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 T-MOBILE USA, INC.

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

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DAVIS WRIGHT TREMAINE LLP

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-PVT

**T-MOBILE USA, INC.’S RESPONSE TO
 PLAINTIFF’S EVIDENTIARY
 OBJECTIONS TO DECLARATIONS**

Date: November 1, 2010
 Time: 9:00 a.m.
 Dept.: 8

The Honorable James S. Ware

I. INTRODUCTION

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2 In support of its motions to compel arbitration and to dismiss (Dkt. Nos. 30, 32, and
3 38), T-Mobile submitted two declarations from T-Mobile employees, Ms. Andrea Baca and
4 Ms. Rebekah Casner. The declarations provide and describe T-Mobile's records about
5 Plaintiff Mary McKinney's account and service. In opposing T-Mobile's motions, Plaintiff
6 did not contest the substance of any of the information contained in the declarations or the
7 documents attached to the declarations. Plaintiff also did not offer any evidence of her own.
8 Plaintiff did, however, file evidentiary objections,¹ objecting to each and every paragraph of
9 the supporting declarations and each exhibit attached to the declarations.

10 Plaintiff's objections are groundless. Ms. Baca and Ms. Casner provide testimony
11 about T-Mobile's business records, which fall within the hearsay exceptions of Fed. R. Evid.
12 803(6) and 803(7). The declarants are familiar with and reviewed the relevant records and
13 therefore are competent to testify about them. The information provided – *e.g.*, that Plaintiff
14 activated and renewed or extended service on her account 68 times and accepted the Terms &
15 Conditions containing the arbitration agreement each time, that she failed to opt-out of the
16 arbitration agreement, and that she did not purchase or extend service from T-Mobile when
17 she bought the Google phone from Google – is relevant to the pending motions.

II. ARGUMENT

A. Plaintiff's Objections Should Be Rejected From the Outset Because They Are Merely a Wholesale, Generalized Attack on the Declarations.

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20 Plaintiff's Objections repeatedly state the same objections to numerous paragraphs in
21 Ms. Baca's and Ms. Casner's declarations, ultimately objecting to every paragraph and every
22 exhibit in rote fashion. The Objections provide no specifics about how or why Plaintiff
23 contends that respective paragraphs in the declarations are supposedly objectionable, except to
24 cite and paraphrase provisions of the Federal Evidence Rules.
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28 ¹ See Evidentiary Objections to Declarations Provided In Support of T-Mobile's Motion to Compel Arbitration and Motion to Dismiss (Dkt. No. 50), referred to here as "Objections."

1 Vague and generalized objections such as this can and should be rejected from the
2 outset. “It is the ‘burden [of] the party moving to strike the affidavit to show the
3 inadmissibility of each statement in the affidavit.’” *Hardin v. Reliance Trust Co.*, 2006 WL
4 2850457, *1 (N.D. Ohio Sept. 29, 2006) (quoting *Reddy v. Good Samaritan Hosp. & Health*
5 *Ctr.*, 137 F. Supp. 2d 948, 954 (S.D. Ohio 2001); accord *AT&T v. Shared Comm’cn Servs.*,
6 1995 WL 555868, *3 (E.D. Pa. Sept. 14, 1995). Objections or a motion to strike should point
7 specifically to the statements in an affidavit or declaration that the movant asserts should be
8 stricken and should provide the specific reasons why. 10B C. Wright, A. Miller & M. Kane,
9 FED. PRACTICE & PROCEDURE § 2738 (2010); *Perma Research & Dev. Co. v. Singer Co.*, 410
10 F.2d 572, 579 (“We also note that the motion to strike was much too general in that it did not
11 specify which parts of the Chanler affidavit should be stricken and why. . . . [P]laintiff was
12 required to do more than swing its bludgeon wildly.”). When a party fails to provide this
13 specificity, a Court may properly disregard the party’s objections. *See, e.g., Owens v.*
14 *Superfos A/S*, 170 F. Supp. 2d 1188, 1190 n.1 (M.D. Ala. 2001) (“Defendant objected to
15 virtually every paragraph relied upon in Plaintiff’s briefs [T]he form of Defendant’s
16 objections is offensive.”); *Grady v. Illinois Bell Tel. Co.*, 1996 WL 473657, *5 n.5 (N.D. Ill.
17 Aug. 13, 1996) (“where a motion to strike is too general . . . the motion need not be granted”
18 (internal quotation omitted)); *Reddy*, 137 F. Supp. 2d at 958 & n.14; *AT&T*, 1995 WL 555868,
19 at *3. It should not be left to the Court to have to sift through a declaration to pick out
20 portions that may be objectionable. *Ernst Seidelman Corp. v. Mollison*, 10 F.R.D. 426, 428
21 (S.D. Ohio 1950).

22 Plaintiff’s Objections to the declarations of Ms. Baca and Ms. Casner are a wholesale
23 onslaught, challenging the declarations “*in toto*” as well as each paragraph in the declarations
24 and each attached exhibit. At the same time, Plaintiff has offered no evidence to controvert
25 any of the facts in the declarations nor has she otherwise contended that any of the facts are
26 untrue. Given this, Plaintiff’s Objections ring hollow. *See Tickanen v. Harris & Harris, Ltd.*,
27 461 F. Supp. 2d 863, 868 (E.D. Wisc. 2006) (finding admissible affidavit to support motion to
28 compel arbitration, showing that plaintiffs accepted cardholder agreement containing

1 arbitration clause, and noting, “Interestingly, although plaintiffs challenge the competency of
2 [the affiant] to proffer this evidence, plaintiffs fail to submit any personal evidence disputing
3 that they received any of the documents attached to [the] affidavit.”); *AT&T Corp. v.*
4 *Community Network Servs., Inc.*, 1999 WL 1267457, *5 (S.D.N.Y. Dec. 29, 1999) (finding
5 admissible declarations providing account histories as business records, and granting summary
6 judgment to plaintiff for amounts due because defendant did not offer opposing evidence but
7 merely “unsupported conjecture that the final balances due in their accounts may be wrong”).

8 Given the improper, generalized nature of Plaintiff’s Objections and her failure to
9 contest or offer any opposing evidence regarding any fact stated in the declarations, the Court
10 can and should overrule the Objections, without more.

11 **B. Plaintiff’s Objections Should Be Rejected on Each of the Various**
12 **Grounds To Which Plaintiff Alludes.**

13 If the Court determines that it should consider Plaintiff’s Objections in more detail, it
14 will see that none has merit. Because Plaintiff repeats various types of objections verbatim,
15 numerous times, the discussion that follows will address the objections by categories.

16 *1. Plaintiff’s Objections re Hearsay, Fed. R. Evid. 803(6) and*
17 *803(7).*

18 Plaintiff objects to the declarations of both Ms. Baca and Ms. Casner “*in toto*” on the
19 ground of hearsay. Objections Nos. 1, 40. Plaintiff does not identify any statement in either
20 declaration that she contends constitutes hearsay. Nor does she explain why she believes the
21 declarations contain hearsay, merely citing portions of Federal Rules 801 and 802 defining
22 hearsay. *Id.*

23 Both declarations are based on business records of T-Mobile. Ms. Baca’s declaration
24 provides information from T-Mobile records for Ms. McKinney’s account, including that she
25 activated five lines of service, later took upgrade offers and extended or renewed her service
26 no fewer than 63 times, received and accepted the T-Mobile Terms & Conditions containing
27 the arbitration agreement each time, did not purchase or extend service from T-Mobile when
28 she purchased the Google phone, but did later use her Google phone with her T-Mobile

1 service. With her declaration, Ms. Baca also provided copies of the governing Terms &
2 Conditions, service agreements executed in stores, and materials packaged with phones sold
3 by T-Mobile. Ms. Casner's declaration addressed the process by which T-Mobile customers
4 may opt out of the arbitration agreement and noted that T-Mobile's records reflect that Ms.
5 McKinney never exercised her rights to opt out.²

6 It is well established that a corporate representative's declaration recounting or
7 providing a company's records falls within the business records exception to the hearsay rule.
8 Fed. R. Evid. 803(6). For the present motion, two cases that are most directly on point
9 concerned affidavits explaining arbitration agreements. In *Posern v. Prudential Securities,*
10 *Inc.*, 2004 WL 1145877, *3 (N.D. Cal. May 3, 2004), Judge Conti of this Court held that an
11 affidavit of a Prudential representative submitting an account agreement entered into by the
12 plaintiff-investors was admissible under Rule 803(6), and he granted Prudential's motion to
13 compel arbitration based on the agreement. In *Tickanen*, 461 F. Supp. 2d at 867-68, the court
14 overruled hearsay objections and held that a bank representative's declaration providing and
15 explaining an arbitration agreement and notices sent to the plaintiff credit cardholders was
16 admissible. That court likewise compelled arbitration.

17 While these cases concern arbitration agreements, many other cases demonstrate that
18 declarations concerning computer-stored account records come within the business records
19 exception to the hearsay rule. *See, e.g., Mora v. Harley-Davidson Credit Corp.*, 2009 WL
20 464465, *4 & n.1 (E.D. Cal. Feb. 24, 2009) ("As Seaman's declaration is based on his review
21 of records maintained by HDCC in the ordinary course of business, the requirements of Fed.
22 R. Evid. 803(6) are met and the hearsay objection is overruled."); *Hardin*, 2006 WL 2850457,
23 at *2 ("[T]he account files upon which Contino based her testimony are RTC's business
24 records, which are admissible as evidence under the business records exception to the hearsay
25 rule under Fed. R. Evid. 803(6)."); *Spector v. Experian Info. Servs. Inc.*, 321 F. Supp. 2d 348,

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27 ² Because Ms. Casner's declaration concerns the lack of any arbitration opt-out by Plaintiff, as reflected
28 by T-Mobile's records, it falls within the portion of the business record exception set forth in Rule
803(7).

1 352-53 (D. Conn. 2004) (declarations from bank employees regarding year-end account
2 reports and maintenance of account notes for plaintiff's account held admissible because they
3 were "statements regarding business records kept in the ordinary course of business, and
4 therefore [the] testimony and documents are admissible under Fed. R. Evid. 803(6)); *AT&T*
5 *Corp.*, 1999 WL 1267457, at **4-5 (declarations submitting account histories and amounts
6 due derived from computer-stored data were admissible as business records under Rule
7 803(6); *In re Memorex Telex Corp.*, 242 B.R. 826, 831-32 (D. Del. 1999) (call logs of contacts
8 with customers held admissible as business records); *AFD Fund v. United States*, 61 Fed. Cl.
9 540, 544-45 (2004) (affidavit and statement of accounts drawn from electronic records
10 admissible under Rule 803(6)).

11 T-Mobile must keep records of customers' accounts, purchases, activations, service
12 plans, and service usage in order to manage and bill the accounts. Because the declarations of
13 Ms. Baca and Ms. Casner are premised on these regularly-kept business records, the
14 declarations and attached exhibits (which are likewise business records) are admissible under
15 the hearsay exceptions set forth in Rules 803(6) and 803(7).

16 2. *Plaintiff's Objections re Foundation, Fed. Evid. Rule 602.*

17 Plaintiff similarly objects "*in toto*" to Ms. Baca's declaration on the basis that it
18 allegedly lacks foundation under Rule 602. *See* Objection No. 2. Plaintiff's Objections go on
19 to assert identical foundation objections to every substantive paragraph in Ms. Baca's
20 declaration and as to each of the attached exhibits, *see id.* Nos. 5-39, in each instance merely
21 referencing the subject of the paragraph and objecting "on the ground of lack of personal
22 knowledge," with no further explanation. Because Plaintiff's Objections are essentially
23 identical throughout, one example will suffice. Paragraph 3 of Ms. Baca's declaration states:
24 "According to T-Mobile's records, Mary McKinney originally activated two lines of T-Mobile
25 service on March 6, 2002, through an Internet dealer, InPhonic, Inc. (the '25' and '18' lines on
26 her account)." Baca Dec. ¶ 3 (footnote omitted). Plaintiff's objection is:

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1 This statement is objected to on the ground of lack of personal knowledge.
2 Fed. R. Evid. 602. Ms. Baca has not established how she knows Plaintiff
herself activated an account.

3 Objections, No. 5.

4 As reflected on the face of her declaration, Ms. Baca recounted what T-Mobile's
5 records of Ms. McKinney's account reflect. A corporate representative offering a declaration
6 about the contents of the corporation's business records need not have personal knowledge of
7 the activity reflected in the records. She only need be a "qualified witness," meaning that she
8 is familiar with the records kept in the ordinary course of business, has reviewed the records
9 and can attest to what they state. *See* 2 K. Broun, MCCORMICK ON EVIDENCE § 292 (2009)
10 ("[A]nyone with the necessary knowledge is qualified; this witness need not have firsthand
11 knowledge of the matter reported or actually have prepared the report or observed its
12 preparation." (footnote omitted)). That a corporate representative declarant is familiar with
13 and qualified to testify about a corporation's records can be determined from the declarant's
14 position and averments about the records. *See, e.g., Edwards v. Toys "R" Us*, 527 F. Supp. 2d
15 1197, 1201-02 & n.5 (C.D. Cal. 2007); *Mora*, 2009 WL 464465, at *4 n.1 ("[Declarant] is
16 competent to speak to the account records based on his experience, position within the
17 company, access to account records, and personal knowledge based on the review he initiated
18 of [the] account data."); *Johnston v. Arrow Fin. Servs., LLC*, 2006 WL 2710663 (N.D. Ill.
19 Sept.15, 2006) (denying motion to strike declaration of executive assistant where he was
20 familiar with company's policies and procedures and had examined company's records
21 regarding plaintiffs); *Tickanen*, 461 F. Supp. 2d at 868 ("personal knowledge of a company's
22 policies can be established by virtue of a person's position"); *AT&T Corp.*, 1999 WL
23 1267457, at *5 ("there is no requirement that the person whose first-hand knowledge was the
24 basis of the entry [in corporate records] be identified, so long as it was the business entity's
25 regular practice to get information from such a person.").

26 The declarations of Ms. Baca and Ms. Casner reflect that they are familiar with and
27 reviewed T-Mobile's records concerning Ms. McKinney's account. Ms. Baca is familiar with
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1 T-Mobile customer account records both as a paralegal who handles customer claims and as a
2 former Customer Care representative. Baca Dec. ¶¶ 1, 2. Ms. Casner is also a paralegal,
3 responsible for T-Mobile's process and records regarding customers who choose to opt out of
4 arbitration. Casner Dec. ¶¶ 1, 2. Contrary to Plaintiff's Objections, neither Ms. Baca nor Ms.
5 Casner must have personally witnessed Ms. McKinney's activations, renewals, or other
6 activity relating to her T-Mobile account and service. As shown above, they are both amply
7 qualified and competent to testify about T-Mobile's records regarding Ms. McKinney and her
8 account. Plaintiff's Objections regarding foundation and personal knowledge should be
9 rejected.

10 3. *Plaintiff's Objections re Expert Testimony, Fed. R. Evid. 701.*

11 The first two paragraphs of Ms. Baca's declaration describe her current and prior
12 positions with T-Mobile and the basis for her familiarity with customer account records. *See*
13 Baca Dec. ¶¶ 1, 2. Oddly, Plaintiff objects to these paragraphs on the ground that they "seek
14 to establish Ms. Baca's ability to provide lay testimony as to scientific, technical or other
15 specialized knowledge," citing Fed. R. Evid. 701. *See* Objections Nos. 3, 4. T-Mobile has
16 not offered Ms. Baca as an expert, and nothing in her declaration suggests anything of the sort.
17 Plaintiff's objections are, frankly, nonsensical.³

18 4. *Plaintiff's Objections re Relevance, Fed. R. Evid. 402.*

19 Finally, Plaintiff objects to all but one of the substantive paragraphs of Ms. Baca's
20 declaration on the ground of relevance. *See* Objections Nos. 5-9, 11-37. Indeed, in many
21 instances, Plaintiff has objected to individual paragraphs in Ms. Baca's declaration *twice* on
22 relevance grounds. *See id.* Nos. 23-27, 29-33. Again, Plaintiff's objections are the same
23 throughout, and so one example will illustrate. Paragraph 5 of Ms. Baca's declaration
24 explains that Ms. McKinney entered into contracts with T-Mobile each time she activated
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27 ³ Indeed, in the same objections, Plaintiff states: "Insofar as these paragraphs are not an improper
28 attempt to establish *Ms. Jacobs* as an expert, they are objected to on the ground that they are
irrelevant." *See* Objections Nos. 3, 4 (emphasis added). T-Mobile has no idea who Ms. Jacobs is.

