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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

15 MARY McKINNEY, et al.,
 16 Plaintiff,

17 v.

18 GOOGLE INC., a Delaware corporation,
 HTC CORP., a Taiwanese corporation, and
 19 T-MOBILE USA, INC., a Delaware
 corporation,
 20 Defendants.

Case No. 5:10-CV-01177-JW
 Case No. 5:10-CV-03897-JW

**DEFENDANTS GOOGLE INC. AND HTC
 CORPORATION'S REPLY BRIEF IN
 SUPPORT OF MOTION TO DISMISS
 SECOND AMENDED COMPLAINT**

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

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1 **I. INTRODUCTION**

2 In multiple respects, the opposition (“Opp.”) filed by plaintiff Mary McKinney
3 (“Plaintiff”) serves only to confirm that the Rule 12(b)(6) motion to dismiss the Second Amended
4 Complaint (“SAC”) filed by defendants Google Inc. (“Google”) and HTC Corporation (“HTC”)
5 should be granted. Indeed, Plaintiff offers no response to many of Google and HTC’s
6 independently dispositive arguments in their motion’s opening brief (“Motion”), and the few
7 arguments that she does offer are insufficient and, in fact, demonstrably incorrect. Because
8 Plaintiff has now had three opportunities to state a claim, and offers no indication how she would
9 (or could) do so if again given leave to amend, the SAC should be dismissed with prejudice.

10 **II. ARGUMENT**

11 **A. Plaintiff’s Misrepresentation Claims Should Be Dismissed Under Rule 9(b).**

12 Plaintiff’s claims based on alleged misrepresentations that the Nexus One would maintain
13 “consistent” connectivity to T-Mobile’s 3G network must be dismissed for failure to satisfy Rule
14 9(b)’s particularity requirements. During oral argument on Google and HTC’s motion to dismiss
15 the First Amended Complaint, Plaintiff’s counsel stated – to secure leave to amend – that the
16 SAC *would* “meet the challenge that is being offered, namely, to allege a misrepresentation
17 based on a representation that [the Nexus One] will consistently function at 3G all of the time.”
18 Opp. at 11 (quoting Nov. 1, 2010 Hg. Tr., at 24:15-25:4). Plaintiff does not deny that, contrary to
19 counsel’s statement, the SAC does not plead *any* representation by Google or HTC that even
20 mentions 3G connectivity, let alone promises the Nexus One will maintain “consistent” 3G
21 connectivity. Instead, Plaintiff’s Opposition offers only a series of confused arguments, which do
22 nothing to excuse her failure to identify any actionable misrepresentation by Google or HTC.

23 First, Plaintiff wrongly asserts that her UCL, FAL and CLRA claims are governed by
24 Rule 8(a)’s notice pleading rule, and not Rule 9(b). *See* Opp. at 7-9.¹ The Ninth Circuit has
25 consistently and repeatedly held that Rule 9(b) applies to state law claims based on fraudulent
26

27 ¹ Plaintiff does not seriously dispute that Rule 9(b) applies to her common law fraud, negligent
28 misrepresentation, and unjust enrichment claims; Plaintiff actually tries to argue only that her
“UCL, FAL, and CLRA Claims” are not governed by Rule 9(b). *See id.* at 7-8.

1 misrepresentations, including claims under California’s consumer protection statutes. *Kearns v.*
2 *Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009) (UCL and CLRA claims); *Vess v. Ciba-*
3 *Geigy Corp.*, 317 F.3d 1097, 1103-06 (9th Cir. 2003) (UCL, FAL and CLRA claims); Motion at
4 10. The Ninth Circuit in *Kearns* explicitly held that, where the plaintiff asserts California
5 statutory consumer fraud claims premised on defendant’s alleged “misrepresentations” and
6 related “nondisclosure[s]” about its product, both the misrepresentation and non-disclosure
7 allegations *must* be pled with particularity or the claims are subject to dismissal under Rule 9(b).
8 567 F.3d at 1125-27. Any misrepresentation-based allegations not pled with Rule 9(b)
9 particularity “should be ‘disregarded,’ or ‘stripped’ from the claim for failure to satisfy Rule
10 9(b).” *Kearns*, 567 F.3d at 1124 (quoting *Vess*, 317 F.3d at 1105).² Here, Plaintiff’s UCL, FAL,
11 and CLRA claims are based on alleged misrepresentations by Google and HTC that Nexus One
12 would maintain “consistent” 3G connectivity and thus must be pled with Rule 9(b) particularity.

13 Second, Plaintiff’s contention that her SAC’s conclusory allegations “satisf[y] Rule 9(b)”
14 (Opp. at 7, 9-10) is manifestly without merit. As this Court has held, Rule 9(b) requires Plaintiff
15 to identify and plead the “specific content” of any “false representations” supposedly made by
16 Google and HTC. *Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 706-07 (N.D. Cal. 2009)
17 (Ware, J.). Here, however, Plaintiff does not allege with particularity any representation by
18 Google or HTC that the Nexus One would maintain “consistent” 3G connectivity – the
19 “misrepresentation” on which Plaintiff’s claims are based. *See* Motion at 1, 10; *see also* Opp. at 1
20 (“consistent 3G access”). In fact, Plaintiff does not allege any representation by either defendant
21 that even mentions 3G in connection with the Nexus One. Although she alleges that the
22 “appellation” 3G is “commonly understood to provide superior data transfer rates over older cell
23 technology,” Opp. at 2, Plaintiff overlooks the fact that there is no such “appellation” for the
24 Nexus One (unlike, for instance, the “iPhone 3G”). Ultimately, it is dispositive that the SAC does

25 _____
26 ² The few authorities Plaintiff cites suggest merely that some essential elements of a common law
27 fraud claim – such as “intent” – need not be pled with Rule 9(b) particularity or at all under the
28 UCL. *See* Opp. at 10-12. But that in no way excuses Plaintiff’s failure to identify and plead with
particularity some *actionable misrepresentation* by Google and HTC falsely promising that the
Nexus One would maintain “consistent 3G connectivity” – as required by Rule 9(b) under *Vess*,
Kearns, and the other authorities cited by Google and HTC.

1 not identify a single representation by HTC about the Nexus One, and that the only representation
2 by Google alleged with particularity is this entirely non-actionable statement from Google's
3 website: "Experience Nexus One, the new Android phone from Google." Motion at 10 (quoting
4 SAC, ¶ 35).³

5 Finally, Plaintiff is wrong to suggest that her conclusory allegations might be deemed
6 sufficient because she has alternatively cast them as claims of "omission" or "concealment." See
7 Opp. at 8-9. Under settled law, Rule 9(b) applies to claims of nondisclosure and omission, as
8 varieties of misrepresentations. *Kearns*, 567 F.3d at 1126; *Marolda v. Symantec Corp.*, 672 F.
9 Supp. 2d 992, 1001-02 (N.D. Cal. 2009); Motion at 12-13 & n.8 (citing cases). Moreover, as this
10 Court recognized in *Long v. Hewlett-Packard Co.*, "to be actionable [an] omission must be
11 contrary to a representation actually made by the defendant." 2007 U.S. Dist. LEXIS 79262, at
12 *24 (N.D. Cal. July 27, 2007) (quoting *Daugherty v. American Honda Motor Co.*, 144 Cal. App.
13 4th 824, 835 (2006)); accord *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187, at *11 (N.D.
14 Cal. Feb. 10, 2011) (dismissing omission-based claim under *Daugherty* where "Plaintiffs do not
15 identify any affirmative representation concerning the subject of any alleged omissions"). Hence,
16 Plaintiff's failure to plead any Google or HTC representation that even mentions the consistency
17 of the Nexus One's "3G" connectivity dooms her omission allegations. See Motion at 12-13.⁴

18 In sum, despite the Court's leave to amend, Plaintiff has still failed to plead her allegations
19 of misrepresentation and related omission with the particularity demanded by Rule 9(b). The
20 SAC's conclusory allegations must be "disregarded" and "stripped" from the SAC under settled
21 Ninth Circuit law, *Kearns*, 567 F.3d at 1124; *Vess*, 317 F.3d at 1105, and Plaintiff's

22 ³ Plaintiff also simply ignores that she has no basis in fact or law to try to hold Google and HTC
23 accountable for any alleged statement supposedly "made to her by a 'T-Mobile sales
24 representative'" that the Nexus One is essential for websurfing, email, and has "3G speed" –
25 which, in any event, is not even alleged to have "promise[d] that the Nexus One will maintain
26 'consistent' 3G connectivity on T-Mobile's 3G wireless network, much less other 3G wireless
networks." Motion at 12-13 (emphasis in original; quoting SAC, ¶ 39). Perhaps Plaintiff can
raise this in her arbitration against non-defendant T-Mobile, but it cannot support claims here
against Google and HTC for statements they never made. See also Motion at 12 n.7.

27 ⁴ As Plaintiff does not dispute, the SAC also fails to identify and plead with Rule 9(b)
28 particularity any representation by Google or HTC that they would provide some type of
customer service that they allegedly failed to provide. See Motion at 12- 13, 23. So Plaintiff's
"customer service" misrepresentation allegations fail for the same reasons.

1 misrepresentation-based claims in the SAC – First, Second, Third, Seventh, Eighth, and Ninth
2 Causes of Action – necessarily fail as a matter of law.

3 **B. Plaintiff’s Breach Of Warranty Claims Should Be Dismissed.**

4 As a procedural matter, Plaintiff’s warranty claims fail for lack of “pre-suit notice.”
5 Motion at 15. Unable to deny that the SAC fails to allege that she gave pre-suit notice on her
6 warranty claims (which she did not), Plaintiff asserts that her “CLRA notice” under California
7 Civil Code section 1770 should suffice even though she cites no authority that CLRA notice can
8 substitute for her separate and independent legal obligation to give pre-suit warranty notice under
9 California Commercial Code section 2607. Opp. at 12-13. More fundamentally, Plaintiff’s
10 warranty claims fail for multiple substantive reasons as well, as explained below.

11 **1. Plaintiff’s “Express Warranty” Claim Fails.**

12 As Google and HTC argued, Plaintiff’s express warranty claim fails because the SAC
13 does not allege any statement by Google or HTC that could constitute an express warranty that
14 the Nexus One would maintain “consistent” 3G connectivity, nor does it allege Plaintiff’s
15 reasonable reliance on any such supposed express warranty. See Motion at 15-18. Plaintiff’s
16 Opposition does not and cannot respond to these dispositive legal arguments.

17 First, Plaintiff’s claim fails because the SAC does not plead that Google and HTC actually
18 made the express warranty on which this claim depends, *i.e.*, the explicit promise that the Nexus
19 One was “guaranteed to provide ‘consistent’ 3G connectivity.” Motion at 16 (quoting SAC, ¶¶
20 100-04). To adequately plead “the exact terms of the warranty,” *Sanders v. Apple, Inc.*, 672 F.
21 Supp. 2d 978, 987 (N.D. Cal. 2009), Plaintiff had to allege facts sufficient to show that Google
22 and HTC actually made some “explicit guarantees” and “specific and unequivocal written
23 statement[s]” about the consistency of the Nexus One’s connectivity to T-Mobile’s 3G network
24 that could qualify as the sort of “affirmation[] of fact or promise[]” required to constitute an
25 actionable “express warranty.” *Maneely v. General Motors Corp.*, 108 F.3d 1176, 1181 (9th Cir.
26 1997); accord *McKinniss v. Sunny Delight Beverages Co.*, 2007 U.S. Dist. LEXIS 96108, at
27 **16-17 (C.D. Cal. Sept. 4, 2007). The SAC does not satisfy this most fundamental requirement
28 because it does not – and cannot – identify any instance in which Google or HTC actually made

1 statements promising that the Nexus One would maintain “consistent” 3G connectivity. *See also*
2 pp. 1-4, *supra*.

3 Plaintiff’s Opposition offers a string-cite of mostly non-California cases, which ultimately
4 just confirm that no claim will lie unless the defendant made some affirmation of fact and
5 promise sufficient to qualify as an actionable express warranty. *See Opp.* at 14. The two
6 California cases Plaintiff cites are inapposite, and underscore why Plaintiff’s express warranty
7 claim fails. In *Gonzalez v. Drew Indus. Inc.*, 2007 U.S. Dist. LEXIS 35952 (C.D. Cal. May 10,
8 2007), the express warranty claim survived a dismissal motion where (unlike here) the plaintiff
9 alleged that the defendants had affixed “stickers” to the plastic bathtubs at issue that explicitly but
10 falsely promised that its bathtubs were tested and conformed with federal flammability standards,
11 and (also unlike here) the defendant did not even dispute the existence of the express warranty at
12 issue. *Id.* at **2-4, 34-35. Also unlike this case is *Williams v. Beechnut Nutrition Corp.*, 185 Cal.
13 App. 3d 135 (1986) – cited by Plaintiff – which involved “a glass juice bottle intended for use by
14 infants” and “shaped like a ‘baby bottle,’” which shattered and injured the plaintiff’s infant during
15 use. 185 Cal. App. 3d at 138. Given these extraordinary facts, the court of appeal had no
16 problem concluding that the manufacturer expressly warranted that its product was reasonably
17 safe for use by infants (when in fact it was not), especially where plaintiffs alleged that the
18 defendant “‘expressly warranted’” that the glass baby bottle was “‘safe for its intended use.’” *Id.*
19 at 142. Here, however, there is no basis for Plaintiff’s assertion that Google and HTC expressly
20 warranted, and therefore guaranteed, “consistent” 3G connectivity for the Nexus One – a device
21 Plaintiff admits was designed to operate on both 2G and 3G networks so that voice and data
22 services could still be used when 3G connectivity is unavailable. *See SAC*, ¶¶ 41, 52-53, 64.
23 Accordingly, this case is far more like *Baltazar v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 13187
24 (N.D. Cal. Feb. 10, 2011), where Judge Fogel recently dismissed the plaintiff’s express warranty
25 claim based on Apple’s supposed promise that its iPad would “function outdoors as an e-reader
26 and mobile internet device” as allegedly “represented by Apple.” *Id.* at *2. As in *Baltazar*,
27 Plaintiff has failed to recite “the exact terms” of the supposed express warranty by specifying the
28 “content” of the actual representation made that supposedly forms the basis for Plaintiff’s express

1 warranty claim. *Id.* at **6-7.

2 Second, Plaintiff’s express warranty claim also must be dismissed because, as her
3 Opposition confirms, she cannot establish “reasonable reliance” on any express warranty actually
4 made by Google or HTC. Motion at 17-18 (citing cases); *see also Baltazar*, 2011 U.S. Dist.
5 LEXIS 13187, at *6 (dismissing express warranty claim where plaintiffs failed to allege their own
6 “reasonable reliance on the particular commercial or advertisement” whereby the defendant
7 supposedly made an actionable express warranty). Here, any subjective ““expectation”” that
8 Plaintiff might have had about whether the Nexus One would maintain “consistent” 3G
9 connectivity cannot be based on anything Google and HTC actually stated and thus expressly
10 warranted. *See* Motion at 17 (quoting SAC, ¶ 104). Indeed, Plaintiff neither alleges nor argues in
11 her Opposition that she relied on any *actual statement* made by either Google or HTC promising
12 and therefore expressly warranting that the Nexus One would maintain “consistent” 3G
13 connectivity.⁵ This too is dispositive. Finally, Plaintiff ignores Google and HTC’s additional
14 argument that the terms and disclaimers in their contracts contradict Plaintiff’s allegations and
15 refute the reasonableness of any claimed reliance on promises Google and HTC never made. *Id.*
16 at 16-17.

17 **2. Plaintiff’s “Implied Warranty Of Merchantability” Claim Fails.**

18 As Google and HTC argued, Plaintiff’s implied warranty claim fails because (1) the SAC
19 fails to allege facts showing that the Nexus One is not merchantable under the governing
20 California authorities; (2) Google’s disclaimer of implied warranties further undermines the
21 claim; and (3) Plaintiff lacks privity with HTC. *See* Motion at 17-21. The Opposition does not
22 sufficiently respond to these independently dispositive arguments.

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24
25 ⁵ Plaintiff’s Opposition says that she relied “in part” on the “concept” that she was buying a
26 device that would maintain “consistent 3G connectivity,” Opp. at 16, given the “impression” she
27 says she had. *Id.* at 1, 9. But despite her conclusory argument that Google and HTC “touted” the
28 Nexus One’s “3G characteristics” in product advertising, *id.* at 16, Plaintiff does not identify and
allege facts showing that Google and HTC *actually stated* that the Nexus One would provide
“consistent” 3G connectivity, or that she relied on any such non-existent promise. As a matter of
law, there is no such thing as an *implied* “express warranty.”

1 Plaintiff has not only conceded by her silence that this claim must be dismissed, but also
2 “waived” any contrary arguments. *City of Arcadia v. EPA*, 265 F. Supp. 2d 1142, 1154 n.16
3 (N.D. Cal. 2003).

4 **b. Google’s Legally Enforceable Disclaimer Of Any Implied**
5 **Warranties Extinguishes Any Claim.**

6 While the SAC’s implied warranty claim must be dismissed for the foregoing reason,
7 Plaintiff offers no meaningful response to Google’s argument based on the legally enforceable
8 and explicit disclaimer of any “IMPLIED WARRANTIES OF MERCHANTABILITY” set forth
9 in the Google Terms of Sale,⁷ which satisfies the requirements of California Commercial Code
10 section 2316(2). *See* Motion, Exh. 1, at p. 4; RFJN, Exh. 1, at p. 4. This disclaimer bars any
11 implied warranty claim under California common law and the California Commercial Code.

12 **c. Plaintiff Lacks Privity With HTC.**

13 Plaintiff does not dispute that she lacks privity with HTC, or that privity is required to
14 state a claim for breach of implied warranty under California common law. *See In re NVIDIA*
15 *GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *21 (N.D. Cal. Nov. 19, 2009).

16 **3. Plaintiff’s Arguments Based On The Song-Beverly Act Do Not And**
17 **Cannot Save Her Warranty Claims From Dismissal.**

18 Unable to respond to Google and HTC’s dispositive arguments requiring dismissal of her
19 express and implied warranty claims under California common law, Plaintiff attempts to save
20 these claims by asserting that they are “properly pleaded” under the “Song-Beverly Act.” Opp. at
21 15-16. Plaintiff has it backwards. To state any claim under the Song-Beverly Act, Plaintiff must
22 *first* “plead successfully a breach of state warranty law.” *Birdsong v. Apple, Inc.*, 590 F.3d 955,
23 958 n.2 (9th Cir. 2009). Here, the same fundamental defects requiring dismissal of Plaintiff’s
24 common law warranty claims also require dismissal of any Song-Beverly Act claim. *Id.*

25 Moreover, Plaintiff offers no response to Google and HTC’s argument and cited authority
26 that the Song-Beverly Act does not apply to product purchases over the Internet made by out-of-

27 ⁷ In an effort to evade this result, Plaintiff in her RFJN opposition relies on meritless assertions
28 and arguments, which Google rebuts in its RFJN reply.

1 state residents. See Motion at 13 n.9. Indeed, *Annunziato v. eMachines, Inc.* confirms that non-
2 California residents – like Plaintiff, a Pennsylvania resident, see SAC, ¶ 2 – who “purchased the
3 product over the internet” cannot pursue Song-Beverly Act claims. 402 F. Supp. 2d 1133, 1142
4 (C.D. Cal. 2005). As to her lack privity with HTC, Plaintiff does not dispute that privity is
5 required for breach of implied warranty claim under the Commercial Code, and ignores authority
6 holding that privity is also required under the Song-Beverly Act. *Tietzworth v. Sears, Roebuck &*
7 *Co.*, 2009 U.S. Dist. LEXIS 98532, at *36 (N.D. Cal. Oct. 13, 2009).

8 **4. Plaintiff’s State-Law Warranty Claims Are Also Preempted.**

9 Although Plaintiff’s broader preemption arguments are rebutted below (see pp. 13-15,
10 *infra*), Plaintiff does not deny that the SAC’s state-law warranty claims are the same as those this
11 Court already dismissed as preempted because they were tied to and could not be separated from
12 preempted attacks on the sufficiency of T-Mobile’s 3G network. Motion at 14-15. Tellingly,
13 Plaintiff quotes the Court’s ruling granting leave to assert different warranty claims based on
14 identifiable “actual defects” in the Nexus One and proclaims that this is what she has done, but
15 none of her bullet-pointed allegations supports any “actual defects” theory. Opp. at 5-6. In fact,
16 the SAC *nowhere* identifies and pleads any “actual defects” in the Nexus One – as distinct from
17 “T-Mobile’s insufficient infrastructure,” SAC, ¶ 88 – that supposedly caused the 3G connectivity
18 problems about which Plaintiff complains. Plaintiff elsewhere admits that she can only *speculate*
19 that there *might* be a defect in the device that “may” (or may not) cause or contribute in some
20 unspecific manner to the alleged problems. Opp. at 17.⁸ As Plaintiff admits, she “does not
21 know” one way or the other “whether the substantive failures” as to 3G connectivity “were
22 caused by [the Nexus One’s] software at all,” and the most she can say is that it “is *possible* that
23 her problems were caused by the Google Phone.” *Id.* at 18 (emphasis added). This is fatal for
24 two reasons. First, it confirms that Plaintiff’s “possible” defect allegations and warranty claims
25 are not the sort of “*actual* defects” claims that might escape preemption under the Court’s prior

26 ⁸ Moreover, even though Plaintiff purports to challenge “defects” in the Nexus One, she has
27 absolutely no response to Google and HTC’s argument that, as before, the claims are inextricably
28 intertwined with FCA preempted attacks on the adequacy of T-Mobile’s 3G network
infrastructure. Hence, the SAC’s claims remain preempted.

1 ruling. Nov. 16, 2010 Order, at 17 (emphasis added). Second, it compels dismissal of Plaintiff's
2 claims under *Twombly*'s motion-to-dismiss standard, which requires Plaintiff to plead enough
3 well-pleaded facts to state a claim that is "plausible on its face," *Bell Atl. Corp. v. Twombly*, 550
4 U.S. 544, 570 (2007), and "more than" the sort of "possibility" on which Plaintiff relies here. *Id.*
5 at 556; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962,
6 969 (9th Cir. 2009).

7 **5. Plaintiff's Federal Warranty Claim Under The Magnuson-Moss**
8 **Warranty Act Fails Along With Her Deficient State-Law Claims.**

9 As Plaintiff admits, the Magnuson-Moss Warranty Act ("MMWA") merely "provides a
10 federal cause of action for state law implied warranty claims." Opp. at 16 (quoting *In re NVIDIA*
11 *GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *24 (N.D. Cal. Nov. 19, 2009)). For the multiple
12 reasons stated above, Plaintiff's implied warranty of merchantability claim fails, which mandates
13 dismissal of the SAC's MMWA claim as well. *See also* Motion at 21.

14 **C. Plaintiff's Negligence Claim Should Be Dismissed As Barred By The**
15 **Economic Loss Rule.**

16 Plaintiff's arguments as to why her negligence claim is not barred by the economic loss
17 rule are completely without merit. She does not deny that the economic loss rule requires
18 dismissal of negligence claims where the complaint fails to allege that the allegedly defective
19 product caused physical injury or damage to other property, *i.e.*, damage to property other than
20 the product itself. Motion at 21-22 (citing cases); Opp. at 17-18; *see also Jimenez v. Superior Ct.*,
21 29 Cal. 4th 473, 483 (2002). Nor does she deny that the SAC's negligence claim seeks recovery
22 of purely economic loss; indeed, nowhere does the SAC allege that the Nexus One caused
23 Plaintiff physical injury or damage to any of her other property. Hence, Plaintiff's negligence
24 claim is barred under the rule that "[w]here a purchaser's expectations in a sale are frustrated
25 because the product [s]he bought is not working properly, h[er] remedy is said to be in contract
26 alone, for [s]he has suffered only 'economic' losses." *Robinson Helicopter Co. v. Dana Corp.*, 34
27 Cal. 4th 979, 988-89 (2004). Indeed, Plaintiff's negligence claim seeks recovery of purely
28 economic damages based on the SAC's allegations that her expectations that the Nexus One

1 would provide consistent 3G connectivity have been frustrated given how her device operates.

2 Trying to evade this legally compelled result, Plaintiff now pretends that the “product” at
3 issue here is not the Nexus One *device* itself, but instead the Nexus One’s *software*. Opp. at 17-
4 18. She then speculates that the software “may” (or may not) play some role in 3G connectivity
5 issues she allegedly experienced – saying that it is at least “possible.” Opp. at 17-18. But
6 Plaintiff’s argument fails for multiple reasons.

7 First, the allegations in the SAC do not support Plaintiff’s new theory that the “product” at
8 issue in this case is the Nexus One’s *software*, as opposed to the Nexus One *device*. The only
9 “product” discussed in the SAC is the Nexus One *device*. See generally SAC. The SAC nowhere
10 alleges that the Nexus One’s *software* is a distinct and separable component part that was
11 defective and damaged the Nexus One device. Notably, the Sixth Cause of Action for
12 “Negligence” does not even mention the Nexus One’s software. See SAC, ¶¶ 115-21. In fact,
13 nothing in the SAC supports counsel’s bare assertion that the Nexus One’s software is both the
14 allegedly “defective product,” Opp. at 18, and also “not so integrated” into the Nexus One “that it
15 loses its separate identity,” *id.*, for purposes of the economic loss rule.⁹ At bottom, the product at
16 issue here is the product that is alleged in the SAC, and the product that was sold as a single
17 integrated unit: the Nexus One device. See also *E. River S.S. Corp. v. Transamerica Delaval*
18 *Inc.*, 476 U.S. 858, 867 (1986).

19 Second, as noted above, Plaintiff’s speculation that it is “possible” that there might be
20 some unidentified defect in the Nexus One’s software that might play some unidentified role in
21 the alleged 3G connectivity problems (Opp. at 17-18) is the very sort of mere “possibility” that is
22 insufficient to state a claim that is “plausible on its face.” *Twombly*, 550 U.S. at 556, 570.¹⁰

23 _____
24 ⁹ Plaintiff misleadingly quotes the phrase “the software is a mess” in the SAC as if it were an
25 affirmative allegation she made, see Opp. at 17, but in reality that phrase comes from a quote of
26 one 27-year old New Jersey consumer included in a *New York Times* article Plaintiff excerpted in
27 the SAC in a paragraph focused on the adequacy of “customer support.” SAC, ¶ 60. Moreover,
28 even saying that “the software is a mess” is insufficient, as it neither alleges nor even suggests
that the software is both legally “defective” and the cause of the Nexus One’s claimed 3G
connectivity problems (both of which are nowhere pleaded in the SAC).

¹⁰ Given the SAC’s fundamental pleading deficiencies under *Twombly*, Plaintiff is clearly wrong
to argue that the unpled issue of whether the software might be a separable product that is
“defective” and caused the alleged “consistent 3G connectivity” problems present disputed

1 Finally, despite Plaintiff’s failed analogy, this case bears no resemblance to *In re NVIDIA*
2 *GPU Litig.*, 2009 U.S. Dist. LEXIS 108500 (N.D. Cal. Nov. 19, 2009). There, the plaintiffs sued
3 the manufacturer of “defective graphic processing units” and “chips” that were sold as distinct
4 products to third party computer manufacturers (*e.g.*, Hewlett-Packard) who then used the GPUs
5 in computers sold to consumers. *Id.* at **4-6. Unlike here, the plaintiffs’ complaint in *NVIDIA*
6 alleged that the defendant’s GPUs were “defective” for specifically identified technical reasons.
7 *Id.* at **6-7. Also unlike here, the plaintiffs’ complaints alleged that the GPUs were the
8 “defective product” at issue, and that the defective GPUs caused many specifically identified
9 forms of damage to their computers, such as harm to the computer’s battery and other internal
10 components. *Id.* at **7-10. On these entirely different facts, this Court ruled that the plaintiffs
11 “adequately alleged that Defendant’s defective product (the GPU) caused damage to property
12 such as the CPU’s battery,” and therefore plaintiffs “alleged that the defective GPU has caused
13 damage to property other than itself.” *Id.* at *40.¹¹

14 In sum, Plaintiff’s negligence claim is barred by the economic loss rule and her attempts
15 to evade that rule are unavailing.

16 **D. Plaintiff’s Unjust Enrichment And Declaratory Relief Claims Should Be**
17 **Dismissed.**

18 Plaintiff offers no defense for her duplicative “declaratory relief” claim. *See* Motion at 22
19 (citing authorities). Plaintiff admits that there is no cognizable claim for “unjust enrichment”
20 under California law, but suggests that her claim could simply be treated as synonymous with a
21 claim for equitable “restitution.” *Opp.* at 20. But Plaintiff ignores Google and HTC’s dispositive
22 argument that no “restitution” claim can be asserted where, as here, there exists an enforceable
23 agreement between the parties. *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1167 (9th

24 factual issues for a jury to decide. *Opp.* at 18.

25 ¹¹ Plaintiff’s negligence claim is also unlike the “defective window installed in a mass-produced
26 home” that caused damage “to other parts of the home in which it [was] installed” in *Jimenez*
27 (cited by Plaintiff, *Opp.* at 17-18) – which was held to constitute a distinct and separable
28 “defective product” for purposes of the economic loss rule. 29 Cal. 4th at 483-84; *see also id.* at
485-88 (Kennard, J., concurrence) (“the windows may be regarded as a distinct product for
purposes of the economic loss rule” because they “may be readily separated from the overall unit”
of which they are just a readily severable part).

1 Cir. 1996); Motion at 22 n.14; SAC, ¶ 100 (alleging existence of “agreements” with defendants).
2 Plaintiff’s Ninth and Tenth Causes of Action must be dismissed.

3 **E. All Of Plaintiff’s Claims Should Be Dismissed As Preempted By The FCA.**

4 Plaintiff does not dispute that the SAC *still* does not allege that her Nexus One failed to
5 maintain “consistent” 3G connectivity due to “actual defects” in the device itself, as opposed to
6 deficiencies in the infrastructure of T-Mobile’s 3G wireless network. Plaintiff alleges that 3G
7 connectivity issues are caused *either* by some “possible” but unidentified defect in the device, *or*
8 by T-Mobile’s wireless network, *or* by “a combination of the two.” SAC ¶ 101; *see also id.*, ¶ 70
9 (“the infrastructure of T-Mobile’s 3G wireless network and/or the Google phone itself were
10 defective and inadequate”). Indeed, in the introduction to her Opposition, Plaintiff describes the
11 alleged connectivity problems as resulting from the fact that “[T-Mobile’s] network connectivity
12 did not offer a true 3G experience.” Opp. at 2.

13 Plaintiff does not dispute that these allegations, upon which all of her claims are based, are
14 the same as those that this Court held to be preempted under 47 U.S.C. § 332(c)(3) in both the
15 *iPhone* case and its prior ruling in this case. Instead, Plaintiff asserts that her claims are not
16 preempted under *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035 (9th Cir. 2010),
17 but based on her fundamental misreading of that case. In fact, *Shroyer* confirms – consistent with
18 the FCC’s own interpretation of *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir.
19 2000) – that express FCA preemption under section 332(c) turns on the “substance” of the
20 particular claims at issue, and not merely their “form.” *Shroyer*, 622 F.3d at 1040. As *Shroyer*
21 notes, the plaintiffs’ claim in *Bastien* was preempted because it relied on state consumer
22 protection law in a manner that necessarily would embroil the court in determining the
23 sufficiency of AT&T’s network. *Id.* Hence, the *substance* of the claim implicated assessments
24 reserved for the FCC to make and thus preempted under section 332(c)(3).

25 The Ninth Circuit held that the plaintiff’s breach of contract and fraud claims in *Shroyer*
26 were not preempted because the adequacy of the challenged service was to be measured against
27 specific contractual and other representations by AT&T regarding service levels. *Id.* The
28 contract claim required the court to determine only “whether New Cingular has performed its

1 promise in a contract,” and the fraud claim turned on a determination as to whether AT&T
2 “misrepresented the level of service it would provide” measured against representations actually
3 made by AT&T and pled with Rule 9(b) particularity. Finally, the Ninth Circuit added that
4 “*Bastien* dealt with market entry,” while Shroyer’s non-preempted claims did not. *Id.* at 1040.

5 Here, unlike the non-preempted claims in *Shroyer*, the substance of Plaintiff’s challenged
6 state-law claims are inextricably intertwined with and cannot be separated from preempted
7 attacks on the sufficiency of the infrastructure and performance of carriers’ 3G wireless networks,
8 including their 3G “market entry” and “rates charged.” Motion at 14-15, 23; Nov. 16, 2010
9 Order, at 17; *In re Apple iPhone 3G Prods. Liab. Litig.*, No. 09-2045, slip op. at 9, 14 (N.D. Cal.
10 April 2, 2010). Plaintiff’s continued inability to plead her misrepresentation-based allegations
11 about “consistent 3G connectivity” with Rule 9(b) particularity (*see pp. 1-4, infra*) not only
12 further distinguishes this case from *Shroyer*, but also makes her claims even more like the
13 preempted claims in *Bastien* where the plaintiffs similarly failed to plead any “particular promises
14 or representations” and “specific instances of the words used by” the defendant in support of their
15 conclusory “misrepresentation” allegations. *Bastien*, 205 F.3d at 889-90. Moreover, Plaintiff
16 ignores her own allegations that T-Mobile’s 3G network infrastructure is not only “insufficient”
17 (SAC, ¶ 88), but also “not designed to provide consistent connectivity to its 3G network for
18 Google Phone users.” SAC, ¶¶ 58-59. Nor does Plaintiff even respond to Google and HTC’s
19 argument that the SAC’s state-law claims will inescapably result in protracted litigation about the
20 adequacy of T-Mobile’s 3G infrastructure, as well as that of other carriers, and implicate
21 preempted assessments about each carrier’s 3G market entry and rates charged in connection with
22 3G service and the Nexus One. Motion at 15, 23. In short, the “substance” (*Shroyer*, 622 F.3d at
23 1040) of Plaintiff’s claims is what triggers express FCA preemption under 47 U.S.C. § 332(c)(3),
24 and Plaintiff’s attempt to elevate form over substance necessarily fails.

25 **F. Plaintiff’s Customer Service Allegations Cannot Support Any Viable Claim.**

26 Finally, Plaintiff’s suggestion that her ancillary “customer service” allegations are
27 independently actionable, and do not fall with her failed substantive claims, is meritless. Plaintiff
28 ignores the SAC’s failure to plead with Rule 9(b) particularity any instance in which Google and

1 HTC misrepresented the customer service they would provide. Motion at 23. Plaintiff also cites
2 no authority for the proposition that Google and HTC violated any *legal duty* to provide what
3 Plaintiff believes to be adequate “customer service,”¹² nor any authority for any breach of duty or
4 compensable injury and damage here. *Compare* Motion at 24; *with* Opp. at 21-22. Instead,
5 Plaintiff tries to invoke the UCL’s “unfairness” prong, but disregards that any economic loss she
6 claims to have suffered was supposedly incurred “as a result” of her Nexus One purchase and not
7 any allegedly inadequate customer service. Motion at 24. Indeed, as Plaintiff does not dispute,
8 her frustration and mental distress are not compensable, *id.* n.16, and her cryptic reference to
9 “fees paid to [her] cellular service provider” during the period of any delay allegedly related to
10 customer-service issues (Opp. at 22) disregards that Plaintiff admittedly had a pre-existing,
11 independent “contract[ual]” obligation to pay her T-Mobile service fees. SAC, ¶ 49.

12 **III. CONCLUSION**

13 For the foregoing reasons, and those set forth in Google and HTC’s opening brief,
14 Plaintiff’s Second Amended Complaint should be dismissed without leave to amend.

15
16 Dated: April 18, 2011

Respectfully submitted,

17 DECHERT LLP

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STEVEN B. WEISBURD

19 *Attorneys for Defendant GOOGLE INC.*

20 DATED: April 18, 2011

MUNGER, TOLLES & OLSON LLP

21
22 By: /s/ Rosemarie T. Ring
ROSEMARIE T. RING

23
24 _____
25 ¹² The one case Plaintiff cites, *Roberts v. USSC Payroll Corp.*, 635 F. Supp. 2d 948, 951 (N.D.
26 Iowa 2009), is an employment discrimination case that neither holds nor suggests that sellers and
27 manufacturers of cellphones and electronic devices have a *legal duty* to provide “customer
28 service” as “intrinsic in the purchase of a product,” as Plaintiff states. Opp. at 21. Plaintiff
quotes from the decision’s factual background, where the court was merely describing what the
plaintiff’s job responsibilities entailed in working for a company that was presumably hired by
those who provide customer service as a customer courtesy, and not to discharge any legal duty.
See also Motion at 24 n.15.

Attorneys for Defendant HTC CORPORATION

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CERTIFICATION

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