity to a supposedly faster 3G  
25 network and that users would expect regular 3G connectivity and materially faster data transfer  
26 rates than other devices designed for EDGE compatibility.

27 64. Plaintiffs and the Class purchased their Google Phones with the reasonable  
28 expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G

1 network. The advertisements Defendants disseminated that stressed the excellence and reliability  
2 of the Google Phone constitute a warranty that the products would operate as advertised during  
3 their useful life, upon which Plaintiffs and the Class reasonably acted. The Google Phone is not  
4 fit for its warranted, advertised, ordinary and intended purpose of providing reliable 3G network  
5 connectivity and is in fact defective, or would not pass without objection in the trade or industry  
6 in terms of being unable to provide consistent and reliable 3G network connectivity. This defect  
7 has manifested for all Plaintiffs and Class members as they do not consistently receive 3G  
8 network connectivity using their Google Phones.

9 65. Plaintiff has given notice to Defendants of this breach by separate letter or demand,  
10 and those demands have been ignored or rejected. As detailed above, Google, HTC, and T-  
11 Mobile stated that they would offer several “patch” fixes and other improvements, which have not  
12 provided Plaintiffs or the Class with reliable or sustained 3G connectivity.

13 66. Defendants’ breach of the warranty described above also constitutes a violation of  
14 Cal. Civ. Code §1792, *et seq.*

15 67. Plaintiff and Class members are entitled to damages as a result of such breaches.  
16 Plaintiff and the Class request relief as described below as appropriate for this Cause of Action.

### 17 18 **THIRD CAUSE OF ACTION**

#### 19 ***Against All Defendants***

#### 20 **(Violation of the Magnuson-Moss Warranty Act)**

21 68. Plaintiff incorporates by reference each and every preceding paragraph as though  
22 fully set forth herein.

23 69. Plaintiff and Class members are “consumers” within the meaning of the  
24 Magnuson-Moss Act.

25 70. Defendants are “suppliers” and “warrantors” within the meaning of the Magnuson-  
26 Moss Act.

27 71. The Google Phone is a “consumer product” within the meaning of the Magnuson-  
28 Moss Act.

1           72. Defendants' written affirmations of fact, promises and/or descriptions as alleged  
2 herein are each a "written warranty" as to the Google Phone providing consistent 3G network  
3 connectivity and/or there exists an implied warranty for the sale of such products within the  
4 meaning of the Magnuson-Moss Act.

5           73. For the reasons detailed above, Defendants breached these express and implied  
6 warranties, as the Google Phones did not perform as Defendants represented or were not fit for  
7 their intended use. Defendants have refused to remedy such breaches, and their conduct caused  
8 damages to Plaintiffs and members of the Class.

9           74. The amount in controversy meets or exceeds the sum or value of \$50,000  
10 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit.

11           75. As Defendants have refused all previous requests, resorting to any informal dispute  
12 settlement procedure and/or affording Defendants another opportunity to cure these breaches of  
13 warranties is unnecessary and/or futile. Any remedies available through any informal dispute  
14 settlement procedure would be inadequate under the circumstances, as Defendants have indicated  
15 they have no desire to participate in such a process at this time. Any requirement under the  
16 Magnuson-Moss Act or otherwise that Plaintiffs resort to any informal dispute settlement  
17 procedure and/or afford Defendants a reasonable opportunity to cure the breach of warranties  
18 described above is excused and/or has been satisfied.

19           76. As a result of Defendants' breaches of warranty, Plaintiffs and Class members have  
20 sustained damages and other losses in an amount to be determined at trial. Plaintiffs and Class  
21 members are entitled to recover damages, specific performance, costs, attorneys' fees, rescission,  
22 and/or other relief as is deemed appropriate.

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and on behalf of the members of the Class defined herein, as applicable, pray for judgment and relief as follows as appropriate for the above causes of action:

1. An order certifying this case as a class action and appointing Plaintiff and her counsel to represent the Class;

2. A temporary, preliminary and/or permanent order for injunctive relief enjoining Defendants from pursuing the policies, acts and practices complained of herein;

3. A declaratory judgment stating that Defendants may not pursue the policies, acts and practices complained of herein;

4. A temporary, preliminary and/or permanent order for injunctive relief requiring Defendants to undertake an informational campaign to inform members of the general public as to the wrongfulness of Defendants' practices;

5. An award of actual, statutory and/or exemplary damages, as appropriate for the particular Causes of Action;

6. An order requiring disgorgement of Defendants' ill-gotten gains by requiring the payment of restitution to Plaintiff and members of the Class, as appropriate for the particular Causes of Action;

7. Reasonable attorneys' fees;

8. All related costs of this suit;

9. Pre- and post-judgment interest; and

10. Such other and further relief as the Court may deem necessary or appropriate.

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**JURY DEMAND**

Plaintiff and the Class demand a trial by jury on all claims so triable.

DATED: June 11, 2010

Attorneys for Plaintiff Mary McKinney and the Proposed Class

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 4<sup>th</sup> day of October 2010, served via the Court's electronic filing system, a true and correct copy of the above and foregoing on counsel as follows:

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