IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Mary McKinney,

Plaintiff,

v.

Google, Inc., et al.,

Defendants.

_____/

NO. C 10-01177 JW

ORDER GRANTING T-MOBILE'S MOTION TO COMPEL ARBITRATION; DENYING T-MOBILE'S MOTION TO DISMISS AS MOOT; DENYING HTC'S MOTION TO COMPEL ARBITRATION; GRANTING GOOGLE AND HTC'S MOTION TO DISMISS WITH LEAVE TO AMEND

I. INTRODUCTION

Mary McKinney ("Plaintiff") brings this putative class action against Google, Inc. ("Google"), HTC Corp. ("HTC") and T-Mobile USA, Inc. ("T-Mobile") (collectively, "Defendants"), alleging, *inter alia*, violations of the Federal Communications Act, 47 U.S.C. §§ 201, 207 and breach of warranty. Plaintiff alleges that the Nexus One mobile device (the "Google Phone") is defective in that it fails to maintain connectivity to T-Mobile's 3G wireless network.

Presently before the Court are: (1) Defendant T-Mobile's Motion to Compel Arbitration;[1] (2) Defendant T-Mobile's Motion to Dismiss;[2] (3) Defendant HTC's Motion to Compel Arbitration and Stay Claims;[3] and (4) Defendants Google and HTC's Motion to Dismiss Plaintiff's First Amended

[1] (hereafter, "T-Mobile's Arbitration Motion," Docket Item No. 30.)

[2] (hereafter, "T-Mobile's Motion to Dismiss," Docket Item No. 36.)

[3] (hereafter, "HTC's Arbitration Motion," Docket Item No. 39.)

Complaint.[4] The Court conducted a hearing on November 1, 2010. Based on the papers submitted to date and oral argument, the Court: (1) GRANTS T-Mobile's Arbitration Motion; (2) DENIES T-Mobile's Motion to Dismiss as moot; (3) DENIES HTC's Arbitration Motion; and (4) GRANTS Google and HTC's Motion to Dismiss with leave to amend.

II. BACKGROUND

A. Factual Allegations

In a First Amended Complaint[5] filed on June 11, 2010, Plaintiff alleges as follows:

Plaintiff, a Pennsylvania resident, bought a Google Phone over the Internet on January 9, 2010. (FAC ¶ 2.) Defendant Google is a Delaware corporation that marketed and sold the Google Phone throughout the United States. (Id. ¶ 3.) Defendant HTC is a Taiwanese corporation that designed and manufactured the Google Phone. (Id. ¶ 4.) Defendant T-Mobile is a Delaware corporation that was, until very recently, the exclusive provider of the telephone and data service plans for the Google Phone. (Id. ¶ 5.) Defendant T-Mobile also owns and operates a 3G network. (Id.)

The Google Phone is a "smartphone" that operates using the Android Mobile Technology Platform which provides e-mail and Internet access through a 3G network. (FAC ¶¶ 25, 31-32.) The Google Phone could be purchased online from Google for $529 as an "unlocked" phone usable with any wireless service, or at a discounted price of $179 when purchased with a new two-year contract with T-Mobile's wireless service. (Id. ¶¶ 33-34.)

Defendants consistently advertised the Google Phone, working in tandem with the T-Mobile network, as providing 3G data transfer rates. (FAC ¶ 38.) This 3G transfer rate of up to 7.2 megabytes per second is important to many smartphone users who employ their devices to run data-heavy applications, and download and play various media. (Id. ¶ 32.) Contrary to Defendants' assertions, Plaintiff and other members of the putative class

[4] (hereafter, "Google's Motion to Dismiss," Docket Item No. 41.)

[5] (hereafter, "FAC," Docket Item No. 26.)

received no 3G connectivity for a significant portion of time. (Id. ¶ 41.) This lack of connectivity also caused a significant number of dropped calls. (Id.) Moreover, Defendants have failed to provide adequate customer service to assist Google Phone customers in helping to resolve these issues. (Id. ¶ 45.)

On the basis of the allegations outlined above, Plaintiff alleges three causes of action: (1) Violation of the Federal Communications Act ("FCA"), 47 U.S.C. §§ 201, 207; (2) Breach of Express Warranty and the Implied Warranty of Merchantability; and (3) Violation of the Magnuson-Moss Warranty Act ("MMWA"), 15 U.S.C. §§ 2301, *et seq*.

B. Procedural History

On January 29, 2010, Plaintiff filed her original Complaint in Santa Clara County Superior Court. On March 22, 2010, Defendants removed the case to this Court. (See Docket Item No. 1.) On June 11, 2010, Plaintiff filed her First Amended Complaint. (See Docket Item No. 26.) On October 8, 2010, the Court related Plaintiff's case with a similar case filed by Nathan Nabors against Google, Case No. C 10-03897. (See Docket Item No. 60.)

Presently before the Court are Defendants' Motions to Compel Arbitration and to Dismiss.

III. STANDARDS

A. Motion to Compel Arbitration

"A party to a valid arbitration agreement may 'petition any United States district court for an order directing that such arbitration proceed in the manner provided for in such agreement.'" Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004) (quoting 9 U.S.C. § 4). The district court must only determine whether an arbitration agreement exists and whether it encompasses the dispute at issue. See id. at 1012; see also Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). A court interpreting the scope of an arbitration provision should apply ordinary state law principles of contract construction. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). Thus, arbitration should only be denied

where "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Technologies, Inc. v. Communication Workers, 475 U.S. 643, 650 (1986) (quoting United Steelworkers v. Warrior & Gulf Navigation Corp., 363 U.S. 574, 582-83 (1960)).

The Federal Arbitration Act ("FAA") provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable," but courts may decline to enforce them when grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" federal law. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). In interpreting the validity of an arbitration agreement, a court applies state law. See Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1210 (9th Cir. 1998).

B. Motion to Dismiss

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129

S. Ct. 1937, 1949 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

IV. DISCUSSION

A. T-Mobile's Motion to Compel Arbitration and Motion to Dismiss

Defendant T-Mobile moves to compel arbitration on the ground that all of Plaintiff's claims fall within the scope of a valid and binding agreement containing an arbitration clause. (T-Mobile's Arbitration Motion at 1.) Plaintiff responds that: (1) the arbitration clause contains several provisions that are unconscionable, rendering it unenforceable; (2) Plaintiff's MMWA claims are not subject to arbitration; and (3) there is no evidence that Plaintiff was ever provided with a copy of any service contract.[6]

1. Conflict of Laws

As a threshold matter, the parties dispute whether California or Pennsylvania law applies.[7] T-Mobile contends that Pennsylvania law applies, as identified in the forum selection provision of the parties' agreement. (T-Mobile's Arbitration Motion at 10-13.) Plaintiff contends that California law applies because Pennsylvania law is contrary to California's fundamental public policy against class action waivers. (Opp'n to T-Mobile's Arbitration Motion at 6-12.)

A federal court looks to the law of the forum state in resolving choice of law issues. Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 937 (9th Cir. 2001). In determining whether to enforce contractual choice-of-law provisions, "California courts shall apply the principles set forth in section 187 [of the Restatement (Second) of Conflict of Laws], which reflects a strong policy favoring

[6] (Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant T-Mobile's Motion to Compel Arbitration and to Stay Claims at 1-2, hereafter, "Opp'n to T-Mobile's Arbitration Motion," Docket Item No. 49.)

[7] (T-Mobile's Arbitration Motion at 10-13; Opp'n to T-Mobile's Arbitration Motion at 9-12.)

enforcement of such provisions." Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 464-65 (Cal. 1992). Under Section 187, a court must first determine: (1) whether the chosen state has a substantial relationship to the parties or transaction; or (2) whether there is any other reasonable basis for the parties' choice of law. Id. at 465. If either test is met, then the court must next determine whether the chosen state's law is contrary to a fundamental policy of California and whether California has a materially greater interest in the determination of the particular issue. Id. If California has a materially greater interest, then the choice-of-law provision will not be enforced. Id.

Here, the parties' agreement provides that it is governed by "the laws of the state in which [Plaintiff's] billing address in [Defendant T-Mobile's] records is located."[8] Pennsylvania has a substantial relationship to the parties and transaction, as Plaintiff lives there, and bought and used her Google Phone there. (See, e.g., FAC ¶ 2.) With respect to class action waiver in an arbitration clause, Pennsylvania law, however, is fundamentally different from California law. Whereas California law holds that a class action waiver in an arbitration clause can be unconscionable, such provisions are generally enforced in Pennsylvania.[9] Even though Pennsylvania and California law are at odds, the Court will only apply California law if California has a materially greater interest in the determination of this issue. The Court concludes that Pennsylvania has a greater interest, as Pennsylvania is the state where the contract was entered into, the place of performance, the location where the alleged wrongs occurred, and the state where Plaintiff resides. Thus, as California does not have a materially greater interest, the Court will enforce the parties' choice of law provision.

[8] (Declaration of Andrea Baca in Support of Motion to Compel Arbitration and Motion to Dismiss ¶ 30, Ex. A, hereafter, "Baca Decl.," Docket Item No. 33.) Plaintiff filed evidentiary objections to T-Mobile's declarations, including the Baca Declaration. (See Docket Item No. 50.) The Court OVERRULES Plaintiff's objection with respect to the service agreements which are attached to the Baca Declaration because they are exempt from the hearsay rule as business records. See Fed. R. Evid. 803(6). All of Plaintiff's other objections are OVERRULED as moot.

[9] Compare Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009) with Kaneff v. Delaware Title Loans, Inc., 587 F.3d 616 (3d Cir. 2009).

Accordingly, the Court applies Pennsylvania law in determining the validity of the arbitration clause.[10]

2. The Arbitration Clause

Defendant T-Mobile contends that Plaintiff's claims fall within the scope of the arbitration clause. (T-Mobile's Arbitration Motion at 9-10.)

The parties' agreement provides that:

> **2. * Dispute Resolution and Arbitration. WE EACH AGREE THAT, EXCEPT AS PROVIDED BELOW (AND EXCEPT AS TO PUERTO RICO CUSTOMERS), ANY AND ALL CLAIMS OR DISPUTES BETWEEN YOU AND US IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, OUR SERVICES, DEVICES OR PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING ARBITRATION, RATHER THAN IN COURT.** This includes any claims against other parties relating to Services or Devices provided or billed to you (such as our suppliers or retail dealers) whenever you also assert claims against us in the same proceeding. . . .
>
> **Notwithstanding the above, YOU MAY CHOOSE TO PURSUE YOUR CLAIM IN COURT AND NOT ARBITRATION if: . . . (b) YOU OPT-OUT OF THESE ARBITRATION PROCEDURES WITHIN 30 DAYS FROM THE DATE YOU ACTIVATED THAT PARTICULAR LINE OF SERVICE** . . . .
>
> If the arbitration provision applies . . . , then either you or we may start arbitration proceedings. . . . We will pay upon filing of the arbitration demand, all filing, administration and arbitrator fees for claims that total less than $75,000 . . . .
>
> **CLASS ACTION WAIVER**. WE EACH AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS . . . WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION . . . .

(Baca Decl., Ex. A (emphasis in original).)

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[10] In the alternative, Plaintiff contends that federal law applies to void the arbitration clause. (Opp'n to T-Mobile's Arbitration Motion at 17.) As the Supreme Court has held, courts look to state law to determine if an arbitration agreement is unconscionable. See, e.g., Doctor's Assocs., 517 U.S. at 687. In accordance with this precedent, the parties' agreement provides that "[t]his agreement is governed by the Federal Arbitration Act, applicable federal laws, and the laws of the state in which [Plaintiff's] billing address in [Defendant T-Mobile's] records is located." (Baca Decl., Ex. A.) Thus, the Court applies Pennsylvania law in determining whether the arbitration clause is unconscionable.

Here, Plaintiff's claims challenge the adequacy of the Google Phone, Defendant T-Mobile's 3G network and the quality of its customer service, which are claims relating to Defendant T-Mobile's "services, devices or products." (See, e.g., FAC.) Thus, the Court finds that Plaintiff's claims against Defendant T-Mobile fall within the ambit of the agreement's arbitration clause.

3. Enforceability of the Arbitration Clause

Defendant T-Mobile contends that its arbitration clause is generally enforceable. (T-Mobile's Arbitration Motion at 13-17.) Plaintiff responds that, even under Pennsylvania law, the arbitration clause is procedurally and substantively unconscionable. (Opp'n to T-Mobile's Arbitration Motion at 12-16.)

Pennsylvania law generally favors the enforcement of arbitration agreements. Salley v. Option One Mortg. Corp., 925 A.2d 115, 119 (Pa. 2007). Pennsylvania law recognizes, however, that an arbitration agreement may be avoided on grounds of unconscionability. Id. "[T]he party challenging an arbitration agreement has the burden to demonstrate that the agreement is both procedurally and substantively unconscionable." Zimmer v. CooperNeff Advisors, Inc., 523 F.3d 224, 230 (3d Cir. 2008) (emphasis removed). Procedural unconscionability concerns the process by which the parties entered into a contract and has been defined as the "absence of meaningful choice on the part of one of the parties." Hopkins v. New Day Financial, 643 F. Supp. 2d 704, 716 (E.D. Pa. 2009). Substantive unconscionability, on the other hand, refers to terms that unreasonably favor one party. Witmer v. Exxon Corp., 434 A.2d 1222, 1228 (Pa. 1981).

Here, it is undisputed that the agreement was pre-written, and there was no opportunity for negotiation or modification of its terms. (T-Mobile's Arbitration Motion at 13-17; Opp'n to T-Mobile's Arbitration Motion at 13.) Phone companies' agreements are provided to customers on a "take it or leave it" basis, and Plaintiff, an individual, was in a significantly weaker bargaining position than Defendant T-Mobile, a large corporation. Contrary to Defendant T-Mobile's contention that Plaintiff had her choice of several phone companies, Plaintiff's First Amended Complaint alleges that T-Mobile was the exclusive carrier for locked Google Phones. (FAC ¶ 5.) Thus, the Court finds that T-Mobile's agreement is procedurally unconscionable.

With respect to substantive unconscionability, the arbitration clause applies to both parties, and does not appear to contain any limitations on individual damages. (Baca Decl., Ex. A.) Moreover, T-Mobile pays for the costs of arbitration for claims up to $75,000, and Plaintiff may recover all attorney fees and costs if she prevails. (Id.) Finally, although the parties' agreement contains a class action waiver provision, the agreement also allows customers to opt-out of arbitration within 30 days of activation of service. (Baca Decl. ¶¶ 3, 4, 29, Ex. A); see also Kaneff, 587 F.3d at 625 (upholding one-way arbitration agreement with class action waiver); Clerk v. First Bank, No. 09-51212010, 2010 U.S. Dist. LEXIS 27206, at *43-44 (E.D. Pa. Mar. 22, 2010) (upholding class action waiver with opt-out). Thus, the Court finds that the arbitration clause in the parties' agreement is not substantively unconscionable.

Plaintiff's reliance on Thibodeau v. Comcast Corp.[11] is misplaced. There, the Pennsylvania Superior Court held that an arbitration clause containing a class action waiver was unconscionable because the plaintiff's individual damages of approximately $10 "effectively ensured that [the] defendant will never face liability for wrongdoing." Thibodeau, 912 A.2d at 886. Here, unlike Thibodeau, the agreement's class action waiver does not preclude all liability because Plaintiff alleges several hundred dollars in individual damages, she may recover her attorney fees as a prevailing party and Defendant T-Mobile will pay the arbitration fees.[12] (See, e.g., FAC ¶¶ 1, 15, 74.)

Accordingly, the Court finds that the arbitration clause in the parties' agreement is not void as unconscionable.

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[11] 912 A.2d 874 (Pa. Super. Ct. 2006).

[12] See also O'Shea v. Direct Fin. Solutions, No. 07-1881, 2007 U.S. Dist. LEXIS 90079, at *4-5 (E.D. Pa. Dec. 5, 2007) (class action waiver not substantively unconscionable where alleged damages were approximately $300 and agreement provided for payment of all arbitration fees by defendant); Clerk, 2010 U.S. Dist. LEXIS 27206, at *43-44 (distinguishing Thibodeau and holding that class action waiver was not unconscionable where individual damages alleged were approximately $600).

4. The Arbitrability of Plaintiff's Magnuson-Moss Warranty Act Claims

Plaintiff contends that her claims under the MMWA are not subject to arbitration. (Opp'n to T-Mobile's Arbitration Motion at 23-25.)

Although the MMWA provides a private right of action to file suit in a United States District Court, it also expresses a policy of encouraging warrantors to establish "informal dispute settlement procedures" to more expeditiously settle consumer disputes. 15 U.S.C. § 2310(a)(1). While the term "informal dispute settlement procedure" is not defined by the MMWA, the Federal Trade Commission ("FTC") is instructed to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty." 15 U.S.C. § 2310(a)(2). If a warrantor establishes an informal dispute settlement procedure which meets the requirements established by the FTC, the consumer may not commence a civil action unless she first exhausts the informal procedure. 15 U.S.C. § 2310(a)(3)(C)(i). Under its rule-making authority, the FTC has adopted a regulation stating that any informal dispute settlement procedure under the MMWA cannot be legally binding. See 16 C.F.R. § 703.5(j); 40 Fed. Reg. 60168, 60211 (1975).

Following the FTC's regulation, several district courts have adopted the view that the MMWA precludes binding arbitration.[13] The Fifth and Eleventh Circuits, however, have disagreed with the FTC and allowed enforcement of arbitration clauses over MMWA claims.[14] Although the Ninth Circuit has yet to address the issue, the majority of recent cases nationwide have held that binding arbitration is permissible under the MMWA.[15] In resolving the conflict between the courts,

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[13] See, e.g., Breniser v. Western Rec. Vehicles, Inc., No. CV-07-1418-HU, 2008 U.S. Dist. LEXIS 100807 (D. Or. Dec. 12, 2008); Rickard v. Teynor's Homes, Inc., 279 F. Supp. 2d 910 (N.D. Ohio 2003).

[14] See Walton v. Rose Mobile Homes LLC, 298 F.3d 470, 478 (5th Cir. 2002); Davis v. S. Energy Homes, Inc., 305 F.3d 1268, 1280 (11th Cir. 2002); see also Jones v. GMC, 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009).

[15] See, e.g., 2-18 Commercial and Consumer Warranties § 18.02 (surveying various cases, and noting that "[t]he recent trend . . . is to enforce binding arbitration agreements to which the consumer has expressly assented.").

the Court turns to the fundamental principles of statutory interpretation. A court must defer to an agency's interpretation of the statute if: (1) Congress has not spoken directly to the issue; and (2) the agency's interpretation "is based on a permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984).

Here, following the reasoning outlined in the Fifth and Eleventh Circuits, the Court finds that there is no indication of Congressional intent that MMWA claims not be made subject to an arbitration agreement. Nothing in the text, history or purposes of the MMWA suggests Congressional intent to preclude binding arbitration.[16] Conversely, Congress has expressed a clear intent in favor of arbitration for contractual claims. See, e.g., 9 U.S.C. § 2. The Court also finds that the FTC's interpretation is not reasonable. See Davis, 305 F.3d at 1280. FTC does not have the power to ban binding arbitration just because it may set standards for "informal dispute settlement procedures." 15 U.S.C. § 2310(a)(2). Thus, the Court finds that Plaintiff's MMWA claims are subject to arbitration.

5. Whether Plaintiff Agreed to the Parties' Service Agreement

Finally, Plaintiff contends that there is no evidence that she ever agreed to any service contract. (Opp'n to T-Mobile's Arbitration Motion at 4.)

Defendant T-Mobile, however, submitted a declaration attaching the service agreement that Plaintiff agreed to when she originally signed up for T-Mobile service eight years ago, as well as the subsequent agreements that were provided to Plaintiff each time she renewed or upgraded her service. (See, e.g., Baca Decl. ¶¶ 3-7, 10, 20, 22, 25, Ex. A.) Moreover, Plaintiff fails to allege, let alone submit a declaration, that she was not in fact provided with a copy of the parties' agreement. (Opp'n to T-Mobile's Arbitration Motion at 4-6.) Thus, the Court rejects Plaintiff's contention as unsubstantiated.

[16] Walton, 298 F.3d at 478 (examining the language, legislative history and purpose of the MMWA and concluding that the Act "does not preclude binding arbitration of claims pursuant to a valid binding arbitration agreement, which the courts must enforce pursuant to the FAA").

Accordingly, the Court GRANTS Defendant T-Mobile's Motion to Compel Arbitration. In light of this holding, the Court DENIES Defendant T-Mobile's Motion to Dismiss as moot.

B. HTC's Motion to Compel Arbitration

Defendant HTC moves to compel arbitration on the ground that HTC is a third-party beneficiary of the T-Mobile service agreement and accompanying arbitration clause. (HTC's Arbitration Motion at 1.) As explained above, Pennsylvania law applies in determining whether Defendant HTC is a third-party beneficiary.[17]

Under Pennsylvania law, there is a "two part test for determining whether one is an intended third-party beneficiary: (1) the recognition of the beneficiary's right must be appropriate to effectuate the intention of the parties; and (2) the performance must satisfy an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Guy v. Liederbach, 459 A.2d 744, 751 (Pa. 1983) (quotations and citation omitted). The party seeking beneficiary status bears the burden as to both elements. Scarpitti v. Weborg, 609 A.2d 147, 150 (Pa. 1992).

Here, it is undisputed that Defendant HTC is not mentioned in Defendant T-Mobile's service agreement with its customers.[18] Moreover, there is no indication that Plaintiff or Defendant T-Mobile intended the arbitration clause to benefit Defendant HTC, or any other manufacturer of any phone utilized by T-Mobile's customers. Although the arbitration clause does mention claims against "other parties . . . such as our suppliers or retail dealers,"[19] Defendant HTC does not establish that it is either a T-Mobile supplier or retailer in the face of Plaintiff's allegations that the phone was marketed and distributed by Google, not HTC. (See, e.g., Opp'n to HTC's Arbitration Motion at 5; see also FAC ¶¶ 3-5.) Finally, Defendant HTC does not cite to any relevant "circumstances" that

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[17] See also Duvall v. Galt Medical Corp., No. C-07-03714-JCS, 2007 WL 4207792, at *8 (N.D. Cal. Nov. 27, 2007).

[18] (HTC's Arbitration Motion at 3-4; Plaintiff's Memorandum of Points and Authorities in Opposition to HTC's Motion to Compel Arbitration and To Stay Claims at 4-6, hereafter, "Opp'n to HTC's Arbitration Motion," Docket Item No. 48.)

[19] (Baca Decl., Ex. A.)

would justify application of the arbitration agreement to an unnamed third-party manufacturer. Thus, the Court finds that Defendant HTC fails to meet its burden to establish that it is a third-party beneficiary of Defendant T-Mobile's service agreement.

Accordingly, the Court DENIES Defendant HTC's Arbitration Motion.

C. Google and HTC's Motion to Dismiss

Defendants Google and HTC move to dismiss Plaintiff's First Amended Complaint on the grounds that Plaintiff has failed to state an FCA or any state and federal breach of warranty claims. (Motion to Dismiss at 1.)

1. Plaintiff's FCA Claim

Defendants Google and HTC contend that Plaintiff's FCA claim should be dismissed on the grounds that: (1) it is not pleaded with particularity; (2) Defendants Google and HTC are not "common carriers;" and (3) there is no determination by the Federal Communications Commission ("FCC") that Defendants' conduct violates the FCA. (Google's Motion to Dismiss at 7-14.) The Court addresses the issue of whether Google and HTC are "common carriers" within the meaning of Section 201(b) of the FCA first because it may be dispositive.

Section 201(b) of the FCA regulates the charges and practices of a "common carrier." 47 U.S.C. § 201(b). As defined in the FCA, "the term 'common carrier' . . . means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign transmission of energy . . . ." 47 U.S.C. § 153(10). "Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning." FCC v. Midwest Video Corp., 440 U.S. 689, 701 n.10 (1979). The Supreme Court has defined a common carrier as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." Midwest Video Corp., 440 U.S. at 701 (alteration in original). The FCC, the agency created to enforce the FCA, has further "concluded that common carriers offer 'basic' information transport rather than 'enhanced' services, which implicate the transfer and storage of information that subscribers can access." Howard v. America Online, Inc.,

208 F.3d 741, 752 (9th Cir. 2000) (citation omitted). "Enhanced services 'include[] access to the Internet and other interactive computer networks.'" Id. (citation omitted); see also 47 C.F.R. § 64.702(a). Thus, the FCC has concluded that Internet Service Providers are generally not common carriers. See, e.g., In re Non-Accounting Safeguards, 11 F.C.C. Rcd. 21905, 22034 (1996). The Ninth Circuit has specifically upheld the FCC's construction of "common carrier" as a reasonable interpretation under Chevron.[20] See Howard, 208 F.3d at 752 (concluding that AOL is not a common carrier).

Here, Plaintiff has failed to allege that Google or HTC offer a discrete basic service in connection with the Google Phone. Plaintiff's First Amended Complaint does not even allege that Google or HTC, the phone manufacturer, are common carriers. (See FAC.) Moreover, much of Plaintiff's opposition, such as citation to the Google Phone's ability to provide email access, calendar synching and access to Google search functionality via the Internet, highlight the "enhanced" nature of the services and hence support a finding that Defendants are not common carriers. (See, e.g., Opp'n to Google's Motion to Dismiss at 10-11.)

In the alternative, Plaintiff contends that Google and HTC are common carriers because they are "re-sellers" of communications services for other mobile companies. (Opp'n to Google's Motion at 11-12.) Plaintiff relies on AT&T v. FCC,[21] where the Second Circuit held that re-sale of communications services, which "is the subscription to communications services and facilities by an entity and the reoffering of communications services and facilities to the public (with or without 'adding value') for profit," is a "common carrier" activity. Id. at 24. However, AT&T is inapposite, as Plaintiff has failed to allege either Google or HTC re-sell T-Mobile's phone services to the public.

Accordingly, the Court GRANTS Google and HTC's Motion to Dismiss as to Plaintiff's FCA claim.

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[20] 467 U.S. at 843.

[21] 572 F.2d 17 (2d Cir. 1978).

2. Plaintiff's State and Federal Breach of Warranty Claims

Defendants Google and HTC contend that Plaintiff's express warranty claim should be dismissed because Plaintiff fails to allege any factual statement promising connectivity or reasonable reliance thereon. (Google's Motion to Dismiss at 14-17.) Defendants Google and HTC further contend that Plaintiff's implied warranty claims should be dismissed on the grounds that: (1) Plaintiff fails to plead that the Google Phone is not merchantable; (2) Google disclaimed any implied warranty; and (3) Plaintiff cannot succeed on a claim against HTC because she lacks privity with HTC. (Id. at 14-21.) Finally, Defendants Google and HTC contend that Plaintiff's warranty claims are preempted under 47 U.S.C. § 332(c)(3). (Id. at 21-24.) Because the last issue may be dispositive, the Court addresses it first.

The FCA contains a broad preemption clause: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). "Under this section, a state enactment may be preempted either because: (1) the enactment regulates the rates charged by a mobile service; or (2) because the enactment regulates the market entry of any such service." Telesaurus VPC, LLC v. Power, 2010 U.S. App. LEXIS 20851 (9th Cir. Oct. 8, 2010).

To determine whether a cause of action is preempted, the key inquiry is "the nature of the claims . . . and what the effect of granting the relief requested would be." Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 989 (7th Cir. 2000). "In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service." Id. at 988. "Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." AT&T Co. v. Central Office Tel., Inc., 524 U.S. 214, 223 (1998). This is because "[r]ates do not exist in isolation. They have meaning only when one knows the services to which they are attached." Id. "[A] complaint that service quality is poor is really an attack on the rates charged for the service . . . ." Bastien, 205 F.3d at 988. In In re Apple iPhone 3G Prods. Liab. Litig., this Court interpreted the

Seventh Circuit's opinion in Bastien and held that warranty claims based on defendant's allegedly faulty 3G network were preempted by the FCA.[22]

Similarly here, Plaintiff's warranty claims are premised on allegations that Defendants knew that T-Mobile's 3G network was not sufficiently developed, and that Defendants deceived Plaintiff into paying higher rates for a service that Defendants knew they could not deliver. (See, e.g., FAC ¶¶ 32-41.) In a footnote in its Opposition, Plaintiff acknowledges that other cases have held that similar claims are preempted, but nonetheless "maintains that these claims are not preempted." (Opp'n to Google's Motion to Dismiss at 8, n.1.) Plaintiff, however, offers no analysis in support of this contention, nor does she attempt to distinguish the cases that appear directly on point.

The Court also finds that the warranty claims alleged against Defendants Google and HTC are tied to the claims alleged against Defendant T-Mobile, as Defendants allegedly "acted in concert" to sell more Google Phones than they knew could be supported on T-Mobile's 3G network. (FAC ¶ 54.) Based on Plaintiff's allegations, the Court finds that it is unable to reasonably separate Plaintiff's claims to pertain only to Defendants Google and HTC.[23] Thus, the Court finds that Plaintiff's state law claims are preempted because they are attacks on T-Mobile's rates and market entry. Similarly, the Court finds that Plaintiff's MMWA claim is not viable in the absence of any state law warranty claims because the MMWA merely provides a federal cause of action for state law implied warranty claims. See 15 U.S.C. § 2301(7).

Accordingly, the Court GRANTS Defendants Google and HTC's Motion to Dismiss as to Plaintiff's state law warranty claims and MMWA claim.[24]

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[22] No. C 09-02045-JW, 2010 U.S. Dist. LEXIS 79054, at *19-20 (N.D. Cal. Apr. 2, 2010)

[23] See In re Apple iPhone 3G Prods. Liab. Litig., 2010 U.S. Dist. LEXIS 79054, at *31-32 (finding that claims against Apple, the phone manufacture, were preempted because they could not be separated from the claims against the service provider defendant).

[24] As the Court did not evaluate Google's Terms of Sale for the Google Phone or HTC's limited warranty in reaching its decision, the Court DENIES Google's Request for Judicial Notice and Plaintiff's accompanying opposition as moot. (See, e.g., Docket Item Nos. 42, 51.)

D. Leave to Amend

At issue is whether the Court should grant leave to amend. Upon review of the First Amended Complaint, the Court discerns a potential basis for asserting claims under state warranty laws and the MMWA against Defendants Google and HTC. See, e.g., Shroyer v. New Cingular Wireless Services, Inc., No. 08-55028, 2010 WL 3619936, at *1 (9th Cir. Sept. 20, 2010).[25] For example, Plaintiff may be able to state claims against Google and HTC for actual defects of the Google Phone or its applications. Such claims do not challenge a carrier's rates or market entry and hence would not be preempted. Thus, the Court finds that leave to amend is warranted. However, any amendment shall be consistent with the terms of this Order, particularly factual basis for any statements these Defendants allegedly made and Plaintiff's reliance.

V. CONCLUSION

The Court GRANTS T-Mobile's Motion to Compel Arbitration Motion; DENIES T-Mobile's Motion to Dismiss as moot. The Court finds that this Order, as it relates to T-Mobile's Motion to Compel Arbitration is a final order which is appealable.[26] Judgment shall be entered in favor of T-Mobile accordingly.

[25] In Shroyer, a consumer filed suit against a telecommunications company, claiming that his cell phone service was severely degraded following a merger. Id., 2010 U.S. App. LEXIS 19814, at *6. The Ninth Circuit held that "it is the substance of the claim, not its form, that determines preemption." Id. at *6. Thus, after analyzing the plaintiff's complaint, the Ninth Circuit found that his fraud, breach of contract and misrepresentation claims were not preempted, while his unfair competition claim was preempted. Id. at *9.

[26] See Green Tree Fin'l Corp.-Alabama v. Randolph, 531 U.S. 79, 86-89 (2000) (holding that the district court's order compelling arbitration was a final decision with respect to arbitration within the meaning of the Federal Arbitration Act and therefore appealable).

The Court DENIES HTC's Motion to Compel Arbitration. The Court GRANTS Google and HTC's Motion to Dismiss with leave to amend. On or before **December 3, 2010**, Plaintiff shall file an Amended Complaint consistent with the terms of this Order.

Dated: November 16, 2010

JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

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Dated: November 16, 2010

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

United States District Court
For the Northern District of California