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

Defendants

5:10-cv-01177-JW

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: April 25, 2011
Time: 9:00 A.M.
Courtroom: 8
Judge: Hon. James Ware

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I. INTRODUCTION AND PROCEDURAL HISTORY

On January 29, 2010, Plaintiff Mary McKinney, on behalf of herself and others similarly situated, filed suit in California state court against defendants Google, Inc.; T-Mobile USA, Inc; and HTC Corp. based on the reasonable belief that McKinney and others were purchasing a true 3G device when they bought regarding the Google Nexus One smartphone (the "Google Phone" or "the device"). Defendants removed that case to this Court on March 22, 2010, and McKinney filed an amended Complaint on June 11, 2010. Docs. 24, 26. This Court related McKinney's case to that of Nathan Nabors, which complains of similar conduct, on October 8, 2010. Doc. 60. On November 1, 2010, this Court held oral argument regarding the motions to dismiss and compel filed by Defendants. Docs. 30, 36, 39, 41. Although this Court dismissed certain causes of action and compelled arbitration against T-Mobile, at bottom, this Court recognized the valid causes of action that have been pleaded in McKinney's Second Amended Complaint, which was filed on December 3, 2011. Doc. 75. McKinney has complied with this Court's orders and pleaded state law causes of action that should be sustained at the pleading stage, especially considering the current status of this case.

The basic theory of this case is simple: McKinney and members of the Class purchased the Google Phone under the impression that it was a true 3G device, based on the representations made by Google, HTC, and T-Mobile. After purchase, McKinney and the Class learned that the device did not provide consistent 3G access to their cellular provider's networks. Purchasers revolted, but they were left holding the bag for a purchase they otherwise would not have made had the true facts regarding the Google Phone been disclosed. McKinney, in particular, was unable to use her Google Phone for any purpose for a significant amount of time. They were unable to get assistance from their cellular providers or HTC, and received only delayed and ineffective assistance from Google. The Class in this case did not get the full benefit of their bargain with Google and HTC.

II. STATEMENT OF RELEVANT FACTS

The basic facts underlying McKinney's claims on behalf of herself and the Class are simple: Google and HTC together designed and marketed the Google Phone, which is a 3G

device that is designed to provide superior data transfer rates over earlier model devices. Compl. ¶¶ 31-32, 38-40. T-Mobile was the "exclusive" provider of 3G wireless network connectivity for the device, but customers could pay a higher cost for an unlocked phone that would work on other networks. Compl. ¶ 27, 45. Google offered purchasers of the device incentives to subscribe to T-Mobile's wireless service or, if—like McKinney—they were already T-Mobile customers, incentives to extend their contracts with T-Mobile when purchasing the Google Phone. Compl. ¶¶ 33-34, 37. Google offered the device for sale and promoted the device on its homepage, which is some of the most coveted real estate on the Internet. Compl. ¶¶ 30-32. Google, HTC, and T-Mobile also promoted the device in the media.

"For consumers the appellation '3G' is commonly understood to provide superior data transfer rates over older cell technology," and "McKinney understood the '3G' appellation to be consistent with the common understanding of other users. The Nexus One was the first 3G phone McKinney has owned, and a primary reason McKinney purchased this phone was its 3G capability." Compl. ¶¶50-51.

Unfortunately for McKinney and the Class, the Google Phone did not operate as a true 3G device. Despite T-Mobile's representations to the contrary, *see* Compl. ¶ 51, its network connectivity did not offer the true 3G experience that customers reasonably believed that they were purchasing. Compl. ¶¶ 38, 40-44. They experience frequent problems with both calling and data transfer. Compl. ¶ 49. The lack of customer service and technical support provided to Google Phone purchasers added an additional layer of injury, because for substantial amounts of time McKinney and the Class were unable to use their Google Phones for any realistic purpose, let alone for the purpose of consistent 3G connectivity. Compl. ¶ 48. Now, Class members are locked into service agreements, unable to get refunds, and they face unreasonably high termination fees should they desire to sign up for another device or a service plan with another carrier. Compl. ¶¶ 46, 48, 52-55, 59, 62, 64. The monies expended by McKinney and the Class should have resulted in the purchase of a true 3G device that provided 3G connectivity. Instead, for $529 (setting aside additional monies paid to T-Mobile directly), McKinney is left with a device that does not offer the 3G connectivity that she believed she was purchasing, a used

Google Phone that was passed off to her as equivalent to the new phone she purchased, and long stretches of time that she was totally without any use for the phone for which she had paid hundreds of dollars. And now, if McKinney or other Class members want to get away from their Google Phones and move to another device, they are faced with termination fees that are unreasonably high, especially in the light of the hundreds of dollars that McKinney and the Class have already spent on the phones with which they are stuck.

III. STANDARDS FOR ANALYZING A MOTION TO DISMISS.

This Court is, without question, familiar with the standards for denying a motion to dismiss. "For purposes of evaluating a motion to dismiss, the court 'must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.' Any existing ambiguities must be resolved in favor of the pleading." *In re NVIDIA GPU Litig.*, NO. C 08-04312 JW, 2009 U.S. Dist. LEXIS 108500, at *11-*12 (N.D. Cal. Nov. 19, 2009)) (citing and quoting *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973)).

IV. ARGUMENT.

None of the Defendants' several arguments regarding the Second Amended Complaint and its purported deficiencies have merit, regardless of their superficial appeal, and all of them should be rejected for the following reasons. First, Ninth Circuit law is clear that state law and breach of warranty claims like those in the Complaint are not preempted under the Federal Communications Act. Second, McKinney's allegations satisfy all applicable pleading standards under the Federal Rules of Civil Procedure. Rule 8(a) is the governing rule, to be sure, but McKinney's allegations satisfy even the heightened standards of Rule 9(b) should this Court apply those standards, and it should not. Third, McKinney has adequately pleaded every breach of warranty count in the Complaint. Fourth, the economic loss doctrine cannot bar McKinney's claims where there is a disputed factual issue regarding what defects actually caused her Google Phone to be useless for long stretches of time, and worth less than a true 3G device the rest of the time she has owned it. Fifth, McKinney's unjust enrichment and declaratory relief are viable stand-alone causes of action and theories of recovery.

A. McKinney's State Law Claims Are Not Preempted.

McKinney's state law claims are not preempted under governing Ninth Circuit law. *Shroyer v. New Cingular Wireless Services, Inc*. presented facts and issues materially similar to those at issue in this case. 622 F.3d 1035, 1038 (9th Cir. 2010). In *Shroyer*, the plaintiff "filed a class action against . . . a corporation resulting from the merger of AT&T Wireless Services, Inc., and Cingular Wireless Corporation. . . . Shroyer had a contract for wireless telephone services with AT&T. He alleged that, immediately following the merger, his cellular phone service was severely degraded." *Id.* Shroyer alleged that (1) New Cingular breached the existing AT&T contract because it did not provide adequate service coverage; (2) New Cingular required him to sign a new contract if he wanted the service that AT&T contracted in his existing service agreement; (3) New Cingular misrepresented and omitted key facts to the Federal Communications Commission regarding the merger; and (4) the FCC would not have approved the New Cingular merger if it had known that breaches of contract like those Shroyer alleged would occur. *Id*. Shroyer pleaded the following claims: "1) breach of contract; 2) fraud and deceit; 3) unfair competition under Cal. Bus. & Prof. Code §§ 17200-210; and 4) a demand for a declaratory judgment." *Id*.

New Cingular made arguments similar to those that Defendants have made before this Court: "New Cingular would have this court rely on *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir.2000), to hold that the substance of Shroyer's claims is really an attack on the post-merger service, and that deciding the case would necessarily involve regulating the modes and conditions under which New Cingular may begin offering service." *Id*. at 1039. The Ninth Circuit, however, rejected that argument:

> [T]he FCC rejected this per se argument in *In re Wireless Consumers Alliance*, and so do we. . . . New Cingular attempts to distinguish *In re Wireless Consumers Alliance* by observing that there the FCC was deciding whether an award of damages based on state law breach of contract and fraud claims was preempted by § 332. Here, New Cingular argues, we are confronted with whether the contract and fraud claims themselves are preempted. This difference does not affect our conclusion; if damages are not preempted, neither are the claims under which they are awarded.

Id. at 1039 & n.3.

In *Shroyer*, the only claims that the Court found preempted were based on whether the FCC had accurate facts and would have approved the merger "depend[ed] on the assessment of the public benefit of the merger. That determination has already been made by the FCC, and reexamination of that issue under state law is preempted either by § 332 or by the ordinary principles of conflict preemption." *Id*. at 1041. This claim was not preempted because it was a UCL claim. It was preempted because it was inextricably intertwined with whether New Cingular and ATTM committed a fraud on the FCC during the merger approval process—a fact that does not exist in this case.

This Court has concluded previously that if McKinney can allege that the problems or defects at issue are as a result of a defect in the phone itself, such claims would *not* be preempted under the FCA:

> For example, Plaintiff may be able to state claims against Google and HTC for actual defects of the Google Phone or its applications. Such claims do not challenge a carrier's rates or market entry and hence would not be preempted. Thus, the Court finds that leave to amend is warranted.

Doc. 73 at 17. That is precisely the conduct that has been alleged here. McKinney has alleged that Defendants committed the following unfair acts and practices, among others:

- Sold her a product that they represented, and she believed, would act as a true 3G device, based on representations of both T-Mobile and Defendants ; (Compl. ¶¶ 3, 13, 37-40, 44, 50-51, 53)
- Took the full payment for a Google Phone even though McKinney should have received a discount, because she was an existing T-Mobile customer when Google completed the sale of her phone from its California headquarters; (Compl. ¶¶ 2, 4, 5, 7, 48-49, 68)
- Sent McKinney a used Google Phone, even though she had paid full price for her purchase of a "new" (non-working) Google Phone; (Compl. ¶¶ 7, 55, 67)
- Left McKinney without any type of cellular device for weeks after her $529 purchase, because she refused to pay another $529 for a second Google Phone; (Compl. ¶¶ 5-7);

- Refused to provide McKinney with any reasonable customer service so she could obtain cellular service, generally, or 3G service—the type of service for which McKinney had paid a premium. (Compl. ¶¶ 1, 3, 8, 13, 57, 60-62, 73)

McKinney's allegations regarding the failures of the phone marketed to her as "essential for web surfing and email" (Compl. ¶ 39) very clear:

> [McKinney's Google Phone] never had 3G service at any point, and showed an error message regarding the phone's hardware that directed her to contact her mobile service provider. When she contacted T-Mobile, she was told that T-Mobile could not help her and that she should contact Google directly. There was no help line to call Google, and she had to wait on an email reply. McKinney was unable to obtain phone service or use any of the features of the Google Phone during this time, but never received a rebate or other compensation for that time during which her Google Phone was unable to be used for its intended purpose.

Compl. ¶ 4.

Absolutely none of those allegations and the claims on which they are based are preempted. McKinney's claims based on the Defendants' false and misleading representations are not preempted because neither the FCA, 47 U.S.C. § 151, *et seq.*, nor any federal regulations promulgated thereunder regulate advertising or the use of the 3G appellation. The portion of the FCA governing mobile services, 47 U.S.C. § 332, does not regulate advertising or the 3G appellation. Nor does the subchapter governing common carriers, 47 U.S.C. §§ 201-276. *See* 47 U.S.C. § 332(c)(1)(A) (stating persons engaged in commercial mobile services are to be treated as common carriers subject to subchapter II). Despite the Google Phone being regulated by at least three different parts of Title 47 of the Code of Federal Regulations, none of the regulations govern advertising or the appellation 3G. Part 20 of Title 47 governing commercial mobile radio services ("CMRS") requires providers to abide by certain parts of subchapter II of the FCA and other regulations, but it does not govern advertising or the 3G appellation. *See* 47 C.F.R. § 20.15(a). Under Part 22 of Title 47, the licensing and operation of cellular radiotelephone service is regulated, but conspicuously absent are any regulations governing advertising or the 3G appellation. *See* 47 C.F.R. §§ 22.900-.973. To the extent the Google Phone operates on either narrow or broadband frequencies, the regulations in Part 24 of Title 47 do not govern advertising or the 3G appellation. *See* 47 C.F.R. §§ 21.1-.903.

"It is well settled that state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under [47 U.S.C.] § 332." *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 668 F. Supp. 2d 831, 839 (W.D. La. 2009); *see also Phillips v. AT & T Wireless*, 4:04-CV-40240, 2004 WL 1737385 (S.D. Iowa July 29, 2004) (explaining that not all matters affecting wireless providers' rates are preempted as rate regulation under the FCA). Indeed, it is well established that the FCA *does not* govern deceptive advertising, misrepresentations or unfair trade practices. *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998); *Shaw v. AT&T Wireless Servs. Inc.*, No. 3:00-CV-1614, 2001 WL 539650, *4 (N.D. Tex. 2001); *Spielholz v. Superior Court*, 86 Cal.App.4th 1366, 1374 (2001); *State of Minnesota v. Worldcom, Inc.*, 125 F.Supp.2d 365, 372 (D. Minn 2000). Even the FCC agrees with that proposition. *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17035-36 [¶¶ 25-27] (FCC 2000).

Under *Shroyer*, therefore, claims regarding representations of service are not preempted, even though claims that require second-guessing the FCC's approval of mergers are preempted. 622 F.3d at 1041. Claims that ask a Federal court to prevent a new cellular company from entering a new market (which Defendants have not argued) may be preempted, whereas claims that ask a Federal court to enforce state consumer-protection laws and seek restitution for money paid for a product that did not work for the purpose for which it was intended are not preempted under *Shroyer*. *Id.* at 1039-40.

B. <u>McKinney has Pleaded All of Her Claims with the Requisite Specificity.</u>

McKinney's claims are not grounded in fraud, and are subject only to the requirements of Federal Rule of Civil Procedure 8(a). In the alternative, McKinney satisfies Rule 9(b) to the extent it applies to the Complaint and, to be sure, it does not govern any of the allegations McKinney has made.

1. McKinney's UCL, FAL and CLRA Claims Are Not Grounded In Fraud And Are Therefore Not Subject to Rule 9(b)

Rule 9(b)'s heightened pleading requirements only apply to allegations describing fraudulent conduct—meaning a cause of action where they underlying cause of action in its

entirety is fraud. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Accordingly, "Plaintiffs are not required to plead 'reliance' and 'materiality' with particularity, because those elements are grounded in the UCL's and CLRA's 'as a result' of language and are thus distinct from the common law fraud element of justifiable reliance." *Shin v. BMW of North America*, No. CV 09-00398 AHM (AJWx), 2009 WL 2163509, at *4 (N.D. Cal. July 16, 2009) (citing Cal. Bus. & Prof. Code § 17204; Cal. Civ. Code § 1780(a); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)).

As a general rule, a "pleading is sufficient under Rule 9(b) if it identifies "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Semegen v. Weidner*, 780 F.2d 727, 735 (9th Cir. 1985).[1] Plaintiffs need not plead the "date, place or time" of the fraud, so long as they use an "alternate means of injecting precision and some measure of substantiation into their allegations of fraud." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984).

Moreover, UCL and CLRA claims based on an omission or concealment "can succeed without the same level of specificity required by a normal fraud claim." *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007). Indeed, as numerous courts recognize "an actionable omission obviously cannot be particularized as to 'the time, place and contents of the false representations.'" *Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp. 867, 875 (N.D. Ill. 1989); *see also Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987) ("Where the fraud consists of omissions on the part of the defendants, the plaintiff may find alternative

[1] *See also David K. Lindemuth Co. v. Shannon Fin. Corp.*, 637 F. Supp. 991, 993 (N.D. Cal. 1986) ("Rule 9 must be read in light of Rule 8(a) requiring averments to be simple, concise and direct."). Moreover, Rule 9(b)'s requirement is "relaxed "in cases of corporate fraud" where "plaintiffs will not have personal knowledge of all of the underlying facts" such as the identities of particular defendants." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *see* Compl. ¶¶ 37-38. The standard under Rule 9(b) is also less stringent when the plaintiff alleges fraud by omission that occurred over a period of time. *Falk v. General Motors Corp.*, 496 F. Supp. 2d 1088, 1098-99 (N.D. Cal. 2007); *see also U.S. v. Hempfling*, 431 F. Supp. 2d 1069, 1075 (E.D. Cal. 2006); *Rhoades v. Powell*, 644 F. Supp. 645, 666 (E.D. Cal. 1986) (noting that when "the timeframe of the alleged wrongdoing is clear from the complaint," Rule 9(b) requires "less specificity" in pleading). Thus, McKinney's omission and misrepresentation claims cannot be dismissed for failure to precisely state the time and place of Defendants' fraudulent conduct. *See Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987).

ways to plead the particular circumstances of fraud. [F]or example, a plaintiff cannot plead either the specific time of the omission or the place, as he is not alleging an act, but a failure to act.").

2. McKinney Satisfies Rule 9(b) to the Extent It Applies.

Although Defendants suggests otherwise, "Rule 9(b) does not require nor make legitimate the pleading of detailed evidentiary matters." *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973); *see also Gutierrez v. Givens*, 989 F. Supp. 1033, 1044 (S.D. Cal. 1997) (explaining that the Rule 9(b) standard is relaxed at the initial stages of litigation since "[b]efore discovery, Plaintiffs cannot aspire to know all of the details of an alleged fraud against them").

McKinney satisfies any applicable pleading standard. McKinney has alleged in her Complaint the circumstances that support her claim. McKinney has discussed adequately the representations made by Defendants in and through the media, as well as their shortcomings in meeting the advertised goals of the Google Phone. For Defendants to say they are unsure which of their representations created the impression that they were selling a 3G device is disingenuous. Google even offered up what was described as "the most valuable ad space on the entire Internet" to see its phone. Compl. ¶¶ 29-30.

Moreover, the Complaint alleges the substance of the material omissions and misrepresentations, the identity of the parties responsible for the material omissions and misrepresentations, and the injuries resulting from the material omissions and misrepresentations. The Complaint thoroughly identifies the "who," "what," "when," "where," and "how." The "who" are Defendants Google and HTC, McKinney and the proposed class members who were misled and purchased the product. Compl. ¶¶ 2, 10-12. The "what" and "how" is the Google Phone and Defendants" false and misleading representations and overall marketing scheme implying that the phone would "maintain connectivity" to 3G networks, and would operate as a true 3G device. Compl. ¶¶ 31-70. The "where" are Defendants' headquarters and/or design, manufacturing, packaging and/or marketing facilities. Compl. ¶¶ 11-12, 14. The "when" is at least from January 2009 when the Google Phone was made available for sale. Compl. ¶ 32. Any further specificity is solely within the control of the Defendants, and they have changed the point from which McKinney made her purchase several times since she filed her lawsuit. Compl. ¶¶

37-38. Thus, McKinney's allegations in the Complaint are sufficient to satisfy Rule 9(b). *Falk*, 496 F. Supp. 2d at 1099.

3. McKinney's UCL And FAL Claims Are Well-Pleaded.

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (Cal. 2011) (quoting Cal. Bus. & Prof. Code § 17200; *Kasky v. Nike, Inc.* 27 Cal.4th 939, 949 (Cal. 2002)). The UCL prohibits "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive or untrue advertising." Cal. Bus. & Prof. Code § 17200. "Each of these three adjectives captures 'a separate and distinct theory of liability.'" *Rubio v. Capital One Bank*, 613 F.3d 119, 1203 (9th Cir. 2010) (quoting *Kearns*, 567 F.3d at 1127). Here, McKinney alleges Defendants violated all three prongs. Compl. ¶¶ 71-81.

First, the UCL requires no showing of scienter and unintentional conduct violates the statute if shown to be fraudulent, unlawful or unfair. *See Cortez v. Purolator Air Filtration Prods. Co.*, 99 P.2d 706 (2000). "The text of Rule 9(b) requires only that in 'all *averments of fraud* . . . the circumstances constituting fraud . . . shall be stated with particularity.' The rule does not require that allegations supporting a claim be stated with particularity *when those allegations describe non-fraudulent conduct*." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104 (9th Cir. 2003) (emphasis added, reversing dismissal of UCL claims under Rule 9(b) because those claims did not *solely* depend on averments of fraud).

The California Supreme Court has noted that in "drafting [the UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the Act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" *Bank of the West v. Superior* Court, 2 Cal.4th 1254, 1266-67 (1992) (internal citations omitted). The California Supreme Court and numerous other courts have consistently interpreted the UCL broadly to sustain consumer protection claims without requiring they be pleaded with Rule 9(b) particularity.

See Committee on Children's Tel., Inc. v. General Foods Corp., 35 Cal.3d 197, 211-12 n.11 (1983) ("The requirement that fraud be pleaded with specificity . . . does not apply to causes of action under the consumer protection statutes"); *People v. Superior Ct.*, 9 Cal.3d 283, 287-88 (1973) (issues relating to when, where or whom constituted evidentiary facts that need not be pleaded for UCL); *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1118 (C.D. Cal. 2008) (Rule 9(b) did not apply to the plaintiff's UCL claims where the plaintiffs "merely allege[d] that the representations were likely to deceive and that [p]laintiffs were damaged by the deception; they make no effort to allege common law fraud elements"); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1138 (C.D. Cal. 2005) (UCL false advertising claims can be asserted without implicating Rule 9(b)); *Nordberg v. Trilegeant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006) ("Rule 9(b) is not strictly applicable to the current action as the CLRA is not a fraud statute. . . . To require that plaintiffs prove more than the statute itself requires would undercut the intent of the legislature in creating a remedy separate and apart from common-law fraud"); *Multimedia Patent Trust v. Microsoft Corp.*, 525 F. Supp. 2d 1200, 1217 (S.D. Cal. 2007) ("[T]o the extent that a federal pleading is grounded in fraud, it must meet the requirements of Rule 9(b). . . . [H]owever, the elements of common law fraud law are not essential to a claim under the California unfair competition law.").

In *Vess v. Ciba-Geigy*, the Ninth Circuit held Rule 9(b)'s particularity requirements apply when a claim is entirely "grounded in fraud," which only occurs when plaintiffs allege "a unified course of fraudulent conduct *and rely entirely on that course of conduct as the basis of a claim*." *Vess*, 317 F.3d at 1103 (emphasis added). McKinney's claims are based on the FCA and warranty, and thus are not dependent—much less "*entirely dependent*"—on proving "fraudulent" conduct. McKinney's claims are thus not governed "entirely" by Rule 9(b). *Vess*, 317 F.3d at 1103; *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1052 (N.D. Cal. 2004).

Kearns v. Ford Motor Co., relied on by Google and HTC, is not to the contrary. *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009). In *Kearns*, the Ninth Circuit merely held that Rule 9(b) is applicable to UCL and CLRA claims when a claim based *solely* on fraud is alleged, as the plaintiffs did in that case. *Kearns*, 567 F.3d at 1125 ("[r]eviewing the complaint, Kearns

alleges that Ford engaged in a fraudulent course of conduct"). Here, the claims at issue are not based solely on a fraudulent course of conduct, as the elements for a fraud claim need to be shown to establish Defendants" liability. No cause of action here asserts or relies on a fraudulent course of conduct—and certainly none is solely "fraud based".

That comports entirely with the current state of California law on the matter. *In re Tobacco II Cases*, 207 P.3d 20, 35 & n.14 (Cal. 2009) (relying on *Bank of the West* and *Committee on Children's Television*). Under California law, a UCL "plaintiff need not show that a UCL defendant intended to injure anyone through its unfair or unlawful conduct. The UCL imposes strict liability when property or monetary losses are occasioned by conduct that constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 181 (Cal. 2000). Even under Defendants' chosen framework, there still is no intent element, and McKinney has no need to plead any of her claims—or the facts underlying them—beyond the "short and plain statement" required by Rule 8(a).

C. McKinney's Claims For Breach Of Warranty Are Adequately Pleaded.

Setting aside, for a moment, the failed preemption arguments that Defendants contend preempt every claim pleaded in the Complaint, there are several reasons for this Court to reject the contentions that McKinney's breach of warranty claims are insufficient. Each of those reasons is addressed in turn.

1. Defendants had adequate notice.

McKinney specifically alleges that Defendants were given notice of their breach: "Under Section 1782 of the CLRA, McKinney has notified Defendants in writing of the particular violations of Section 1770 of the CLRA (the Notice) and demanded, among other things, that Defendants cease engaging in the wrongful conduct alleged herein and that Defendants provide restitution. McKinney is sending Notice by means of by certified mail, return-receipt requested, to Defendants at their principal places of business concurrent with the service of this Complaint." Compl. ¶ 96; *see also id.* ¶ 99. Defendants are wrong in claiming McKinney did not allege notification of her warranty claims, and cannot contradict these allegations through their Motion.

McKinney's notice allegations are more than sufficient to comply with California law. *See In re HP Inkjet Printer Litig.*, 2006 U.S. Dist. LEXIS 12848, at *16 (N.D. Cal. Mar. 7, 2006). California law requires only that notice be given before or in connection with the filing of the pleading in which such claim is alleged. Therefore, notice otherwise given within a reasonable period of time can under California law follow commencement of suit provided it is subsequently and properly pleaded. *Hampton v. Gebhardt's Chili Powder Co.*, 294 F.2d 172, 173 (9th Cir. 1961). Moreover, in cases arising under the California Uniform Commercial Code, the question of how, when and whether the buyer notified the seller of a breach within a reasonable time is a question of fact that cannot be decided at the pleading stage. *Mexia v. Rinker Boat Co., Inc.*, 174 Cal.App.4th 1297, 1307 (2009). No formal written notice is required; indeed oral communications of the existence of a problem have been found to suffice. *McAnulty v. Lema*, 200 Cal.App.2d 126, 132-33 (1962).[2] In any event, notice is not required to HTC because pre-suit notice of breach of warranty is not required where the action is against a manufacturer, like HTC here, and is brought by an injured consumer against a manufacturer with whom the consumer has not dealt. *Sanders v. Apple Inc.*, 672 F.Supp.2d 978, *Greenman v. Yuba Power Prods.*, 59 Cal.2d 57, 61 (1963).

Moreover, from complaints Defendants—especially Google—received and the responses it provided consumers, Defendants were aware consumers were experiencing substantial connectivity problems with their Google Phones and demanding a response. *See* Compl. ¶¶ 3-9, 54-59. McKinney herself gave Google sufficient notice several times—including three opportunities to cure the problems she experienced before she ever filed suit. Unfortunately, the ultimate result of this notice and complaint process was for Google to stick McKinney with a reconditioned phone, rather than a new phone (for which she paid the full $529 purchase price).

[2] "The requirement of notice of breach is based on a sound commercial rule designed to allow the defendant the opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements." *See Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal.3d 374, 380. That legislative purpose has been satisfied, because McKinney's pre-suit CLRA letter , original complaint and First Amended Complaint all included breach of warranty claims. Defendants now raise the issue of notice for the first time in their second Motion to Dismiss.

Under these circumstances, the statutory demand for notice is more than satisfied "by proof of complaints from some but not all the buyers" of the Google Phone. *See Metowski v. Traid Corp.*, 28 Cal.App.3d 332, 339 (1972).

2. McKinney's express warranty claims are adequately pleaded.

Numerous courts have held that pleading a breach of express warranty does not require a plaintiff to provide precise detailed allegations concerning the warranty or its breach. *See, e.g., Huber v. Howmedica Osteonics Corp.*, No. 07-2400, 2008 U.S. Dist. LEXIS 106479, at *12-14 (D.N.J. Dec. 30, 2008); *Bell v. Manhattan Motorcars, Inc.*, No. 06-4972, 2008 U.S. Dist. LEXIS 58648, at *10-11 (S.D.N.Y. Aug. 4, 2008) ("Any affirmation of fact or promise which relates to the goods, or any description of the goods at issue, which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation, promise or description."); *Gonzalez v. Drew Indus.*, No. 06-8233, 2007 U.S. Dist. LEXIS 35952, at *34-35 (C.D. Cal. May 10, 2007); *Butcher v. DaimlerChrysler Co.*, No. 08-207, 2008 U.S. Dist. LEXIS 57679, at *6-8 (M.D.N.C. July 29, 2008); *Irwin v. Country Coach Inc.*, No. 05-145, 2006 U.S. Dist. LEXIS 35463, at *17 (E.D. Tex. Feb. 1, 2006) (plaintiffs alleged misrepresentation based on promotional materials); *see also DeFebo v. Andersen Windows, Inc.*, No. 09-2993, 2009 U.S. Dist. LEXIS 87889, at *17-19 (E.D. Pa. Sept. 24, 2009); *Ivory v. Pfizer Inc.*, No. 09-0072, 2009 U.S. Dist. LEXIS 90735, at *14-15 (W.D. La. Sept. 30, 2009). It is sufficient to allege that (1) the offer and sale of the product to establish the warranties; (2) the product did not perform as intended; (3) plaintiffs wanted the product for a specific purpose and relied on the seller's superior knowledge when purchasing; and (4) defendants were on notice of the defect. *Promuto v. Waste Mgmt., Inc.*, 44 F.Supp.2d 628, 642-46 (S.D.N.Y. 1999); *Williams v. Beechnut Nutrition Corp.*, 185 Cal.App.3d 135, 142-43 (1986); *Moraca v. Ford Motor Co.*, 332 A.2d 607, 611 (N.J. Sup. Ct. App. Div. 1974); *DeWitt v. Eveready Battery Co.*, 562 S.E.2d 140, 151-53 (N.C. 2002).

McKinney meets that standard. First, "Defendants represented to McKinney before she bought the Google Phone that the Google Phone was at least as fast as the iPhone 3G, the primary competitor to the Google Phone." Compl. ¶ 42. Second, McKinney has alleged adequately that the device has not worked as intended. Compl. ¶¶ 3-9, 54-59. Third, McKinney has alleged that

the Google Phone was advertised widely and consistently as a true 3G device; "McKinney based her purchasing decision on the facts Defendants promoted regarding the Google Phone: namely, that it was a true '3G' device; that it was very fast when uploading or downloading data from the Internet; and that it would work in a manner that justified the premium price she paid for the Google Phone." Compl. ¶¶ 3, 35. Fourth, McKinney has pleaded "the infrastructure of T-Mobile's 3G wireless network and/or the Google Phone itself were defective and inadequate to provide the represented performance and speed, resulting in injury to the McKinney and the Class." Compl. ¶ 70.

McKinney should not be penalized at the pleading stage for failing to provide further specificity. As stated in the Complaint, McKinney's initial transaction was all-electronic. She has offered adequate specificity at this stage, and cannot be expected to have offered more. McKinney does not own a printer. Compl. ¶ 38. She could not have reduced the information on her computer screen to a format replicable in her Complaint, but she has recounted the information she recalls. Further, McKinney has alleged "[o]n information and belief . . . discovery will bear out consistent representations from Google, HTC, T-Mobile, and other entities regarding the speed and efficacy of the Google Phone as a true 3G device. At present all of that information is solely within the control of Defendants and other third parties, and is unavailable to McKinney or the class." Compl. ¶ 38. Google itself has scrubbed the page from which McKinney made her purchase several times since this Complaint was filed. Compl. ¶ 37. McKinney presumes that those pages have been adequately archived by Defendants to prevent further spoliation, even though they have tried to whitewash all publicly-available information. The physical impossibility McKinney faces in reprinting here the representations she saw pre-purchase should not doom her complaint, which has been adequately pleaded, because she has alleged both what she saw and heard, as well as when she saw it.

3. <u>McKinney's implied warranty claims are adequately pleaded.</u>

The Defendants' contention that McKinney cannot plead implied warranty claims are erroneous. The Song-Beverly Act provides as follows: "[E]very sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's

implied warranty that the goods are merchantable." Cal. Civ. Code § 1792. So long as plaintiff pleads they are the third party beneficiary of the relationship between the defendants (and since the phones were designed for consumer use, there is no other conceivable beneficiary), no vertical privity of contract between a manufacturer and consumer is required; nor is it required that the manufacturer sell the product directly to the consumer. *Nvidia*, 2009 WL 4020104 at *4. Except for consumer goods sold on "as is," the consumer's rights under the Song-Beverly Act expressly cannot be waived. Cal. Civ. Code § 1792.3.

McKinney's first Google Phone was not only unfit for its intended purpose—a device that offered consistent 3G connectivity—it was unfit for any purpose more sophisticated than a paperweight; her later phones have fared little better. Compl. ¶¶ 4-7, 55 ("McKinney ***never had 3G service*** on her first Google Phone, and has had 3G service on later Google Phones that can best be described as sporadic and inconsistent. These defects caused McKinney to be unable to use her phone ***for any purpose*** for a significant portion of the time she has owned the Google Phone.") (emphasis added).

4. McKinney's claims under the Magnuson-Moss Warranty Act are adequately pleaded.

To the extent Defendants argue that the implied warranty claims pleaded by McKinney fail, they are wrong. "The Magnuson-Moss Warranty Act provides a federal cause of action for state law implied warranty claims." *In re NVIDIA GPU Litig.*, 2009 WL 4020104, at *7 (N.D. Cal. 2009) (citing 15 U.S.C. § 2301(7)). Insofar as Defendants contend that the facts pleaded do not constitute an express warranty, they are wrong again. Defendants touted the 3G characteristics of the Google Phone, including its speed and data transfer rates, and those statements constitute a warranty that the Google Phone would operate as advertised during its useful life, or at least through the two-year term of the required service agreement the majority of the Class likely entered into. Compl. ¶¶ 1, 3, 5, 13, 33-40, 42-45, 50-52, 54, 55. McKinney's purchasing decision was based, in large part, on the concept that she was purchasing a true 3G device that would work from the time of purchase. Compl. ¶¶ 3, 13, 39-40, 50-51. When

approached regarding the limitations of the Google Phone, McKinney and the Class were given a short shrift of epic proportions:

> Most people use the phone on T-Mobile's network, which offers a subsidy if a customer buys a contract, and the phone is made by HTC, a major Taiwanese manufacturer. But it is sold exclusively by Google through a special Web-based store.
>
> Despite its central role in the process, Google does not appear to have built a significant infrastructure to provide customer support. There is no phone number for support, for example, and customers who send an e-mail message may wait for days to hear back.

Compl. ¶ 60; *see also id*. ¶¶ 56-58. Because the Plaintiffs' non-disclaimable warranty claims under the Song-Beverly Act, among others, are properly pleaded, the motion to dismiss on this issue should be denied.

D. <u>The Economic Loss Rule Does Not Bar McKinney's Tort Claims.</u>

Defendants not dispute McKinney properly asserts a claim for negligence. Instead, they argue they are immune at the pleadings stage from tort liability for any negligent acts that lead to the harm suffered by McKinney and the Class. It is well settled the "economic loss rule allows a plaintiff to recover in strict products liability in tort when a product defect causes damages to 'other property,' that is, property *other than the product itself*." *Jimenez v. Super. Ct.*, 29 Cal.4th 473, 483 (2002) (emphasis in original). *See also In re NVIDA GPU Litig.*, 2009 WL 4020104, *12 (2009) (denying motion to dismiss negligence claim where plaintiff alleged defective graphics processing unit "caused consumers" computers to underperform…and ultimately result[ed] in markedly degraded computers").

Here, McKinney has alleged, among other things, that "the software is a mess" and Defendants "breached their duty to properly manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use, or sell the Google Phone to function as advertised." Compl. ¶¶ 61, 119. McKinney further alleges that the defects in the software may have caused the Google Phone to "fail to receive reliable and sustained connectivity" to any 3G network" and caused a "substantially lower data transfer rate than the 3G that was advertised." Compl. ¶¶ 52, 117. In combination, this may have caused the Google Phone to underperform (relative to the Defendants' overpromising), as McKinney and Class members "experience[d] a significant

number of dropped calls when the Google Phone cannot locate an available 3G network connection." Compl. ¶ 54. McKinney, therefore, has adequately alleged Defendants' defective product (the software) caused damage to other property such as inability to connect to 3G network, which resulted in underperformance of telephone.

The economic loss doctrine does not apply when damages are caused to "other property." *Aas v. Superior Court*, 24 Cal.4th 627, 641 (2000) (collecting cases). The concept of "other property" is broadly applied to include "damage to one part of a product caused by another defective part." *Id.* To constitute an integrated system the property must be "so integrated into the overall unit that it *loses its identity*." *Jimenez v. Superior Ct.*, 29 Cal.4th 473, 486 (2002) (Kennard, J., concurring). Because this case is in its nascent stages, and no discovery at all has occurred, McKinney does not know exactly which component part(s) caused the software issues and inability to consistently connect to 3G networks—or whether the substantive failures were caused by software at all. This information is in the sole custody of Defendants, but is discoverable and thus there exists a cognizable negligence theory. Although it is possible that the cellular network was the cause of McKinney's issues, it also is possible that her problems were caused by failures of the Google Phone, a component of the Google Phone, separate software or firmware, or another unknown cause that will only be known after discovery. Those potential causes—including the software, firmware, cellular network, or service—are not so integrated into the Google Phone that it loses its separate identity. *Jimenez*, 29 Cal.4th at 476. The extent to which the Google Phone and any cause of the flaws McKinney experienced are distinct—whether they constitute separate property or are a single integrated unit—is a question of fact to be determined by a jury. *KB Homes v. Superior Court (Consolidated Industries Corp.)*, 112 Cal.App.4th 1076, 1087 (2003) (holding determining the nature of a product at issue and whether the injury for which recovery is sought is to the product itself or to property other than the defective product, is the province of the trier of fact). Thus, this is not an issue that can be properly resolved on a motion to dismiss.

Further, Defendants rely upon cases involving inherently dangerous products. *Seely v. White Motor Co.*, 63 Cal.2d 9, 12 (1965) (alleging negligent manufacture of truck) and *Robinson*

Helicopter Co., Inc. v. Dana Corp., 102 P.3d 268 (2008) (negligent misrepresentation action brought by a helicopter manufacturer against its part supplier). Indeed, Defendants" reference to *Seely v. White Motor Co.*, 63 Cal.2d 9, is inapposite because the issue on appeal there was whether the trial court "erred in awarding damages for lost profits and for the money paid on a purchase price of a truck" used by the plaintiff for his business of heavy-duty hauling. *Seely* at 63 Cal.2d 12. The Court reasoned "[a] consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market"). This reasoning was in reliance on *Trans World Airlines v. Curtiss-Wright Corp.* 1 Misc.2d 477 [148 N.Y.S.2d 284, 290] (1955). There, the New York Supreme Court held manufacturers of articles of component parts thereof, which are inherently dangerous when negligently made are liable for injury or property damage only. *Id.* at 480. The Court relied on another automobile case, *Wyatt v. Cadillac Motor Car Division*, 145 Cal.App.2d 423, finding an automobile manufacturer's duty "was confined to the exercise of reasonable care to be free from defects might be reasonably expected to produce bodily injury or damage to other property." *Wyatt v. Cadillac Motor Car Division*, 145 Cal.App.2d 423, 426 (1956).

In stark contrast, the instant case involves a cellular phone, not an automobile or helicopter. There is no allegation the Google phone is an inherently dangerous product. Defendants' duty was more than merely manufacturing and selling a phone that didn't cause physically injury or damage to other products. Rather, as alleged in the Complaint, Defendants' duty was "to properly manufacture, design, test, produce, assemble, inspect, distribute, market, package, prepare for use and sell the Google Phone to function as advertised." Compl. ¶¶ 116, 119. Indeed, if manufacturers of consumer products were only charged with the duty to making products that don't cause bodily harm or damage other products, they would never be liable for making or selling products that fail to work as promised.

Defendants' additional authority supporting its assertion of the economic loss doctrine is unavailing. *See Platte Anchor Bolt, Inc. v. IHI, Inc*, 352 F.Supp.2d 1048, 1051 (2004) (alleging negligence premised on alleged failure to perform contractual obligations where parties were in a business relationship). The instant action involves a relationship between a consumer and the

maker(s) and/or seller of the product; not a business relationship. Any reference to a manufacturer's liability for negligence is merely dicta and is not binding. *See Aas v. Superior Court (William Lyon Co.)*, 24 Cal.4th 627 (2000) (construction defect action). Accordingly, McKinney should be permitted to proceed with her negligence claim.

E. McKinney's Claims For Unjust Enrichment And Declaratory Relief Are Well-Pleaded.

Although Defendants cite the portion of *Nvidia* declaring "unjust enrichment is a theory of recovery, not an independent legal claim," they ignore the Court's finding elsewhere in the same paragraph that unjust enrichment "is synonymous with restitution." *See Nvidia*, 2009 U.S. Dist. LEXIS 108500, at *38. Restitution "may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory (an election referred to at common law as "waiving the tort and suing in assumpsit")." *McBride v. Boughton*, 123 Cal.App.4th 379, 388 (2004); *see also Paracor Fin., Inc. v. General Elec. Cap. Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) ("Under California law … unjust enrichment is an action in quasi-contract").

McKinney seeks restitution of monies unjustly obtained from her by Defendants in combination with the common counts claim. Compl. ¶¶ 140-43. McKinney has alleged that "Defendants were unjustly enriched and have received. . . excessive revenue at the expense of McKinney and the Class" and request "the return of any monies by which Defendants were unjustly enriched." *Id.* ¶¶ 142-43. Although the Complaint phrases the legal claim in terms of unjust enrichment and common counts, because that is the proper term, the substance of the cause of action is restitution. As in *McBride*, which this Court cited in *Nvidia*, Plaintiffs" "purported cause of action for unjust enrichment" should be construed as an attempt to plead a cause of action for restitution. *See McBride*, 123 Cal.App.4th at 388.

To the extent Defendants seek to have this cause of action dismissed because it is derivative or pleaded alternatively, those attempts fail. A defendant "is not entitled to have a cause of action dismissed for failure to state a claim simply because it conflicts with another cause

of action." *Oracle Corp. v. SAP AG*, 2008 U.S. Dist. LEXIS 103300, at *24 (N.D. Cal. Dec. 15, 2008); *accord In re Verisign, Inc. Deriv. Litig.*, 531 F. Supp. 2d 1173, 1217 (N.D. Cal. 2007). Inconsistent pleading is permissible under Federal Rule of Civil Procedure 8(e)(2). *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 314 (9th Cir. 1989).

F. Defendants' Failure To Provide Customer Support Is Actionable.

McKinney's Complaint adequately pleads claims for relief that are able to withstand this conclusory Motion to Dismiss. Defendant erroneously relies upon *First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 985–86 (9th Cir. 2000), which was a legal malpractice case revolving around an incident of a judge's recusal because his former law clerk worked for the defendant's attorney's law firm. The court held the defendant had no legal duty to disclose that his law clerk formerly worked for the presiding judge because it was not reasonably foreseeable that the conduct would lead to impropriety. *Id.* However, in the present case, a duty to act reasonably under the circumstances were attached to the sale of the Google Phone because a company's associated customer service is intrinsic in the purchase of a product, particularly with cellular telephones or other electronic devices. *See generally Roberts v. USCC Payroll Corp.*, 635 F. Supp. 2d 948, 951 (N.D. Iowa 2009) ("as [Retail Wireless Consultants] plaintiffs were responsible for providing general customer service, including selling cellular telephones and USCC cellular telephone services, answering questions and billing inquiries and accepting payments. Plaintiffs were also responsible for completing accurate paperwork and transactions according to company policies and procedures").

Further, Defendants' failure to provide adequate customer services supports McKinney's UCL and CLRA claims that Defendants' conduct as alleged constitutes unfair methods of competition and unfair or deceptive business acts or practices. Indeed, McKinney has alleged that Defendants' conduct constitutes "unfair methods of competition and unfair or deceptive business practices" in violation of section 1770(a) of the CLRA. Compl. ¶ 95. McKinney also alleged Defendants' conduct violates the "unfair" prong of the UCL. Compl. ¶ 74. Therefore, in support of McKinney's allegations of unfairness, allegations regarding Defendants' failure to provide adequate customer service are actionable. *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th

1394, 1403 (2006) (in consumer cases, a business practice is unfair where the injury caused by the allegedly unfair business practice: a) is substantial; b) is not outweighed by any countervailing benefits to consumers or to competitors; and c) could not reasonably have been avoided). For example, McKinney's allegations for unfair competition are supported by Defendants' lack of infrastructure and preparedness at the time of the launch—not only did they fail to ensure the Google Phone could maintain 3G connectivity but also failed to ensure there was adequate assistance. Compl. ¶ 60. This was particularly egregious, because the Google Phone was a brand new product and the Droid operating system was brand new. Compl. ¶¶ 41, 60. The harm to McKinney and the Class is substantial, did not benefit the Defendants in any way, and could not have been avoided by McKinney.

Defendants' failure to provide adequate customer service exemplifies their disregard for purchasers of the Google Phone; once Defendants took the money from McKinney and the Class, they no longer cared whether the product worked. Additionally, Defendants' failure to provide adequate service further evidences the care McKinney took to remedy the situation and mitigate her losses before filing this lawsuit. In sum, the lack of customer service deprived McKinney and the Class of the bargain they believed they had struck—a brand new, true 3G device that would operate properly when paired with Defendants' a 3G compatible cellular network. Instead, McKinney and the Class went for days on end with either sporadic or no 3G connectivity (or connectivity of any kind, in McKinney's case)—even in areas where the 3G coverage map showed 3G coverage was available—while Defendants enjoyed the profits from their sale of the Google Phone and the Class members were deprived of the monies they paid Defendants, as well as the fees paid to their cellular service providers while unable to use their phones.

V. CONCLUSION

For all of the above reasons, the Defendants' Motion should be denied and they should be ordered to file an Answer to the Complaint.[3]

[3] In the alternative, if the Court grants Apple's Motion in any respect, McKinneys request that the Court grant them leave to amend their Complaint to cure any deficiencies. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."). The Ninth Circuit requires this policy favoring amendment be applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). *See also Von Saher v.*

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

By: /s/ Sara D. Avila

DATED: April 4, 2011

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Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1031 (9th Cir. 2009) ("Unless it is clear that the complaint could not be saved by amendment, dismissal without prejudice and without leave to amend is not appropriate").