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

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

Plaintiff,)

v.)

GOOGLE, INC., a Delaware corporation; and)
HTC CORP., a Delaware corporation.)

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; and**
10. **Declaratory Relief;**

Judge: Hon. James Ware

DEMAND FOR JURY TRIAL

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

4 **INTRODUCTION**

5 1. This is a class action against Defendants on behalf of McKinney and a class of all
6 consumers who purchased the Nexus One mobile device (the “Google Phone”) manufactured and
7 marketed by Google and HTC and sold to access a 3G wireless network (the “Class”), arising out
8 of the failure of the Google Phone to maintain connectivity to a wireless network, as well as for
9 Defendants’ lack of customer support to assist Google Phone customers in coping with this
10 defect.

11 **THE PARTIES**

12 ***Plaintiff***

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

16 3. McKinney had a nightmarish experience with her Google Phone and the inept
17 customer service that flowed from her purchase of the Google Phone. As described further
18 below, McKinney based her purchasing decision on the facts Defendants promoted regarding the
19 Google Phone: namely, that it was a true “3G” device; that it was very fast when uploading or
20 downloading data from the Internet; and that it would work in a manner that justified the
21 premium price she paid for the Google Phone.

22 4. McKinney actually has owned three separate Google Phones. The first Google
23 Phone she owned was purchased through the Google web store. She had that phone for less than
24 a week. It never had 3G service at any point, and showed an error message regarding the phone’s
25 hardware that directed her to contact her mobile service provider. When she contacted T-Mobile,
26 she was told that T-Mobile could not help her and that she should contact Google directly. There
27 was no help line to call Google, and she had to wait on an email reply. McKinney was unable to
28 obtain phone service or use any of the features of the Google Phone during this time, but never

1 received a rebate or other compensation for that time during which her Google Phone was unable
2 to be used for its intended purpose. She returned her first Google Phone to Google.

3 5. McKinney's second Google Phone was shipped from Google after her first phone
4 was returned. Google first refused to send McKinney her second Google Phone without charging
5 her \$529 for the full price of another phone. Google said that they would reimburse McKinney
6 for that charge, but McKinney refused to pay Google a total of more than \$1,000 for two phones
7 that did not work. McKinney's experience with her second phone was similar to the first. She
8 returned it to Google approximately 3-4 weeks after it was shipped to her.

9 6. McKinney's third Google Phone was shipped to her from T-Mobile in
10 approximately March or April of 2010. She continues to use this phone, because it is her best
11 option for cellular phone and data service after spending hundreds of dollars and hours of her
12 personal time dealing with service failures.

13 7. Because McKinney refused to pay the additional \$529 dollars for a new phone,
14 Google refused to ship McKinney a "new" phone to replace the "new" phone that she purchased.
15 Instead, Google and T-Mobile only replaced McKinney's new, full-price Google Phone with a
16 "used" Google Phone that they represented had been refurbished.

17 8. McKinney has had to spend countless hours dealing unsuccessfully with customer
18 service issues. In addition to time, effort, and the taxing mental exertion of dealing with
19 Defendants and T-Mobile, McKinney also has lost money or property as a result of the failures of
20 her Google Phone, and has suffered cognizable injury as a result of the Defendants' conduct.

21 9. Because McKinney does not have extensive records of her communications with
22 Defendants and T-Mobile, she is informed and believes that Defendants and T-Mobile have
23 extensive records regarding McKinney's purchases and service requests.

24 ***Defendants***

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

28

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

3 ***Non-Defendant Third Party***

4 12. Non-Defendant T-Mobile, a third-party that served as McKinney’s wireless
5 carrier, is an American subsidiary of Germany-based Deutsche Telekom’s T-Mobile International
6 business, which has its principal place of business in Bellevue, Washington. T-Mobile provides
7 wireless voice and data communications services to subscribers in the U.S., including California.
8 T-Mobile was a provider of the telephone and data service plans for the Google Phone throughout
9 the U.S., including California.

10 13. McKinney is informed and believes and based thereon alleges that at all times
11 relevant herein each of the Defendants was the agent, servant, employee, subsidiary, affiliate,
12 partner, assignee, successor-in-interest, alter ego or other representative of each of the remaining
13 Defendants and was acting in such capacity in doing the things herein complained of and alleged.
14 In committing the unlawful and wrongful acts as alleged herein, Defendants planned and
15 participated in and furthered a common scheme by means of manufacturing, marketing and
16 selling the Google Phone for access to T-Mobile’s 3G network, despite Google Phone’s inability
17 to maintain connectivity to the 3G network. Further, Defendants failed to provide adequate
18 customer service to McKinney and the Class to cope with this defect.

19 **CLASS ACTION ALLEGATIONS**

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

25 15. The Class is currently defined as follows: “All persons within the United States
26 who purchased the Google Phone through www.google.com at any time between January 5, 2010
27 and the present and who either (a) received a rebate for their phone because they have a T-Mobile
28

1 service plan for access to its 3G wireless network or (b) paid the full price for an ‘unlocked’
2 Google phone for use on another 3G network.”

3 A. **Numerosity**

4 16. Class members are so numerous that individual joinder of all members is
5 impracticable. While the precise number of Class members has not been determined at this time,
6 and the facts to determine that number presently are within Defendants’ sole control, based on
7 public reports McKinney believes the number of Class members who bought a Google Phone and
8 purchased T-Mobile 3G service during the class period is well over one hundred thousand people.

9 17. Class members are readily ascertainable. Defendants’ sales, service plan and
10 subscription records contain information as to the number and location of all Class members, a
11 significant number of whom are likely still under service contracts with T-Mobile. Because
12 Google and T-Mobile should have accurate and detailed sales and service information regarding
13 individual Class members and up-to-date contact information, including their e-mail or SMS
14 addresses, an easy and accurate method is available for identifying and notifying Class members
15 of the pendency of this action.

16 B. **Commonality**

17 18. Common questions of law and fact predominate over questions affecting
18 individual Class members. These common questions of law and fact include the following:

- 19 (a) Whether Defendants advertised and sold the Google Phone by promoting the
20 characteristics of 3G speed and performance, when in fact the actual
21 performance was materially different, and worse, than the promises and claims
22 made by defendants;
- 23 (b) Whether Defendants failed to disclose material facts about limitations in the
24 speed and performance characteristics of the Google Phone to consumers, and;
- 25 (c) Whether Defendants forced Class members to pay unjust charges for the goods
26 and services they were sold, as well as whether that failure violates statutory and
27 common law prohibitions against such conduct, as detailed more fully below.
28

1 **C. Typicality**

2 19. McKinney’s claims are typical of the claims of the Class. McKinney sustained
3 injury and a loss of money or property arising from, and as a result of, Defendants’ unlawful
4 common course of conduct. McKinney purchased the Google Phone based in substantial part on
5 the uniform advertised claim of the phone having the characteristics of increased data transfer
6 speed and greater performance than was actually provided. Those representations were a
7 substantial factor in the decision to purchase the Google Phone. McKinney has received, at best,
8 sporadic 3G speed or connection to a 3G network with her Google Phone. She did not receive
9 any disclosures from Defendants before or after purchase explaining the material limitations in
10 the Google Phone and how its interaction with a 3G network materially reduced its performance
11 such that, for a significant period of time, the phones do not in fact provide 3G capability and
12 access.

13 **D. Adequacy of Representation**

14 20. McKinney can fairly and adequately represent and protect the Class’s interests.
15 McKinney’s claims are both typical of the Class’s claims and are based on facts that are common
16 to the Class. The Class representative has suffered similar injuries and damages arising from
17 Defendants’ conduct. As such, McKinney can adequately represent the Class because she seeks
18 the same or similar remedies that would be available to other Class members. No irreconcilable
19 conflicts exist between the positions of McKinney and those of the Class members.

20 21. McKinney has retained attorneys who are competent and experienced in litigating
21 significant class actions to represent their interests and that of the Class. Counsel have significant
22 experience in handling class actions and the types of claims asserted herein, and have been
23 appointed as class counsel by courts in other actions. McKinney and her counsel already have
24 done significant work in identifying and investigating the potential claims in this action, and are
25 willing to devote the necessary resources to vigorously litigate this action. McKinney and her
26 counsel are aware of their fiduciary responsibilities to the Class to represent fairly and adequately
27 the Class and are determined to discharge those duties by seeking the maximum possible recovery
28 for the Class based on the merits of these claims and the available resources.

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

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

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

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

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

25 26. McKinney are unaware of any insurmountable difficulties in the management of
26 this action to preclude its maintenance as a class action and believe their claims can all be
27 established at trial on a classwide basis.
28

1 **JURISDICTION AND VENUE**

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

7 28. This Court has jurisdiction over each Defendant because each Defendant is either a
8 corporation or an association organized under the laws of California, a foreign corporation or
9 association authorized to do business in California and registered with the California Secretary of
10 State, or does sufficient business in or has sufficient minimum contacts with California, or
11 otherwise intentionally avails itself of the California markets through the promotion, marketing,
12 advertising and/or sales of their products and services in California to render the exercise of
13 jurisdiction by California courts permissible under traditional notions of fair play and substantial
14 justice.

15 29. Under 28 U.S.C. section 1391, venue is proper in this District because Google is
16 headquartered in, and maintains its principal place of business within, this District, and HTC does
17 business and continues to do business in this District. Moreover, a substantial portion of the acts
18 and practices underlying this Complaint occurred here.

19 30. Because Google sold nearly all of the Google Phones through its web site,
20 essential acts consummating the sale of each and every Google Phone occurred in this District.

21 **STATEMENT OF FACTS**

22 31. Google is an American public corporation specializing in Internet search and
23 advertising services and recently, entered the retail business when it decided to develop and sell
24 “smart phones”, which are multi-functional mobile devices with advanced capabilities. “smart
25 phones” have become a lucrative market for companies, who are scrambling for market share in
26 this highly competitive field.

27 32. The Google Phone was “[d]eveloped in partnership with hardware manufacturer
28 HTC,” according to WIRED magazine, and was released throughout the United States on January

1 5, 2010. Matthew Honan, *WIRED*, “Google Debuts Android-Powered Nexus One
2 ‘Superphone’,” Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-
4 powered-nexus-one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-
3 powered-nexus-one-superphone/) (last visited June 8, 2010).

5 33. In the United States, T-Mobile was the exclusive wireless carrier that allowed the
6 Google Phone to be used on a 3G wireless network.

7 34. An estimated 20,000 Google Phones were sold during the first week of the phone’s
8 release.

9 35. The Google Phone was advertised widely. Perhaps the most important ad portal
10 for the Google Phone, however, was the Google.com homepage itself. Upon its release, Google
11 changed its homepage to be viewed as follows:



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20 Jason Kincaid, “The Nexus One Gets A Priceless Ad On Google’s Homepage,” *Tech Crunch*,
21 Jan. 6, 2010, at <http://techcrunch.com/2010/01/06/nexus-one-google-homepage/> (last visited June
22 8, 2010).

23
24 36. One commentator said as follows regarding that ad: “This is the kind of
25 advertising that money can’t buy, because it simply isn’t for sale. And because Google almost
26 never features ads on the page, you can be sure it’s going to be catching quite a few eyeballs. Last
27 time an ad popped up here John Gruber called it ‘the most valuable ad space on the entire
28

1 Internet’.” *Id.* Based on Google’s approximately 88 billion searches run each month during
2 2009, that statement has concrete validity.

3 37. Representations regarding the Google Phone were made to the public through
4 multiple points of contact. First, Class members were presented information created by Google
5 through the web site Google set up to sell its phone. Unfortunately, all of Google’s promotional
6 materials have been scrubbed from that address and, for an extended period of time, only a
7 “sorry” message was presented to the public when the public searches for information regarding
8 that device. See www.google.com/phone (visited Aug. 24, 2010). In fact, in July 2010, Google
9 determined that it would not sell any of the Nexus One model Google Phones. Suzanne Choney,
10 Google Will Stop Selling Nexus One Phones in US, [msnbc.com](http://www.msnbc.msn.com/id/38309866), July 19, 2010, at
11 <http://www.msnbc.msn.com/id/38309866> (last visited Nov. 29, 2010). Now, the online store for
12 Google telecommunications offers information regarding all of its Android platform devices. See
13 www.google.com/phone (last visited Nov. 29, 2010).

14 38. Even if she had wanted to print out records of the advertisements and visual
15 representations she saw, McKinney could not, because she does not own a printer. On
16 information and belief, however, discovery will bear out consistent representations from Google,
17 HTC, T-Mobile, and other entities regarding the speed and efficacy of the Google Phone as a true
18 3G device. At present all of that information is solely within the control of Defendants and other
19 third parties, and is unavailable to McKinney or the class.

20 39. Second, T-Mobile and other wireless carriers made representations to the public
21 regarding the Google Phone. In fact, McKinney specifically was told by a T-Mobile sales
22 representative that the Google Phone had 3G speed. McKinney also was told that the device was
23 “essential for web surfing and email.” T-Mobile told McKinney that she had to purchase the
24 Google Phone directly from Google, because they could not sell it to her, and the T-Mobile sales
25 representative directed McKinney to the Google web store, where she could complete her
26 purchase.

27 40. Those representations consistently presented the Google Phone as a true “3G”
28 device that would offer superior upload and download speeds, and a device that would be worth

1 the premium McKinney and the Class would pay both for their devices and for the more
2 expensive service plans that would be needed to support their devices.

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

8 42. Defendants represented to McKinney before she bought the Google Phone that the
9 Google Phone was at least as fast as the iPhone 3G, the primary competitor to the Google Phone.

10 43. The "3G" technology is alleged to feature faster peak data transfer rates over
11 previous networks of up to 7.2 Mbps (megabytes per second). These data transfer rates are
12 especially important to many "smart phone" users who employ their devices to run and store
13 applications; send and receive email; download and play media; and share pictures and
14 information via social networking systems.

15 44. Without purchasing a wireless service plan through T-Mobile for 3G network
16 access, the Google Phone cost buyers \$529. With a new T-Mobile wireless network service plan,
17 which is a two-year contract, customers paid \$179 for the Google Phone plus the additional
18 monthly charge for the T-Mobile wireless service, which may exceed \$100 per month.

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

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

27 47. In May 2010, almost five months after the Google Phone was first sold through
28 Google's online store, Google announced that it was shifting from an online-only retail strategy to

1 a “bricks-and-mortar” sales option. Tom Krazit, *cNet*, “Google turns Nexus One strategy upside
2 down,” May 14, 2010, at http://news.cnet.com/8301-30684_3-20005015-265.html (last visited
3 June 8, 2010). Google, therefore, opened new avenues of sales and service to later-arriving
4 customers that it refused to provide to “early adopters.”

5 48. T-Mobile customers who were under contract were allowed to upgrade and
6 purchase the Google Phone, but such an upgrade required those customers to pay the difference
7 between the \$529 price of the phone and any upgrade credit allotted to the customer’s account.
8 Those customers also are required to extend their T-Mobile contract for an additional two years.

9 49. McKinney, who was under contract to T-Mobile when she bought her first Google
10 Phone, was eligible for such an upgrade credit, but never received her discount from either
11 Defendants or T-Mobile.

12 50. Defendants consistently advertised the Google Phone, working in tandem with a
13 mobile network, as providing 3G data transfer rates. For consumers the appellation “3G” is
14 commonly understood to provide superior data transfer rates over older cell technology, which
15 worked on an “EDGE” standard.

16 51. McKinney understood the “3G” appellation to be consistent with the common
17 understanding of other users. The Nexus One was the first 3G phone McKinney has owned, and
18 a primary reason McKinney purchased this phone was its 3G capability.

19 52. Second generation multiple access standards known as GSM/EDGE, which are
20 commonly understood as working on 2G or 2.5G levels, have a maximum data transfer rate of
21 237 kbps (kilobytes per second). The Google Phone was designed to operate both on the 2G
22 network and a third generation, or 3G, multiple access standard network. According to
23 Defendants, 3G technology features faster peak data transfer rates over previous networks.

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

27 54. Contrary to Defendants’ assertions, McKinney and other members of the Class
28 experience connectivity on the 3G wireless network only a fraction of the time they are connected

1 to the T-Mobile's 3G wireless network, or receive no 3G connectivity at all for a significant
2 portion of time. The lack of 3G connectivity also causes McKinney and other members of the
3 Class to experience a significant number of dropped calls when the Google Phone cannot locate
4 an available 3G network connection. Defendants either knew, reasonably should have known, or
5 were obligated to understand that the Google Phone could not consistently perform at a 3G level,
6 contrary to the Defendants' representations.

7 55. McKinney never had 3G service on her first Google Phone, and has had 3G
8 service on later Google Phones that can best be described as sporadic and inconsistent. These
9 defects caused McKinney to be unable to use her phone for any purpose for a significant portion
10 of the time she has owned the Google Phone.

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

17 57. Google, HTC, and T-Mobile have not provided satisfactory answers with regard to
18 the defects experienced by McKinney and Class members.

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

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

27 “While the majority of Nexus One owners have been thrilled with their experience,
28 HTC is aware that some owners have reported having some technical issues with
their Nexus One devices,” the spokesperson told Betanews. HTC, Google, and T-

1 Mobile take all such reports very seriously, and are working closely together to
2 determine what issues may be behind these reports."

3 ****

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

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

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

16 Scott M. Fulton III, *Betanews*, "HTC admits customers have Nexus One 3G trouble, not yet
17 blaming the phone", Jan. 11, 2010, at [http://www.betanews.com/article/HTC-admits-customers-
18 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).

19 58. Even areas where T-Mobile's limited 3G coverage was represented to exist, T-
20 Mobile's network did not provide consistent 3G performance for Google Phone purchasers.
21 "Complaints on Google's support forum said users were unable to get 3G service in areas where
22 T-Mobile's maps indicated they should get it. Google doesn't have a solution for the problem yet,
23 [Google spokesperson Carolyn Penner] said." *San Jose Mercury News*, "Hype, complaints top
24 sales so far for Google's Nexus One phone," Jan. 21, 2010, at
25 [http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-
26 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).

27 59. Defendants failed to warn McKinney and Class members of the limitations
28 associated with using the Google Phone or its internal understanding that the T-Mobile 3G
network was not designed to provide consistent connectivity to its 3G network for Google Phone
users.

60. Moreover, Defendants did not provide adequate customer service to assist Google
Phone customers in helping resolve the issues. When customers contacted T-Mobile to request

1 assistance, the customer was provided with only an email address to contact Google directly. The
2 customer then had to wait for several days for a response:

3 New owners of the Nexus One, the latest touch-screen “smart phone” to run on
4 Android, Google’s mobile operating system, have found themselves at a loss
5 when it comes to resolving problems with the handset. They cannot call Google
6 for help, and the company warns that it may take up to 48 hours to respond to e-
7 mail messages.

8 ****

9 Early buyers of the device, like Kiran Konathala, a 27-year-old database
10 programmer in Long Branch, N.J., have complained of dropped calls, plodding
11 download speeds and connectivity snags. “The hardware is great, but the software
12 is a mess,” he said. “It’s not been a happy experience so far.”

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

15 Most people use the phone on T-Mobile’s network, which offers a subsidy if a
16 customer buys a contract, and the phone is made by HTC, a major Taiwanese
17 manufacturer. But it is sold exclusively by Google through a special Web-based
18 store.

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

23 *****

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

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

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

1 Jenna Wortham & Miguel Hefst, *N.Y. Times*, “Hey Google, Anybody Home?,” Jan. 13, 2010, at
2 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,
3 2010).

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

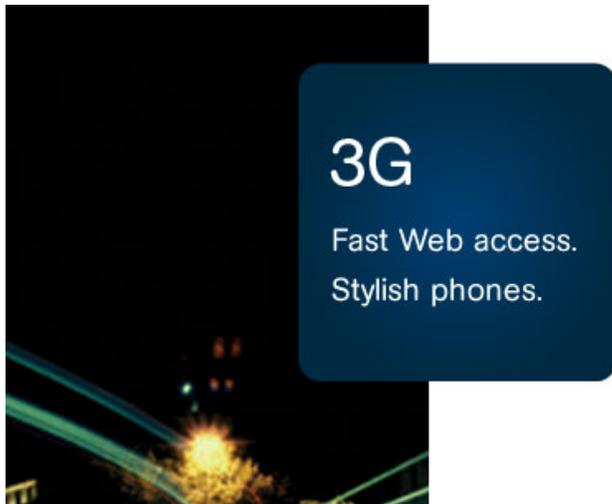
9 62. Despite knowledge that the Google Phone cannot maintain consistent 3G service
10 and that they do not provide adequate customer service, Defendants continue to manufacture,
11 design, promote and and/or sell the Google Phone as being able to operate on a 3G wireless
12 network.

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

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

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

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



 Enjoy the Internet on the go: Web pages download faster

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

 Send photos faster to friends and family

 Watch YouTube™ and other video files

 Do more with your phone

- Send e-mail with large attachments

- Download documents, applications, and

9

10 music faster

11 - Upload and share large files (photos, videos, presentations)

12 - Browse and download the online information you need—fast

13 http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_Go3G (last visited

14 June 8, 2010). Unfortunately, in an inconspicuous place in minute font at the bottom of that page,

15 T-Mobile offers the following qualifying language:

16 3G coverage is available only in certain markets. To provide the best network
17 experience for all our customers we may temporarily reduce data throughput for a
18 small fraction of customers who use a disproportionate amount of bandwidth. Your data session, plan, or service may be suspended, terminated, or restricted for
19 significant roaming or if you use your service in a way that interfaces with our
20 network or ability to provide quality service to other users. Some devices require
21 specific data plans; if you do not have the right plan for your device, you may not
22 be able to use data services. Additional charges may apply. Domestic use only.

23 67. McKinney and other members of the Class were injured in fact and lost money or
24 property as a result of Defendants' material misstatements and omissions of material fact, paying
25 more to receive inferior service in relation to what they believed they had purchased. McKinney
26 suffered injury-in-fact, because, as described above, the Google Phone she purchased was
27 unsatisfactory and worth less than what she paid for it. This includes the "refurbished" Google
28 Phone, for which she paid full price.

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

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

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

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

20 77. As discussed above, McKinney and members of the Class purchased the Google
21 Phone and the T-Mobile 3G wireless service plan directly from Google and/or T-Mobile and/or
22 their authorized agents. McKinney and members of the Class were injured in fact and lost money
23 or property as a result of such acts of unfair competition.

24 78. Defendants received the funds paid by McKinney and the members of the Class.
25 Defendants profited enormously by misrepresenting the speed and performance of the Google
26 Phone and not disclosing material problems and limitations with the Google Phone and its
27 interaction with T-Mobile's 3G wireless network as well as not providing adequate customer
28 service to assist Google Phone customers in resolving these issues. Defendants' revenues

1 attributable thereto are thus directly traceable to the millions of dollars paid out by McKinney and
2 the Class for the Google Phone, the required service plans and the associated fees.

3 79. Unless Defendants are enjoined from continuing to engage in the unlawful, unfair
4 and fraudulent business acts and practices as described herein, McKinney and the Class will
5 continue to be injured by Defendants' conduct.

6 80. Defendants, through their acts of unfair competition, have acquired money from
7 Class members. McKinney and the Class request this Court disgorge and restore such money to
8 them and enjoin Defendants from continuing to violate California Business and Professions Code
9 §17200, *et seq.*

10 81. The unlawful, unfair and fraudulent conduct described herein is ongoing and
11 continues to this date. McKinney and the Class, therefore, are entitled to relief described below
12 as appropriate for this Cause of Action.

13 **SECOND CAUSE OF ACTION**

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

16 ***Against All Defendants***

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

19 83. Defendants' acts and practices as described herein have deceived and/or are likely
20 to deceive members of the Class and the public. Defendants have promoted the Google Phone as
21 being able to operate with a 3G wireless network. In reality, the Google Phone connects over a
22 slower network a significant amount of the time and/or drops a significant number of calls while
23 searching for limited 3G network resources. Marketing the phone by claiming it connects to a 3G
24 network lead reasonable consumers, including McKinney, to believe they regularly can obtain 3G
25 network connectivity and significantly higher data transfer rates.

26 84. Defendants have also failed to provide adequate customer service to Google Phone
27 customers, including the McKinney and the Class, as they have to wait for numerous days to
28 receive a response to an email inquiry, which was the only way for early adopters to contact
Google, and during that time, their Google Phone can not use a wireless network as promised.

1 85. T-Mobile uniformly advertises and sells 3G network data plans for the Google
2 Phone and requires Class members to pay higher rates for such plans. For a significant amount of
3 time, McKinney and Class members are unable to access a 3G network and cannot consistently
4 get 3G connectivity and data transfer rates despite Defendants uniformly assertions of this
5 characteristic and selling it to them at a premium.

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

9 87. Such assertions are likely to deceive, and continue to deceive, the consuming
10 public for the reasons detailed above.

11 88. The above-described false, misleading, and deceptive assertions Defendants
12 disseminated continues to have a likelihood to deceive in that Defendants have failed to disclose
13 the true and actual performance of the Google Phone based on its interaction with T-Mobile's
14 insufficient 3G infrastructure. Defendants have failed to instigate a public information campaign
15 to alert consumers of these deficiencies, which continues to create a misleading perception of the
16 Google Phone's speed, performance and enhanced network and operating connectivity.

17 89. In making and disseminating the statements alleged herein, Defendants should
18 have known their advertisements were untrue and misleading in violation of California Business
19 & Professions Code § 17500, *et seq.* McKinney and the Class members based their decisions to
20 purchase the Google Phone in substantial part on Defendants' misrepresentations and omitted
21 material facts. The revenues to Defendants attributable to products sold in those false and
22 misleading assertions amount to millions of dollars for the Google Phone and the required service
23 plans. McKinney and Class members were injured in fact and lost money or property as a result.
24 McKinney and the Class suffered injury in fact and lost money and property as a result of
25 Defendants' unlawful conduct.

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

1 Google Phone. Whether the problem is with the Google Phone itself or with the Class member's
2 wireless carrier's network, or a combination of the two, is irrelevant as to whether the warranty
3 was breached.

4 102. Moreover, Defendants do not provide adequate customer service for Google Phone
5 customers who are forced to wait for numerous days to receive a response to an email inquiry,
6 which was the only way to contact Google, and during that time, their Google Phone could not be
7 used on a 3G wireless network.

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

13 104. McKinney and the Class purchased their Google Phone with the reasonable
14 expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G
15 network. Defendants' assertions that the Google Phone has 3G network capability constitutes a
16 warranty that the product would operate as promoted during their useful life, upon which
17 McKinney and the Class reasonably acted. The Google Phone is not fit for its warranted,
18 advertised, ordinary and intended purpose of providing reliable 3G network connectivity and is in
19 fact defective, or would not pass without objection in the trade or industry in terms of being
20 unable to provide consistent and reliable 3G network connectivity. This defect has manifested for
21 all McKinney and Class members as they do not consistently receive 3G network connectivity
22 using their Google Phone.

23 105. Defendants' breach of the warranty described above also constitutes a violation of
24 Cal. Civ. Code §1792, *et seq.*

25 106. McKinney and Class members are entitled to damages as a result of such breaches.

26 107. McKinney and the Class request relief as described below as appropriate for this
27 Cause of Action.
28

1 **FIFTH CAUSE OF ACTION**

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

3 ***Against All Defendants***

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

6 109. McKinney and Class members are “consumers” within the meaning of the
7 Magnuson-Moss Act.

8 110. Defendants are “suppliers” and “warrantors” within the meaning of the Magnuson-
9 Moss Act. The Google Phone is a “consumer product” within the meaning of the Magnuson-
10 Moss Act.

11 111. Defendants’ written affirmations of fact, promises and/or descriptions as alleged
12 herein are each a “written warranty” as to the Google Phone providing consistent 3G network
13 connectivity and/or there exists an implied warranty for the sale of such products within the
14 meaning of the Magnuson-Moss Act.

15 112. For the reasons detailed above, Defendants breached these express and implied
16 warranties, as the Google Phone did not perform as Defendants represented or were not fit for
17 their intended use. Defendants have refused to remedy such breaches, and their conduct caused
18 damages to McKinney and members of the Class.

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

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

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1 **SIXTH CAUSE OF ACTION**

2 **(Negligence)**

3 ***Against All Defendants***

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

6 116. At all times mentioned herein, Defendants undertook a duty to properly
7 manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use
8 and sell the Google Phone to function as advertised and represented on T-Mobile's 3G network.
9 Defendants' duties alleged herein applied to McKinney and the Class.

10 117. The Google Phone, either alone or by acting in combination with T-Mobile's 3G
11 network with which it exclusively operates, was negligently tested, manufactured, built and/or
12 designed, which causes McKinney and the Class to fail to receive reliable and sustained
13 connectivity to T-Mobile's 3G network.

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

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

21 120. Defendants knew or should have known that McKinney and the Class would suffer
22 foreseeable injuries and harm as a result of Defendants' failure to exercise reasonable ordinary
23 care as alleged. Defendants' negligence was a direct, substantial, legal and proximate cause of
24 the injuries, damages, harm and economic loss that Plaintiff and the Class suffered, and will
25 continue to suffer, as described herein.

26 121. As a proximate result of Defendants' negligence, McKinney and the Class suffered
27 separate economic damages and loss from the purchase of the Google Phone itself, as alleged
28 herein.

1 **SEVENTH CAUSE OF ACTION**

2 **(Negligent Misrepresentation)**

3 ***Against All Defendants***

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

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

9 124. Defendants had no reasonable grounds for believing their representations were true
10 because the Google Phone has consistently had issues with providing reliable 3G network
11 connectivity, and T-Mobile's 3G network could not provide consistent 3G network connectivity
12 to customers who purchased service for their Google Phone 3G, based on T-Mobile's
13 overburdened and under-supported 3G network. Defendants should have known, or had a duty to
14 learn, about the true facts that contradicted their representations.

15 125. In making these representations to McKinney and the Class, Defendants intended
16 to induce McKinney and the Class to purchase the Google Phone.

17 126. At all times herein, McKinney and the Class were unaware of the falsity of
18 Defendants' statements.

19 127. McKinney and the Class reasonably acted in response to the statements made by
20 Defendants when they purchased a Google Phone and were required to also sign up for T-
21 Mobile's 3G network service plan and other increased costs.

22 128. As a proximate result of Defendants' negligent misrepresentations, McKinney and
23 Class members purchased a Google Phone and are locked into a two-year service plan with T-
24 Mobile for 3G network connectivity that is spotty at best and for which McKinney and Class
25 members pay a premium.

26 129. McKinney and the Class have been damaged and therefore request appropriate
27 relief as described below.

28

1 **EIGHTH CAUSE OF ACTION**

2 **(Fraud and Deceit)**

3 ***Against All Defendants***

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

6 131. Defendants, from the time the Google Phone and service plans on T-Mobile's 3G
7 network were first made available to Class members, consistently deceived McKinney and the
8 Class by: (1) making false uniform misrepresentations to McKinney, the Class, and the public,
9 including, but not limited to, claims that the Google Phone and required service plans would
10 provide customers with consistent 3G network connectivity; and (2) concealing from McKinney,
11 the Class and the public, despite having superior, if not exclusive, knowledge of material facts to
12 the contrary and despite having partially spoken on the issue, that the Google Phone would not
13 consistently function in terms of consistently accessing a 3G network and providing increased
14 data transfer rates due to the manufacture and design of the Google Phone or the limitations of
15 wireless carriers' 3G networks. McKinney and the Class were unaware these representations were
16 false.

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

20 133. Defendants either misrepresented or suppressed the material fact that the Google
21 Phone's 3G network could not provide reliable and sustained 3G network connectivity.
22 Defendants suppressed the material fact that T-Mobile's 3G network could not handle the influx
23 of users and bandwidth demands as a result of the marketing and sale of the Google Phone.

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

26 135. The misrepresentations and concealment of material facts were made and
27 conducted by Defendants with the intent to mislead and induce McKinney and the Class to
28 purchase the Google Phone and the required 3G service plan, and had the effect of doing so.

1 revenues and profits derived from the sale of these products and services and the return of any
2 monies by which Defendants were unjustly enriched.

3 **TENTH CAUSE OF ACTION**

4 **(Declaratory Relief)**

5 ***Against All Defendants***

6 144. McKinney incorporates by reference each and every preceding paragraph as
7 though fully set forth herein.

8 145. An actual controversy over which this Court has jurisdiction now exists between
9 McKinney, the Class and Defendants concerning their respective rights, duties and obligations for
10 which McKinney desires a declaration of rights under the applicable claims asserted herein.

11 146. McKinney and Class members may be without adequate remedy at law, rendering
12 declaratory relief appropriate in that:

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

21 147. McKinney requests a judicial determination and declaration of the rights of Class
22 members, and the corresponding responsibilities of Defendants. McKinney also requests an order
23 declaring Defendants are obligated to pay restitution to all members of the Class as appropriate
24 and otherwise pay over all funds Defendants wrongfully acquired either directly or indirectly
25 because of the illegal conduct by which Defendants were unjustly enriched.

26 148. A judicial declaration is necessary and appropriate at this time under the
27 circumstances so the parties may ascertain their respective rights and duties.

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

DATED: December 3, 2010

Attorneys for Plaintiff Mary McKinney and the Proposed Class

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JURY DEMAND

McKinney and the Class demand a trial by jury on all claims so triable.
DATED: December 3, 2010 Attorneys for Plaintiff Mary McKinney and the Proposed Class

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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 Joint
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: December 3, 2010

Attorneys for Plaintiff Mary McKinney and the
Proposed Class

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