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

MARY MCKINNEY, Individually and on )  
behalf of all others similarly situated, )

*Plaintiff,* )

v. )

GOOGLE, INC., a Delaware corporation; )  
HTC CORP., a Delaware corporation; and )  
T-MOBILE USA, INC., a Delaware )  
corporation. )

*Defendants* )

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

CLASS ACTION

**PLAINTIFF’S OPPOSITION TO  
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.

Courtroom: 8, 4th Floor

Judge: Hon. James Ware

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**I. INTRODUCTION**

In connection with their Motion to Dismiss Plaintiff’s First Amended Complaint, Defendants Google Inc. and HTC Corporation have asked the Court to take judicial notice of (1) Google’s Terms of Sale for the Nexus One and (2) HTC’s express limited warranty for the Nexus One. Defendants incorrectly assert that, under Federal Rule of Evidence 201, the Court can take judicial notice of these documents. As explained below, the Court cannot take judicial notice of *any* of these documents for the truth of their content.

**II. ARGUMENT**

**A. Legal Standard**

“Pursuant to Rule 201, a court may take judicial notice of adjudicative facts ‘not subject to reasonable dispute.’” *See Jones v. Doverly*, 2008 WL 733468, at \*18 (S.D. Cal. Mar. 18, 2008) (quoting Fed. R. Evid. 201(b)). To satisfy the rule, facts must be either “generally known” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *See* Fed. R. Evid. 201(b). “The party requesting judicial notice bears the burden of persuading the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source ‘whose accuracy cannot reasonably be questioned.’” *See Jasso v. Citizens Telecomms. Co. of Cal., Inc.*, 2007 WL 97036, at \*2 (E.D. Cal. Jan. 9, 2007); *In re Tyrone F. Conner Corp.*, 140 B.R. 771, 781 (Bankr. E.D. Cal. 1992) (“[A] party requesting judicial notice bears the burden of persuading the trial judge that the fact is a proper matter for judicial notice.”).

Because judicial notice is “an adjudicative device that substitutes the acceptance of a universal truth for the conventional method of introducing evidence,” the doctrine “merits the traditional caution it is given, and courts should strictly adhere to the criteria established by the Federal Rules of Evidence before taking judicial notice of pertinent facts.” *See Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997). Were it otherwise, “the fundamental concept of procedural due process”<sup>2</sup> would be implicated, *see In re Tyrone F. Conner*

1 Corp., 140 B.R. at 782, as “the effect of taking judicial notice under Rule 201 is to preclude a  
2 party from introducing contrary evidence and in effect, directing a verdict against him as to the  
3 fact noticed,” *see United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

4 **B. Public Records May Not Be Judicially Noticed For The Truth Of Their**  
5 **Contents**

6 Matters of public record may be judicially noticed. *See, e.g., Ass'n of Irrigated Residents v.*  
7 *C & R Vanderham Dairy*, 2007 WL 2815038, at \*11 (E.D. Cal. Sept. 25, 2007). “The truth of the  
8 content, and the inferences properly drawn from them, however, is not a proper subject of judicial  
9 notice under Rule 201.” *See Patel v. Parnes*, 253 F.R.D. 531, 536 (C.D. Cal. 2008). In other  
10 words, the Court may take judicial notice “only of the *existence* of those matters of public record  
11 (the existence of a public document or of representations in the document) but not the *veracity* of  
12 the arguments or disputed facts in the document.” *See Cactus Corner, LLC v. U.S. Dep't of Agric.*,  
13 346 F. Supp. 2d 1075, 1099 (E.D. Cal. 2004) (citation omitted); *see also Wyatt v. Terhune*, 315  
14 F.3d 1108, 1114 n.5 (9th Cir. 2003); *R.D. Olson Constr. L.P. v. Am. Safety Indem. Co.*, 2008 WL  
15 4370059, at \*5 n.4 (C.D. Cal. Sept. 23, 2008); *United States v. S. Cal. Edison Co.*, 300 F. Supp.  
16 2d 964, 974 (E.D. Cal. 2004).

17 Accordingly, the Court cannot take judicial notice of the contents of Google’s Terms of  
18 Sale for the Nexus One and HTC’s express limited warranty for the Nexus One. *See Lee v. City of*  
19 *Los Angeles*, 250 F. 3d 668, 689-90 (9th Cir. 2001) (district court erred where it “did more than  
20 take judicial notice of *undisputed* matters of public record”; it also “took judicial notice of  
21 *disputed* facts stated in public records”); *S. Cal. Edison Co.*, 300 F. Supp. 2d at 974 (“A court may  
22 not take judicial notice of one party's opinion of how a matter of public record should be  
23 interpreted.”).

24 **C. Defendants’ Request Must Be Denied Because Disputed Matters Are Not**  
25 **Judicially Noticeable.**

26 “If a court takes judicial notice of a fact in dispute, the court removes [the weapons of

1 rebuttal evidence, cross-examination, and argument] from the parties and raises doubt as to  
2 whether the parties received a fair hearing.” *See Gen. Elec. Capital*, 128 F.3d at 1083. Thus,  
3 Federal Rule of Evidence 201 expressly provides that matters in dispute may not be judicially  
4 noticed. *See Lee*, 250 F. 3d at 689 (“[A] court may not take judicial notice of a fact that is  
5 ‘subject to reasonable dispute.’ ”) (quoting Fed. R. Evid. 201(b)).

6 Plaintiff disputes the authenticity of the documents proffered and assertions made by  
7 Defendants’ attorneys and representatives. Defendants have failed to produce any *undisputed*  
8 matters of public record for which judicial notice may properly be taken, and, thus, their request  
9 must be denied. *See Lee*, 250 F. 3d at 689-90 (9th Cir. 2001).

10 **V. CONCLUSION**

11 For the reasons explained above, the Court should deny Defendants’ Request and refuse to  
12 take judicial notice of Google’s Terms of Sale for the Nexus One and HTC’s express limited  
13 warranty for the Nexus One.

14 DATED: August 25, 2010

Attorneys for Plaintiff Mary McKinney and the  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this 25<sup>th</sup> day of August 2010, served via the Court’s electronic filing system, a true and correct copy of the above and foregoing on counsel as follows:

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