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 10 GOOGLE INC.

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

14 MARY MCKINNEY, Individually and on  
 15 behalf of All others Similarly Situated,

16 Plaintiff,

17 v.

18 GOOGLE INC., a Delaware Corporation;  
 19 HTC CORP., a Delaware Corporation; and T-  
 MOBILE USA, INC., a Delaware  
 20 Corporation,

21 Defendants.

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

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

Date: November 1, 2010  
 Time: 9:00 a.m.  
 Dept: 8  
 Judge: Hon. James Ware

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1 In support of their joint Motion to Dismiss the First Amended Complaint (“FAC”),  
2 Defendants Google Inc. and HTC Corporation hereby respectfully request that this Court take  
3 judicial notice, pursuant to Federal Rule of Evidence 201, of the following documents:

- 4 (1) Google’s Terms of Sale for the Nexus One (“Terms of Sale”), a true and correct  
5 copy of which is attached hereto as Exhibit 1; and
- 6 (2) HTC’s express limited warranty for the Nexus One (“HTC Limited Warranty”), a  
7 true and correct copy of which is attached hereto as Exhibit 2.

8 As explained below, both documents are properly subject to judicial notice under settled law.

9 **I. Google’s Terms Of Sale and HTC’s Limited Warranty Are Properly Subject To**  
10 **Judicial Notice Under The Doctrine Of “Incorporation By Reference.”**

11 Google’s Terms of Sale and HTC’s Limited Warranty may properly be considered by the  
12 Court on Defendants’ joint motion to dismiss, and are subject to judicial notice under the  
13 doctrine of “incorporation by reference,” *Knieval v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir.  
14 2005), because they are referenced in the FAC and their authenticity cannot reasonably be  
15 questioned.

16 As this Court has held, any documents “whose contents are alleged in a complaint and  
17 whose authenticity no party questions, but which are not physically attached to the pleading, may  
18 be considered in ruling on a Rule 12(b)(6) motion to dismiss without converting the motion into  
19 one for summary judgment.” *Long v. Hewlett-Packard Co.*, No. 06-02816, 2007 U.S. Dist.  
20 LEXIS 79262, at \*\*17-18 n.3 (N.D. Cal. July 27, 2007) (considering actual terms of defendant’s  
21 limited warranty and disclaimer in ruling on motion to dismiss even though the agreement was  
22 not physically attached to complaint referencing it); *accord Branch v. Tunnell*, 14 F.3d 449, 454  
23 (9th Cir. 1994) (overruled on other grounds) (document is not “outside” complaint where its  
24 authenticity is not questioned and complaint references it). The Ninth Circuit has “extended the  
25 ‘incorporation by reference’ doctrine to situations in which the plaintiff’s claim depends on the  
26 contents of a document, the defendant attaches the document to its motion to dismiss, and the  
27 parties do not dispute the authenticity of the document, even though the plaintiff does not

1 explicitly allege the contents of that document in the complaint.” *Knivel* 393 F.3d at 1076-77  
2 (under this doctrine, courts may consider on motions to dismiss any authentic documents not  
3 attached to complaint if they are central or intergral to claims asserted); *see also Coto Settlement*  
4 *v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (incorporation by reference applies where  
5 complaint necessarily relies on document or the contents of document are alleged in a  
6 complaint).

7 In her FAC, Plaintiff alleges that she “entered into *agreements* with Defendants or their  
8 agents and received uniform *warranties* in connection with the purchase of [the Nexus One].”  
9 FAC, ¶ 61 (emphasis added). As Plaintiff does not and cannot dispute, her only *agreement* with  
10 Google is set forth and embodied in the “Terms of Sale” attached hereto as Exhibit 1. Indeed,  
11 Plaintiff and her counsel themselves attached the Google “Terms of Sale” as an exhibit to  
12 Plaintiff’s original complaint in this action, which was filed in California state court and  
13 removed to this Court. That copy of the Google “Terms of Sale” is also contained in this Court’s  
14 records because it is attached as Exhibit A to the Declaration of Steven K. Taylor in support of  
15 Defendant’s Notice of Removal. *See* Docket No. 2. With respect to HTC, the only *agreement* or  
16 *warranty* Plaintiff received in connection with her purchase of the Nexus One is set forth and  
17 embodied in the “Limited Warranty,” attached hereto as Exhibit 2.<sup>1</sup>

18 Accordingly, Google’s Terms of Sale and HTC’s Limited Warranty are subject to judicial  
19 notice under the doctrine of “incorporation by reference” and may properly be considered by the  
20 Court in connection with Google and HTC’s Motion to Dismiss. Indeed, courts in this district  
21 routinely use the incorporation by reference doctrine to take judicial notice of warranties that are  
22 referenced in or integral to claims, but that plaintiffs have not attached to their complaints. *See,*  
23 *e.g., Long, supra; Hovsepian v. Apple, Inc.*, No. 08-5788, 2009 U.S. Dist. LEXIS 80868, \*\*7-19  
24 (N.D. Cal. Aug. 21, 2009) (taking judicial notice of express warranty where complaints

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26 <sup>1</sup> HTC’s Limited Warranty is also attached as an exhibit to the Declaration of Rosemarie T. Ring,  
27 which establishes the authenticity of the document. The authenticity of HTC’s Limited Warranty  
is not reasonably subject to dispute by Plaintiff.

1 referenced warranty and claims for relief would depend at least in part on enforceability of  
2 warranty); *Datel Holdings Ltd. v. Microsoft Corp.*, No. 09-05535, 2010 U.S. Dist. LEXIS 40021,  
3 \*\*14-20 (N.D. Cal. April 23, 2010) (taking judicial notice of existence and content of warranty  
4 documents where complaint alleged that contractual right with customers was not “knowingly  
5 given” at time of purchase and therefore claim depended “at least in part, on the contents of the  
6 documents”).

7 **II. The Copy Of The Google Terms of Sale That Is Part Of This Court’s File Is A**  
8 **“Public Record” Subject To Judicial Notice.**

9 Google’s Terms of Sale is also subject to judicial notice because it is contained within  
10 this Court’s own public court files. Judicial notice of matters of public record – including the  
11 records of judicial proceedings, and the pleadings and documents contained in public court files  
12 and records – is entirely proper and commonplace. *See, e.g., Emrich v. Touche Ross & Co.*, 846  
13 F.2d 1190, 1198 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.  
14 1986); *see also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir.  
15 2006).

16 As noted, the Google Terms of Sale are attached as Exhibit A to the Declaration of  
17 Steven K. Taylor that was filed in support of Defendant’s Notice of Removal. *See* Docket No. 2.  
18 That same document was attached by Plaintiff and her counsel to the original complaint in this  
19 action filed in Santa Clara Superior Court.<sup>2</sup> Consequently, Plaintiff cannot reasonably dispute  
20 the authenticity of the document because the copy of the “Terms of Sale” that Google asks this  
21 Court to judicially notice is the exact same copy that Plaintiff and her counsel themselves  
22 attached to Plaintiff’s original complaint in this action, which Defendants subsequently attached  
23 to their Notice of Removal, and which is now available on ECF. This document therefore is  
24 “capable of accurate and ready determination by resort to sources whose accuracy cannot  
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26 <sup>2</sup> In fact, Plaintiff used Google’s Terms of Sale to establish that jurisdiction was proper in Santa  
27 Clara County, and cannot now dispute the authenticity of this document upon which she  
originally relied.

1 reasonably be questioned.” Fed. R. Evid. 201(b).

2 Accordingly, there can be no question that the Google Terms of Sale are properly subject  
3 to judicial notice, either because it is in this Court’s judicial files, or under the doctrine of  
4 incorporation by reference.

5 Dated: July 12, 2010.

Respectfully submitted,

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