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10 Attorneys for Defendant
Apple Inc.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 **NANCY ROMINE MINKLER,**
16 Individually and on Behalf of All Others
Similarly Situated,

17 Plaintiffs,

18 v.

19 **APPLE INC.,**

20 Defendant.
21

CASE NO. 5:13-cv-05332-EJD

**DEFENDANT APPLE INC.'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS COMPLAINT**

DATE: JULY 18, 2014

TIME: 9:00 A.M.

COURTROOM: 4

1 Defendant Apple Inc. (“Apple”) respectfully requests that, in determining its
2 accompanying Motion to Dismiss (“Motion”), the Court to take judicial notice, pursuant to Rule
3 201 of the Federal Rules of Evidence, of the following documents, each of which is attached to
4 the accompanying Declarations of Scott Maier (“Maier Decl.”) and Alec Cierny (“Cierny Decl.”):

5 1. True and correct copies of the one-year hardware warranties for iPhone 5
6 (“Hardware Warranty”). Maier Decl., Exhibit 1 (a-b).

7 2. A true and correct copy of the English language version of the software license
8 agreement for iPhone 5’s operating system, iOS 6.0 (“Software License Agreement”). Maier
9 Decl., Exhibit 2.

10 3. True and correct copies of the customer privacy policies related to Apple’s
11 products, including the iPhone 5 (“Privacy Policy”). Maier Decl., Exhibit 3 (a-d).

12 4. A copy of the Wikipedia article cited by Plaintiff in paragraph 17, n.3 of her
13 Complaint, which was obtained from [http://en.wikipedia.org/wiki/Maps_\(application\)](http://en.wikipedia.org/wiki/Maps_(application)) on
14 February 26, 2014. Cierny Decl., Exhibit 1.

15 In ruling on a motion to dismiss, the Court may consider documents that are not
16 physically attached to the complaint, if those documents are either “incorporated by reference in
17 the complaint[] or matters of judicial notice.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir.
18 2003). Under the doctrine of incorporation by reference, the Court may consider documents
19 specifically referred to in the complaint or upon which the complaint relies and whose
20 authenticity no party questions, “even though the plaintiff does not explicitly allege the contents
21 of that document in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *Coto*
22 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *Marder v. Lopez*, 450 F.3d 445,
23 448 (9th Cir. 2006) (“A court may consider evidence on which the complaint ‘necessarily relies’
24 if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim;
25 and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion ... The
26 court may treat such a document as part of the complaint, and thus may assume that its contents
27 are true for purposes of a motion to dismiss under Rule 12(b)(6).”) (quotations and citations
28

1 omitted). The doctrine of incorporation by reference “applies with equal force to internet pages
2 as it does to printed material.” *Knievel*, 393 F.3d at 1076; *see also Clerkin v. MyLife.com, Inc.*,
3 No. 11-CV-0527, 2011 WL 3809912, at *1 & n.2 (N.D. Cal. Aug. 29, 2011).

4 “What the [doctrine of incorporation by reference] seeks to prevent is the situation in
5 which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a
6 document and placing it in the complaint, even though if the statement were examined in the full
7 context of the document, it would be clear that the statement was not fraudulent.” *In re*
8 *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (citation omitted). The
9 doctrine of incorporation is intended to “prevent plaintiffs from surviving a Rule 12(b)(6) motion
10 by deliberately omitting . . . documents upon which their claims are based.” *Swartz v. KPMG*
11 *LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (quotations and citations omitted). Here, the Court may
12 take judicial notice of the above-referenced documents because (1) the Complaint refers to the
13 documents; (2) the documents are central to Plaintiff’s claim; (3) no party questions the
14 authenticity of the copies attached to the declarations supporting the Motion; and (4) Plaintiff
15 deliberately omitted the documents in an attempt to survive Apple’s Motion.

16 In support of her claims that Apple allegedly misrepresented Apple Map’s functionality
17 and failed to disclose its purported limitations, Plaintiff attempts to plead breaches of alleged
18 express and implied warranties without ever acknowledging the actual one-year hardware
19 warranty that applied—and still applies—to her iPhone. (Complaint ¶43; *see* Hardware Warranty,
20 Maier Decl. Ex. 1 (a-b).) Furthermore, in alleging that Apple breached the implied warranty of
21 merchantability, Plaintiff omits any reference to the fact that Apple properly disclaimed these
22 warranties in both the software license agreement and the hardware warranty. (*See* Hardware
23 Warranty, Maier Decl. Ex. 1 (a-b); Software License Agreement, Maier Decl. Ex. 2.)

24 In addition, in paragraph 109 of the Complaint, Plaintiff alleges that Apple “represented at
25 all relevant times that ‘Apple takes precautions – including administrative, technical, and physical
26 measures – to safeguard [purchaser’s] personal *safety*.’” (Complaint, at ¶109 (emphasis added).)
27 This allegation is flatly contradicted by the actual statement found in Apple’s Privacy Policy
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1 which uses the word “**information**,” not **safety**: “Apple takes precautions – including
2 administrative, technical, and physical measures – to safeguard your personal **information** against
3 loss, theft, and misuse, as well as against unauthorized access, disclosure, alteration, and
4 destruction.” (See Maier Decl., Ex. 3 (a-b) (emphasis added).)

5 Similarly, in paragraph 17 of the Complaint, Plaintiff alleges “Just prior to the release of
6 Apple’s iPhone 5 on September 21, 2012, Minkler visited the Apple website which touted the
7 “non-stop work” of Apple that led to “a number of improvements to Maps.” As a reference for
8 the quote, Plaintiff cites a link to a Wikipedia article. (*Id.* at ¶ 17, n.3 ([http://en.wikipedia.org/
9 wiki/Maps_\(application\)](http://en.wikipedia.org/wiki/Maps_(application)))).) This allegation is flatly contradicted by the actual Wikipedia article,
10 which reports that this statement was not made **prior** to the release of the iPhone 5, but was made
11 by Apple’s CFO during an October 25, 2012 earnings call held over a month **after** the release of
12 the iPhone 5 and “its aforementioned controversies.” (See Cierny Decl., Ex. 1.)

13 Plaintiff should not be permitted to support her claims by “cherry-picking” or
14 misrepresenting certain representations while ignoring specific disclosures. *See Burlington Coat*
15 *Factory*, 114 F.3d at 1426; *Swartz*, 476 F.3d at 763; *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90
16 (9th Cir. 1995) (affirming dismissal of FAL and UCL claims that a sweepstakes mailing was
17 deceptive because language qualifying the allegedly deceptive statement “appear[ed] immediately
18 next to the representations it qualifie[d] and no reasonable reader could ignore it.”). The
19 doctrines of incorporation by reference and judicial notice permit this Court to consider the
20 representations on Apple’s website and other referenced documents in their entirety in ruling on
21 Apple’s Motion. *See Knievel*, 393 F.3d at 1076-77; *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp.
22 2d 833, 837-38 (N.D. Cal. 2000) (“Thus, the court may consider the full text of a document the
23 complaint quotes only in part.”). The accompanying Declarations of Scott Maier and Alec Cierny
24 demonstrate the accuracy and authenticity of the referenced documents, webpages and articles,
25 and Plaintiff cannot reasonably dispute the accuracy or authenticity of these materials.

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1 For these reasons, Apple respectfully requests that the Court grant its request for judicial
2 notice.

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4 Respectfully submitted,

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6 Dated: March 3, 2014

DLA PIPER LLP (US)

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8 By: /s/ Joseph Collins
JOSEPH COLLINS

9 Attorneys for Defendant
10 APPLE INC.
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