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

15 MARY MCKINNEY, Individually and on
 behalf of All Others Similarly Situated,
 16
 Plaintiff,
 17
 v.
 18
 GOOGLE, INC., a Delaware Corporation;
 19 HTC CORP., a Delaware Corporation; and T-
 MOBILE USA, INC., a Delaware Corporation.
 20
 Defendants.
 21

5:10-cv-01177-JW
)
) CLASS ACTION
)
) **PLAINTIFFS' NOTICE OF MOTION AND**
) **MOTION FOR LEAVE TO FILE SECOND**
) **AMENDED COMPLAINT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **THEREOF**
)
)
) Date: November 29, 2010
) Time: 9:00 AM
) Courtroom: 8, 4th Floor
) Judge: Hon. James Ware

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on November 29, 2010, in Courtroom 8, on the fourth floor
4 of the above-titled United States District Court, at 9:00a.m., or as soon thereafter as the matter
5 may be heard, before the Honorable James Ware, Plaintiff Mary McKinney (“Plaintiff”), will and
6 hereby does, move this Court, pursuant to Rule 15(a) of the Federal Rule of Civil Procedure, to
7 grant Plaintiff leave to file a Second Amended Complaint on the basis of the decision of the Ninth
8 Circuit in *Shroyer v. New Cingular Wireless Services, Inc.*, No. 08-55028, ___ F.3d ___, 2010
9 WL 3619936, at *1 (9th Cir. Sept. 20, 2010). This Motion is based upon this Notice of Motion ad
10 Motion, the attached Memorandum of Points and Authorities, all records on file with this Court,
11 and such further oral and written arguments as may be presented at, or prior to, hearing on this
12 matter.

13 Dated: October 21, 2010

Respectfully submitted,

14 Attorneys for Plaintiff Mary McKinney

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16 By: /s/ Sara D. Avila
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs request this Court, under Federal Rule of Civil Procedure 15, grant leave to file a
3 Second Amended Complaint based on the decision of the Ninth Circuit in *Shroyer v. New*
4 *Cingular Wireless Services, Inc.*, No. 08-55028, ___ F.3d ___, 2010 WL 3619936, at *1 (9th
5 Cir. Sept. 20, 2010). This request is based on good cause and satisfies all requirements of Rule
6 15(a) and existing caselaw, and should be granted. A true and correct copy of the Second
7 Amended Complaint is attached as Exhibit A.

8 **A. Statement of Relevant Facts**

9 On January 29, Plaintiff Mary McKinney filed suit in California state court against
10 Google, Inc.; T-Mobile USA, Inc; and HTC Corp. based on several violations of California and
11 Federal law. Defendants removed that case to this Court on March 22, 2010, and Plaintiff Mary
12 McKinney, on behalf of herself and others similarly situated, filed a First Amended Complaint
13 (“Complaint”) on June 11, 2010. Docs. 24, 26. That Complaint alleged violations of Sections
14 201(b) and 207 of the Federal Communications Act (“FCA”). 27 U.S.C. §§ 201(b), 207; Compl.
15 ¶¶ 56-59. It also alleged breaches of express warranties and implied warranties of
16 merchantability against all Defendants. Compl. ¶¶ 60-76. On October 8, 2010 the Court ordered
17 the instant *McKinney* case to *Nathan Nabors v. Google, Inc.*, Case No. 10-CV-038797-HRL (the
18 “*Nabors*” case). The instant *McKinney* case has not been consolidated with the *Nabors* case.

19 The basic facts underlying McKinney’s claims on behalf of herself and the Class are
20 simple: Google and HTC worked in tandem to design and market the Google Nexus One
21 smartphone (the “Google Phone” or “the device”), which is a 3G device that is designed to
22 provide superior data transfer rates over earlier model devices. Compl. ¶¶ 31-32, 38-40. T-
23 Mobile was the exclusive provider of 3G wireless network connectivity for the device, without
24 which the device would have been useless. Compl. ¶ 27. Google offered purchasers of the
25 device incentives to subscribe to T-Mobile’s wireless service or, if they were already T-Mobile
26 customers, incentives to extend their contracts with T-Mobile when purchasing the Google
27 Phone. Compl. ¶¶ 33-34, 37. Google offered the device for sale and promoted the device on its
28 homepage, which is some of the most coveted real estate on the Internet. Compl. ¶¶ 30-32.

1 Google, HTC, and T-Mobile also promoted the device in the media.
2 Unfortunately for McKinney and the Class, the Google Phone did not operate as a true 3G device.
3 Despite T-Mobile’s representations to the contrary, *see* Compl. ¶ 51, its network connectivity did
4 not offer the true 3G experience that customers believed that they were purchasing. Compl. ¶¶
5 38, 40-44. Class members experience frequent problems with both calling and data transfer.
6 Compl. ¶ 49. Although both Google and HTC were aware of the problems that their customers
7 faced, there was a total failure of customer service and technical support provided to their
8 customers.

9 **B. Standard for Granting a Motion for Leave to Amend Complaint**

10 Rule 15(a) “provides that ‘a party may amend the party’s pleading only by leave of court
11 or by written consent of the adverse party; and leave shall be freely given when justice so
12 requires.’ The Ninth Circuit has instructed that the policy favoring amendments ‘is to be applied
13 with extreme liberality.’” *Abels v. JBC Legal Group, P.C.*, 229 F.R.D. 152, 155 (N.D. Cal. 2005)
14 (Ware, J.) (quoting and citing *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
15 (9th Cir. 1990); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). In *Abels*,
16 this Court also noted that “amendments ‘seeking to add claims are to be granted more freely than
17 amendments adding parties.’” *Id.* (quoting *Union Pac. R.R. Co. v. Nevada Power Co.*, 950 F.2d
18 1429, 1432 (9th Cir. 1991)). “The four factors commonly used to determine the propriety of a
19 motion for leave to amend are bad faith, undue delay, prejudice to the opposing party, and futility
20 of amendment. *Id.* at 156 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *DCD Programs*, 833
21 F.2d at 186).

22 **C. Analysis**

23 In this case each of those four factors favors allowing the Plaintiffs leave to amend and
24 file the Complaint.

25 **1. The Plaintiffs Are Acting in Good Faith.**

26 First, there is no bad faith present in this case. Plaintiffs, in good faith, believe that a
27 change in the law that governs this case requires amendment of the operative complaint. On
28 March 22, 2010, defendants Google Inc. and T-Mobile USA, Inc. removed this action from

1 California state court (the Superior Court for the County of Santa Clara) to this Court. Before the
2 Consolidated Complaint was filed in this case on June 11, 2010, this Court dismissed the
3 complaint in similar, but unrelated litigation. *In re Apple iPhone 3G Products Liability*
4 *Litigation*, No. 5:09-md-02045-JW, Doc. 184 (N.D. Cal. Apr. 2, 2010). In that case, this Court
5 determined that all claims based on state law were preempted under Section 332(c) of the Federal
6 Communications Act. The Consolidated Complaint in this case was then filed on June 11, 2010,
7 and was based entirely on legal theories that this Court did not reject in the dismissal of the
8 complaint in *In re Apple iPhone 3G Products Liability Litigation*.

9 After that case was dismissed, the United States Court of Appeals for the Ninth Circuit
10 heard an appeal from a decision of the Central District of California in *Shroyer v. New Cingular*
11 *Wireless Servs., Inc.*, 606 F.3d 658 (9th Cir. 2010) *superseded by* No. 08-55028, ___ F.3d ___,
12 2010 WL 3619936, (9th Cir. Sept. 20, 2010). *Shroyer* presented facts and issues materially
13 similar to those at issue in this case. In *Shroyer*, the plaintiff “filed a class action against . . . a
14 corporation resulting from the merger of AT&T Wireless Services, Inc., and Cingular Wireless
15 Corporation. . . . Shroyer had a contract for wireless telephone services with AT&T. He alleged
16 that, immediately following the merger, his cellular phone service was severely degraded.”
17 *Shroyer* 2010 WL 3619936 at *1. A copy of the opinion in *Shroyer* is attached as Exhibit B.
18 Shroyer alleged that (1) New Cingular breached the existing AT&T contract because it did not
19 provide adequate service coverage; (2) New Cingular required him to sign a new contract if he
20 wanted the service that AT&T contracted in his existing service agreement; (3) New Cingular
21 misrepresented and omitted key facts to the Federal Communications Commission regarding the
22 merger; and (4) the FCC would not have approved the New Cingular merger if it had known that
23 breaches of contract like those Shroyer alleged would occur. *Id.* Shroyer pleaded the following
24 claims: “1) breach of contract; 2) fraud and deceit; 3) unfair competition under Cal. Bus. &
25 Prof.Code §§ 17200-210; and 4) a demand for a declaratory judgment.” *Id.*

26 New Cingular made arguments that were almost identical to those that resulted in the
27 dismissal of the earlier complaint in the *Apple iPhone 3G Products Liability Litigation*: “New
28 Cingular would have this court rely on *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th

1 Cir.2000), to hold that the substance of Shroyer’s claims is really an attack on the post-merger
2 service, and that deciding the case would necessarily involve regulating the modes and conditions
3 under which New Cingular may begin offering service.” *Id.* at *2. The Ninth Circuit, however,
4 rejected that argument. *Id.* at *2 & n.3 (“But the FCC rejected this per se argument in *In re*
5 *Wireless Consumers Alliance*, and so do we. . . . New Cingular attempts to distinguish *In re*
6 *Wireless Consumers Alliance* by observing that there the FCC was deciding whether an award of
7 damages based on state law breach of contract and fraud claims was preempted by § 332. Here,
8 New Cingular argues, we are confronted with whether the contract and fraud claims themselves
9 are preempted. This difference does not affect our conclusion; if damages are not preempted,
10 neither are the claims under which they are awarded.”). The Court of Appeals determined that
11 none of Shroyer’s claims were preempted by Section 332(c), and that the district court could
12 adjudicate those claims on their own merits. *Id.* at *2-*4. Only the claim based on whether the
13 FCC had accurate facts and would have approved the merger “depend[ed] on the assessment of
14 the public benefit of the merger. That determination has already been made by the FCC, and
15 reexamination of that issue under state law is preempted either by § 332 or by the ordinary
16 principles of conflict preemption.” *Id.* at *3. Granting leave to file the Second Amended
17 Complaint to include state law causes of action is necessary under *Shroyer*.

18 **2. The Plaintiffs Have Not Unduly Delayed.**

19 The Plaintiffs make a prompt request to amend their complaint. The initial opinion in
20 *Shroyer* was issued shortly after this Court dismissed the complaint in *In re Apple iPhone 3G*
21 *Products Liability Litigation*, but the amended and operative decision in that case—the opinion
22 that now forms the law of the Ninth Circuit—was issued recently. In the order accompanying its
23 amended opinion, the Ninth Circuit confirmed that no petitions for rehearing or rehearing en banc
24 may be filed. *Id.* at *1. (“There are no pending petitions for panel or en banc rehearing. No
25 subsequent petitions for panel or en banc rehearing may be filed.”) Because no petitions for
26 rehearing or rehearing en banc were filed, and none may be filed from the amended opinion, the
27 time for petitioning the Supreme Court of the United States for a writ of certiorari from the
28 original opinion has now recently expired. *See* U.S. Sup. Ct. R. 13.3 (“The time to file a petition

1 for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed,
2 and not from the issuance date of the mandate (or its equivalent under local practice). But if a
3 petition for rehearing is timely filed in the lower court by any party, or if the lower court
4 appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the
5 time to file the petition for a writ of certiorari for all parties (whether or not they requested
6 rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if
7 rehearing is granted, the subsequent entry of judgment.”). *Shroyer* is now the law of the Ninth
8 Circuit, and appears to undercut earlier determinations by this Court that Section 332 of the
9 Federal Communications Act preempts state-law claims.

10 **3. Defendants Will Not Be Prejudiced.**

11 The Defendants in this case will not be prejudiced. When this case was filed in California
12 state court, the original complaint (which spurred removal to this Court) contained state law
13 causes of action for false and misleading advertising in violation of California Business &
14 Professions Code section 17200, *et seq.*, and section 17500, *et seq.*; violation of the Consumer
15 Legal Remedies Act, California Civil Code section 1750, *et seq.*; breach of express and implied
16 warranties; violation of the Magnuson-Moss Warranty Act; state-law negligence; common counts
17 and unjust enrichment; fraud and deceit; and declaratory relief. All defendants had seen those
18 state-law causes of action, which would be revived under a newly-filed complaint. More
19 importantly, the only reason that those causes of action were not included in the First Amended
20 Complaint is that Plaintiffs’ counsel determined they were not viable under the rulings in *In re*
21 *Apple iPhone 3G Products Liability Litigation*. Because of *Shroyer*, however, counsel believes
22 that those causes of action are viable and should be pleaded on behalf of McKinney and the Class.
23 A true and correct copy of the Second Amended Complaint is attached as Exhibit A.

24 **4. Amendment Is Not Futile.**

25 As discussed above, *Shroyer* undermines the previous determination that state law claims
26 are preempted under Section 332(c) of the Federal Communications Act. Amendment in this case
27 is vital to the duties of Class counsel to pursue all relevant legal strategies on behalf of the Class
28 and the named Plaintiff. “[T]he important difference” between cases like *Bastien*, on the one

1 hand, and cases like *Shroyer* and this case, on the other, “lies in the theories on which they based
2 their challenges. The plaintiff in *Bastien* was asking the court to decide the requisite number of
3 cellular towers needed to support service.” 2010 WL 3619936 at *2. Here, as in *Shroyer*, the
4 Plaintiffs are “asking the court to decide whether [Defendants have] performed [their] promise in
5 a contract and whether [they] misrepresented the level of service [they] would provide. The latter
6 inquiries are ones that § 332, as interpreted in *Wireless*, leaves open to state adjudication.” *Id.*

7 **D. Plaintiffs Met and Conferred With Defendants**

8 On October 14, 2010, counsel for Plaintiff contacted counsel for Google and requested
9 that Google and Defendants T-Mobile USA, Inc. and HTC Corp. grant leave to amend in
10 accordance with *Shroyer*. Counsel for Google subsequently advised Plaintiffs’ counsel that all
11 three defendants object to permitting Plaintiff to file a Second Amended Complaint.

12 **E. Conclusion**

13 The motion for leave to amend should be granted, and the proposed complaint should be
14 filed.¹

15 Respectfully submitted,

16
17 October 21, 2010

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27 ¹ To avoid multiple hearings, this Court may wish to hear any argument regarding this motion on
28 November 1, 2010. Motions to dismiss the current complaint in this case are set to be heard on
that same date.

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1 **CERTIFICATE OF SERVICE**

2 I, Sara D. Avila, am the ECF user whose ID and password are being used to file this
3 Motion and accompanying papers. In compliance with General Order 45, section X.B., I hereby
4 attest that I have on file the concurrences for any signatures indicated by a “conformed” signature
5 (/S) within this e-filed document.

6 DATED: October 21, 2010

Attorneys for Plaintiff Mary McKinney and the
Proposed Class

7
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9 By: /s/ Sara D. Avila
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Exhibit A

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

15 MARY MCKINNEY, Individually and on)
16 behalf of all others similarly situated,)

17 *Plaintiff,*)

18 v.)

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

23 *Defendants*)

5:10-cv-01177-JW

CLASS ACTION

**SECOND AMENDED COMPLAINT
BASED ON:**

1. **Violation of California Business & Professions Code § 17200, et seq.;**
2. **Violation of California Business & Professions Code § 17500, et seq.;**
3. **Violation of Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et seq.;**
4. **Breach of Express Warranty and Implied Warranty of Merchantability;**
5. **Violation of the Magnuson-Moss Warranty Act;**
6. **Negligence;**
7. **Common Counts and Unjust Enrichment;**
8. **Negligent Misrepresentation;**
9. **Fraud and Deceit;**
10. **Declaratory Relief; and**
11. **Violations of the Federal Communications Act.**

)
) **Judge: Hon. James Ware**
)
) **DEMAND FOR JURY TRIAL**
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Plaintiff Mary McKinney, on behalf of herself and all others similarly situated, brings this complaint against Google, Inc.; HTC Corp.("HTC"); and T-Mobile USA, Inc. (collectively, "Defendants"), and alleges as follows:

INTRODUCTION

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

JURISDICTION AND VENUE

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

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

4. This Court has jurisdiction over each Defendant because each Defendant is either a corporation or an association organized under the laws of California, a foreign corporation or association authorized to do business in California and registered with the California Secretary of State, or does sufficient business in or has sufficient minimum contacts with California, or 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 5. 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 6. 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 **THE PARTIES**

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

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

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

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

26 11. Plaintiff is informed and believes and based thereon alleges that at all times
27 relevant herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate,
28 partner, assignee, successor-in-interest, alter ego or other representative of each of the remaining

1 Defendants and was acting in such capacity in doing the things herein complained of and alleged.
2 In committing the unlawful and wrongful acts as alleged herein, Defendants planned and
3 participated in and furthered a common scheme by means of manufacturing, marketing and
4 selling the Google Phone with T-Mobile's monthly service plan for access to its 3G network,
5 despite Google Phone's inability to maintain connectivity to the 3G network. Further, Defendants
6 failed to provide adequate customer service to Plaintiff and the Class to cope with this defect.

7 **CLASS ACTION ALLEGATIONS**

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

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

18 A. **Numerosity**

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

24 15. Class members are readily ascertainable. Defendants' sales, service plan and
25 subscription records contain information as to the number and location of all Class members, a
26 significant number of whom are likely still under service contracts with T-Mobile. Because
27 Defendants Google and T-Mobile should have accurate and detailed sales and service information
28 regarding individual Class members and up-to-date contact information, including their e-mail or

1 SMS addresses, an easy and accurate method is available for identifying and notifying Class
2 members of the pendency of this action.

3 **B. Commonality**

4 16. Common questions of law and fact predominate over questions affecting
5 individual Class members. These common questions of law and fact include the following:

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

15 **C. Typicality**

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

27 **D. Adequacy of Representation**

28

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

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

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

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

26 21. Important interests are served by addressing the issues raised in the Complaint in a
27 class action. Adjudication of individual claims would result in a great expenditure of court and
28 public resources. Resolving the claims on a classwide basis results in significant cost savings.

1 Class action treatment allows similarly situated persons to litigate their claims in the manner that
2 is most efficient and economical for the parties and the judicial system.

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

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

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

15 **STATEMENT OF FACTS**

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

21 26. The Google Phone was “[d]eveloped in partnership with hardware manufacturer
22 HTC,” according to WIRED magazine, and was released throughout the United States on January
23 5, 2010. Matthew Honan, *WIRED*, “Google Debuts Android-Powered Nexus One
24 ‘Superphone’,” Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-
25 powered-nexus-one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/) (last visited June 8, 2010).

26 27. In the Unites States, T-Mobile was the exclusive wireless carrier that allowed the
27 Google Phone to be used on a 3G wireless network.
28

1 28. An estimated 20,000 Google Phones were sold during the first week of the phone's
2 release.

3 29. The Google Phone was advertised widely. Perhaps the most important ad portal
4 for the Google Phone, however, was the Google.com homepage itself. Upon its release, Google
5 changed its homepage to be viewed as follows:

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The image shows a screenshot of the Google homepage. At the top is the word "Google" in its characteristic serif font. Below it is a long, empty search bar. Underneath the search bar are two buttons: "Google Search" and "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).

30. 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.

31. 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

1 Google Phone's primary competitor is Apple's popular iPhone 3G, a cellular device very similar
2 to the Google Phone that also uses the 3G wireless network.

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

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

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

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

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

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

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

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

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

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

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

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

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

8
9 *Contrary to reports, however, HTC is not acknowledging a problem with the
10 phone. As of now, the T-Mobile network remains equally suspect, especially amid
11 the complete lack of much news whatsoever, including to its customers, from
12 Google.*

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

18 *****

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

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

28 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](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

1 maps indicated they should get it. Google doesn't have a solution for the problem yet, [Google
2 spokesperson Carolyn Penner] said." *San Jose Mercury News*, "Hype, complaints top sales so far
3 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
7 associated with using the Google Phone or its internal understanding that the T-Mobile 3G
8 network was not designed to provide consistent connectivity to its 3G network for Google Phone
9 users.

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

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

19 ****

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

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

26 Most people use the phone on T-Mobile's network, which offers a subsidy if a
27 customer buys a contract, and the phone is made by HTC, a major Taiwanese
28 manufacturer. But it is sold exclusively by Google through a special Web-based
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
2 Andy Rubin, Google vice president for engineering in charge of Android
3 technology, acknowledged last week that the company needed to improve. “We
4 have to get better at customer service,” Mr. Rubin said during an on-stage
5 interview at the Consumer Electronics Show in Las Vegas. Instead of taking three
6 days to respond to e-mail messages, he said, “We have to close that three-day gap
7 to a couple of hours.” But Mr. Rubin said that the release of the Nexus One had
8 gone smoothly.

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

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

19
20 Jenna Wortham & Miguel Heft, *N.Y. Times*, “Hey Google, Anybody Home?,” Jan. 13, 2010, at
21 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,
22 2010).

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

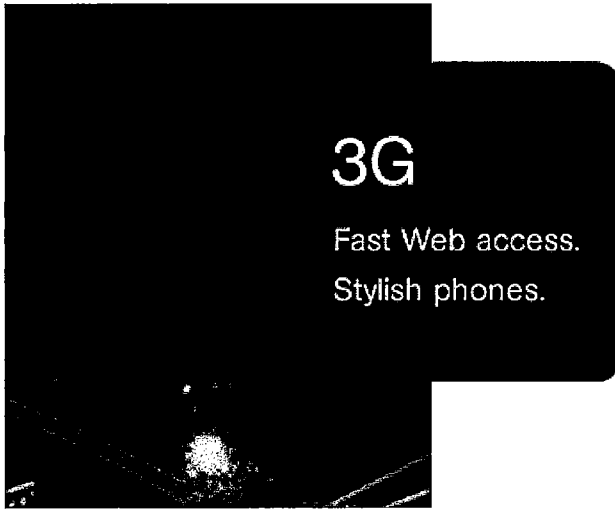
47. Despite knowledge that the Google Phone cannot maintain consistent 3G service
and that they do not provide adequate customer service, Defendants continue to manufacture,
design, promote and and/or sell the Google Phone as being able to operate on a 3G wireless
network.

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.

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

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

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



10 Enjoy the Internet on the go: Web
11 pages download faster

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

15 Send photos faster to friends and
16 family

17 Watch YouTube™ and other video
18 files

19 Do more with your phone

- 20 - Send e-mail with large attachments
- 21 - Download documents, applications, and

22 music faster

- 23 - Upload and share large files (photos, videos, presentations)
- 24 - Browse and download the online information you need—fast

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

28 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.

1 Your data session, plan, or service may be suspended, terminated, or restricted for
2 significant roaming or if you use your service in a way that interfaces with our
3 network or ability to provide quality service to other users. Some devices require
4 specific data plans; if you do not have the right plan for your device, you may not
5 be able to use data services. Additional charges may apply. Domestic use only.

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

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

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

23 55. Defendants failed to disclose at the time of making their false and misleading
24 statements to Plaintiff and the Class that the infrastructure of T-Mobile's 3G wireless network
25 and/or the Google Phone itself were defective and inadequate to provide the represented
26 performance and speed, resulting in injury to the Plaintiff and the Class.

27 **CAUSES OF ACTION**
28 **FIRST CAUSE OF ACTION**

**(Unlawful, Unfair, and Fraudulent Business Practices in Violation of
California Business & Professions Code §17200, et seq.)**

Against All Defendants

1 56. Plaintiff realleges and incorporates herein by reference each of the foregoing
2 paragraphs.

3 57. The Unfair Competition Law, California Business and Professions Code § 17200,
4 *et seq.*, defines unfair competition to include any “unfair,” “unlawful,” or “fraudulent” business
5 act or practice.

6 58. Defendants violated, and continues to violate, California Business and Professions
7 Code § 17200, *et seq.*, by misrepresenting the actual speed and performance of the Google Phone
8 and T-Mobile’s 3G wireless network as well as Defendants’ customer service to assist Google
9 Phone customers in resolving connectivity issues.

10 59. By engaging in the above described acts and practices, Defendants have
11 committed an unfair business practice within the meaning of California Business and Professions
12 Code § 17200, *et seq.* Consumers suffered substantial injury they could not reasonably have
13 avoided other than by not purchasing the product, and there was no countervailing benefit to
14 consumers from Defendants’ unsupported claims and premature release of the Google Phone.

15 60. Defendants’ acts and practices have deceived and/or are likely to deceive Class
16 members and the public and thus constitute a fraudulent business practice as the Google Phone
17 does not properly operate on T-Mobile’s 3G wireless network but instead connects to the Internet
18 using a slower network a significant part of the time and/or results in a significant number of
19 dropped calls as the Google Phone searches for an available 3G network path.

20 61. The acts and practices of Defendants are an unlawful business act or practice
21 because they violate the laws identified in this Complaint, including Negligence, Breach of
22 Express and Implied Warranty of Merchantability, the Magnuson-Moss Warranty Act, Fraud and
23 Deceit, Negligent Misrepresentation, the Consumers Legal Remedies Act, and California
24 Business & Professions Code § 17500, as described below.

25 62. As discussed above, Plaintiff and members of the Class purchased the Google
26 Phone and the T-Mobile 3G wireless service plan directly from Google and/or T-Mobile and/or
27 their authorized agents. Plaintiff and members of the Class were injured in fact and lost money or
28 property as a result of such acts of unfair competition.

1 63. Defendants received the funds paid by Plaintiff and the members of the Class.
2 Defendants profited enormously by misrepresenting the speed and performance of the Google
3 Phone and not disclosing material problems and limitations with the Google Phone and its
4 interaction with T-Mobile's 3G wireless network as well as not providing adequate customer
5 service to assist Google Phone customers in resolving these issues. Defendants' revenues
6 attributable thereto are thus directly traceable to the millions of dollars paid out by Plaintiff and
7 the Class for the Google Phone, the required service plans and the associated fees.

8 64. Unless Defendants are enjoined from continuing to engage in the unlawful, unfair
9 and fraudulent business acts and practices as described herein, Plaintiff and the Class will
10 continue to be injured by Defendants' conduct.

11 65. Defendants, through their acts of unfair competition, have acquired money from
12 Class members. Plaintiff and the Class request this Court disgorge and restore such money to
13 them and enjoin Defendants from continuing to violate California Business and Professions Code
14 §17200, *et seq.*

15 66. The unlawful, unfair and fraudulent conduct described herein is ongoing and
16 continues to this date. Plaintiff and the Class, therefore, are entitled to relief described below as
17 appropriate for this Cause of Action.

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1 **SECOND CAUSE OF ACTION**

2 **(False and Misleading Advertising in Violation of California**
3 **Business & Professions Code §§ 17500, *et seq.*)**

4 ***Against All Defendants***

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

7 68. Defendants' acts and practices as described herein have deceived and/or are likely
8 to deceive members of the Class and the public. Defendants have promoted the Google Phone as
9 being able to operate with a 3G wireless network. In reality, the Google Phone connects over a
10 slower network a significant amount of the time and/or drops a significant number of calls while
11 searching for limited 3G network resources. Marketing the phone by claiming it connects to a 3G
12 network would lead reasonable consumers, including Plaintiff, to believe they regularly can
13 obtain 3G network connectivity and significantly higher data transfer rates. Defendants have also
14 failed to provide adequate customer service to Google Phone customers, including the Plaintiff
15 and the Class, as they have to wait for numerous days to receive a response to an email inquiry,
16 which is the only way to contact Google, and during that time, their Google Phone can not make
17 use of T-Mobile's 3G wireless network as originally promised.

18 69. T-Mobile uniformly advertises and sells 3G network data plans for the Google
19 Phone and requires Class members to pay higher rates for such plans. For a significant amount of
20 time, Plaintiff and Class members are unable to access a 3G network and cannot consistently get
21 3G connectivity and data transfer rates despite Defendants uniformly assertions of this
22 characteristic and selling it to them at a premium.

23 70. By their actions, Defendants are disseminating uniform advertising concerning
24 their products and services, which by its nature is unfair, deceptive, untrue, or misleading within
25 the meaning of California Business & Professions Code §17500, *et. seq.*

26 71. Such assertions are likely to deceive, and continue to deceive, the consuming
27 public for the reasons detailed above.

28 72. The above-described false, misleading, and deceptive assertions Defendants
disseminated continues to have a likelihood to deceive in that Defendants have failed to disclose

1 the true and actual performance of the Google Phone based on its interaction with T-Mobile's
2 insufficient 3G infrastructure. Defendants have failed to instigate a public information campaign
3 to alert consumers of these deficiencies, which continues to create a misleading perception of the
4 Google Phone's speed, performance and enhanced network and operating connectivity.

5 73. In making and disseminating the statements alleged herein, Defendants should
6 have known their advertisements were untrue and misleading in violation of California Business
7 & Professions Code § 17500, *et seq.* Plaintiff and the Class members based their decisions to
8 purchase the Google Phone in substantial part on Defendants' misrepresentations and omitted
9 material facts. The revenues to Defendants attributable to products sold in those false and
10 misleading assertions amount to millions of dollars for the Google Phone and the required service
11 plans. Plaintiff and Class members were injured in fact and lost money or property as a result.
12 Plaintiff and the Class suffered injury in fact and lost money and property as a result of
13 Defendants' unlawful conduct.

14 74. The misrepresentations and non-disclosures by Defendants of the material facts
15 detailed above constitute false and misleading advertising and therefore constitute a violation of
16 California Business & Professions Code § 17500, *et seq.*

17 75. As a result of Defendants' wrongful conduct, Plaintiff and the Class request that
18 this Court cause Defendants to restore money to them, and to enjoin Defendants from continuing
19 to violate California Business & Professions Code § 17500, *et seq.*

20 76. Such conduct is ongoing and continues to this date. Plaintiff and the Class are
21 therefore entitled to the relief described below as appropriate for this Cause of Action.

22 **THIRD CAUSE OF ACTION**

23 **(Violation of Consumers Legal Remedies Act, California Civil Code § 1750, *et seq.*)**

24 ***Against All Defendants***

25 77. Plaintiff incorporates by reference each and every preceding paragraph as though
26 fully set forth herein.

27 78. This cause of action is brought under the Consumers Legal Remedies Act,
28 California Civil Code § 1750, *et seq.* ("CLRA"). Plaintiff is a consumer as defined by California

1 Civil Code § 1761(d), and the Google Phone and T-Mobile's 3G wireless network are goods and
2 services within the meaning of the CLRA.

3 79. Defendants violated and continue to violate the CLRA by engaging in the
4 following deceptive practices proscribed by California Civil Code § 1770(a) in connection with
5 transactions intended to result in, and that did result in, the sale of the Google Phone at issue
6 herein to Plaintiff and members of the Class in violation of, *inter alia*, the following provisions:

- 7 a. Representing the goods and services have characteristics, uses or benefits which
8 they do not have (Cal. Civ. Code § 1770(a)(5));
- 9 b. Representing the goods and services are of a particular standard, quality or grade if
10 they are of another (Cal. Civ. Code § 1770(a)(7));
- 11 c. Advertising goods and services with the intent not to sell them as advertised (Cal.
12 Civ. Code § 1770(a)(9));
- 13 d. Representing a transaction involves rights, remedies or obligations that it does not
14 have or involve (Cal. Civ. Code § 1770(a)(14)); and
- 15 e. Representing the goods and services have been supplied in accordance with a
16 previous representation when they have not (Cal. Civ. Code § 1770(a)(16)).

17 80. Pursuant to Section 1782 of the CLRA, Plaintiff is notifying Defendants in writing
18 of the particular violations of Section 1770 of the CLRA (the Notice) and is demanding, among
19 other things, that Defendants cease engaging in the wrongful conduct alleged herein and that
20 Defendants provide restitution to California residents who are beneficiaries of Defendant's Gift
21 Certificates. Plaintiff is sending Notice by means of by certified mail, return-receipt requested, to
22 Defendants at their principal places of business concurrent with the service of this Complaint. If
23 Defendants fail to respond to Plaintiff's demand within thirty days of receipt of the Notice,
24 pursuant to section 1782(a) and (d) of the CLRA, plaintiff will amend this Complaint to request
25 statutory damages, actual damages, plus punitive damages, interest and attorney's fees. Plaintiff
26 requests that this Court enter such orders or judgments as may be necessary to restore any person
27 in interest any money which may have been acquired by means of such unfair business practices,
28 and for such relief as provided in Civil Code § 1780 and the Prayer for Relief.

1 81. Plaintiff and the Class suffered injury in fact and lost money and property as a
2 result of Defendants' unlawful conduct.

3 82. Pursuant to Cal. Civ. Code § 1780(a)(2), Kellogg should be enjoined from
4 continuing to employ the unlawful methods, acts and practices alleged herein to prevent any
5 future harm to Plaintiff and other members of the Class.

6 **FOURTH CAUSE OF ACTION**

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

8 *Against All Defendants*

9 83. Plaintiff incorporates by reference each and every preceding paragraph as though
10 fully set forth herein.

11 84. Plaintiff and Class members purchased the Google Phone and used them for their
12 ordinary and intended purpose of providing consistent, reliable and sustained access to the
13 supposedly faster 3G network, and entered into agreements with Google and/or T-Mobile or their
14 agents and received uniform warranties in connection with the purchase of such phones.

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

19 86. Moreover, Defendants do not provide adequate customer service for Google Phone
20 customers who are forced to wait for numerous days to receive a response to an email inquiry,
21 which is the only way to contact Google, and during that time, their Google Phone can not make
22 use of T-Mobile's 3G wireless network as originally promised.

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

28

1 88. Plaintiff and the Class purchased their Google Phone with the reasonable
2 expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G
3 network. Defendants’ assertions that the Google Phone has 3G network capability constitutes a
4 warranty that the product would operate as promoted during their useful life, upon which Plaintiff
5 and the Class reasonably acted. The Google Phone is not fit for its warranted, advertised,
6 ordinary and intended purpose of providing reliable 3G network connectivity and is in fact
7 defective, or would not pass without objection in the trade or industry in terms of being unable to
8 provide consistent and reliable 3G network connectivity. This defect has manifested for all
9 Plaintiff and Class members as they do not consistently receive 3G network connectivity using
10 their Google Phone.

11 89. Defendants’ breach of the warranty described above also constitutes a violation of
12 Cal. Civ. Code §1792, *et seq.*

13 90. Plaintiff and Class members are entitled to damages as a result of such breaches.

14 91. Plaintiff and the Class request relief as described below as appropriate for this
15 Cause of Action.

16 **FIFTH CAUSE OF ACTION**

17 **(Violation of the Magnuson-Moss Warranty Act)**

18 ***Against All Defendants***

19 92. Plaintiff incorporates by reference each and every preceding paragraph as though
20 fully set forth herein.

21 93. Plaintiff and Class members are “consumers” within the meaning of the
22 Magnuson-Moss Act.

23 94. Defendants are “suppliers” and “warrantors” within the meaning of the Magnuson-
24 Moss Act. The Google Phone is a “consumer product” within the meaning of the Magnuson-
25 Moss Act.

26 95. Defendants’ written affirmations of fact, promises and/or descriptions as alleged
27 herein are each a “written warranty” as to the Google Phone providing consistent 3G network
28

1 connectivity and/or there exists an implied warranty for the sale of such products within the
2 meaning of the Magnuson-Moss Act.

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

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

9 98. As a result of Defendants' breaches of warranty, Plaintiff and Class members have
10 sustained damages and other losses in an amount to be determined at trial. Plaintiff and Class
11 members are entitled to recover damages, specific performance, costs, attorneys' fees, rescission,
12 and/or other relief as is deemed appropriate.

13 **SIXTH CAUSE OF ACTION**

14 **(Negligence)**

15 ***Against All Defendants***

16 99. Plaintiff incorporates by reference each and every preceding paragraph as though
17 fully set forth herein.

18 100. At all times mentioned herein, Defendants undertook a duty to properly
19 manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use
20 and sell the Google Phone to function as advertised and represented on T-Mobile's 3G network.
21 Defendants' duties alleged herein applied to Plaintiff and the Class.

22 101. The Google Phone, either alone or by acting in combination with T-Mobile's 3G
23 network with which it exclusively operates, was negligently tested, manufactured, built and/or
24 designed, which causes Plaintiff and the Class to fail to receive reliable and sustained
25 connectivity to T-Mobile's 3G network.

26 102. Moreover, Defendants did not provide adequate customer service for Google
27 Phone customers who are forced to wait for numerous days to receive a response to an email
28

1 inquiry, which is the only way to contact Google, and during that time, their Google Phone can
2 not make use of T-Mobile's 3G wireless network as originally promised.

3 103. Defendants, by the conduct detailed above, breached their duty to properly
4 manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use,
5 or sell the Google Phone to function as advertised.

6 104. Defendants knew or should have known that Plaintiff and the Class would suffer
7 foreseeable injuries and harm as a result of Defendants' failure to exercise reasonable ordinary
8 care as alleged. Defendants' negligence was a direct, substantial, legal and proximate cause of
9 the injuries, damages, harm and economic loss that Plaintiff and the Class suffered, and will
10 continue to suffer, as described herein.

11 105. As a proximate result of Defendants' negligence, Plaintiff and the Class suffered
12 separate economic damages and loss from the purchase of the Google Phone itself, as alleged
13 herein.

14 **SEVENTH CAUSE OF ACTION**

15 **(Negligent Misrepresentation)**

16 ***Against All Defendants***

17 106. Plaintiff incorporates by reference each and every preceding paragraph as though
18 fully set forth herein.

19 107. Defendants represented that the Google Phone and the required T-Mobile's 3G
20 service plan would provide customers with sustained and reliable connectivity to the 3G network,
21 thereby obtaining materially faster data transfer rates.

22 108. Defendants had no reasonable grounds for believing their representations were true
23 because the Google Phone has consistently had issues with providing reliable 3G network
24 connectivity, and T-Mobile's 3G network could not provide consistent 3G network connectivity
25 to customers who purchased service for their Google Phone 3G, based on T-Mobile's
26 overburdened and under-supported 3G network. Defendants should have known, or had a duty to
27 learn, about the true facts that contradicted their representations.
28

1 109. In making these representations to Plaintiff and the Class, Defendants intended to
2 induce Plaintiff and the Class to purchase the Google Phone.

3 110. At all times herein, Plaintiff and the Class were unaware of the falsity of
4 Defendants' statements.

5 111. Plaintiff and the Class reasonably acted in response to the statements made by
6 Defendants when they purchased a Google Phone and were required to also sign up for T-
7 Mobile's 3G network service plan and other increased costs.

8 112. As a proximate result of Defendants' negligent misrepresentations, Plaintiff and
9 Class members purchased a Google Phone and are locked into a two-year service plan with T-
10 Mobile for 3G network connectivity that is spotty at best and for which Plaintiff and Class
11 members pay a premium.

12 113. Plaintiff and the Class have been damaged and therefore request appropriate relief
13 as described below.

14 **EIGHTTH CAUSE OF ACTION**

15 **(Fraud and Deceit)**

16 ***Against All Defendants***

17 114. Plaintiff incorporates by reference each and every preceding paragraph as though
18 fully set forth herein.

19 115. Defendants, from the time the Google Phone and service plans on T-Mobile's 3G
20 network were first made available to Class members, consistently deceived Plaintiff and the Class
21 by: (1) making false uniform misrepresentations to Plaintiff, the Class and the public, including,
22 but not limited to, claims that the Google Phone and required service plans would provide
23 customers with consistent 3G network connectivity; and (2) concealing from Plaintiff, the Class
24 and the public, despite having superior, if not exclusive, knowledge of material facts to the
25 contrary and despite having partially spoken on the issue, that the Google Phone would not
26 consistently function in terms of consistently accessing a 3G network and providing increased
27 data transfer rates due to the manufacture and design of the Google Phone and the limitations of
28

1 T-Mobile's 3G network as designed and implemented. Plaintiff and the Class were unaware these
2 representations were false.

3 116. Defendants suggested, asserted and/or promised the Google Phone, acting in
4 combination with T-Mobile's 3G wireless network, would have reliable and sustained
5 functionality on the faster 3G network.

6 117. Defendants either misrepresented or suppressed the material fact that the Google
7 Phone's 3G network could not provide reliable and sustained 3G network connectivity.
8 Defendants suppressed the material fact that T-Mobile's 3G network could not handle the influx
9 of users and bandwidth demands as a result of the marketing and sale of the Google Phone.

10 118. When Defendants made the foregoing misrepresentations, they knew or recklessly
11 disregarded them to be false and/or had no reasonable basis for believing them to be true.

12 119. The misrepresentations and concealment of material facts were made and
13 conducted by Defendants with the intent to mislead and induce Plaintiff and the Class to purchase
14 the Google Phone and the required T-Mobile 3G service plan, and had the effect of doing so.

15 120. In affirmative response to the false, fraudulent and/or willful misrepresentations
16 and concealment of material facts by Defendants, Plaintiff and Class members were induced to
17 and did purchase the Google Phone and were required to pay for a premium T-Mobile 3G service
18 plan.

19 121. Plaintiff and other Class members reasonably based their decision to purchase
20 these phones and plans on the misrepresentations and omissions of material fact by Defendants,
21 and were damaged thereby.

22 122. Defendants' acts were done willfully, maliciously, with fraudulent intent and with
23 deliberate disregard of the rights of Plaintiff and the Class, requiring an award of exemplary
24 damages in addition to actual damages.

25 123. Plaintiff and the Class request appropriate relief as described below.

26 ////

27 ////

28 ////

1 **NINTH CAUSE OF ACTION**

2 **(Common Counts and Unjust Enrichment)**

3 ***Against All Defendants***

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

6 125. Defendants have benefited from their unlawful conduct as detailed above by
7 receiving millions of dollars in revenues and profits derived from the sale of the Google Phone
8 and access to T-Mobile's 3G network. Defendants appreciated the benefit of the receipt of such
9 revenues and profits.

10 126. Because Defendants were unjustly enriched and have received this excessive
11 revenue at the expense of Plaintiff and the Class based on false and misleading statements
12 regarding the Google Phone, its capacity, and its ability to perform its stated functions, it would
13 be inequitable for Defendants to retain the benefits they gained from purchases by Plaintiff and
14 the Class of the Google Phone and the exclusive, required service plans from T-Mobile.

15 127. Plaintiff and other Class members are entitled to the establishment of a
16 constructive trust consisting of the benefit conferred upon Defendants in the form of the excess
17 revenues and profits derived from the sale of these products and services and the return of any
18 monies by which Defendants were unjustly enriched.

19 **TENTH CAUSE OF ACTION**

20 **(Declaratory Relief)**

21 ***Against All Defendants***

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

24 129. An actual controversy over which this Court has jurisdiction now exists between
25 Plaintiff, the Class and Defendants concerning their respective rights, duties and obligations for
26 which Plaintiff desires a declaration of rights under the applicable claims asserted herein.

27 130. Plaintiff and Class members may be without adequate remedy at law, rendering
28 declaratory relief appropriate in that:

- 1 a. damages may not adequately compensate the Class members for the injuries
2 suffered, nor may other claims permit such relief;
- 3 b. the relief sought herein in terms of ceasing such practices or providing a full and
4 complete corrective disclosure may not be fully accomplished by awarding
5 damages; and
- 6 c. if the conduct complained of is not enjoined, harm will result to Class members
7 and the general public because Defendants' wrongful conduct is continuing and
8 persons are entitled to the direct monies taken from them.

9 131. Plaintiff requests a judicial determination and declaration of the rights of Class
10 members, and the corresponding responsibilities of Defendants. Plaintiff also requests an order
11 declaring Defendants are obligated to pay restitution to all members of the Class as appropriate
12 and otherwise pay over all funds Defendants wrongfully acquired either directly or indirectly
13 because of the illegal conduct by which Defendants were unjustly enriched.

14 132. A judicial declaration is necessary and appropriate at this time under the
15 circumstances so the parties may ascertain their respective rights and duties.

16 133. Class members will be irreparably harmed unless the unlawful actions of the
17 Defendants are enjoined, because Defendants will continue to advertise their false and misleading
18 statements regarding the Google Phone. To that end, Plaintiff requests an order compelling
19 disclosures and/or disclaimers on the outside of the Google Phone boxes and/or T-Mobile service
20 plan contracts. Absent injunctive relief, Defendants will continue to market, distribute, and sell the
21 Google Phone to the detriment of their customers.

22 134. Plaintiff has not previously asked for such injunctive relief from the Court.

23 **ELEVENTH CAUSE OF ACTION**

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

25 ***Against All Defendants***

26 135. Plaintiff incorporates by reference each and every preceding paragraph as though
27 fully set forth herein.

28

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

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

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

25 **PRAYER FOR RELIEF**

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

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

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

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

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

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

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

15 7. Reasonable attorneys' fees;

16 8. All related costs of this suit;

17 9. Pre- and post-judgment interest; and

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

19 DATED: October 21, 2010

Attorneys for Plaintiff Mary McKinney and the
Proposed Class

21
22
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JURY DEMAND

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

DATED: October 21, 2010

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