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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*	5:10-cv-01177-JW **PLAINTIFF'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT** Date: April 25, 2011 Time: 9:00 A.M. Courtroom: 8 Judge: Hon. James Ware

I. INTRODUCTION

In connection with their Motion to Dismiss Plaintiff's Second 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 End User License Statement. 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. Dovery*, 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" would be implicated, *see In re Tyrone F. Conner Corp.*, 140 B.R. at 782, as "the effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed," *see United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

B. Defendants' Request Must Be Denied Because Disputed Matters Are Not Judicially Noticeable.

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

rebuttal evidence, cross-examination, and argument] from the parties and raises doubt as to whether the parties received a fair hearing." *See Gen. Elec. Capital,* 128 F.3d at 1083. Thus, Federal Rule of Evidence 201 expressly provides that matters in dispute may not be judicially noticed. *See Lee v. City of Los Angeles,* 250 F. 3d 668, 689 (9th Cir. 2001) ("[A] court may not take judicial notice of a fact that is 'subject to reasonable dispute.' ") (quoting Fed. R. Evid. 201(b)).

1. Defendants Have Not Properly Authenticated Exhibits 1 And 2

Plaintiff disputes the authenticity of the documents proffered and assertions made by Defendants' attorneys and representatives. Defendants have failed to produce any *undisputed* matters of public record for which judicial notice may properly be taken, and, thus, their request must be denied. *See Lee*, 250 F. 3d at 689-90 (9th Cir. 2001). First, Defendants provide no indisputable evidence that the Terms of Sale attached to Plaintiff's original complaint is the Terms of Sale Google attaches to its Request for Judicial Notice. Second, Defendants provide no evidence that Plaintiff actually received the Terms of Sale and/or the HTC End User License Agreement,[1] nor that she read, understood or agreed to any term set forth therein. Third, with regard to the HTC End User License Agreement, Defendants provide absolutely no authority supporting the argument that it can bootstrap this document simply because it is referenced in another document. If that were the state of the law companies could reference a myriad of documents to protect themselves from future liability to consumers.

2. Exhibits 1 and 2 Are Hearsay And Thus Judicial Notice Should Not Be Taken As To Their Facts And Contents

To the extent the Court takes judicial notice as to the existence of Exhibits 1 and 2, it should reject Defendants' request that the Court take judicial notice of the contents of those documents. Hearsay is an out of court statement offered for the truth of the matters asserted. Fed. R. Evid. 801(c). Here, the out of court statements contained in Exhibits 1 and 2 are being offered

[1] Plaintiff has never attached the HTC End User License Agreement to any court filing. Defendant HTC does not offer any evidence showing the HTC End User was given to Plaintiff or any member of the Class. Moreover, Plaintiff's allegations against HTC do not refer to any agreement with HTC. Therefore, the Court should not take judicial notice of Exhibit 2.

for the truth and contents of the matters asserted therein (i.e. to support Defendants' assertion the exhibits disclaim warranties). In particular, Defendants ask the Court to interpret Exhibits 1 and 2 in considering Defendants' Motion to Dismiss. *See* Mtn. at 17:11-18:6, FN 12 and 20:22-21:1. Moreover, Exhibit 2 amounts to "double hearsay" as it is merely a document that was vaguely referenced in Exhibit 1 (referred to as the "HTC Limited Warranty terms"). Accordingly, both documents must not be relied upon for their contents.

III. CONCLUSION

For the reasons explained above, the Court should deny Defendants' Request and refuse to take judicial notice of Google's Terms of Sale for the Nexus One and HTC's End User License Agreement.

DATED: April 4, 2011

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