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 GOOGLE INC.

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

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 16 In re Google Phone Litigation

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

**DEFENDANTS GOOGLE INC. AND HTC
 CORPORATION'S REPLY IN SUPPORT
 OF THEIR REQUEST FOR JUDICIAL
 NOTICE**

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

1 Plaintiffs' Opposition ("Opp.") to the request for judicial notice filed by defendants
2 Google Inc. ("Google") and HTC Corporation ("HTC") is without merit. As Google and HTC
3 argued, the documents at issue – the Terms of Sale for the Nexus One that Plaintiffs' counsel
4 attached to McKinney's original state-court complaint (Exhibit 1) and the HTC Limited Warranty
5 (Exhibit 2) – may properly be considered by the Court on their joint Rule 12(b)(6) motion to
6 dismiss under the "incorporation by reference" doctrine, and are also subject to judicial notice
7 under Federal Rule of Evidence 201. *See* Request for Judicial Notice ("RFJN").

8 **I. The Terms Of Sale And The HTC Limited Warranty Are Subject To Judicial Notice.**

9 Plaintiffs do not even discuss the incorporation-by-reference doctrine, much less dispute
10 Google and HTC's arguments that the Terms of Sale and the HTC Limited Warranty are properly
11 considered under that doctrine.¹ For instance, Plaintiffs do not (and cannot) deny that courts in
12 this District have repeatedly and properly considered the substance and content of written
13 warranties in defendants' customer contracts that the plaintiffs, for whatever reason, failed to
14 attach to their complaints. *See* RFJN at 1-4 (citing cases); *see also Long v. Hewlett-Packard Co.*,
15 2007 U.S. Dist. LEXIS 79262, at **17-18 n.3 (N.D. Cal. July 27, 2007); *Inter-Mark USA, Inc. v.*
16 *Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, at **21-25 (N.D. Cal. Feb. 27, 2008).

17 Nor do Plaintiffs raise any credible argument that the existence and contents of the Terms
18 of Sale and the HTC Limited Warranty are not subject to judicial notice as facts not subject to
19 "reasonable dispute" in that they are "either: (1) generally known within the territorial jurisdiction
20 of the trial court; or (2) capable of accurate and ready determination by resort to sources whose
21 accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b). Plaintiffs do not (and
22 cannot) dispute the settled rule that courts may take judicial notice of documents in their own
23 public case files, which, here, includes the Terms of Sale. The existence and content of the HTC
24 Limited Warranty is also not subject to reasonable dispute because it is a standard document
25 available to the public with the purchase of any Nexus One phone. *See Datel Holdings Ltd. v.*

26
27 ¹ Moreover, in their Opposition to Defendants' Motion to Dismiss, Plaintiffs argue only that
28 HTC's limited warranty may not be considered by the Court under the incorporation by reference
doctrine. *See* Mot. Dismiss Opp. at 4. Plaintiffs do not argue that the Terms of Sale are not
properly before the Court under this doctrine.

1 *Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84 (N.D. Cal. 2010) (taking judicial notice of various
2 documents related to the sale of Xbox 360 video game consoles and related contractual and
3 warranty agreements because they were “standard documents” that were “publicly available
4 online” or “in any Xbox 360 console packaging”). The copy of the HTC Limited Warranty
5 attached as Exhibit 2 to the RJFN is HTC’s standard warranty for the Nexus One that is included
6 in the Nexus One box packaging. *See* Declaration of Rosemarie T. Ring in support of RJFN
7 (“Ring Decl.”), at 1.

8 Instead, Plaintiffs advance only two arguments: (1) that the existence and content of the
9 Terms of Sale and the HTC Limited Warranty are subject to “reasonable dispute” because Google
10 and HTC supposedly have not sufficiently “authenticated” them; and (2) that the documents
11 constitute inadmissible “hearsay.” *Opp.* at 3-4. Both arguments are meritless.

12 **II. Plaintiffs’ Challenge To The Authenticity Of The Documents Is Meritless**

13 Plaintiffs “dispute” the authenticity of the documents on three grounds, none of which are
14 “reasonable” or even relevant to whether they are subject to judicial notice. First, as to the
15 Terms of Sale attached as Exhibit 1 to the RJFN, the best Plaintiffs can do is say that Google
16 provided “no indisputable evidence that the Terms of Sale attached to Plaintiff McKinney’s
17 original complaint is the Terms of Sale Google attaches to its Request for Judicial Notice.” *Opp.*
18 at 3. A simple comparison of the two documents confirms that the Terms of Sale attached to
19 Google’s RFJN is the same as the Terms of Sale in the Court’s own files and public record. *See*
20 *also Yeganeh v. Sims*, 2006 U.S. Dist. LEXIS 32765, at **10-11 (N.D. Cal. May 12, 2006)
21 (taking judicial notice of prior court filings, and noting that “these documents are all court filings
22 whose authenticity may be easily checked against the public record”). Thus, Plaintiffs have no
23 basis to dispute whether Exhibit 1 is the same version of the Terms of Sale that Plaintiffs’ counsel
24 attached to McKinney’s original state-filed complaint.

25 Second, Plaintiffs argue that the Court cannot take judicial notice of the documents
26 because there is “no evidence that Plaintiffs actually received the Terms of Sale and/or the HTC
27 [Limited Warranty], nor that they read, understood or agreed to any term set forth therein.” *Opp.*
28 at 3. Plaintiffs are wrong. In *Datel Holdings*, plaintiff argued that the Terms of Use document

1 for Xbox consoles was not subject to judicial notice because defendant had not established that it
2 was provided to all Xbox customers during the relevant period. The court rejected this argument,
3 holding that whether customers received the document “goes to the weight of the evidence, not to
4 whether the documents are judicially noticeable.” 712 F. Supp. 2d at 984; *see also In re NVIDIA*
5 *GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *8 (N.D. Cal. Nov. 19, 2009) (granting request for
6 judicial notice of written warranties, even though defendant “failed to demonstrate whether [the]
7 documents [were] in fact the warranties that apply to all of the [computers at issue] or even
8 whether [the] purported warranties comprise the full extent of the applicable [] warranties”).
9 Here, Plaintiffs’ counsel themselves alleged in McKinney’s original state-court complaint (to
10 which this copy of Exhibit 1 to the RFJN was attached as its Exhibit A) that this document was
11 the “agreement” between Plaintiffs and Google.² McKinney Docket No. 2 (Pltf’s Class Action
12 Complaint (filed Jan. 10, 2010), ¶ 11 & Exh. A). The Terms of Sale also contain an
13 acknowledgment by Plaintiffs as to the existence of the HTC Limited Warranty, which was also
14 provided to Plaintiffs in Nexus One packaging. *See* Ring Decl. at 1.

15 Third, Plaintiffs’ argument that Defendants cannot “bootstrap” the HTC Limited Warranty
16 “simply because it is referenced in another document,” also misconceives the relevant inquiry—
17 whether the existence and content of a document is reasonably subject to dispute—and is wrong
18 as a factual matter. The Terms of Sale does more than “simply” reference the HTC Limited
19 Warranty. It required Plaintiffs to “acknowledge” the existence of the HTC Limited Warranty
20 and referred them to a copy of the HTC Limited Warranty contained in Nexus One box
21 packaging. *See* RFJN, Exhibit 1.

22 Under the incorporation-by-reference doctrine and Federal Rule of Evidence 201, the
23 authenticity of the documents at issue must reasonably be subject to dispute. *See* RFJN, at 2-4
24 (citing authorities). As discussed above, Plaintiffs have no reasonable basis to dispute the
25 authenticity of the Terms of Sale, or the HTC Limited Warranty, which they expressly

26 _____
27 ² Based on a review of Google’s records, the terms set out in Exhibit 1 are those applicable to
28 Plaintiffs’ purchase of the Nexus One. Moreover, Google’s website required Plaintiffs to check a
box to complete their purchase, by which they indicated their acceptance of these terms. RFJN,
Exh. 1 at 1.

1 acknowledged as part of the Terms of Sale and received in Nexus One box packaging.

2 **III. Plaintiffs’ Challenge To The Documents As Inadmissible Hearsay Is Meritless**

3 Plaintiffs’ argument that the Terms of Sale and the HTC Limited Warranty cannot be
4 considered because they constitute inadmissible “hearsay” (Opp. at 3-4) is equally meritless.
5 Plaintiffs cite no law in support of their argument because there is none. Indeed, “documents
6 containing operative facts, such as the words forming an agreement, are not hearsay.” *Jazayeri v.*
7 *Mao*, 174 Cal. App. 4th 301, 316 (2009); *see also* 1 WITKIN, CALIFORNIA EVIDENCE,
8 Hearsay, § 31 (4th ed. 2000) (hearsay rule does not apply to the content and substance of writings
9 reflecting parties’ contracts and agreements, which are not “hearsay” but rather “original
10 evidence”; “the words themselves, written or oral, are ‘operative facts,’” and not “hearsay”
11 because “an issue in the case is whether they were uttered or written”); *Arechiga v. Dolores*
12 *Press, Inc.*, 192 Cal. App. 4th 567, 576-577 (2011) (“written or oral utterances, which are acts in
13 themselves constituting legal results in issue in the case, do not come under the hearsay rule”).
14 Federal hearsay law is equally clear that a “legally operative document that defines the rights and
15 liabilities of the parties,” such as a contract, is “excluded from the definition of hearsay and is
16 admissible evidence[.]” *Stuart v. UNUM Life Ins. Co. of America*, 217 F.3d 1145, 1154 (9th Cir.
17 2000); *see also U.S. v. Rubier*, 651 F.2d 628, 630 (9th Cir. 1981) (terms of “a contract” have
18 “independent legal significance” and “are not hearsay”); *Mueller v. Abdnor*, 972 F.2d 931, 937
19 (8th Cir. 1992) (“A contract, for example, is a form of verbal act to which the law attaches duties
20 and liabilities and therefore is not hearsay.”); Wright et al., 30B Fed. Prac. & Proc. Evid. § 7005
21 (2d ed. 2011) (“statements constituting contracts” are not “hearsay”). Plaintiffs’ argument that
22 the documents are “hearsay” is not only contrary to the law, but it would prevent courts from ever
23 reviewing and considering the terms of any contract or agreement in the context of any breach-of-
24 contract or breach-of-warranty case.

25 In sum, the Terms of Sale (RFJN Exhibit 1) and the HTC Limited Warranty (RFJN
26 Exhibit 2) may properly be considered by the Court on Google and HTC’s Rule 12(b)(6) motion
27 to dismiss under the incorporation-by-reference doctrine, and both are also subject to judicial
28 notice. Plaintiffs’ arguments to the contrary are baseless.

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Dated: November 28, 2011

Respectfully submitted,

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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.