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 GOOGLE INC.

10  
 11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA  
 13 SAN JOSE DIVISION

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

17 Plaintiff,

18 v.

19 GOOGLE INC., a Delaware Corporation;  
 HTC CORP., a Delaware Corporation; and  
 20 T-MOBILE USA, INC., a Delaware  
 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  
 SECOND AMENDED COMPLAINT**

Date: April 25, 2011  
 Time: 9:00 a.m.  
 Dept: 8  
 Judge: Hon. James Ware

1 In support of their joint Motion to Dismiss the Second Amended Complaint (“SAC”) filed  
2 by Plaintiff Mary McKinney (“Plaintiff”), Defendants Google Inc. (“Google”) and HTC  
3 Corporation (“HTC”) hereby respectfully submit this short memorandum concerning the  
4 following two documents, which are properly before the Court on Defendants’ motion:

- 5 (1) The copy of Google’s Terms of Sale for the Nexus One that Plaintiff’s counsel  
6 themselves attached to Plaintiff’s original complaint filed in California state court,  
7 and alleged to be the “agreement” between Plaintiff and Google, attached hereto as  
8 Exhibit 1 (“Terms of Sale”); and  
9 (2) The copy of HTC’s End User License Agreement, including its Limited Warranty  
10 Statement, attached hereto as Exhibit 2 (“Limited Warranty”).

11 As explained below, these two documents are properly considered by the Court on Defendants’  
12 motion to dismiss under the “incorporation by reference” doctrine. In addition, the documents are  
13 also subject to judicial notice and, therefore, Defendants hereby request that the Court take  
14 judicial notice of the fact and content of Exhibits 1 and 2, pursuant to Federal Rule of Civil  
15 Procedure 201.

16 **I. Exhibits 1 And 2 Are Properly Before The Court On Defendants’ Rule 12(b)(6)**  
17 **Motion To Dismiss Pursuant To The “Incorporation By Reference” Doctrine.**

18 The Court can properly consider Exhibits 1 and 2 pursuant to the “incorporation by  
19 reference” doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005); *In re Silicon*  
20 *Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *Marolda v. Symantec Corp.*, 672 F. Supp.  
21 2d 992, 996 (N.D. Cal. 2009); *see also Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d  
22 974, 984 (N.D. Cal. 2010); *Long v. Hewlett-Packard Co.*, 2007 U.S. Dist. LEXIS 79262, \*\*17-18  
23 n.3 (N.D. Cal., July 27, 2007).

24 Under this doctrine, courts routinely consider documents on motions to dismiss that the  
25 plaintiff has not physically attached to the complaint so long as (1) the complaint explicitly  
26 references the documents and their contents or its claims depend or rely upon them in whole or in  
27 part; and (2) the authenticity of the documents is not reasonably subject to dispute. *See Knievel*,  
28 393 F.3d at 1076-77; *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *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,

1 such as the terms of agreements governing the relationship between the parties, *id.*; SEC filings,  
2 *In re Silicon Graphics Sec. Litig.*, 183 F.3d at 986, “internet pages” and “newspaper articles,”  
3 *Knievel*, 393 F.3d at 1076 (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)).

4 The incorporation-by-reference doctrine furthers the “policy concern” of preventing  
5 plaintiffs from surviving Rule 12(b)(b) motions “by deliberately omitting references to documents  
6 upon which their claims are based,” or otherwise failing to attach referenced documents to their  
7 complaints that support defendants’ motions to dismiss. *Parrino*, 146 F.3d at 706. Under this  
8 doctrine, the documents that the plaintiff failed to attach to the complaint are properly before the  
9 Court once the defendant simply attaches the document to its motion to dismiss. *See Knievel*, 393  
10 F.3d at 1076.

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

13 First, Plaintiff explicitly references and necessarily relies on these two agreements with  
14 Defendants in her Second Amended Complaint. As Plaintiff alleges, she and putative class  
15 members “entered into agreements” when they purchased the Nexus One and thereby “received  
16 uniform warranties in connection with the purchase of such phones.” SAC, ¶ 100. Plaintiff in  
17 fact attached Exhibit 1’s Google “Terms of Sale” for the Nexus One to her original complaint,  
18 and her only agreement with HTC is embodied in its “Limited Warranty” for the Nexus One,  
19 attached as Exhibit 2. Moreover, Plaintiff’s claims – including especially her breach of warranty  
20 claims – necessarily depend upon whether Google and HTC made any “warranties” about the  
21 Nexus One’s 3G connectivity, SAC, ¶ 100, including whether and to what extent there exists any  
22 legally enforceable warranty disclaimers in their respective agreements. *See Long*, 2007 U.S.  
23 Dist. LEXIS 79262, at \*\*17-18 n.3 (citing *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994)).

24 Second, Plaintiff and her counsel cannot reasonably dispute the authenticity of the  
25 documents attached as Exhibits 1 and 2. In fact, Plaintiff’s themselves attached the exact copy of  
26 the Google “Terms of Sale” attached hereto as Exhibit 1 as *an exhibit to Plaintiff’s original*  
27 *complaint*, which was filed in California state court and removed to this Court. *See* Docket No. 2.  
28 By virtue of Defendants’ removal, that exact copy of Google’s “Terms of Sale” is already in this

1 Court's judicial records, within Exhibit A to the Declaration of Steven K. Taylor in support of  
2 Defendant's Notice of Removal. *Id.* Further still, Plaintiff's counsel themselves have alleged that  
3 the "Nexus One Phone – Terms of Sale" that they "attached" to their original state-court  
4 complaint constitutes and reflects the "agreement" between Google and "Google Phone  
5 customers, including Plaintiff." Docket No. 2 (Pltf's Class Action Complaint (filed Jan. 10,  
6 2010), ¶ 11 & Exh. A). The Google Terms of Sale attached as Exhibit 1, in turn, expressly refers  
7 to HTC's Limited Warranty for the Nexus One, Exhibit 2, which is also included in Nexus One  
8 box packaging. Plaintiff cannot *reasonably* dispute the authenticity of either Exhibits 1 or 2.<sup>1</sup>

9 Accordingly, Plaintiff has incorporated Exhibit 1 and Exhibit 2 by reference into her  
10 Second Amended Complaint, and both may be considered by the Court on Google and HTC's  
11 Rule 12(b)(6) motion to dismiss without transforming it into a summary judgment motion. As the  
12 Ninth Circuit has confirmed, the documents are properly before the Court under this doctrine  
13 once "the defendant attaches [them] to its motion to dismiss," *Knievel*, 393 F.3d at 1076, as  
14 Google and HTC have done with both Exhibits 1 and 2 here. *See* Exhibits 1 & 2 to Defendants  
15 Google Inc. And HTC Corporation's Notice Of Motion And Motion To Dismiss Second  
16 Amended Complaint (filed concurrently herewith).

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

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

24 \_\_\_\_\_  
25 <sup>1</sup> On the last round of motions in this action, Plaintiff's counsel signed a pleading including the  
26 entirely conclusory assertion that "Plaintiff disputes the authenticity of the documents proffered,"  
27 *see* Docket No. 51 at 4, without providing any basis in fact or law for that assertion. Such bald  
28 assertions cannot establish that the authenticity of Exhibits 1 and 2 is *reasonably* subject to  
dispute. In any event, the authenticity of Exhibit 1 is confirmed by this Court's own judicial  
records, as well as Plaintiff'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.").

1 EVID. 201(d) (emphasis added).

2 As courts in this District have held in analogous circumstances, it is proper to take  
3 “judicial notice” of documents such as Exhibits 1 and 2 where the fact of their existence and their  
4 content is not reasonably subject to dispute by reference to sources whose accuracy cannot  
5 reasonably be questioned. *See, e.g., Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974,  
6 983-84 (N.D. Cal. 2010) (Laporte, J.); *Hovsepian v. Apple, Inc.*, 2009 U.S. Dist. LEXIS 80868,  
7 \*2 & n.3, \*\*23-24 (N.D. Cal., Aug. 21, 2009) (Fogel, J.) (granting Apple’s request for judicial  
8 notice of “the terms” of its limited warranty provided to iMAC G5 purchasers where complaints  
9 “reference to warranty” and plaintiff’s claims “depend at least in part of [its] enforceability”);  
10 *Berenblat v. Apple, Inc.*, 2009 U.D. Dist. LEXIS 80734, \*2 & n.3 (N.D. Cal., Aug. 21, 2009)  
11 (same); *see also Inter-Mark USA, Inc. v. Intuit, Inc.*, 2008 U.S. Dist. LEXIS 18834, \*\*8-9, 16-17,  
12 22-25 (N.D. Cal., Feb. 27, 2008) (dismissing implied warranty claims given “valid disclaimer of  
13 any warranties” in Intuit’s Software License Agreement, which was properly considered on  
14 12(b)(6) motion and subject to judicial notice).

15 In *Datel Holdings*, for instance, Judge Laporte of the Northern District of California  
16 properly took “judicial notice of the existence and content of” several documents on defendant  
17 Microsoft Corp.’s Rule 12(b)(6) motion – including its Xbox 360 “Limited Warranty” and Xbox  
18 Live “Terms of Use.” 712 F. Supp. 2d at 983-84. After noting the incorporation-by-reference  
19 doctrine, the court ruled that “judicial notice is appropriate because Plaintiff’s complaint depends,  
20 at least in part, on the contents of the documents.” *Id.* at 984. In reaching this result, the court  
21 quoted the analogous reasoning from *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig.*,  
22 2008 U.S. Dist. LEXIS 105199, \*4 (D.N.J., Dec. 31, 2008): ““Those documents are integral to  
23 Plaintiffs’ Amended Complaint, as the warranty language serves, as a matter of law, to either  
24 support or erode Plaintiffs’ claims. As a result, the Court will consider the warranty information,  
25 without converting Defendant’s motion to dismiss into one for summary judgment.”” *Datel*  
26 *Holdings*, 712 F. Supp. 2d at 984 (quoting *In re Samsung Elecs., supra*). Similarly here, the  
27 Court may take judicial notice of both the existence and content of Exhibits 1 and 2, while  
28 leaving to the parties to debate their legal significance and effect in the context of Defendants’

1 joint Rule 12(b)(6) motion to dismiss.

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

16 Accordingly, although Exhibits 1 and 2 are properly before the Court pursuant to the  
17 incorporation-by-reference doctrine, Defendants' alternative request that the Court take judicial  
18 notice of these documents also should be granted.

19 Dated: February 22, 2010

Respectfully submitted,

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DECHERT LLP

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**CERTIFICATION**

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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.