MATTHEW L. LARRABEE (No. 97147)
matthew.larrabee@dechert.com
DECHERT LLP
One Maritime Plaza, Suite 2300
San Francisco, California 94111-3513
Telephone: 415.262.4500
Facsimile: 415.262.4555

STEVEN B. WEISBURD (No. 171490)
steven.weisburd@dechert.com
DECHERT LLP
300 West 6th Street, Suite 2010
Austin, TX 78701
Telephone: 512.394.3000
Facsimile: 512.394.3001

Attorneys for Defendant
GOOGLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re Google Phone Litigation

Lead Case No. 5:10-CV-01177-EJD
(Consolidated with No. 5:10-CV-03897-EJD)

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS GOOGLE INC. AND HTC CORPORATION'S MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

Date: **February 3, 2012**
Time: **9:00 a.m.**
Dept: **1**
Judge: **Hon. Edward J. Davila**

In support of their joint Motion to Dismiss the Consolidated Amended Complaint ("CAC") filed by Plaintiffs Mary McKinney and Nathan Nabors ("Plaintiffs"), Defendants Google Inc. ("Google") and HTC Corporation ("HTC") hereby respectfully submit this short memorandum concerning the following two documents, which are properly before the Court on Defendants' motion:

(1) The copy of Google's Terms of Sale for the Nexus One that Plaintiffs' counsel themselves attached to Plaintiff McKinney's original complaint filed in California state court, alleging it to be the "agreement" between Google and "Google Phone customers, including Plaintiff" – which is attached hereto as Exhibit 1 ("Terms of Sale"); and

(2) The copy of HTC's End User License Agreement, including its Limited Warranty Statement – which is attached hereto as Exhibit 2 ("Limited Warranty").

As explained below, these two documents are properly considered by the Court on Defendants' motion to dismiss under the "incorporation by reference" doctrine. In addition, the documents are subject to judicial notice and, therefore, Defendants hereby request that the Court take judicial notice of the fact and content of Exhibits 1 and 2, pursuant to Federal Rule of Evidence 201.

I. Exhibits 1 And 2 Are Properly Before The Court On Defendants' Rule 12(b)(6) Motion To Dismiss Pursuant To The "Incorporation By Reference" Doctrine.

The Court can properly consider Exhibits 1 and 2 pursuant to the "incorporation by reference" doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 996 (N.D. Cal. 2009); *see also Datel Holdings Ltd. v. Microsoft Corp*., 712 F. Supp. 2d 974, 984 (N.D. Cal. 2010); *Long v. Hewlett-Packard Co*., 2007 U.S. Dist. LEXIS 79262, **17-18 n.3 (N.D. Cal. July 27, 2007).

Under this doctrine, courts routinely consider documents on motions to dismiss that the plaintiff has not physically attached to the complaint so long as the complaint references them, and the authenticity of the documents is not reasonably subject to dispute. *See Knievel*, 393 F.3d at 1076-77; *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) ("We have said that a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned."); *see also*

Datel Holdings Ltd., 712 F. Supp. 2d at 984. The Ninth Circuit has extended the "incorporation by reference" doctrine to permit courts to consider on Rule 12(b)(6) motions an array of documents, such as the terms of agreements governing the relationship between the parties, *id*.; SEC filings, *In re Silicon Graphics Sec. Litig.*, 183 F.3d at 986, "internet pages" and "newspaper articles." *Knievel*, 393 F.3d at 1076 (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002). The incorporation-by-reference doctrine furthers the "policy concern" of preventing plaintiffs from surviving Rule 12(b)(b) motions "by deliberately omitting references to documents upon which their claims are based," or otherwise failing to attach referenced documents to their complaints that support defendants' motions to dismiss. *Parrino*, 146 F.3d at 706. Under this doctrine, the documents that the plaintiff failed to attach to the complaint are properly before the Court once the defendant simply attaches the document to its motion to dismiss. *See Knievel*, 393 F.3d at 1076.

Here, Exhibits 1 and 2 may be considered on Google and HTC's pending motion because both prerequisites to the incorporation-by-reference doctrine are met.

First, Plaintiffs' Consolidated Amended Complaint continues to refer expressly to these two "agreements" with Defendants. *See* CAC, ¶ 85 (alleging that Plaintiffs "entered into agreements" with Google and others "in connection with the purchase of" their Nexus One phone). Plaintiffs' counsel themselves alleged in McKinney's original complaint that Exhibit 1's Google Terms of Sale is the "agreement" between Google and McKinney, as well as putative class members.[1] Plaintiffs' only agreement with HTC is embodied in its "Limited Warranty" for the Nexus One, attached as Exhibit 2. Moreover, the viability of Plaintiffs' implied warranty claim necessarily turns on whether and to what extent there exists any legally enforceable warranty disclaimers in their agreements with Defendants, which is among the reasons why courts have considered the terms of comparable documents on motions to dismiss. *See, e.g*., *Berenblat v. Apple, Inc.*, 2010 U.S. Dist. LEXIS 46052 (N.D. Cal. Apr. 7, 2010) (considering

[1] *McKinney* Docket No. 2 (Pl.'s Class Action Complaint (filed Jan. 10, 2010), ¶ 11 & Exh. A). Based on a review of Google's records, the terms set out in Exhibit 1 are those applicable to both Plaintiffs' purchase of the Nexus One. Moreover, Google's website required Plaintiffs to check a box to complete their purchases, by which they indicated acceptance of these terms. Exh. 1 at 1.

warranty and disclaimer on motion to dismiss implied warranty claim); *accord Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84 (N.D. Cal. 2010); *see also Knievel*, 393 F.3d at 1076 (explaining that doctrine is also applicable to situations in which the plaintiff's claim depends on the contents of a document, even though the plaintiff does not explicitly allege those contents).[2]

Second, Plaintiffs and their counsel cannot reasonably dispute the authenticity of the documents attached as Exhibits 1 and 2. In fact, the exact copy of the Google "Terms of Sale" attached hereto as Exhibit 1 was attached by Plaintiffs' counsel as *an exhibit to McKinney's original complaint*, which was filed in California state court and removed to this Court. *See* Docket No. 2. By virtue of Defendants' removal, that exact copy of Google's "Terms of Sale" is already in this Court's judicial records, within Exhibit A to the Declaration of Steven K. Taylor in support of Defendant's Notice of Removal. *Id.* Further still, Plaintiffs' counsel themselves have alleged that the "Nexus One Phone – Terms of Sale" that they "attached" to their original state-court complaint constitutes and reflects the "agreement" between Google and Plaintiffs. Docket No. 2 (Pl.'s Class Action Complaint (filed Jan. 10, 2010), ¶ 11 & Exh. A). The Google Terms of Sale attached as Exhibit 1, in turn, expressly refers to HTC's Limited Warranty for the Nexus One, Exhibit 2, which is also included in Nexus One box packaging. Plaintiff cannot *reasonably* dispute the authenticity of either Exhibits 1 or 2.[3]

Accordingly, under the incorporation-by-reference doctrine, Exhibits 1 and 2 may properly be considered by the Court on Google and HTC's Rule 12(b)(6) motion to dismiss without transforming it into a summary judgment motion. As the Ninth Circuit has confirmed, the documents are properly before the Court under this doctrine once "the defendant attaches [them] to its motion to dismiss," *Knievel*, 393 F.3d at 1076, as Google and HTC have done with

[2] Moreover, Plaintiff has also put these agreements at issue by claiming that Plaintiff McKinney was "injured in fact" and "lost money or property" as a result of receiving a refurbished Nexus One (CAC ¶ 62), which was entirely consistent with HTC's Limited Warranty.

[3] The authenticity of Exhibit 1 is confirmed by this Court's own judicial records, as well as Plaintiff McKinney's own allegations in her original state-court complaint. The authenticity of Exhibit 2 is confirmed by the declaration of HTC's counsel, filed concurrently herewith. *See* Declaration of Rosemarie Ring ("Ring Decl.").

both Exhibits 1 and 2 here. *See* Exhibits 1 & 2 to Defendants Google Inc. And HTC Corporation's Notice Of Motion And Motion To Dismiss Consolidated Amended Complaint (filed concurrently herewith).

II. The Court May Also Take Judicial Notice Of The Fact And Contents Of Exhibits 1 And 2.

In addition, Exhibits 1 and 2 are subject to judicial notice. Under Federal Rule of Evidence 201, the Court may take judicial notice of any facts "not subject to reasonable dispute" in that they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b)(2). Moreover, the Court "*shall* take judicial notice if requested by a party and supplied with the necessary information." FED. R. EVID. 201(d) (emphasis added).

As courts in this District have held in analogous circumstances, it is proper to take "judicial notice" of documents such as Exhibits 1 and 2 where the fact of their existence and their content is not reasonably subject to dispute by reference to sources whose accuracy cannot reasonably be questioned. *See, e.g.*, *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84 (N.D. Cal. 2010) (Laporte, J.); *Hovsepian v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 80868, *2 & n.3, **23-24 (N.D. Cal., Aug. 21, 2009) (Fogel, J.) (granting Apple's request for judicial notice of "the terms" of its limited warranty provided to iMAC G5 purchasers where complaints "reference the warranty" and plaintiff's claims "depend at least in part on [its] enforceability"); *Berenblat v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 80734, *2 & n.3 (N.D. Cal., Aug. 21, 2009) (same); *see also Inter-Mark USA, Inc. v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, **8-9, 16-17, 22-25 (N.D. Cal., Feb. 27, 2008) (dismissing implied warranty claims given "valid disclaimer of any implied warranties" in Intuit's Software License Agreement, which was properly considered on 12(b)(6) motion and subject to judicial notice).

In *Datel Holdings*, for instance, Judge Laporte of the Northern District of California properly took "judicial notice of the existence and content of" several documents on defendant Microsoft Corp.'s Rule 12(b)(6) motion – including its Xbox 360 "Limited Warranty" and Xbox Live "Terms of Use." 712 F. Supp. 2d at 983-84. After noting the incorporation-by-reference

doctrine, the court ruled that "judicial notice is appropriate because Plaintiff's complaint depends, at least in part, on the contents of the documents." *Id*. at 984. In reaching this result, the court quoted the analogous reasoning from *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig*., 2008 U.S. Dist. LEXIS 105199, *4 (D.N.J., Dec. 30, 2008): "'Those documents are integral to Plaintiffs' Amended Complaint, as the warranty language serves, as a matter of law, to either support or erode Plaintiffs' claims. As a result, the Court will consider the warranty information, without converting Defendant's motion to dismiss into one for summary judgment.'" *Datel Holdings*, 712 F. Supp. 2d at 984 (quoting *In re Samsung Elecs., supra*). Similarly here, the Court may take judicial notice of both the existence and content of Exhibits 1 and 2, while leaving to the parties to debate their legal significance and effect in the context of Defendants' joint Rule 12(b)(6) motion to dismiss.

The fact that the exact copy of Google's "Terms of Sale" attached as Exhibit 1 is *already* in this Court's official judicial records supports Google's request for judicial notice. Judicial notice of matters of public record – including those pleadings and documents contained in public court files and records – is entirely proper. *See, e.g., Emrich v. Touche Ross & Co*., 846 F.2d 1190, 1198 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *see also Reyn's Pasta Bella, LLC v. Visa USA, Inc*., 442 F.3d 741, 746 n.6 (9th Cir. 2006). Plaintiffs' own counsel attached this exact version of Google's "Terms of Sale" to McKinney's original state-court complaint, and alleged that it embodied the "agreement" for the Nexus One agreement between Google and Plaintiffs. *See* Docket No. 2 (Pl.'s Class Action Complaint (filed Jan. 10, 2010), ¶ 11 & Exh. A). McKinney used this exact copy of Google's Terms of Sale to support her allegations that jurisdiction was proper in Santa Clara County. *Id*. Because the document is already contained in this Court's files, the facts of its existence and contents cannot reasonably be subject to dispute. Nor can Plaintiffs or their counsel reasonably dispute the authenticity of the very document that Plaintiffs' own counsel attached to McKinney's original complaint in this action.

Accordingly, although Exhibits 1 and 2 are properly before the Court pursuant to the incorporation-by-reference doctrine, Defendants' alternative request that the Court take judicial

notice of these documents also should be granted.

Dated: October 24, 2011

Respectfully submitted,

DECHERT LLP

By: */s/ Steven B. Weisburd* .
Matthew L. Larrabee (No. 97147)
Steven B. Weisburd (No. 171490)
One Maritime Plaza, Suite 2300
San Francisco, California 94111-3513
Telephone: 415.262.4500
Facsimile: 415.262.4555

Counsel for Defendant GOOGLE INC.

MUNGER, TOLLES & OLSON LLP

By: */s/ Rosemarie T. Ring* .
Henry Weissmann (No. 132418)
Rosemarie T. Ring (No. 220769)
560 Mission Street, 27th Floor
San Francisco, California 94105-2907
Telephone: 415.512.4000
Facsimile: 415.644.6908

Counsel for Defendant HTC CORPORATION

CERTIFICATION

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

14251053.3.LITIGATION