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22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT OF CALIFORNIA
 24 SAN JOSE DIVISION

25 KINDERSTART.COM, LLC, a California)
 26 limited liability company, on behalf of itself and)
 27 all others similarly situated,)
 28 Plaintiffs,)

29 v.)
 30 GOOGLE INC., a Delaware corporation,)
 31 Defendant.)

CASE NO.: C 06-2057 JF (RS)
**DEFENDANT GOOGLE INC.'S
 REQUEST FOR JUDICIAL NOTICE**

Before Hon. Jeremy Fogel
 Date: October 27, 2006
 Time: 9:00 a.m.
 Courtroom: 3

1 **INTRODUCTION**

2 Defendant Google respectfully requests that the Court take judicial notice of the materials
3 attached to the accompanying Declaration of Bart E. Volkmer in Support of Defendants’ Motion
4 to Dismiss the Second Amended Complaint (“Volkmer Declaration”) and Declaration of Matt
5 Cutts in Support of Google’s Special Motion to Strike (“Cutts Declaration”), including certain
6 pages from Defendant Google’s website. All are in the public domain and some are expressly
7 identified and discussed in the Second Amended Complaint (“SAC”). Judicial notice of these
8 materials is appropriate under the law in this Circuit.

9 **ARGUMENT**

10 **I. THIS COURT MAY TAKE JUDICIAL NOTICE OF WEBSITES**

11 Federal Rules of Evidence Rule 201 states that court may take judicial notice of a fact
12 that is “not subject to reasonable dispute in that it is either (1) generally known within the
13 territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by
14 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). This
15 court has stated that “as a general matter, websites and their contents may be proper subjects for
16 judicial notice” provided that the party provides the court with a copy of the relevant web page.
17 *Caldwell v. Caldwell*, No. C05-4166, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006). A true
18 and correct copy of the materials are attached to the Volkmer and Cutts declarations.

19 Other courts in this Circuit and elsewhere have concluded that websites are appropriate
20 subjects for judicial notice. For example, in *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956
21 (C.D. Cal. 2005), the court took judicial of several pages posted on Amazon.com and the
22 American Academy of Allergy Asthma & Immunology website. *Id.* at 965; *see also Wang v.*
23 *Pataki*, 396 F. Supp. 2d 446, 458 (S.D.N.Y. 2005) (court may take judicial notice of internet
24 material); *In re Vertex Pharms., Inc., Sec. Lit.*, 357 F. Supp. 2d 343, 352 n.4 (D. Mass. 2005);
25 *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 709 (2002) (affirming demurrer in which trial court
26 took judicial notice of defendant’s website); *see also Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d
27 1082, 1084 (C.D. Cal. 2001) (taking judicial notice of eBay’s website to determine the nature of
28 its business); *Coremetrics, Inc. v. Atomic Park.com, LLC*, 370 F. Supp. 2d 1013, 1021 (N.D. Cal.

1 2005) (“[A]s is evident from AtomicPark’s website (of which the Court takes judicial notice, see
2 Fed. R. Evid. 201), consumers may contact AtomicPark for information and real-time assistance
3 via the Internet or a toll-free number.”); *Frances Kenny Family Trust v. World Sav. Bank FSB*,
4 No. C04-0372, 2005 WL 106792, at *1 (N.D. Cal. Jan. 19, 2005) (finding content on plaintiffs’
5 website to be proper matter for judicial notice); *Renaissance Greeting Cards, Inc. v. Dollar Tree*
6 *Stores, Inc.*, 405 F. Supp. 2d 680, 684 (E.D. Va. 2005) (taking judicial notice that “visitors to the
7 website www.classicgreetings.com are also offered ‘free classic greetings and poetry cards.’”);
8 *Vlahos v. Schroeffel*, No. 02-CV-0139, 2006 WL 544444, at *5 (E.D.N.Y. Mar. 6, 2006) (taking
9 judicial notice of program description posted on hospital website); *Autism Soc. of Mich. v.*
10 *Fuller*, No. 05-CV-73, 2006 WL 1519966, at *2 (W.D. Mich. May 26, 2006) (taking judicial
11 notice of definition of autism as set forth at <http://www.autism-society.org>). The contents of
12 these pages are capable of accurate and ready determination by resort to sources whose accuracy
13 cannot reasonably be questioned.

14 **II. THIS COURT MAY TAKE JUDICIAL NOTICE OF DOCUMENTS THAT ARE**
15 **EXPLICITLY REFERENCED IN THE COMPLAINT OR INTEGRAL TO**
16 **PLAINTIFF’S CLAIMS**

17 Under the “incorporation by reference” doctrine, documents “whose contents are alleged
18 in a complaint and whose authenticity no party questions, but which are not physically attached
19 to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v.*
20 *Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds*, *Galbraith v. County of*
21 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *accord Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06
22 (9th Cir. 1998), *superseded on other grounds*, *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d
23 676 (9th Cir. 2006); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (“Even if a
24 document is not attached to a complaint, it may be incorporated by reference into a complaint if
25 the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s
26 claim.”). The “incorporation by reference” doctrine extends to such documents in order to
27 prevent “plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to
28 documents upon which their claims are based.” *Parrino*, 146 F.3d at 706; *see also Wietschner v.*
Monterey Pasta Co., 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003) (“[D]ocuments crucial to the

1 plaintiff's claims but not explicitly incorporated in a complaint can be noticed in order to prevent
2 a plaintiff from surviving a Rule 12(b)(6) motion by deliberately omitting references to
3 documents upon which their claims are based.”).

4 Plaintiff repeatedly refers to, but did not attach to the SAC, portions of defendant
5 Google's website. *See, e.g.*, SAC ¶¶ 3, 34, 61, 67, 73, 77, 78, 83-92, 116-120, 140, 147, 151,
6 153, 160. Because these documents are extensively referred to in the SAC, and form the basis of
7 plaintiff's claim, they are proper subjects for judicial notice. Defendants therefore request that
8 the Court take judicial notice of the documents attached to the Volkmer Declaration.

9 **CONCLUSION**

10 For the foregoing reasons, defendants respectfully request that the Court take judicial
11 notice of the documents attached to the Volkmer and Cutts Declarations.

12
13 Dated: September 22, 2006

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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15 By: /s/ Bart Volkmer
Bart Volkmer

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17 Attorneys for Defendant Google Inc.

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