

1 **MILSTEIN, ADELMAN & KREGER, LLP**
 2 WAYNE S. KREGER, State Bar No. 154759
 3 wkreger@maklawyers.com
 4 SARA D. AVILA, State Bar No. 268213
 5 savila@maklawyers.com
 6 2800 Donald Douglas Loop North
 7 Santa Monica, California 90405
 8 Telephone (310) 396-9600
 9 Facsimile (310) 396-9635

ADR

Filed
 FILED
 2010 AUG 31 11:40
 RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 N.D. CALIFORNIA

E-filing

6 **WHATLEY DRAKE & KALLAS, LLC**
 7 Joe R. Whatley, Jr. (*pro hac vice* pending, NY Bar No.4406088)
 8 jwhatley@wdklaw.com
 9 Edith M. Kallas (*pro hac vice* pending, NY Bar No. 2200434)
 10 ekallas@wdklaw.com
 11 Patrick J. Sheehan (*pro hac vice* pending, NY Bar No. 3016060)
 12 psheehan@wdklaw.com
 13 1540 Broadway, 37th Floor
 14 New York, New York 10036
 15 Tel: (212) 447-7070
 16 Fax: (212) 447-7077

Apple

13 Attorneys for Plaintiff
 14 Additional Counsel Listed on Signature Page

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

17 NATHAN NABORS, Individually and on behalf of all others similarly situated,

Case No. **CV 10-03897**

HRL

Plaintiff,

CLASS ACTION COMPLAINT

v.

20 GOOGLE, INC., a Delaware corporation,

Defendant

- 1. Violation of the Federal Communications Act;
- 2. Breach of Express Warranty and Implied Warranty of Merchantability; and
- 3. Violation of the Magnuson-Moss Warranty Act.

DEMAND FOR JURY TRIAL

25 Plaintiff Nathan Nabors, on behalf of himself and all others similarly situated, brings this
 26 complaint against Google, Inc. (“Defendant”), and alleges as follows:
 27

BY FAX

1 **CLASS ACTION ALLEGATIONS**

2 5. Plaintiff brings this action on behalf of himself and all other persons similarly
3 situated within the states of Florida and California. Under Federal Rule of Civil Procedure
4 23(b)(1), (b)(2), and (b)(3), the proposed class is both ascertainable and shares a well-defined
5 community of interest in common questions of law and fact.

6 6. The Florida Class is currently defined as follows:

7 **All persons within the State of Florida who purchased the**
8 **Google Phone through www.google.com at any time between**
9 **January 5, 2010 and the present.**

10 **Excluded from the Class are governmental entities, Defendant,**
11 **any entity in which Defendant has a controlling interest, and**
12 **Defendant's officers, directors, affiliates, legal representatives,**
13 **employees, co-conspirators, successors, subsidiaries, and**
14 **assigns. Also excluded from the Class is any judge, justice, or**
15 **judicial officer presiding over this matter and the members of**
16 **their immediate families and judicial staff.**

17 7. The California Class is currently defined as follows:

18 **All persons within the State of California who purchased the**
19 **Google Phone through www.google.com at any time between**
20 **January 5, 2010 and the present.**

21 **Excluded from the Class are governmental entities, Defendant,**
22 **any entity in which Defendant has a controlling interest, and**
23 **Defendant's officers, directors, affiliates, legal representatives,**
24 **employees, co-conspirators, successors, subsidiaries, and**
25 **assigns. Also excluded from the Class is any judge, justice, or**
26 **judicial officer presiding over this matter and the members of**
27 **their immediate families and judicial staff.**

28 8. A. **Numerosity**

Class members are so numerous that individual joinder of all members is impracticable. While the precise number of Class members has not been determined at this time, and the facts to determine that number presently are within Google's sole control, based on public

1 reports Plaintiff believes the number of Class members who bought a Google Phone and
2 purchased T-Mobile 3G service during the class period is well over one hundred thousand people.

3 10. Class members are readily ascertainable. Google's sales records contain
4 information as to the number and location of all Class members. Because Google should have
5 accurate and detailed sales and service information regarding individual Class members and up-
6 to-date contact information, including their e-mail or SMS addresses, an easy and accurate method
7 is available for identifying and notifying Class members of the pendency of this action.

8 **B. Commonality**

9 11. Common questions of law and fact predominate over questions affecting individual
10 Class members. These common questions of law and fact include the following:

- 11 (a) Whether Google advertised and sold the Google Phone by promoting the
12 characteristics of 3G speed and performance, when in fact the actual performance
13 was materially different, and worse, than the promises and claims made by
14 Google;
- 15 (b) Whether Google failed to disclose material facts about limitations in the speed
16 and performance characteristics of the Google Phone to consumers, and;
- 17 (c) Whether Google's forum selection clause applies the law of California to all
18 Class members; and,
- 19 (d) Whether Google forced Class members to pay unjust charges for the goods and
20 services they were sold, as well as whether that failure violates statutory and
21 common law prohibitions against such conduct, as detailed more fully below.

22 **C. Typicality**

23 12. Plaintiff's claims are typical of the claims of the Class. Plaintiff sustained injury
24 and a loss of money or property arising from, and as a result of, Google's unlawful common
25 course of conduct. Plaintiff purchased the Google Phone based in substantial part on the uniform
26 advertised claim of the phone having the characteristics of increased data transfer speed and
27 greater performance than was actually provided. Those representations were a substantial factor
28 in the decision to purchase the Google Phone. Plaintiff received, at best, sporadic 3G speed or

1 connection to a 3G network with her Google Phone. He did not receive any disclosures from
2 Google before or after purchase explaining the material limitations in the Google Phone and how
3 its interaction with T-Mobile 3G network materially reduced its performance such that, for a
4 significant period of time, the phones do not in fact provide 3G capability and access.

5 **D. Adequacy of Representation**

6 13. Plaintiff can fairly and adequately represent and protect the Class's interests.
7 Plaintiff's claims are both typical of the Class's claims and are based on facts that are common to
8 the Class. The Class representative has suffered similar injuries and damages arising from
9 Google's conduct. As such, Plaintiff can adequately represent the Class because he seeks the
10 same or similar remedies that would be available to other Class members. No irreconcilable
11 conflicts exist between the positions of Plaintiff and those of the Class members.

12 14. Plaintiff retained attorneys who are competent and experienced in litigating
13 significant class actions to represent their interests and that of the Class. Counsel have significant
14 experience in handling class actions and the types of claims asserted herein, and have been
15 appointed as class counsel by courts in other actions. Plaintiff and his counsel already have done
16 significant work in identifying and investigating the potential claims in this action, and are willing
17 to devote the necessary resources to vigorously litigate this action. Plaintiff and his counsel are
18 aware of their fiduciary responsibilities to the Class to represent fairly and adequately the Class
19 and are determined to discharge those duties by seeking the maximum possible recovery for the
20 Class based on the merits of these claims and the available resources.

21 15. Plaintiff has standing to represent a California Class and Florida Class by virtue of
22 the choice of law clause in Google's forum selection clause in its Nexus One Phone – Terms of
23 Sale, which states the terms and relationship between consumers and Google "shall be governed
24 by the laws of the State of California."

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

26 16. A class action is a superior method for resolving the claims herein alleged as
27 compared to other available group-wide methods for adjudicating these issues. The remedy to
28 resolve the common classwide issues regarding the issues detailed herein would be to refund a

1 portion of the cost of the Google Phone and/or the increased service plan costs. Because of the
2 nearly-certain low individual damage amount, which is less than \$1,000 per Class member in
3 almost every conceivable circumstance, individual Class members would have little incentive to
4 prosecute such claims on an individual basis. Such individual actions are not cost-effective or
5 practical, as the costs associated with proving a *prima facie* case would exceed the obtainable
6 recovery.

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

12 18. There is a substantial likelihood of inconsistent verdicts, which would frustrate the
13 resolution of these legal issues for Google and force them to comply with inconsistent legal
14 standards.

15 19. The trial and litigation of Plaintiff's claims are manageable. Individual litigation of
16 the legal and factual issues raised by Google's conduct would increase delay and expense to all
17 parties and the court system. The class action device presents far fewer management difficulties
18 and provides the benefits of a single, uniform adjudication, economies of scale, and
19 comprehensive supervision by a single court. Moreover, Google's application of California law to
20 all of its consumers provides for a Florida and California class, both to be adjudicated under
21 California law.

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

28

1 terms into these Terms that cannot be excluded. Those rights, remedies, and
2 implied terms are not excluded by these Terms. To the extent that the relevant law
3 permits Google to limit their operation, Google's liability under those laws will be
4 limited at its opinion, to the cost of replacing the goods, acquiring he equivalent
5 goods or having the goods repaired.

6 26. Because Google sold all of the Google Phones through its web site, essential acts
7 consummating the sale of each and every Google Phone occurred in this District.

8 **STATEMENT OF FACTS**

9 27. Google is an American public corporation specializing in Internet search and
10 advertising services and recently, entered the retail business when it decided to develop and sell
11 smartphones, which are multi-functional mobile devices with advanced capabilities. Smartphones
12 have become a lucrative market for companies, who are scrambling for market share in this highly
13 competitive field.

14 28. The Google Phone was "[d]eveloped in partnership with hardware manufacturer
15 HTC," according to WIRED magazine, and was released throughout the United States on January
16 5, 2010. Matthew Honan, *WIRED*, "Google Debuts Android-Powered Nexus One 'Superphone',"
17 Jan. 5, 2010, at [http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/)
18 [one-superphone/](http://www.wired.com/gadgetlab/2010/01/google-debuts-android-powered-nexus-one-superphone/) (last visited June 8, 2010).

19 29. In the Unites States, T-Mobile was the exclusive wireless carrier that allowed the
20 Google Phone to be used on a 3G wireless network.

21 30. An estimated 20,000 Google Phones were sold during the first week of the phone's
22 release.

23 31. The Google Phone was advertised widely. Perhaps the most important ad portal
24 for the Google Phone, however, was the Google.com homepage itself. Upon its release, Google
25 changed its homepage to be viewed as follows:

26 //
27 //
28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Google™



Experience Nexus One, the new Android phone from Google.

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

32. One commentator said as follows regarding that ad: "This is the kind of advertising that money can't buy, because it simply isn't for sale. And because Google almost never features ads on the page, you can be sure it's going to be catching quite a few eyeballs. Last time an ad popped up here John Gruber called it 'the most valuable ad space on the entire Internet.'" *Id.* Based on Google's approximately 88 billion searches run each month during 2009, that statement has concrete validity.

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

34. The "3G" technology is alleged to feature faster peak data transfer rates over previous networks of up to 7.2 Mbps (megabytes per second). These data transfer rates are especially important to many smartphone users who employ their devices to run and store

1 applications; send and receive email; download and play media; and share pictures and
2 information via social networking systems.

3 35. Without purchasing a wireless service plan through T-Mobile for 3G network
4 access, the Google Phone costs \$529. With a new T-Mobile wireless network service plan, which
5 is a two-year contract, a customer pays \$179 for the Google Phone plus the additional monthly
6 charge for the T-Mobile wireless service, which may exceed \$100 per month.

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

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

15 38. Recently, Google announced that it was shifting from an online-only retail strategy
16 to a "bricks-and-mortar" sales option. Tom Krazit, *cNet*, "Google turns Nexus One strategy
17 upside down," May 14, 2010, at http://news.cnet.com/8301-30684_3-20005015-265.html (last
18 visited June 8, 2010). Google, therefore, has opened new avenues of sales and service to later-
19 arriving customers that it refused to provide to "early adopters."

20 39. An existing T-Mobile customer may also upgrade to purchase the Google Phone,
21 but this requires the customer to pay the difference between the \$529 price of the phone and any
22 upgrade credit allotted to the customer's account. Those customers also are required to extend
23 their T-Mobile contract for an additional two years.

24 40. Google consistently advertised the Google Phone, working in tandem with the T-
25 Mobile network, as providing 3G data transfer rates. For consumers the appellation "3G" is
26 commonly understood to provide superior data transfer rates over older cell technology, which
27 worked on an "EDGE" standard.

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

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

9 43. Contrary to Google's assertions, Plaintiff and other members of the Class
10 experience connectivity on the 3G wireless network only a fraction of the time they are connected
11 to the T-Mobile's 3G wireless network, or receive no 3G connectivity at all for a significant
12 portion of time. The lack of 3G connectivity also causes Plaintiff and other members of the Class
13 to experience a significant number of dropped calls when the Google Phone cannot locate an
14 available 3G network connection. Google either knew, reasonably should have known, or was
15 obligated to understand that the Google Phone could not consistently perform at a 3G level,
16 contrary to the Google's representations.

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

23 45. Google has not provided satisfactory answers with regard to the defects
24 experienced by Plaintiff and Class members:

25 A spokesperson for HTC, the manufacturer of the Nexus One phone
26 sold by Google and deployed thus far on T-Mobile's GSM network,
27 told Betanews late Monday evening that it is aware of the magnitude of
28 3G connectivity problems reported by customers nationwide since last
week. As of Monday evening, several hundred messages were posted to
Google's support Web site, many reporting essentially the same
problem: For the most part, their 3G connections are spotty and

1 variable; and for some, 3G is non-existent.

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

6 “While the majority of Nexus One owners have been thrilled with their
7 experience, HTC is aware that some owners have reported having some
8 technical issues with their Nexus One devices,” the spokesperson told
9 Betanews. HTC, Google, and T-Mobile take all such reports very
10 seriously, and are working closely together to determine what issues
11 may be behind these reports.”

12 ****

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

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

22 All that Google will say on the subject is as follows: “We are
23 investigating this issue and hope to have more information for you
24 soon. We understand your concern and appreciate your patience.”

25 Scott M. Fulton III, *Betanews*, “HTC admits customers have Nexus One 3G trouble, not yet
26 blaming the phone”, Jan. 11, 2010, at [http://www.betanews.com/article/HTC-admits-customers-
27 have-Nexus-One-3G-trouble-not-yet-blaming-the-phone/1263265252](http://www.betanews.com/article/HTC-admits-customers-have-Nexus-One-3G-trouble-not-yet-blaming-the-phone/1263265252) (last visited June 8, 2010).

28 Even areas where T-Mobile’s limited 3G coverage was represented to exist, T-Mobile’s network
did not provide consistent 3G performance for Google Phone purchasers. “Complaints on
Google’s support forum said users were unable to get 3G service in areas where
T-Mobile’s maps indicated they should get it. Google doesn’t have a solution for the problem yet,
[Google spokesperson Carolyn Penner] said.” *San Jose Mercury News*, “Hype, complaints top
sales so far for Google’s Nexus One phone,” Jan. 21, 2010, at
[http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-
nexus-one-phone/1066986](http://www.tampabay.com/news/business/retail/hype-complaints-top-sales-so-far-for-googles-nexus-one-phone/1066986) (last visited June 8, 2010).

1 46. Google failed to warn Plaintiff and Class members of the limitations associated
2 with using the Google Phone or its internal understanding that the T-Mobile 3G network was not
3 designed to provide consistent connectivity to its 3G network for Google Phone users.

4 47. Moreover, Google did not provide adequate customer service to assist Google
5 Phone customers in helping resolve the issues. When customers, including Plaintiff, contacted T-
6 Mobile to request assistance, the customer was provided with only an email address to contact
7 Google directly. The customer then had to wait for several days for a response:

8 New owners of the Nexus One, the latest touch-screen smartphone to run on
9 Android, Google's mobile operating system, have found themselves at a loss
10 when it comes to resolving problems with the handset. They cannot call Google
11 for help, and the company warns that it may take up to 48 hours to respond to e-
12 mail messages.

13 ****

14 Early buyers of the device, like Kiran Konathala, a 27-year-old database
15 programmer in Long Branch, N.J., have complained of dropped calls, plodding
16 download speeds and connectivity snags. "The hardware is great, but the software
17 is a mess," he said. "It's not been a happy experience so far."

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

20 Most people use the phone on T-Mobile's network, which offers a subsidy if a
21 customer buys a contract, and the phone is made by HTC, a major Taiwanese
22 manufacturer. But it is sold exclusively by Google through a special Web-based
23 store.

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

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

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

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

9 Jenna Wortham & Miguel Heft, *N.Y. Times*, “Hey Google, Anybody Home?,” Jan. 13, 2010, at
10 <http://www.nytimes.com/2010/01/13/technology/companies/13google.html> (last visited June 8,
11 2010).

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

17 49. Despite knowledge that the Google Phone cannot maintain consistent 3G service
18 and that they do not provide adequate customer service, Google continued to manufacture, design,
19 promote and and/or sell the Google Phone as being able to operate on a 3G wireless network.

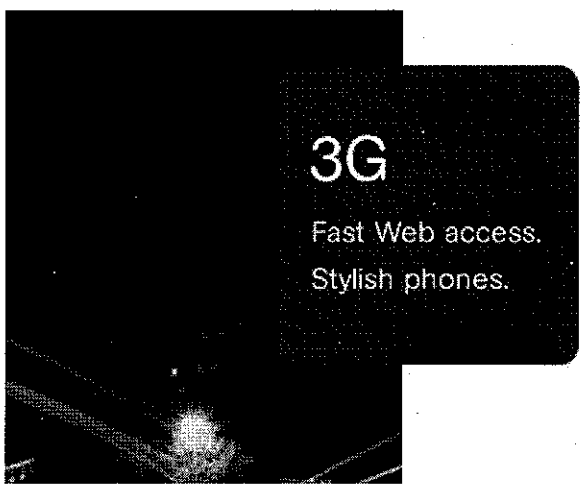
20 50. Moreover, Google did not offer refunds to consumers who purchased the Google
21 Phone expecting it to operate properly on the 3G wireless network, when it has not, after the
22 standard 14-day period (or 30-day period in California) following the purchase.

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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



Enjoy the Internet on the go: Web pages download faster

Multi-task: Browse the Web, send messages, or find movie times—all while talking
Send photos faster to friends and family
Watch YouTube™ and other video files
Do more with your phone

- Send e-mail with large attachments
- Download documents, applications, and music faster
- Upload and share large files (photos, videos, presentations)
- Browse and download the online information you need—fast

2.

http://www.t-mobile.com/promotions/genericregular.aspx?passet=Pro_Pro_Go3G (last visited June 8, 2010). Unfortunately, in an inconspicuous place in minute font at the bottom of that page, T-Mobile offers the following qualifying language:

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

54. Plaintiff and other members of the Class were injured in fact and lost money or property as a result of Google's material misstatements and omissions of material fact, paying more to receive inferior service in relation to what they believed they had purchased.

55. As a result of Google's material misrepresentations and omissions of material facts, Plaintiff and other members of the Class are locked into a two-year service plan with

1 inferior T-Mobile 3G wireless network connectivity. A substantial factor in entering into those
2 agreements was the representation that the Google Phone would operate as a true 3G device.

3 56. Google and DOE defendants acted in concert to sell the Google Phone and either
4 knew, should have known, or were obligated to understand that they were trying to sell more
5 Google Phone devices than the existing T-Mobile's 3G wireless network could handle, and the
6 Google Phone itself suffered from defective hardware and/or software. Plaintiff and other Class
7 members were injured, either directly or indirectly, in response to the representations, advertising
8 and/or other promotional materials that were prepared and approved by Google and disseminated
9 on the face of the product and/or through assertions that contained the representations regarding
10 the Google Phone and T-Mobile's 3G wireless network. Had the true facts been disclosed,
11 Plaintiff and other Class members would not have purchased the Google Phone at the prices and
12 under the terms and conditions to which they were and are subjected.

13 57. Google failed to disclose at the time of making their false and misleading
14 statements to Plaintiff and the Class that the infrastructure of T-Mobile's 3G wireless network
15 and/or the Google Phone itself were defective and inadequate to provide the represented
16 performance and speed, resulting in injury to the Plaintiff and the Class.

17 58. Plaintiff paid \$230 to break his then-contract with AT&T so he could use the T-
18 Mobile network in order to get a Google Phone. Plaintiff paid \$563.38 for the phone. Plaintiff
19 purchased the Google Phone directly from Google online.

20 59. **Plaintiff did not have a contract with T-Mobile so it was a month-to-month**
21 **service with no contract. Plaintiff was missing calls and the Google Phone did not function**
22 **correctly. When Plaintiff called T-Mobile, T-Mobile said the phone's malfunctions were not**
23 **their problem. When Plaintiff attempted to speak to Google, they said the same thing.**

24 //

25 //

26 //

27 //

28 //

1 **FIRST CAUSE OF ACTION**

2 ***Against All Google and DOE Defendantss***

3 **(Violation of the Federal Communications Act, 47 U.S.C. §§ 201 and 207)**

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

6 61. Pursuant to the Federal Communications Act, 47 U.S.C. section 201(b), “[a]ll
7 charges, practices, classifications, and regulations for and in connection with such communication
8 service, shall be just and reasonable, and any such charge, practice, classification, or regulation
9 that is unjust or unreasonable is declared to be unlawful.”

10 62. Pursuant to 27 U.S.C. section 207, Plaintiff has a private right of action to enforce
11 the rights granted under Section 201(b) in this Court. “Any person claiming to be damaged by
12 any common carrier subject to the provisions of this chapter may . . . bring suit for the recovery of
13 the damages for which such common carrier may be liable under the provisions of this chapter, in
14 any district court of the United States of competent jurisdiction.”

15 63. Based on the conduct alleged above, Defendant has violated Section 201(b) of the
16 Federal Communications Act, because, as previously determined by the FCC in rulings relating to
17 whether false and misleading claims can constitute a violation of the FCA, their charges for the
18 Google Phone as an internet access device and the companion T-Mobile premium service plans as
19 detailed above that Plaintiff and Class Members were required to purchase were unjust based
20 upon the claims they made as compared to what was actually provided. T-Mobile also
21 misrepresented or omitted material facts relating to the quality of the 3G coverage service that
22 would be available to Class Members using the Google Phone. T-Mobile’s service was thus not
23 provided in accordance with its terms and conditions or in accordance with the promises included
24 in advertising for the Google Phone, resulting in a material difference between their promises and
25 actual performance. Even if Google is found to have been charging a “reasonable rate” for its
26 products and services, it is still subject to a claim for damages for non-disclosure or false
27 advertising of the material facts set forth herein based on its misrepresentations or failing to
28

1 inform Class Members of other material terms, conditions, or limitations on the services provided
2 Class Members.

3
4 **SECOND CAUSE OF ACTION**

5 ***Against All Google and All Defendants***

6 **(Breach of Express Warranty and Implied Warranty of Merchantability)**

7 64. Plaintiff incorporates by reference each and every preceding paragraph as though
8 fully set forth herein.

9 65. Plaintiff and Class members purchased their Google Phones and used them for
10 their ordinary and intended purpose of providing consistent, reliable and sustained access to the
11 supposedly faster 3G network, and entered into agreements with Google or its agents and received
12 uniform warranties in connection with the purchase of such phones.

13 66. The Google Phone cannot perform its ordinary and represented purpose because
14 the Google Phone does not provide consistent connection to the T-Mobile 3G network in
15 combination with using the Google Phone. Whether the problem is with the Google Phone itself
16 or with the T-Mobile 3G network, or a combination of the two, is irrelevant as to whether the
17 warranty was breached.

18 67. When Google placed the Google Phone into the stream of commerce, it knew,
19 reasonably should have known, or was obligated to understand that the intended and ordinary
20 purpose of its phone was to provide consistent connectivity to a supposedly faster 3G network and
21 that users would expect regular 3G connectivity and materially faster data transfer rates than other
22 devices designed for EDGE compatibility.

23 68. Plaintiffs and the Class purchased their Google Phones with the reasonable
24 expectation that they would receive reliable and sustained connectivity to a purportedly faster 3G
25 network. The advertisements Google disseminated that stressed the excellence and reliability of
26 the Google Phone constitute a warranty that the products would operate as advertised during their
27 useful life, upon which Plaintiffs and the Class reasonably acted. The Google Phone is not fit for
28 its warranted, advertised, ordinary and intended purpose of providing reliable 3G network

1 connectivity and is in fact defective, or would not pass without objection in the trade or industry
2 in terms of being unable to provide consistent and reliable 3G network connectivity. This defect
3 has manifested for all Plaintiffs and Class members as they do not consistently receive 3G
4 network connectivity using their Google Phones.

5 69. Plaintiff has given notice to Google of this breach by separate letter or demand, and
6 those demands have been ignored or rejected. As detailed above, Google stated it would offer
7 several "patch" fixes and other improvements, which have not provided Plaintiffs or the Class
8 with reliable or sustained 3G connectivity.

9 70. Google's breach of the warranty described above also constitutes a violation of
10 Cal. Civ. Code §1792, *et seq.*

11 71. Plaintiff and Class members are entitled to damages as a result of such breaches.
12 Plaintiff and the Class request relief as described below as appropriate for this Cause of Action.

13
14 **THIRD CAUSE OF ACTION**

15 ***Against Google and All Defendants***

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

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

19 73. Plaintiff and Class members are "consumers" within the meaning of the
20 Magnuson-Moss Act.

21 74. Google is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss
22 Act.

23 75. The Google Phone is a "consumer product" within the meaning of the Magnuson-
24 Moss Act.

25 76. Google's written affirmations of fact, promises and/or descriptions as alleged
26 herein are each a "written warranty" as to the Google Phone providing consistent 3G network
27 connectivity and/or there exists an implied warranty for the sale of such products within the
28 meaning of the Magnuson-Moss Act.

1 3. A declaratory judgment stating that Google may not pursue the policies, acts and
2 practices complained of herein;

3 4. A temporary, preliminary and/or permanent order for injunctive relief requiring
4 Google to undertake an informational campaign to inform members of the general public as to
5 the wrongfulness of Google's practices;

6 5. An award of actual, statutory and/or exemplary damages, as appropriate for the
7 particular Causes of Action;

8 6. An order requiring disgorgement of Google's ill-gotten gains by requiring the
9 payment of restitution to Plaintiff and members of the Class, as appropriate for the particular
10 Causes of Action;

11 7. Reasonable attorneys' fees;

12 8. All related costs of this suit;

13 9. Pre- and post-judgment interest; and

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

15 DATED: August 26, 2010

Attorneys for Plaintiff Nathan Nabors and the
Proposed Class

17
18
19 By: /s/ Sara D. Avila
MILSTEIN, ADELMAN & KREGER, LLP
Wayne S. Kreger
Sara D. Avila

21 WHATLEY DRAKE & KALLAS, LLC
Joe R. Whatley, Jr.
Edith M. Kallas
Patrick J. Sheehan

22
23
24 LAW OFFICE OF HOWARD
RUBINSTEIN
Howard Rubinstein
howardr@pdq.net
914 Waters Avenue, Suite 20
Aspen, Colorado 81611
Tel: (832) 715-2788

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SMITH & VANTURE, LLP
Brian W. Smith
bws@smithvantage.com
1615 Forum Place, Suite 4C
West Palm Beach, Florida 33401
Tel: (800) 443-4529
Fax: (561) 688-0630

JURY DEMAND

Plaintiff and the Class demand a trial by jury on all claims so triable.

DATED: August 26, 2010

Attorneys for Plaintiff Nathan Nabors and the
Proposed Class

By: /s/ Sara D. Avila
MILSTEIN, ADELMAN & KREGER, LLP
Wayne S. Kreger
Sara D. Avila

WHATLEY DRAKE & KALLAS, LLC
Joe R. Whatley, Jr.
Edith M. Kallas
Patrick J. Sheehan

LAW OFFICE OF HOWARD
RUBINSTEIN
Howard Rubinstein
howardr@pdq.net
914 Waters Avenue, Suite 20
Aspen, Colorado 81611
Tel: (832) 715-2788

SMITH & VANTURE, LLP
Brian W. Smith
bws@smithvanture.com
1615 Forum Place, Suite 4C
West Palm Beach, Florida 33401
Tel: (800) 443-4529
Fax: (561) 688-0630