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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
 Case No. 5:10-CV-03897-JW

**DEFENDANTS GOOGLE INC. AND HTC
 CORPORATION'S REPLY IN SUPPORT
 OF THEIR REQUEST FOR JUDICIAL
 NOTICE**

Date: April 25, 2010
 Time: 9:00 a.m.
 Dept: 8
 Judge: Hon. James Ware

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1 Plaintiff's Opposition ("Opp.") to the request for judicial notice filed by defendants
2 Google Inc. ("Google") and HTC Corporation ("HTC") is without merit. As Google and HTC
3 argued, the documents at issue – the Google Terms of Sale for the Nexus One that Plaintiff and
4 her counsel attached to their original state-court complaint (Exhibit 1) and the HTC Limited
5 Warranty (Exhibit 2) – may properly be considered by the Court on their joint Rule 12(b)(6)
6 motion to dismiss under the "incorporation by reference" doctrine, and are also subject to
7 judicial notice under Federal Rule of Evidence 201. *See* Request for Judicial Notice ("RFJN").

8 **I. The Google Terms Of Sale And The HTC Limited Warranty Are Subject To**
9 **Judicial Notice.**

10 Plaintiff does not even discuss the incorporation-by-reference doctrine, much less dispute
11 Google and HTC's arguments that the Google Terms of Sale and the HTC Limited Warranty are
12 properly considered under that doctrine because her warranty claims necessarily rely on them, as
13 even Plaintiff admits by alleging in support of those claims that she "entered into agreements"
14 and "received ... warranties in connection with the purchase of [the Nexus One]." FAC ¶ 100.¹
15 The Google Terms of Sale that govern Plaintiff's purchase of the Nexus One and the HTC
16 Limited Warranty are the "agreements" and "warranties" between Plaintiff and Defendants and
17 therefore are necessary to her claims and properly incorporated by reference into the operative
18 complaint. *See Knievel v. ESPN, Inc.*, 393 F.3d 1068, 1076 (9th Cir. 2005) (judicial notice of a
19 document is appropriate where plaintiff's claim depends upon the document); *Parrino v. FHP,*
20 *Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (judicial notice of a document that is "crucial to the
21 plaintiff's claims, but not explicitly incorporated in his complaint, ... is supported by the policy
22 concern underlying the rule: Preventing plaintiffs from surviving a Rule 12(b)(6) motion by
23 deliberately omitting references to documents upon which their claims are based").

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25 ¹ For instance, Plaintiff does not (and cannot) deny that courts in this District – including this
26 Court – have repeatedly and properly considered the substance and content of written warranties
27 in defendants' customer contracts that the plaintiffs, for whatever reason, failed to attach to their
28 complaints. *See* RFJN at 2-5 (citing cases); *see also Long v. Hewlett-Packard Co.*, 2007 U.S.
Dist. LEXIS 79262, at **17-18 n.3 (N.D. Cal. July 27, 2007) (Ware, J.).

1 Nor does Plaintiff raise any credible argument that the existence and contents of the
2 Google Terms of Sale and the HTC Limited Warranty are not subject to judicial notice as facts
3 not subject to “reasonable dispute” in that they are “either: (1) generally known within the
4 territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by
5 resort to sources whose accuracy cannot reasonably be questioned.” *See* Fed. R. Evid. 201(b).
6 Plaintiff does not (and cannot) dispute the settled rule that courts may take judicial notice of
7 documents in their own public case files, which, here, includes the Google Terms of Sale. The
8 existence and content of the HTC Limited Warranty is also not subject to reasonable dispute
9 because it is a standard document available to the public with the purchase of any Nexus One
10 phone. *See Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983-84 (N.D. Cal.
11 2010) (taking judicial notice of various documents related to the sale of Xbox 360 video game
12 consoles and related contractual and warranty agreements because they were “standard
13 documents” that were “publicly available online” or “in any Xbox 360 console packaging”). The
14 copy of the HTC Limited Warranty attached as Exhibit 2 to the RJFN is HTC’s standard
15 warranty for the Nexus One that is included in the Nexus One box packaging. *See* Declaration of
16 Rosemarie T. Ring in support of RJFN (“Ring Decl.”), at 1.

17 Instead, Plaintiff advances only two arguments: (1) that the existence and content of the
18 Google Terms of Sale and the HTC Limited Warranty are subject to “reasonable dispute”
19 because Google and HTC supposedly have not sufficiently “authenticated” them; and (2) that the
20 documents constitute inadmissible “hearsay.” *Opp.* at 3-4. Both arguments are meritless.

21 **II. Plaintiff’s Challenge To The Authenticity Of The Documents Is Meritless.**

22 Plaintiff “disputes” the authenticity of the documents on three grounds, none of which are
23 “reasonable” or even relevant to whether they are subject to judicial notice. *First*, as to the
24 Google Terms of Sale attached as Exhibit 1 to the RJFN, the best Plaintiff can do is say that
25 Google provided “no indisputable evidence that the Terms of Sale attached to Plaintiff’s original
26 complaint is the Terms of Sale Google attaches to its Request for Judicial Notice.” *Opp.* at 3. A
27 comparison of the two documents confirms they are the same and include the identical ECF
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1 filing legend in the Court’s own files and public record. *See also Yeganeh v. Sims*, 2006 U.S.
2 Dist. LEXIS 32765, at **10-11 (N.D. Cal. May 12, 2006) (taking judicial notice of prior court
3 filings, and noting that “these documents are all court filings whose authenticity may be easily
4 checked against the public record”). Thus, Plaintiff has no basis to dispute whether Exhibit 1 is
5 the same version of the Terms of Sale that Plaintiff and her counsel attached to their original
6 state-filed complaint.

7 *Second*, Plaintiff argues that the Court cannot take judicial notice of the documents
8 because there is “no evidence that Plaintiff actually received the Terms of Sale and/or the HTC
9 [Limited Warranty], nor that she read, understood or agreed to any term set forth therein.” *Opp.*
10 at 3. Plaintiff is wrong. In *Datel Holdings*, plaintiff argued that the Terms of Use document for
11 Xbox consoles was not subject to judicial notice because defendant had not established that it
12 was provided to all Xbox customers during the relevant period. The court rejected this
13 argument, holding that whether customers received the document “goes to the weight of the
14 evidence, not to whether the documents are judicially noticeable.” 712 F. Supp. 2d at 984; *see*
15 *also In re NVIDIA GPU Litig.*, 2009 U.S. Dist. LEXIS 108500, at *8 (N.D. Cal. Nov. 19, 2009)
16 (granting request for judicial notice of written warranties, even though defendant “failed to
17 demonstrate whether [the] documents [were] in fact the warranties that apply to all of the
18 [computers at issue] or even whether [the] purported warranties comprise the full extent of the
19 applicable [] warranties”). Here, the documents were, in fact, provided to Plaintiff, as she
20 alleged in her original state-court complaint (to which she attached a copy of Exhibit 1), which
21 specifically represented Exhibit 1 as the “agreement” between Plaintiff and Google.² *McKinney*
22 Docket No. 2 (Pltf’s Class Action Complaint (filed Jan. 10, 2010), ¶ 11 & Exh. A) (“jurisdiction
23 is proper because the Terms of the Sale agreement between the Google Phone customers,
24 including Plaintiff, and Google requires that any legal matters shall be submitted to the courts
25 located within the county of Santa Clara. *See Nexus One Phone – Terms of Sale*, attached hereto

26 _____
27 ² Based on a review of Google’s records, the terms set out in Exhibit 1 are those applicable to
28 Plaintiff’s purchase of the Nexus One. Moreover, Google’s website required Plaintiff to check a
box to complete her purchase, by which she indicated her acceptance of these terms. Exh. 1 at 1.

1 as Exhibit A.”). Google’s Terms of Sale also contain an acknowledgment by Plaintiff as to the
2 existence of the HTC Limited Warranty, which was also provided to Plaintiff in Nexus One
3 packaging. *See* Ring Decl. at 1.

4 *Third*, Plaintiff’s argument that Defendants cannot “bootstrap” the HTC Limited
5 Warranty “simply because it is referenced in another document,” also misconceives the relevant
6 inquiry—whether the existence and content of a document is reasonably subject to dispute—and
7 is wrong as a factual matter. The Google Terms of Sale does more than “simply” reference the
8 HTC Limited Warranty. It required Plaintiff to “acknowledge” the existence of the HTC
9 Limited Warranty and referred her to a copy of the HTC Limited Warranty contained in Nexus
10 One box packaging. *See* Exhibit 1.

11 Under the incorporation-by-reference doctrine and Federal Rule of Evidence 201, the
12 authenticity of the documents at issue must *reasonably* be subject to dispute. *See* RFJN, at 2-4
13 (citing authorities). As discussed above, Plaintiff has no reasonable basis to dispute the
14 authenticity of the Google Terms of Sale, or the HTC Limited Warranty, which she expressly
15 acknowledged as part of the Google Terms of Sale and received in Nexus One box packaging.

16 **III. Plaintiff’s Challenge To The Documents As Inadmissible Hearsay Is Meritless**

17 Plaintiff’s argument that the Google Terms of Sale and the HTC Limited Warranty
18 cannot be considered because they constitute inadmissible “hearsay” (Opp. at 3-4) is equally
19 meritless. Plaintiff cites no law in support of her argument because there is none. Indeed,
20 “documents containing operative facts, such as the words forming an agreement, are not
21 hearsay.” *Jazayeri v. Mao*, 174 Cal. App. 4th 301, 316 (2009); *see also* 1 WITKIN, CALIFORNIA
22 EVIDENCE, *Hearsay*, § 31 (4th ed. 2000) (hearsay rule does not apply to the content and
23 substance of writings reflecting parties’ contracts and agreements, which are not “hearsay” but
24 rather “original evidence”; “the words themselves, written or oral, are ‘operative facts,’” and not
25 “hearsay” because “an issue in the case is whether they were uttered or written”); *Arechiga v.*
26 *Dolores Press, Inc.*, 192 Cal. App. 4th 567, 576-577 (2011) (“written or oral utterances, which
27 are acts in themselves constituting legal results in issue in the case, do not come under the
28

1 hearsay rule”). Plaintiffs’ argument that the documents are “hearsay” is not only contrary to the
2 law, but it would prevent courts from ever reviewing and considering the terms of any contract
3 or agreement in the context of any breach-of-contract or breach-of-warranty case.

4 In sum, Google’s Terms of Sale (Exhibit 1) and the HTC Limited Warranty (Exhibit 2)
5 may properly be considered by the Court on Google and HTC’s Rule 12(b)(6) motion to dismiss
6 under the incorporation-by-reference doctrine, and both are also subject to judicial notice.

7 Plaintiff’s arguments to the contrary are baseless.

8 Dated: April 18, 2011.

Respectfully submitted,

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