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GOOGLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MARY MCKINNEY, Individually and on behalf of All others Similarly Situated,

Plaintiff,

v.

GOOGLE INC., a Delaware Corporation; HTC CORP., a Delaware Corporation; and T-MOBILE USA, INC., a Delaware Corporation,

Defendants.

Case No. 5:10-CV-01177-JW

DEFENDANTS GOOGLE INC. AND HTC CORPORATION'S NOTICE OF MOTION AND MOTION TO DISMISS SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 25, 2011
Time: 9:00 a.m.
Dept: 8
Judge: Hon. James Ware

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on April 25, 2011, in Courtroom 8, on the fourth floor of the above-titled United States District Court, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable James Ware, defendants Google Inc. and HTC Corporation will, and hereby do, move this Court, pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), for an order dismissing plaintiff Mary McKinney's Second Amended Complaint for failure to state a claim upon which relief can be granted, on the grounds that: (i) plaintiff's various claims based on alleged misrepresentations and related omissions are not pled with Rule 9(b) particularity; (ii) plaintiff's warranty-based claims fail because they are preempted, essential elements are not sufficiently pled, Google's warranty disclaimer bars the claims, plaintiff fails to plead the requisite pre-suit notice of breach, and plaintiff lacks privity with HTC; (iii) plaintiff's negligence claim fails under the economic loss rule; (iv) plaintiff's unjust enrichment and declaratory relief claims are not independently viable claims; (v) plaintiff asserts the same claims this Court held to be preempted in the *iPhone* litigation; and (vi) plaintiff's customer service complaints do not support any viable legal claim.

This Motion is based upon this Notice of Motion and Motion, the attached Memorandum of Points and Authorities and exhibits thereto as well as the Request for Judicial Notice filed concurrently herewith, all records on file with this Court, and such oral and written argument as may be presented at, or prior to, the hearing on this matter.

Dated: February 22, 2011,

Respectfully submitted,

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By: */s/ Steven B. Weisburd* .

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I. INTRODUCTION

After the Court dismissed the three claims asserted in her First Amended Complaint, Plaintiff Mary McKinney ("Plaintiff") in her Second Amended Complaint ("SAC") now tries to assert ten claims concerning the Nexus One smartphone, allegedly marketed and sold by Google Inc. ("Google"), and manufactured by HTC Corporation ("HTC"). But the amended complaint does not cure the fatal defects that resulted in dismissal of Plaintiff's last complaint, and merely asserts additional claims that suffer the same flaws and further infirmities as well.

The Nexus One is an advanced mobile cellular device that was designed to operate, and does operate, on both 2G/EDGE and 3G wireless networks. *See* SAC, ¶¶ 41, 52-53, 64. The premise of Plaintiff's case continues to be that Google and HTC *misrepresented* and *warranted* that the Nexus One would maintain "consistent connectivity" to 3G networks, including T-Mobile's 3G network, and thus would operate as what Plaintiff calls a "true 3G device." *Id.*, ¶¶ 38, 40, 58-59, 65. The Court dismissed Plaintiff's last complaint with leave to amend on her counsel's assurance that Plaintiff would plead with particularity statements actually made by Google and HTC representing that the Nexus One "will *consistently* function at 3G all of the time."[1] But the amended complaint contains no such allegations. Plaintiff's failure to satisfy Rule 9(b) compels dismissal of her claims based on alleged misrepresentations about the Nexus One's 3G speed and performance – including her statutory claims under California's Unfair Competition Law, Bus. & Prof. Code §§ 17200 *et seq.* ("UCL"), False Advertising Law, Bus. & Prof. Code §§ 17500 *et seq.* ("FAL"), and Consumer Legal Remedies Act, Civ. Code §§ 1750 *et seq.* ("CLRA"), and her common law fraud, negligent misrepresentation, and unjust enrichment claims (First, Second, Third, Seventh, Eighth, and Ninth Causes of Action).

Plaintiff's remaining claims also clearly fail as a matter of law. Plaintiff's "warranty" claims (Fourth and Fifth Causes of Action) are indistinguishable from the ones this Court already dismissed as preempted under 47 U.S.C. § 332(c)(3), and thus remain preempted. As before, they

[1] Hearing Transcript, Nov. 1, 2010, at 24:15-25:4 (emphasis added).

also fail for other reasons as well. Plaintiff's "express" warranty claim fails because she does not plead any statement actually made by Google and HTC constituting an affirmation of fact promising that the Nexus One would provide "consistent" 3G connectivity or that she actually saw and relied on any such statement. Plaintiff's "implied" warranty claim fails because allegations about inconsistent 3G connectivity do not render the Nexus One not merchantable and unfit for its ordinary purpose, particularly given that, as the SAC acknowledges, the Nexus One is designed to and does operate on 2G/EDGE networks when 3G coverage is unavailable. New allegations in the amended complaint regarding devices that were replaced are a red herring. Plaintiff alleges that those devices were replaced because they were inoperable on any wireless network, not because they did not maintain "consistent" 3G connectivity (which is the theory upon which all of her claims are based). Given that Plaintiff admits that her current Nexus One provides phone and data services, though apparently not "consistently" as she would like on a 3G network, these allegations actually refute rather than support her warranty claims, and show that the applicable Nexus One warranty was honored. Moreover, Plaintiff's warranty claims are barred by Google's lawful disclaimer of Nexus One warranties in its Terms of Sale contract with Plaintiff, and she does not even purport to assert any claim under HTC's Limited Warranty. Plaintiff's federal warranty claim falls along with her legally defective state-law claims.

Plaintiff's "negligence" claim (Sixth Cause of Action) fails as a matter of law under the economic loss rule – which bars any negligence claim where, as here, the plaintiff alleges purely economic loss and does not allege that the product at issue caused the type of physical injury and damage to other property required to support a tort claim for negligence. Plaintiff's "unjust enrichment" and "declaratory relief" claims (Ninth and Tenth Causes of Action) are not independent causes of action, and therefore must be dismissed under settled law.

Finally, as this Court has already found in dismissing the last complaint, Plaintiff's claims are also preempted under this Court's reasoning in the *iPhone* litigation. Plaintiff's complaints about Defendants' "customer service" do not support any viable claim.

Accordingly, as explained below, Plaintiff has asserted no viable claim against Google or HTC, and her Second Amended Complaint should be dismissed without leave to amend.

II. BACKGROUND

A. Procedural History

On January 29, 2010, Plaintiff Mary McKinney filed in California state court her original complaint, which contained the same claims and core allegations in the current complaint, and also attached as an exhibit Google's "Terms of Sale." *See* Docket No. 2 (Notice of Removal) & Exh. A (Nexus One Phone – Terms of Sale). Defendants removed the action to federal court on March 22, 2010. *Id.* In the wake of this Court's preemption ruling in the *iPhone* litigation, Plaintiff on June 14, 2010 filed her First Amended Complaint ("FAC"), which asserted three claims against Google, HTC, and T-Mobile USA, Inc. ("T-Mobile"), based on the Nexus One's alleged failure to maintain "consistent" connectivity to T-Mobile's 3G wireless network: (1) a claim under the Federal Communications Act ("FCA") premised on false advertising; (2) a state-law claim for breach of express warranty and the implied warranty of merchantability; and (3) a federal warranty claim under the Magnuson-Moss Warranty Act.

The Court granted T-Mobile's motion to compel arbitration, and dismissed T-Mobile from the action. *See* Nov. 16, 2010 Order (Docket No. 73), at 5-12, 17. The Court also granted Google and HTC's Rule 12(b)(6) motion to dismiss all claims asserted in the First Amended Complaint, with leave to amend. *Id.* at 17.

As to Plaintiff's allegations that Google and HTC misrepresented that the Nexus One would maintain "consistent" 3G connectivity, the Court highlighted the First Amended Complaint's failure to plead its allegations with particularity, and offered Plaintiff's counsel the "challenge" – which counsel accepted on the record – to allege with particularity that Google and HTC actually made the "misrepresentation" to Plaintiff that the Nexus One "will consistently function at 3G all of the time." Nov. 1, 2010 Hr'g. Tr. at 24:24-25:4. The Court's Order emphasized that "any amendment shall be consistent with the terms of this Order," and must set forth "particularly" Plaintiff's "factual basis for any statements these Defendants actually made and Plaintiff's reliance." Nov. 16, 2010 Order, at 17.

The Court also dismissed the First Amended Complaint's breach of warranty claims, ruling that they were preempted by the Federal Communication Act's express preemption

provision, 47 U.S.C. § 332(c)(3), because they were tied to and could not be separated from preempted attacks on T-Mobile's 3G market entry and rates charged for 3G cellular service in connection with the Nexus One. *See* Nov. 16, 2010 Order, at 15-16. Those preempted warranty claims were based on allegations that the claimed 3G connectivity problems were caused "either" by T-Mobile's inadequate network infrastructure and 3G service, "or" by some possible defect in the Nexus One device itself, "or a combination of the two." FAC, ¶ 62; *see also id.*, ¶¶ 44, 50, 54. The Court granted leave to amend for Plaintiff's counsel to plead, if they could consistent with Rule 11, a breach of warranty claim premised on some "actual defects" in the Nexus One device itself that caused the alleged 3G connectivity problems. Nov. 16, 2010 Order, at 17; *see also* Nov. 1, 2010 Hr'g. Tr. at 23:10-24:5, 26:20-27:2. The Court's Order noted, but left open for resolution, Google and HTC's other arguments and contentions why Plaintiff's breach of warranty claims had to be dismissed. Nov. 16, 2010 Order, at 15-16.

B. Summary Of Plaintiff's Allegations In The Second Amended Complaint[2]

Like her prior complaint, Plaintiff's Second Amended Complaint alleges that the Nexus One is "an advanced mobile cellular phone" – or "smartphone" – that "operates using the Android Mobile Technology Platform," and has an array of "features," including Internet access, email, texting, and other audio and video capabilities. SAC, ¶¶ 1, 31, 41, 53. Plaintiff alleges that the Nexus One is designed to operate on either a 3G wireless network or a "2G" wireless network (also known as "GSM/EDGE"), and to switch between networks so that the Nexus One's phone and data features can be used when a 3G connection is unavailable for whatever reason. *Id.*, ¶¶ 52-53. The Nexus One allegedly could be purchased online from Google for $529 as an "unlocked" phone usable with any wireless service (*e.g.*, AT&T), or at a discounted price of $179 when purchased with a new two-year contract for T-Mobile's wireless service. *Id.*, ¶¶ 44-46.

Plaintiff Mary McKinney, a Pennsylvania resident, alleges that she bought her Nexus One on or about January 9, 2010 over the Internet from Google's website, *id.*, ¶ 2, but has been displeased with its alleged failure to maintain "consistent connectivity" to T-Mobile's 3G network. *Id.*, ¶ 59; *see also id.*, ¶¶ 1, 19, 54, 55, 58, 65, 83, 85, 100-04, 123, 131-33. Plaintiff

[2] The Complaint's well-pleaded allegations are assumed true for purposes of this motion only.

also has been displeased with Google and HTC's "customer support" and "customer service." SAC, ¶¶ 1, 3-9, 60, 62, 78, 102, 118.

Plaintiff alleges that she has owned three Nexus One devices. *Id.*, ¶ 4. She alleges that she was "unable to obtain phone service or use any of the features" on the first device and that her experience with the second device "was similar to the first." *Id.*, ¶¶ 4-5. Both devices were replaced. *Id.* Plaintiff alleges that her current Nexus One provides phone and data services, but only "sporadic and inconsistent" connectivity to a 3G network as opposed to a 2G/EDGE network. *Id.*, ¶¶ 4-9, 55. Plaintiff expresses frustration at Google's "inept customer service," including having to wait several days to receive an "email" response from Google, which has allegedly caused her emotional distress. *Id.*

Although her current Nexus One device admittedly provides "cellular phone and data service," SAC, ¶ 6, Plaintiff asserts class-wide claims premised on the Nexus One's failure to maintain "consistent" 3G connectivity. Plaintiff alleges that "the infrastructure of T-Mobile's 3G wireless network and/or the Google phone itself were defective and inadequate" to provide "consistent" 3G connectivity. *Id.*, ¶ 70; *id.*, ¶ 65 ("combination of the phone and/or the network made it difficult" to "receive reliable and sustained" 3G connectivity). According to Plaintiff, "[w]hether the problem is with the Google phone itself or with the ... wireless carrier's network, or a combination of the two is irrelevant" to her claims. *Id.*, ¶ 101.

As in her last complaint, Plaintiff alleges that she bought the Nexus One with the "expectation" that it would maintain "consistent and reliable 3G network connectivity." *Id.*, ¶ 104. Google and HTC allegedly deceived her into believing that the Nexus One was a "true '3G' device" by allegedly *misrepresenting* and *warranting* that the Nexus One would maintain "consistent connectivity" to T-Mobile's 3G network and other 3G networks. *Id.*, ¶¶ 1, 3, 58-59; *see also id.*, ¶¶ 3, 40, 53-54, 58-59, 62, 65, 68, 83, 85, 101, 111, 117, 123, 131-133, 142, 149.

But nowhere does her Second Amended Complaint identify any factual representation made by either Google or HTC about 3G connectivity, much less a statement promising "consistent" 3G connectivity. As before, the only statement by Google alleged with any particularity in the Second Amended Complaint says merely: "Experience Nexus One, the new

Android phone from Google." *Id.* at ¶ 35. And as before, Plaintiff does not identify *any* advertising or marketing statements about the Nexus One made by HTC. Instead, Plaintiff continues to rely on entirely conclusory allegations that Google and HTC made "material misrepresentations and omissions of material fact" about the Nexus One's 3G connectivity, *id.*, ¶¶ 68-70, and that the Nexus One failed to "consistently perform at a 3G level, contrary to the Defendants' representations." *Id.*, ¶ 54. Plaintiff further alleges that Google and HTC "failed to warn" that "the T-Mobile 3G network was not designed to provide consistent connectivity to its 3G network" for "users" of the Nexus One. *Id.*, ¶ 59.

Based on these allegations, Plaintiff's Second Amended Complaint asserts ten claims.

In her First, Second, and Third Causes of Action, Plaintiff asserts statutory claims based on California's UCL, FAL, and CLRA. Each claim is premised on alleged misrepresentations by Google and HTC that the Nexus One would provide "consistent" 3G connectivity, or about their customer service. *See id.*, ¶¶ 59, 62, 65, 73-74, 78, 83-89, 95.[3] On each claim, Plaintiff alleges that she and putative class members suffered injury in fact and lost money or property as a result of Google and HTC's supposed misrepresentations. *Id.*, ¶¶ 77, 89, 97.

Relatedly, Plaintiff in her Seventh and Eighth Causes of Action asserts common law claims for "Negligent Misrepresentation" and "Fraud and Deceit." She alleges that Google and HTC negligently "represented" that the Nexus One would provide "sustained and reliable connectivity to the 3G network," which was false because "T-Mobile's 3G network could not provide consistent 3G network connectivity" to Nexus One users. SAC, ¶¶ 123-24. On her fraud claim, Plaintiff further alleges that Google and HTC made "false uniform misrepresentations" promising the Nexus One would maintain "consistent 3G network connectivity," and also "conceal[ed]" that the Nexus One would not provide "consistent[]" connectivity to "a 3G network" despite their superior knowledge and "having partially spoken on the issue" of the Nexus One's 3G connectivity. *Id.*, ¶¶ 131-33.

[3] In her First Cause of Action under the UCL, Plaintiff asserts that Google and HTC's alleged misrepresentations and related omissions constitute "fraudulent" and "unfair" business practices, SAC, ¶¶ 73-75. Because she references only her other causes of action as the predicate for any "unlawful" business practices claim, *id.*, ¶ 76, any such claim fails with her substantive claims.

In her Fourth and Fifth Causes of Action, Plaintiff asserts breach of warranty claims under California state law and the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.* ("MMWA"), respectively. Plaintiff alleges that she and putative class members all "entered into agreements" with Google and HTC and "received uniform warranties," which expressly or impliedly warranted that the Nexus One would "provide consistent connection to a 3G wireless network." SAC, ¶¶ 100-01. The Nexus One's failure to maintain "consistent" 3G connectivity allegedly breaches Defendants' express and implied warranties. *Id.*, ¶¶ 101, 111.

In her Sixth Cause of Action, Plaintiff broadly asserts a tort claim for "Negligence" premised on the Nexus One's failure to provide "consistent" 3G connectivity, which allegedly caused Plaintiff and putative class members to suffer harm. *Id.*, ¶¶ 116-21. The only alleged harm specified in the complaint, however, is "economic damages and loss." *Id.*, ¶ 121.

Plaintiff's Ninth Cause of Action asserts an "Unjust Enrichment" claim based on allegations that Google and HTC have been unjustly enriched by their "false and misleading statements" given that the Nexus One does not maintain "consistent" 3G connectivity. *Id.*, ¶¶ 141-43. The Tenth Cause of Action for "Declaratory Relief" seeks a declaration regarding the parties' respective rights and obligations, *id.*, ¶¶ 145-49.

Plaintiff asks the Court to certify a nation-wide class, for an injunction and a restraining order, for declaratory relief, and for an award of damages, restitution, disgorgement, fees, costs, and interest. *See* Prayer for Relief.

III. LEGAL STANDARD

A Rule 12(b)(6) motion to dismiss is properly granted unless the complaint alleges "enough" well-pleaded "facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). To survive a Rule 12(b)(6) motion, the "non-conclusory 'factual content'" and reasonable inferences therefrom must be "plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 968-72 (9th Cir. 2009) (internal citations omitted). Any conclusory allegations are properly disregarded. *Id.* The Court must consider only the well-pleaded allegations in Plaintiff's Second Amended Complaint. *Id.*

Under the doctrine of "incorporation by reference," courts on Rule 12(b)(6) motions to dismiss routinely consider the terms of written agreements between the parties where the document is not attached to the complaint, as long as the plaintiff references it in the complaint and its authenticity is not reasonably subject to dispute. *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 996 (N.D. Cal. 2009); *see also Long v. Hewlett-Packard Co.*, 2007 U.S. Dist. LEXIS 79262, at **17-18 n.3 (N.D. Cal., July 27, 2007) (Ware, J.) (considering on Rule 12(b)(6) motion the terms of defendant's limited warranty and disclaimer in document referenced in, but not attached to, complaint), *aff'd*, 316 F. App'x 585 (9th Cir. 2009). Here, the Second Amended Complaint explicitly alleges and references the "agreements" that Plaintiff and putative class members entered whereby they allegedly received "uniform warranties in connection with the[ir] purchase of" the Nexus One. SAC, ¶ 100. Plaintiff and her counsel attached the exact copy of Exhibit 1 to their original complaint filed in California state court and alleged that it was the agreement between Google and Plaintiff. *Compare* Exh. 1; *with* Docket No. 2 (Notice of Removal) & Exh. A (Nexus One Phone – Terms of Sale). HTC's Limited Warranty is attached as Exhibit 2. The documents are referenced in and integral to Plaintiff's claims, and their authenticity cannot reasonably be disputed. Hence, under the incorporation-by-reference doctrine, the Court may properly consider the entirety of Exhibits 1 and 2.[4]

IV. ARGUMENT

After compelling arbitration of Plaintiff's claims against T-Mobile, the Court granted Google and HTC's Rule 12(b)(6) motion and dismissed Plaintiff's First Amended Complaint with leave to amend after explaining to counsel what would have to be alleged in any amended complaint to support a viable legal claim against Google and HTC. Specifically, the Court afforded Plaintiff's counsel the opportunity (1) to plead with particularity some actionable

[4] Under the incorporation-by-reference doctrine, the defendant may properly "attach[] the document to its motion to dismiss" where, as here, the plaintiff has for whatever reason not attached it to the complaint or explicitly referenced its contents therein. *Knievel*, 393 F.3d at 1076-77. In addition to this procedure, Google's Terms of Sale and HTC's Limited Warranty are also properly subject to judicial notice, as explained in Defendants' Request For Judicial Notice ("RFJN") filed concurrently herewith.

"misrepresentation" by Google and HTC that Plaintiff saw and relied upon promising that the Nexus One would consistently operate at a 3G level; and (2) to plead some breach of warranty claim that is different from the preempted claims asserted in Plaintiff's First Amended Complaint, and instead based on allegations showing that the alleged 3G connectivity problems were caused by "actual defects" in the Nexus One device, as opposed to T-Mobile's 3G wireless network. *See* Nov. 1, 2010 Hr'g Tr., at 24:6-25:7; Nov. 16, 2010 Order, at 17. The Second Amended Complaint does not do either. Indeed, Plaintiff still does not identify a single statement actually made by Google or HTC regarding 3G connectivity, let alone one promising "consistent" 3G connectivity. As to what caused the alleged 3G connectivity problem, Plaintiff identifies no actual defect in the Nexus One that she claims to be responsible for the problem. Instead, as before, Plaintiff continues to assert that it is irrelevant "[w]hether the problem is with the Google Phone itself or with the Class member's wireless carrier's network, or a combination of the two." SAC, ¶ 101. As explained below, all of Plaintiff's claims must be dismissed for multiple reasons, and none of them states a claim for relief that is "plausible on its face." *Twombly*, 550 U.S. at 570. Thus, Google and HTC's motion to dismiss is again due to be granted, this time without leave to amend.

A. All Of Plaintiff's Claims Must Be Dismissed For Failure To State A Claim On Which Relief May Be Granted.

1. Because Plaintiff Has Not Satisfied Rule 9(b)'s Particularity Requirements, Her Fraud-Based Claims Based On Alleged Misrepresentations Must Be Dismissed (First, Second, Third, Seventh, Eighth, And Ninth Causes Of Action).

In its First, Second, Third, Seventh, Eighth, and Ninth Causes of Action, the Second Amended Complaint asserts statutory claims under California's UCL, FAL, and CLRA, as well as common law claims for fraud, negligent misrepresentation, and unjust enrichment. Each claim is premised on alleged misrepresentations by Google and HTC promising that the Nexus One would "consistently" operate at a 3G level. *See* SAC, ¶¶ 18(a), 38-42, 50, 54-55, 58-59, 62, 65, 68, 73, 78, 83-90, 95, 123-126, 128, 131-137, 142; *see also* pp. 4-7, *supra.*

Federal Rule of Civil Procedure 9(b) requires that all averments of fraud must be plead "with particularity." FED. R. CIV. PROC. 9(b). As the Ninth Circuit has held, Rule 9(b)'s

heightened particularity requirement applies to all misrepresentation and related omission/non-disclosure claims sounding in fraud – regardless of how the claim is styled, and regardless of whether it is labeled a "fraud" claim. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 706-07 (N.D. Cal. 2009) (Ware, J.). Rule 9(b) applies to Plaintiff's allegations of misrepresentation in her First, Second, Third, Seventh, Eighth, and Ninth Causes of Action – regardless of whether the claim is asserted under California's UCL, FAL, or CLRA, *Kearns*, 567 F.3d at 1125; *Yumul v. Smart Balance, Inc.*, 2010 U.S. Dist. LEXIS 86394, **10-11 (C.D. Cal., Mar. 24, 2010); common law fraud under theories of affirmative misrepresentation, non-disclosure, or concealment, *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 968, 974-75 (N.D. Cal. 2008); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1001 (N.D. Cal. 2009); negligent misrepresentation, *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003); or unjust enrichment, *In re Actimmune Mktg. Litig.*, 2009 U.S. Dist. LEXIS 103408, **50-51 (N.D. Cal., Nov. 6, 2009).

But Plaintiff's Second Amended Complaint does not plead with the requisite particularity *any representation* by Google or HTC about the Nexus One's 3G connectivity – much less any "misrepresentation" promising that the Nexus One would "operate consistently on a 3G level." SAC, ¶¶ 3, 37-40, 54, 69, 83, 95, 123, 131-133. In fact, Plaintiff does not allege a single statement by HTC about the Nexus One at all. The *only* alleged statement by Google is the same entirely non-actionable statement from Google's website that Plaintiff quoted in her First Amended Complaint: "Experience Nexus One, the new Android phone from Google." *Id.*, ¶ 35. Thus, Plaintiff still has failed to satisfy Rule 9(b)'s requirements – which required her to plead with particularity the "specific content" of any "false representations" supposedly made by Google and HTC, *Mangindin*, 637 F. Supp. 2d 706-07, including "'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (citation omitted).[5]

[5] Plaintiff's suggestion that she cannot be expected to plead with Rule 9(b) particularity the what, when, who, and where as to any Google and HTC misrepresentations *made to her* promising "consistent 3G connectivity" is frivolous – as these facts are uniquely in her own possession and "clearly within plaintiff's knowledge." *Marolda*, 672 F. Supp. 2d at 1001-02 Although Plaintiff alleges that "discovery" would provide her a way to uncover statements made to others by Google

Plaintiff's failure to satisfy Rule 9(b)'s requirements in the Second Amended Complaint flies in the face of her counsel's statements to the Court made to secure leave to amend:

> THE COURT: ...[W]here is it that it's alleged that the representation is that [the Nexus One] would always operate on 3G all of the time?
>
> PLAINTIFF'S COUNSEL: Your Honor, that has not been pled specifically in this complaint.
>
> THE COURT: Can you? ... I'm willing to give you leave [to amend] if you want to go back and see whether or not you can meet the challenge that is being offered, namely, to allege a misrepresentation based on a representation that it will consistently function at 3G all of the time.
>
> PLAINTIFF'S COUNSEL: Your Honor, I believe that we can.

Nov. 1, 2010 Hg. Tr. at 24:15-25:4.[6] Despite this colloquy, Plaintiff's counsel has not pled with particularity *any* alleged statements by Google or HTC that the Nexus One "will consistently function at 3G all of the time." *Id.* As to Google and HTC, the Second Amended Complaint still includes only conclusory allegations that lack the particularity demanded by Rule 9(b). *See, e.g.*, SAC, ¶¶ 3, 37-40, 50, 54, 69, 83, 95, 123, 131-133.

The few allegations added to the Second Amended Complaint do not satisfy Rule 9(b) or support any claim against Google and HTC. Indeed, Plaintiff adds a statement allegedly made to her by a "*T-Mobile* sales representative" that the Nexus One "was 'essential for websurfing and email'" and "had 3G speed." SAC, ¶ 39 (emphasis added). This well illustrates why Rule 9(b) requires Plaintiff to plead the "specific content of the false representations as well as the *identities of the parties to the misrepresentations*." *Mangindin*, 637 F. Supp. 2d 706-07 (emphasis added). Plaintiff's allegation cannot support claims against Google or HTC for statements they never made in advertising or marketing the phone; rather, at most, it relates to claims she might choose

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and HTC that supposedly promised the Nexus One would provide "consistent" 3G connectivity, SAC, ¶ 38, one of Rule 9(b)'s purposes is to protect defendants from precisely this sort of fishing expeditions in "discovery." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

[6] Following this colloquy with Plaintiff's counsel, the Court's Order granting leave to amend stressed not only that "any amendment shall be consistent with the terms of this Order," but also that Plaintiff was directed to plead "particularly" the claimed "factual basis for any statements these Defendants allegedly made" promising "consistent" 3G connectivity as well as "Plaintiff's reliance" thereon. Nov. 16, 2010 Order at 17.

to pursue in arbitration against non-defendant T-Mobile.[7] Moreover, even that alleged T-Mobile statement does not promise that the Nexus One will maintain "consistent" 3G connectivity on T-Mobile's 3G wireless network, much less other 3G wireless networks.

Plaintiff also adds that Google and HTC supposedly "misrepresent[ed]" the "customer service" they promised to provide to help Nexus One users resolve "connectivity" issues. SAC, ¶ 72. But, again, Plaintiff does not identify with Rule 9(b) particularity any actual statement made by either Google or HTC about "customer service," let alone one promising some particular level of guaranteed customer service for the Nexus One that Google and HTC failed to provide.

Finally, Plaintiff variously tries to expand her omission and non-disclosure allegations, *see* SAC, ¶¶ 59, 68-70, 131, but this effort also fails. As the Ninth Circuit has held, "nondisclosure is a claim for misrepresentation in a cause of action for fraud" that "must be pleaded with particularity under Rule 9(b)." *Kearns*, 567 F.3d at 1126; *see also Marolda*, 672 F. Supp. 2d at 1002 (Rule 9(b) applies to "claims of nondisclosure and omission, as varieties of misrepresentations"); *Grant v. Aurora Loan Servs., Inc.*, 2010 U.S. Dist. LEXIS 98034, **36-41 (C.D. Cal., Sept. 10, 2010) (Rule 9(b) applies to fraudulent concealment claims); *Stearns v. Select Comfort Retail Corp.*, 2009 U.S. Dist. LEXIS 48367, **29-31 (N.D. Cal., June 5, 2009) (dismissing concealment claim with prejudice for failure to satisfy Rule 9(b)). Here, Plaintiff's omission-based allegations are pled with no more particularity than her deficient allegations of affirmative misrepresentation by Google and HTC. In fact, they are just as conclusory as those held to be insufficient by the Ninth Circuit in *Kearns*, 567 F.3d at 1126-27, and by Judge Patel of the Northern District of California in *Marolda*, 672 F. Supp. 2d at 1002.[8] Moreover, given that

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[7] Given that T-Mobile is no longer a defendant, Plaintiff cannot even pretend that Google and HTC might somehow be held vicariously liable for an oral statement a T-Mobile representative allegedly made to her. Indeed, the Second Amended Complaint references "Non-Defendant T-Mobile," SAC, ¶ 12, and then purports to allege only that Google and HTC, as "Defendants," acted as the "agent ... or other representative" of the other "Defendants." *Id.*, ¶ 13.

[8] As Judge Patel explained, "to plead the circumstances of omission with specificity," the plaintiff must "describe the content of the omission and where the omitted information should or could have been revealed, as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information." *Marolda*, 672 F. Supp. 2d at 1002. Like the plaintiff in *Marolda*, Plaintiff comes nowhere close to satisfying that standard.

Plaintiff does not and cannot identify any Google or HTC representation mentioning or discussing the Nexus One's level of 3G connectivity, her allegation that Google and HTC's omissions are somehow rendered actionable by virtue of their having "partially spoken on the issue" of the Nexus One's 3G connectivity, SAC, ¶ 131, is both legally and factually meritless. *See Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187, *11 (N.D. Cal., Feb. 10, 2011); *Daugherty v. American Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006).

In sum, the Second Amended Complaint does not plead with particularity *any* actionable representation by Google or HTC about the Nexus One. It does not plead with particularity any representation that the Nexus One would "consistently" operate at a 3G level, or any representation promising some level of customer service Google and HTC failed to provide. Nor does it plead with the requisite specificity that Plaintiff actually relied on any particularly identified misrepresentation by Google and HTC promising the Nexus One would maintain "consistent" 3G connectivity. *Baltazar*, 2011 U.S. Dist. LEXIS 13187, *9. The First, Second, Third, Seventh, Eighth, and Ninth Causes of Action must be dismissed for failure to satisfy the particularity pleading requirements of Federal Rule of Civil Procedure 9(b).

2. Plaintiff's Warranty-Based Claims Must Be Dismissed For Multiple Reasons (Fourth And Fifth Causes of Action).

Plaintiff asserts the same warranty-based claims in her Fourth and Fifth Causes of Action that she asserted in her First Amended Complaint. *Compare* SAC, ¶¶ 99-114; *with* FAC, ¶¶ 60-76. In her Fourth Cause of Action, Plaintiff asserts a state-law claim for breach of "express warranty" and the "implied warranty of merchantability." SAC, ¶¶ 99-107.[9] In her Fifth Cause

[9] While Plaintiff's state-law warranty claims are premised on California common law, her Fourth Cause of Action also includes a conclusory reference to violation of "Cal. Civ. Code § 1792, *et seq.*" (SAC, ¶ 105), which is California's Song-Beverly Act. By its terms, the Song-Beverly Act explicitly applies only to consumer goods "'sold at retail in this state'" – *i.e.*, "purchased … in the state of California." *In re NVIDIA GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, *5 (N.D. Cal., Nov. 19, 2009). Plaintiff is a Pennsylvania resident who alleges that she bought her Nexus One over the Internet from Google's website. SAC, ¶ 2. Because she does not allege that she purchased the phone at retail in California, any warranty claim under the Song-Beverly Act fails. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1142 (C.D. Cal. 2005) (dismissing Song-Beverly claim brought by Massachusetts resident who "purchased the product over the internet"). In any event, the same fundamental defects that doom Plaintiff's common law warranty claims – discussed at length below – also require dismissal of any Song-Beverly Act claim as well. *See, e.g., Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009).

of Action, Plaintiff again tries to assert a federal warranty claim under the MMWA. SAC, ¶¶ 108-114. The claims fail as a matter of law for multiple reasons.

a. Plaintiff's State-Law Warranty Claims Should Be Dismissed Because They Are Indistinguishable From The Preempted Claims The Court Already Dismissed.

The Court already ruled that Plaintiff's state-law warranty claims in her First Amended Complaint were preempted under the FCA's express preemption provision, 47 U.S.C. § 332(c)(3), because they were tied to preempted attacks on T-Mobile's 3G wireless network, and could not reasonably be separated from those preempted claims. *See* Nov. 16, 2010 Order, at 15-16. The Court granted leave to amend for Plaintiff to plead a *different* claim premised on "actual defects" in the Nexus One, which its Order says would not implicate any preempted challenge to deficiencies the 3G wireless network of T-Mobile or other carriers. *Id.* at 17. But the state-law warranty claims in the Second Amended Complaint are indistinguishable from the claims this Court already dismissed as preempted, and thus they remain preempted.

Indeed, the Second Amended Complaint's warranty claims are based on the same allegations regarding the cause of the alleged 3G connectivity "problems" as those in the First Amended Complaint that the Court held to trigger express FCA preemption – *i.e.*, that the lack of "consistent" 3G connectivity is caused by some unidentified defect in the Nexus One device itself "or" by a "wireless carrier's network" and inadequate 3G infrastructure, "or" some "combination of the two." SAC, ¶ 101; *see also id.*, ¶ 70 ("the infrastructure of T-Mobile's 3G wireless network and/or the Google phone itself were defective and inadequate" to provide consistent 3G connectivity), ¶ 65 ("combination of the phone and/or the network made it difficult ... to receive reliable and sustained connectivity on the 3G wireless network"); *compare* FAC ¶¶ 44, 50, 54, 62.

Plaintiff asserts that it is "irrelevant" for purposes of "whether the warranty was breached" if the problem is with the device itself or with T-Mobile's inadequate 3G infrastructure (or that of other wireless carriers). SAC, ¶ 101. But Plaintiff misses the point. The distinction is critical for purposes of *express FCA preemption*, and also with respect to the Court's grant of leave to amend to try to plead a *non-preempted* and legally viable breach of warranty claim. Consistent with Rule 11, however, Plaintiff does not and cannot plead that the claimed 3G connectivity problems

are in fact caused by some "actual defect" in the Nexus One device, Nov. 16, 2010 Order, at 17, as opposed to and distinct from "T-Mobile's insufficient infrastructure," SAC, ¶ 88. On the contrary, other allegations in the Second Amended Complaint reveal that the problem is indeed with T-Mobile's network – as Plaintiff herself alleges both that "T-Mobile's network did not provide consistent 3G performance for Google Phone purchasers," SAC, ¶ 58, and that "the T-Mobile 3G network was not designed to provide consistent connectivity to its 3G network for Google Phone users," *id.*, ¶ 59. Plaintiff's state-law warranty claims will inescapably result in protracted litigation about the adequacy of T-Mobile's 3G infrastructure, as well as that of other carriers, and implicate preempted assessments about each carrier's 3G market entry and reasonableness of their rates charged for 3G service for the Nexus One. Thus, as before, the state-law warranty claims in the Second Amended Complaint are preempted under 47 U.S.C. § 332(c)(3) because they are tied to, and inseparable from, preempted claims challenging the adequacy of the 3G wireless networks of T-Mobile and other 3G wireless carriers.[10]

b. Plaintiff's Warranty Claims Fail For Lack Of Pre-Suit Notice.

Plaintiff does not allege that she gave pre-suit notice of the alleged breach of express or implied warranty, as required by California Commercial Code section 2607(3)(A). *See, e.g., Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187, *5 (N.D. Cal., Feb. 10, 2011); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 380 (1974). Consequently, Plaintiff's state-law warranty claims must be dismissed. *See Andrade v. Pangborn Corp.*, 2004 U.S. Dist. LEXIS 22704, *61 (N.D. Cal. Oct. 22, 2004); *Vogel v. Thrijii Drug Co.*, 43 Cal. 2d 184, 187 (1954).

c. Plaintiff's "Express Warranty" Claim Fails Because She Does Not – And Cannot – Allege Any Factual Statement By Google Or HTC Promising Any Guaranteed Level Of 3G Connectivity, Or Reasonable Reliance On Any Such Statement.

Any breach of express warranty claim should be dismissed unless the plaintiff has sufficiently alleged: "(1) the exact terms of the warranty; (2) reasonable reliance on the warranty;

[10] As before, Plaintiff's claims trigger both the 3G "market entry" and "rates" charged prongs of express FCA preemption, Nov. 16, 2010 Order, at 17, even though either would suffice under section 332(c)(3), which preempts any state regulation of market entry "or" rates charged by any commercial mobile service. 47 U.S.C. § 332(c)(3); *see also Ball v. GTE Mobilnet of Calif.*, 81 Cal. App. 4th 529, 543 (2000).

and (3) a breach of warranty that proximately causes the plaintiff's injury." *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 987 (N.D. Cal. 2009); *Avago Techs. United States, Inc. v. Venture Corp.*, 2008 U.S. Dist. LEXIS 105528, **11-12 (N.D. Cal., Dec. 22, 2008) (Ware, J.); *cf.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (because "an express warranty arises from the manufacturer's statements," it is a "contractual commitment voluntarily undertaken").

Plaintiff still does not, and cannot, allege essential elements of her claim. *First*, Plaintiff fails to plead facts sufficient to show that Google or HTC made any express warranty about the Nexus One's level of 3G connectivity. In any action for breach of express warranty, the plaintiff must plead and prove facts sufficient to show that the defendants actually and explicitly made "affirmations of fact or promises" that became part of the basis of the bargain, thereby voluntarily undertaking an actual "express warranty." *Pisano v. American Leasing*, 146 Cal. App. 3d 194, 197-98 (1983); *McKinniss v. Sunny Delight Beverages Co.*, 2007 U.S. Dist. LEXIS 96108, **16-17 (C.D. Cal., Sept. 4, 2007). The premise of Plaintiff's claim is that Google and HTC expressly warranted that the Nexus One device was guaranteed to provide "consistent" 3G connectivity. SAC, ¶¶ 100-104; *see also id.*, ¶¶ 50-55; *see also* Nov. 1, 2010 Hg. Tr. at 23:10-24:19. Yet nowhere does Plaintiff identify any factual representation by Google or HTC about the Nexus One's 3G connectivity that could possibly constitute the sort of explicit "affirmation of fact or promise" required to support an "express warranty" claim. This alone is dispositive. *See, e.g.*, *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir. 1997) (express warranty claim fails where defendant made "no explicit guarantees" nor any "specific and unequivocal written statement" sufficient to constitute the requisite "affirmations of fact or promises that became part of the basis of the bargain"); *accord McKinniss*, 2007 U.S. Dist. LEXIS 96108, at **16-17; *Baltazar*, 2011 U.S. Dist. LEXIS 13187, *5.[11]

[11] Moreover, the SAC's failure to plead that Google and HTC made any express *written* warranty promising that the Nexus One would maintain "consistent" 3G connectivity is fatal to any claim under the Song-Beverly Act and MMWA – both of which require the existence of an express "written" warranty. *See* CAL. CIV. CODE § 1791.2; *Keith v. Buchanan*, 173 Cal. App. 3d 13, 19-20 (1985); *see also* 15 U.S.C. § 2301(6).

Second, Plaintiff's failure to plead her own "reasonable reliance" on any supposed factual representation by Google or HTC amounting to an express warranty further requires dismissal of her claim. *Sanders*, 672 F. Supp. 2d at 988 (dismissing breach of express warranty claim where plaintiff failed to allege "reasonable reliance" on any specific representations actually made by defendant); *see also Moncada v. Allstate Ins. Co.*, 471 F. Supp. 2d 987, 997 (N.D. Cal. 2006) (express warranty claim failed where plaintiff had not read and relied on defendant's representations allegedly constituting express warranties). Instead, the Second Amended Complaint alleges that Plaintiff purchased the Nexus One "with the reasonable expectation" that she would receive "consistent" 3G connectivity, SAC, ¶ 104, but Plaintiff does not and cannot allege that this "expectation" is based on any factual representation made by Google and HTC.

Moreover, the disclaimers in Google's Terms of Sale attached as Exhibit 1, and HTC's Limited Warranty attached as Exhibit 2, contradict Plaintiff's allegations that Google and HTC promised that the Nexus One was guaranteed to provide any particular level of connectivity, much less "consistent" 3G connectivity. The Google "Terms of Sale" attached to Plaintiff's original complaint not only provide that "3G network availability may depend on your mobile carrier" (and, thus, is not guaranteed and warranted), but also direct Plaintiff to check with her mobile carrier to confirm that the device's technical specifications are "compatible with 3G coverage in [Plaintiff's] area." Terms of Sale, at p. 2 (Exh. 1 hereto, and to RFJN). Further still, the Google Terms of Sale refer to HTC's limited one-year replacement or repair warranty, and include the following disclaimer:

> OTHER THAN THE ABOVE AND TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, GOOGLE EXPRESSLY DISCLAIMS ALL WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, REGARDING ANY DEVICES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON-INFRINGMENT.

Id. at pp. 4-5.[12] HTC's Limited Warranty, in turn, explicitly excludes from coverage "defects"

[12] Google's warranty disclaimer is an enforceable contractual limitation. *See Inter-Mark USA, Inc., v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, *8 (N.D. Cal., Feb. 27, 2008); *see also Fogo v. Cutter Labs., Inc.*, 68 Cal. App. 3d 744, 758 (1977) ("clearly" the phrase "the foregoing warranty is exclusive and in lieu of all other warranties" appearing at the end of party's limited warranty constituted disclaimer). Indeed, this Court in *Long v. Hewlett-Packard Co.* upheld and enforced a

caused by "a defective function of the cellular network or other system." *See* Exh. 2. Thus, not only does Plaintiff fail to allege any statement by Google or HTC that could constitute an actionable "express warranty" concerning the Nexus One's 3G connectivity, but Defendants' written disclaimers and warranties refute the reasonableness of any claimed reliance by her on some feigned (and non-existent) express warranty about the Nexus One's connectivity to T-Mobile's 3G network or any other 3G wireless network.

d. Plaintiff's "Implied Warranty of Merchantability" Claim Fails.

i. Plaintiff Fails To Plead Facts Showing The Nexus One Is Not Merchantable And Unfit For Its Ordinary Purpose.

"Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law." *American Suzuki Motor Corp. v. Superior Ct. (Carney)*, 37 Cal. App. 4th 1291, 1295-96 (1995). The implied warranty of merchantability guarantees that products have only "a minimum level of quality" and are free of *fundamental* defects that are "so basic" that they render the item not "merchantable" at all and "unfit for its ordinary purpose." *Id.* at 1291, 1295-96. As the Ninth Circuit has held, the implied warranty of merchantability is breached where defendant's product "lacks even the most basic degree or fitness for ordinary use." *Birdsong*, 590 F.3d at 958; *see also Tietsworth v. Sears, Roebuck and Co.*, 2009 U.S. Dist. LEXIS 98532, *36 (N.D. Cal., Oct. 13, 2009) ("'mere manifestation of a defect by itself does not constitute a breach of the implied warranty of merchantability" because "there must be a fundamental defect that renders the product unfit for its ordinary purpose'") (citation omitted).

Here, Plaintiff's claim is premised on the illegitimate notion that all Nexus One devices are not "merchantable" and "unfit" for their ordinary purpose as smartphones to the extent that the Nexus One does not operate *consistently* on a 3G wireless network, and instead sometimes operates on a 2G/EDGE network when 3G network service is unavailable. *See* SAC, ¶¶ 100-01.

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comparable disclaimer, which provided: "To the extent allowed by local law, the above warranties are exclusive and no other warranty or condition, whether written or oral, is expressed or implied and HP specifically disclaims any implied warranties or conditions of merchantability, satisfactory quality, and fitness for a particular purpose." 2007 U.S. Dist. LEXIS 79262, at **16-17.

Even if it was somehow Plaintiff's "expectation" that the Nexus One would maintain "consistent" 3G connectivity, *id.*, ¶¶ 103-04, the implied warranty of merchantability "does not impose a general requirement that goods precisely fulfill the expectation of the buyer" and instead guarantees only "a minimum level of quality." *American Suzuki*, 37 Cal. App. 4th at 1296.

Rather than supporting her claim that all Nexus One devices are unmerchantable and unfit, Plaintiff's own allegations continue to refute the claim. Indeed, as her Second Amended Complaint admits, the Nexus One *can and does function and operate* even in those instances when 3G connectivity is unavailable and the device switches to a 2G/EDGE wireless network. *See* SAC, ¶ 52 (conceding that Nexus One "was designed to operate both on the 2G network and a third generation, or 3G, multiple access standard network"); ¶ 53 (conceding that Nexus One's "phone and data operations" can "still be used" whenever "3G connectivity [is] unavailable"). Consequently, the Nexus One is entirely merchantable and fit for its ordinary purpose despite Plaintiff's desire that it operate more "consistently" on a 3G wireless network as opposed to a 2G/EDGE wireless network. Indeed, courts repeatedly have rejected claims for breach of the implied warranty of merchantability where – as here – they were premised on alleged problems with products that were still operational as to the level of functionality protected by the doctrine of implied warranty of merchantability. In *Birdsong*, for instance, the Ninth Circuit affirmed dismissal of an implied warranty of merchantability claim where Apple's iPod could still function for its ordinary purpose of "listening to music" despite the plaintiff's hearing-damage allegations related to listening to iPod's music at higher levels. 590 F.3d at 958. Likewise, in *Tietsworth*, the court dismissed implied warranty of merchantability claims based on allegations that washing machines allegedly "stop in mid-cycle," and required users to restart them "sometimes more than once." 2009 U.S. Dist. LEXIS 98532, at **36-37. Despite the significant inconvenience to users, the claims failed as a matter of law because the plaintiffs failed to plead facts sufficient to show that the machines were not fit for the ordinary purpose "of washing clothes." *Id.* Similarly here, even Plaintiff's allegations confirm that the Nexus One is entirely merchantable and operational as a smartphone in instances when the device switches from a 3G network to a 2G/EDGE network when 3G coverage is unavailable.

Finally, Plaintiff's new allegations in the amended complaint regarding the three Nexus One devices she has owned actually refute her claims, rather than support them. Plaintiff alleges that her first two Nexus One devices were replaced because she was "unable to obtain phone service or use any of the features" of the devices. SAC, ¶¶ 4-5. In other words, they were replaced under warranty because they were inoperable on any wireless network, not because they provided inconsistent connectivity to T-Mobile's 3G wireless network. Even assuming those replaced devices were inoperable, that does not support the claims Plaintiff asserts, which are based on the theory that all Nexus One devices are unmerchantable because they provide "sporadic and inconsistent" 3G connectivity.[13] *Id.*, at ¶ 55. Because Plaintiff admits that her current Nexus One device does provide "phone and data service," *id.*, at ¶ 6, the Nexus One is entirely merchantable and fit for its ordinary purpose despite Plaintiff's allegations.

ii. Google's Disclaimer Of Any Implied Warranty Of Merchantability Also Defeats The Claim.

Plaintiff's merchantability claim also fails as a matter of law in light of Google's legally enforceable disclaimers of any implied warranty of merchantability. *See* Exh. 1; RJN, Exh. 1 at p. 4. Under settled law, merchants may lawfully disclaim the implied warranty of merchantability so long as they do so in a conspicuous fashion and specifically mention merchantability. *See, e.g.*, Cal. Comm. Code § 2316(2); *Inter-Mark USA, Inc., v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, *21 (N.D. Cal., Feb. 27, 2008) (under section 2316(2), "an implied warranty of merchantability may be excluded in a written document in which the disclaimer is conspicuous and mentions merchantability"; dismissing implied warranty of merchantability claim where plaintiff's software licensing agreement with defendant contained "a valid disclaimer of any implied warranties"); *accord Long*, 2007 U.S. Dist. LEXIS 79262, at *16. Here, Google's explicit disclaimer of any "IMPLIED WARRANTIES OF MERCHANTABILITY" is conspicuously set forth in the Google Terms of Sale (*see* Exh. 1; RFJN, Exh. 1, at p. 4), and

[13] As Plaintiff's counsel has admitted on the record, the claim Plaintiff wishes to pursue on a class-wide basis in this case is "not the phone won't operate at all" but rather "that the phone vacillates between 2G and 3G" and thereby fails to provide "consistent" 3G connectivity. Nov. 1, 2010 Hg. Tr. at 22:13-24:5.

readily satisfies section 2316(2)'s requirements.

iii. Plaintiff's Implied Warranty Claim Against HTC Also Fails Because She Lacks Privity With HTC.

In addition to the fatal defects set forth above, Plaintiff's implied warranty claim against HTC fails because she purchased her Nexus One from Google, SAC, ¶¶ 2, 4, and therefore lacks privity with HTC. "California courts have expressed a policy against holding manufacturers liable to end-consumers under a theory of implied warranty where the parties are not in privity." *In re NVIDIA GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *36 (citing cases). Because Plaintiff does not, and cannot, allege that she purchased her Nexus One from HTC, her implied warranty claim against HTC also fails as a matter of law.

e. Plaintiff's Federal Warranty Claim Under The Magnuson-Moss Warranty Act Fails (Fifth Cause Of Action).

Plaintiff's federal warranty claim under the Moss-Magnuson Warranty Act necessarily fails and must be dismissed along with Plaintiff's defective state-law warranty claims. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (plaintiff with no state-law warranty claim has no federal MMWA claim); *accord*, Nov. 16, 2010 Order, at 16 ("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.").

3. Plaintiff's "Negligence" Claim Seeking Purely Economic Damages Is Barred Under The Economic Loss Rule (Sixth Cause of Action).

In her Sixth Cause of Action, Plaintiff tries to assert a "Negligence" claim against Google and HTC by which she seeks recovery of only "economic loss" and "economic damages," without any allegation that the Nexus One caused her physical injury or damage to other property. *See* SAC, ¶¶ 115-121. The claim fails as a matter of law under California's "economic loss rule," which precludes "negligence" claims where the claimed harm is purely economic and it is not alleged that the product at issue caused personal injury or physical damage to other property. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 18 (1965); *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1051 (N.D. Cal. 2004); *see also Aas v. Superior Court* (*William Lyon Co.*), 24 Cal. 4th 627, 636 (2000) ("no recovery is allowed for economic loss alone" in any "actions for

negligence"). "Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988-89 (2004) (internal quotations and citations omitted). Because Plaintiff does not and cannot allege that the Nexus One's alleged failure to maintain "consistent" 3G connectivity caused personal injury or physical damage to other property, the Sixth Cause of Action fails as a matter of law.

4. Plaintiff's "Unjust Enrichment" and "Declaratory Relief" Claims Are Not Independently Viable Claims, And Must Be Dismissed (Ninth and Tenth Causes of Action).

Finally, Plaintiff's Ninth and Tenth Causes of Action also must be dismissed because they are not independently viable causes of action. Indeed, courts have repeatedly dismissed "unjust enrichment" claims indistinguishable from Plaintiff's Ninth Cause of Action because, under California law, unjust enrichment is simply "not a cause of action." *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004); *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008) (affirming dismissal of unjust enrichment claim); *In re NVIDIA GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *38 (dismissing unjust enrichment claim with prejudice because it is not cognizable under California law); *see also Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1270-71 (N.D. Cal. 2007) (dismissing unjust enrichment claim because it added "nothing" to plaintiff's available relief under substantive claims).[14]

Where a declaratory relief claim "is entirely commensurate with the relief sought through [the] other causes of action," it is properly dismissed as "duplicative and unnecessary." *Mangindin*, 637 F. Supp. 2d at 707-08; *Carramerica Realty Corp. v. NVIDIA Corp.*, 2006 U.S. Dist. LEXIS 75399, *14 (N.D. Cal. Sept. 29, 2006) (dismissing declaratory relief claim that was "wholly derivative" of substantive claims asserted in complaint). Because Plaintiff's declaratory relief claim is wholly derivative and duplicative of her other claims, it should be dismissed.

[14] Moreover, another reason this claim fails is that Plaintiff pleads the existence of "agreements" with Google and HTC, SAC, ¶ 100, and California law is clear that an unjust enrichment claim "will not lie" where there is an enforceable agreement between the parties. *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996).

5. Consistent With This Court's *iPhone* Ruling, All Of Plaintiff's State-Law Claims Are Preempted Under 47 U.S.C. § 332(c)(3).

Finally, Plaintiff asserts in her Second Amended Complaint the same core allegations and all of the same claims that the Court held to be preempted under 47 U.S.C § 332(c)(3) in *In re Apple iPhone 3G Prods. Liab.*, No. 09-2045, slip op. at 9, 14 (N.D. Cal., Apr. 2, 2010) (claims against Apple under UCL, FAL, CLRA, breach of warranty, negligence and fraud dismissed as preempted attacks on 3G "market entry" and "rates" charged). Because 3G is not even in the Nexus One's name – unlike the "iPhone 3G" – express FCA preemption is even more plainly applicable here than in *iPhone*. Moreover, Plaintiff's continued inability to plead with particularity any *misrepresentation* by Google and HTC regarding 3G connectivity, let alone promising "consistent" 3G connectivity, confirms that this case is far more like the preempted infrastructure and market entry claims in *iPhone* and *Bastien v. AT&T Wireless Servs., Inc*, 205 F.3d 983, 989-90 (7th Cir. 2000), and entirely unlike the true misrepresentation claims pled with Rule 9(b) particularity that escaped preemption in *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1039-42 (9th Cir. 2010), which did not even involve the "market entry" prong of FCA preemption. *Id.* at 1040 ("*Bastien* dealt with market entry, which the states are expressly excluded from regulating by § 332," but Shroyer's non-preempted claim based on false promises "does not"). Hence, while Plaintiff's state-law claims fail for multiple independent reasons, they are all also preempted under this Court's own section 332(c)(3) reasoning.

B. Plaintiff's "Customer Support" Allegations Do Not Support Any Legally Viable Claim For Relief.

Plaintiff's Second Amended Complaint also reprises her criticisms about Google and HTC's allegedly inadequate "customer service," *see, e.g.*, SAC ¶¶ 4, 8, 13, 60, 62, 78, 84, 102, 118, but these allegations are legally immaterial and cannot support any viable claim for relief. Indeed, Plaintiff's conclusory allegations that Google and HTC made "misrepresentations" about "customer service" cannot support any claim because – like Plaintiff's other misrepresentation allegations – they are not pled with Rule 9(b) particularity. *See also* p. 12, *supra*. Apart from her unsupported misrepresentation theory, Plaintiff has no authority for any contention that Google and HTC violated any conceivable *legal duty* owed to her in relation to their allegedly inadequate

customer service. *See also First Interstate Bank of Arizona, N.A. v. Murphy, Weir, & Butler*, 210 F.3d 983, 986 (9th Cir. 2000) (existence of a legal duty is a pure question of law for the Court).[15] Nor has Plaintiff alleged facts showing any breach by Google and HTC of any customer-service duty. Indeed, Plaintiff can cite no authority for the proposition that allegedly having to wait a few days for an email response from a product vendor, *e.g.*, SAC, ¶¶ 4, 8, 60, 78, 84, violates California law and subjects the vendor to legal liability for inadequate customer service. Finally, Plaintiff alleges no facts showing that any supposed breach of any "customer support" duty by Google and HTC actually caused her to suffer legally cognizable injury and damage. Any alleged inconvenience and "taxing mental exertion" occasioned by her customer service experience, SAC, ¶ 8 – while regrettable – do not constitute compensable injury on any of her claims as a matter of law.[16] Thus, Plaintiff's "customer service" complaints cannot support any viable legal claim.

C. Plaintiff's Claims This Time Should Be Dismissed Without Leave To Amend.

The Court granted leave to amend to see if Plaintiff's counsel could fix the fundamental problems in her misrepresentation and warranty claims that led the Court to dismiss her First Amended Complaint. Plaintiff cannot cure those defects because they are incurable. Instead of fixing the specific problems identified by the Court, Plaintiff in the Second Amended Complaint only compounded the problems by asserting additional claims that suffer the same fatal flaws as before, or new claims that are patently without merit under settled law. Accordingly, Plaintiff has confirmed that she cannot allege facts sufficient to support any claims for relief, and hence further leave to amend would be futile. *See Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Servs.*, 911 F.2d 242, 247 (9th Cir. 1990).

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[15] Plaintiff does not allege facts supporting the existence of any legal duty to provide "customer support," much less specify precisely what she thinks that hypothetical duty entails. Moreover, Plaintiff disregards that customer service, including any 1-800 "helpline," is offered by some only as a courtesy and not because it is mandated to satisfy any judicially enforceable "legal duty."

[16] Under California law, emotional distress and inconvenience is not compensable in breach of warranty, contract, and even tort actions involving only economic loss to the plaintiff and not physical injury, *see Kwan v. Mercedes-Benz of North Am., Inc.*, 23 Cal. App. 4th 174, 187-92 (1994) (citing cases); *Gravillis v. Coldwell Banker Residential Brokerage Co.*, 143 Cal. App. 4th 761, 777 (2006) (citing cases); and clearly no emotional distress "damages" are recoverable under the UCL or FAL, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003).

V. CONCLUSION

For the foregoing reasons, Google and HTC's motion to dismiss Plaintiff Mary McKinney's Second Amended Complaint should be granted without leave to amend.

Dated: February 22, 2011,

Respectfully submitted,

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CERTIFICATION

I, Matthew L. Larrabee, am the ECF User whose identification and password are being used to file this motion. In compliance with General Order 45.X.B., I hereby attest that Steven B. Weisburd and Rosemarie T. Ring have concurred in this filing.