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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 MARCUS A. ROBERTS, KENNETH A.
CHEWEY, ASHLEY M. CHEWEY, AND
13 JAMES KRENN, on behalf of themselves and
all others similarly situated,

14 Plaintiffs,

15 v.

16 AT&T MOBILITY LLC,

17 Defendant.
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Case No. 3:15-cv-03418-EMC

**DEFENDANT AT&T MOBILITY LLC'S
NOTICE OF MOTION AND MOTION
FOR JUDICIAL NOTICE AND
INCORPORATION BY REFERENCE**

Date: June 18, 2020
Time: 1:30 p.m.
Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

1 **NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD: Please take notice that
3 Defendant AT&T Mobility LLC (“AT&T”) hereby files this motion for judicial notice and
4 incorporation by reference of certain documents in consideration of AT&T’s motion to dismiss,
5 which is being filed along with this motion. Pursuant to the Court’s order (Dkt. 166), the motion
6 will be heard via teleconference and/or video conference on June 18, 2020, at 1:30 p.m. PST
7 before the Honorable Judge Edward M. Chen.

8 In accordance with Federal Rule of Evidence 201(b) and the judicial doctrine of
9 incorporation by reference, this motion seeks the Court’s consideration of the documents
10 attached to the Declaration of Kevin Ranlett and the Declaration of Randolph Shackelford, both
11 of which are being filed with this motion.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), courts
14 are permitted to consider not only the complaint in its entirety, but also matter of which the Court
15 may take judicial notice under Federal Rule of Evidence 201(b) and documents that are
16 incorporated by reference in the complaint. Pursuant to that rule and doctrine, AT&T
17 respectfully requests that the Court consider the following documents when ruling on AT&T’s
18 motion to dismiss:

- 19 • The Stipulated Order for Permanent Injunction and Monetary Judgment in
20 *Federal Trade Commission v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC
21 (N.D. Cal. Dec. 4, 2019) [Dkt. 201] (attached as Exhibit 1 to the accompanying
22 Declaration of Kevin Ranlett);
23 • The media publications attached as Exhibits 2-12 to the Ranlett Declaration;
24 • The California Plaintiffs’ contracts with AT&T:
25 ○ Plaintiff Marcus Roberts’s June 6, 2012 Wireless Customer Agreement
26 (attached as Exhibit 3 to the Declaration of Beth Headley [Dkt. 30]);¹

27 _____
28 ¹ For the convenience of the Court, the previously filed Headley Declaration and its

- 1 ○ Plaintiff Ashley Chewey’s October 21, 2012 Wireless Customer
- 2 Agreement (attached as Exhibit 4 to the Headley Declaration); and
- 3 ○ Plaintiff Marcus Roberts’s September 20, 2014 Wireless Customer
- 4 (attached as Exhibit 5 to the Headley Declaration); and
- 5 • Certain monthly bills and records of text messages to the California plaintiffs that
- 6 they allege in the operative complaint (attached as Exhibits 1-2 to the Declaration
- 7 of Randolph Shackelford and Exhibits 4-5 and 13 to the Declaration of Joseph
- 8 Munzenrider [Dkt. No. 29]).²

9 **ARGUMENT**

10 “[W]hen ruling on Rule 12(b)(6) motions to dismiss,” “courts ordinarily examine” not
 11 only the complaint, but also “documents incorporated into the complaint by reference, and
 12 matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
 13 551 U.S. 308, 322 (2007).

14 Federal Rule of Evidence 201(b) governs requests for judicial notice. That rule provides
 15 that a court may take as true “a fact that is not subject to reasonable dispute because it: (1) is
 16 generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and
 17 readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
 18 Evid. 201(b). Courts lack discretion to deny a valid request for judicial notice; Rule 201(c)
 19 provides that “[t]he court . . . must take judicial notice if a party requests it and the court is
 20 supplied with the necessary information.” Id. 201(c).

21 **A. The Court May Take Judicial Notice of Its Orders from the Related FTC** 22 **Action.**

23 It is settled that court orders are a proper subject for judicial notice. The existence of
 24 court orders is “not subject to reasonable dispute” because they “can be accurately and readily
 25 determined” by checking the court’s docket. Accordingly, the Ninth Circuit repeatedly has
 26 _____
 relevant exhibits has been attached as Exhibit 13 to the Ranlett Declaration. In addition, the
 Ranlett Declaration’s exhibits have been consecutively paginated for ease of citation.

27 ² The previously filed Munzenrider Declaration and its relevant exhibits have been
 28 attached as Exhibit 14 to the Ranlett Declaration.

1 confirmed that “[w]e may take judicial notice of court filings and other matters of public record.”
2 *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *see also, e.g.*,
3 *Mahoney v. Sessions*, 871 F.3d 873, 876 n.2 (9th Cir. 2017) (taking judicial notice of police
4 department’s Use of Force Policy approved by court order in prior case); *In re Icenhower*, 755
5 F.3d 1130, 1142 (9th Cir. 2014) (taking judicial notice of court filings); *Lemire v. Cal. Dep’t of*
6 *Corr. & Rehab.*, 726 F.3d 1062, 1069 n.1 (9th Cir. 2013) (same).

7 AT&T therefore requests that this Court take judicial notice of an order that this Court
8 entered in related action *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785-EMC (N.D. Cal.)—
9 specifically, the Stipulated Order for Permanent Injunction and Monetary Judgment that this
10 Court entered on December 4, 2019 at docket number 201. A true and correct copy of that order
11 is attached as Exhibit 1 to the Ranlett Declaration.

12 **B. The Court May Take Judicial Notice of Media Reports.**

13 Courts also routinely take judicial notice of news reports and other print and online media
14 publications, as the fact that such an article was published is “not subject to reasonable dispute”
15 and “can be accurately and readily determined.” Fed. R. Evid. 201(b); *see also, e.g., Makaeff v.*
16 *Trump Univ., LLC*, 715 F.3d 254, 259 (9th Cir. 2013 (“We grant Makaeff’s requests to take
17 notice of book collaborations between Donald Trump and Trump University, newspaper and
18 magazine articles, and web pages.”); *Von Saher v. Norton Simon Museum of Art at Pasadena*,
19 592 F.3d 954, 960 (9th Cir. 2010) (taking “judicial notice of the fact that various newspapers,
20 magazines, and books have published information about the Cranachs”), *overruled on other*
21 *grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002); *Heliotrope*
22 *Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.118 (9th Cir. 1999) (taking judicial notice of
23 “information contained in news articles”); *In re Aqua Metals, Inc. Securities Litig.*, No. 17-cv-
24 71420-HSG, 2019 WL 3817849, at *5 (N.D. Cal. Aug. 14, 2019) (taking judicial notice of press
25 releases for the purpose of determining what was disclosed to the market); *In re Animation*
26 *Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1198 n.2 (N.D. Cal. 2015) (taking judicial notice
27 of “media articles regarding the DOJ investigation”).

28

1 Under these principles, AT&T requests that the Court take judicial notice of the
 2 following media reports, true and correct copies of which are attached as Exhibits 2-12 to the
 3 Ranlett declaration:

- 4 • Press Release, AT&T, *An Update for Our Smartphone Customers With Unlimited*
 5 *Data Plans* (July 29, 2011), at [https://web.archive.org/web/20110801065909/
 6 https://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=
 7 32318&mapcode=corporate](https://web.archive.org/web/20110801065909/https://www.att.com/gen/press-room?pid=20535&cdvn=news&newsarticleid=32318&mapcode=corporate);
- 8 • Karl Bode, *AT&T Wages Quiet War on Grandfathered Unlimited Users*,
 9 DSLReports, at <http://www.dslreports.com/shownews/118235> (Feb. 6, 2012);³
- 10 • Christina Bonnington, *AT&T begins sending throttling warnings to top data hogs*,
 11 CNN Business (Oct. 3, 2011), at [https://www.cnn.com/2011/10/03/tech/web/att-
 12 throttling-warnings-data-hogs/index.html](https://www.cnn.com/2011/10/03/tech/web/att-throttling-warnings-data-hogs/index.html);
- 13 • Lester Black, *The Basics: AT&T's 'Throttling' of Smartphone Data Hogs*,
 14 Popular Mechanics (Aug. 2, 2011), at [https://www.popularmechanics.com/
 15 technology/gadgets/a11881/the-basics-att-throttling-of-smartphone-data-hogs/](https://www.popularmechanics.com/technology/gadgets/a11881/the-basics-att-throttling-of-smartphone-data-hogs/);
- 16 • Willa Plank, *Confessions of an iPhone Data Hog*, Wall Street Journal (Jan. 27,
 17 2012), at [https://www.wsj.com/articles/
 18 SB10001424052970204624204577183032028581306](https://www.wsj.com/articles/SB10001424052970204624204577183032028581306);
- 19 • Cecilia Kang & Hayley Tsukayama, *AT&T to throttle data speeds for heaviest*
 20 *wireless users*, Washington Post (Aug. 1, 2011), at [https://
 21 www.washingtonpost.com/business/technology/atandt-to-throttle-data-speeds-for-
 22 heaviest-wireless-users/2011/08/01/gIQAh0HBoI_story.html](https://www.washingtonpost.com/business/technology/atandt-to-throttle-data-speeds-for-heaviest-wireless-users/2011/08/01/gIQAh0HBoI_story.html);
- 23 • Hayley Tsukayama, *AT&T clarifies throttling on data plans*, Washington Post
 24 (Mar. 1, 2012), at [https://www.washingtonpost.com/business/technology/atandt-
 25 clarifies-throttling-on-data-plans/2012/03/01/gIQALAqCIR_story.html](https://www.washingtonpost.com/business/technology/atandt-clarifies-throttling-on-data-plans/2012/03/01/gIQALAqCIR_story.html);

26 _____
 27 ³ This article also is incorporated by reference by paragraph 23 of the operative complaint,
 and thus may be considered with AT&T's motion to dismiss for that reason as well. *Tellabs*, 551
 U.S. at 322; *see also* pages 5-9, *infra*.

- 1 • Steve Kovach, *This Is The Text Message AT&T Sends When You're Being A Data*
2 *Hog*, Business Insider (Sept. 30, 2011), at [https://www.businessinsider.com/att-](https://www.businessinsider.com/att-data-speed-throttling-text-message-2011-9)
3 [data-speed-throttling-text-message-2011-9](https://www.businessinsider.com/att-data-speed-throttling-text-message-2011-9);
- 4 • Marguerite Reardon, *Are you in AT&T's top 5 percent of heaviest data users?*,
5 CNET (Dec. 23, 2011), at [https://www.cnet.com/news/are-you-in-at-ts-top-5-](https://www.cnet.com/news/are-you-in-at-ts-top-5-percent-of-heaviest-data-users/)
6 [percent-of-heaviest-data-users/](https://www.cnet.com/news/are-you-in-at-ts-top-5-percent-of-heaviest-data-users/);
- 7 • AT&T officially changes unlimited data policy, will throttle over 3GB, iMore
8 (Mar. 1, 2012), at <https://www.imore.com/att-unlimited-data-throttling-policy>;
9 and
- 10 • Brian Klug, *AT&T Sets Unlimited 3G data cap to 3GB, 4G LTE Unlimited cap to*
11 *5GB*, Anandtech (Mar. 1, 2012), at [https://www.anandtech.com/show/5623/att-](https://www.anandtech.com/show/5623/att-sets-unlimited-3g-data-cap-to-3gb-4g-lte-unlimited-cap-to-5gb)
12 [sets-unlimited-3g-data-cap-to-3gb-4g-lte-unlimited-cap-to-5gb](https://www.anandtech.com/show/5623/att-sets-unlimited-3g-data-cap-to-3gb-4g-lte-unlimited-cap-to-5gb);

13 **C. The Plaintiffs' Contracts with AT&T Are Incorporated by Reference in the**
14 **Complaint.**

15 Courts also may take judicial notice of certain documents not attached to the complaint
16 under the “incorporation by reference” doctrine. Under that doctrine, at the motion-to-dismiss
17 stage, “[a] court may consider evidence on which the complaint ‘necessarily relies,’ if: (1) the
18 complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no
19 party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*,
20 450 F.3d 445, 448 (9th Cir. 2006); *see also, e.g., Ecological Rights Found. v. Pac. Gas & Elec.*
21 *Co.*, 713 F.3d 502, 511 (9th Cir. 2013) (“Under the ‘incorporation by reference’ doctrine, ‘[e]ven
22 if a document is not attached to the complaint, it may be incorporated by a reference into a
23 complaint if the plaintiff refers extensively to the document or the document forms the basis of
24 the plaintiff’s claim.”) (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)
25 (alteration by court).

26 Although Plaintiffs did not attach their AT&T contracts to the operative complaint, that
27 document refers extensively to AT&T’s “Wireless Customer Agreement” and “service plans”
28 and discusses some of their provisions. Compl. [Dkt. 11] ¶ 28; *see also id.* ¶¶ 14-16 (referring to

1 “service plans”); *id.* ¶¶ 48-49 (discussing arbitration provision in Wireless Customer
2 Agreements); *id.* ¶¶ 60, 64 (discussing Roberts’s service plans); *id.* ¶¶ 71, 77 (discussing
3 Chewey’s service plans). In fact, Plaintiffs’ AT&T contracts are “central” to their claims
4 (*Marder*, 450 F.3d at 448)—especially to their claim for breach of the “standardized contract
5 between” them and AT&T. *Id.* ¶ 144; *see also id.* ¶¶ 143-47. When, as here, a plaintiff sues for
6 breach of contract, the contract itself is an appropriate subject for judicial notice under the
7 “incorporation by reference” doctrine. *See, e.g., Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th
8 Cir. 2007) (holding that engagement letter “was properly considered on the 12(b)(6) motion”
9 because “Swartz brought a breach of contract claim . . . and referred explicitly to the engagement
10 letter”); *Golden State Med. Supply, Inc. v. Capmatic Ltd.*, 2016 WL 8856649, at *3 (C.D. Cal.
11 Jan. 7, 2016) (“Where, as here, Plaintiff’s claim for breach of contract alleges the existence of a
12 contract, the defendant may offer such a document, and the district court may treat such a
13 document as part of the complaint, and thus may assume that its contents are true for purposes of
14 a motion to dismiss[.]”) (internal quotation marks omitted).

15 Moreover, there is no dispute as to the authenticity of Plaintiffs’ contracts. AT&T
16 submitted these Wireless Customer Agreements with its motion to compel arbitration (Dkt. 30),
17 and Plaintiffs did not dispute the authenticity of those documents. Indeed, in seeking
18 reconsideration of the Court’s order compelling arbitration, Plaintiffs affirmatively relied on
19 those Wireless Customer Agreements in contending that the arbitration provision within them
20 violated California public policy. *See* Dkt. 85, at 6-7 (quoting from the Wireless Customer
21 Agreement attached to the Headley Declaration [Dkt. 30]). Having relied upon the authenticity
22 of their Wireless Customer Agreements to obtain reconsideration of the order compelling
23 arbitration, Plaintiffs are judicially estopped from denying the authenticity of those documents
24 now. *Ah Quin v. Cty. of Kauai Dept. of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013).

25 Because Plaintiffs’ operative complaint extensively relies upon and asserts that AT&T
26 violated Plaintiffs’ contracts, those documents should be deemed to be incorporated by reference
27 in the complaint and considered with AT&T’s motion to dismiss. AT&T therefore requests that
28

1 the Court take judicial notice of Roberts’s and the Chewey’s Wireless Customer Agreements,
2 true and correct copies of which are attached as to the Headley Declaration [Dkt. 30]:

- 3 • Plaintiff Marcus Roberts’s June 6, 2012 Wireless Customer Agreement (*id.* Ex.
4 3);
- 5 • Plaintiff Ashley Chewey’s October 21, 2012 Wireless Customer Agreement (*id.*
6 Ex. 4); and
- 7 • Plaintiff Marcus Roberts’s September 20, 2014 Wireless Customer Agreement
8 (*id.* Ex. 5).⁴

9 **D. The Alleged Bill Messages and Text Message Notifications Are Incorporated**
10 **by Reference in the Complaint.**

11 The Court also may take judicial notice of messages on certain monthly bills and text
12 message notifications sent to the California Plaintiffs regarding speed reductions under the
13 “incorporation by reference” doctrine because Plaintiffs refer to them in the operative complaint
14 and rely on them in asserting their claims as proof that they exceeded usage thresholds and were
15 subject to speed reductions. *Ecological Rights Found.*, 713 F.3d at 511; *Marder*, 450 F.3d at 448.

16 Specifically, Plaintiffs allege that AT&T included the following quoted “statement in
17 some customers’ July or August 2011 monthly bill:

18 **Important Update for Unlimited Data Plan Customers**

19 To provide the best possible network experience, starting 10/01/11,
20 smartphone customers with unlimited data plans whose usage is in
21 the top 5% of users can still use unlimited data but may see
22 reduced data speeds for the rest of their monthly bill cycle. We’ll
23 alert you if you near the top 5%. To avoid slowed speeds you may
24 use Wi-Fi or choose a tiered data plan. Details @
25 att.com/dataplans.

26 Compl. ¶ 29. Plaintiffs allege that these bill messages were deceptive. *Id.* ¶ 30.

27 Plaintiffs further allege that AT&T sent “text messages” to “some subscribers . . . as they
28 approach or exceed the secret data usage caps” that Plaintiffs challenge in this action. *Id.* The
named Plaintiffs further allege receiving such text messages and having their data speeds

27 ⁴ As noted above, for the convenience of the Court, the Headley Declaration and these
28 exhibits are attached to the Ranlett Declaration filed with this motion.

1 reduced. *See, e.g., id.* ¶ 66 (Roberts); *id.* ¶ 78 (Chewey). Nor can there be any dispute as the
2 authenticity of AT&T's records of these text messages because AT&T submitted the records
3 with its motion to compel arbitration (Dkt. 29), and Plaintiffs again did not contest their
4 authenticity.

5 Because Plaintiffs' operative complaint extensively relies upon and asserts that AT&T
6 sent the 2011 bill messages as well text message notifications that Plaintiffs exceeded usage
7 thresholds and would be subject to speed reductions, the records of those bill messages and text
8 messages should be deemed to be incorporated by reference in the complaint and considered
9 with AT&T's motion to dismiss. AT&T therefore requests that the Court take judicial notice of
10 records of the following text messages sent to Roberts and the Cheweys, true and correct copies
11 of which are attached as to the Declaration of Joseph Munzenrider [Dkt. 29]:⁵

- 12 • The first page of Roberts's monthly invoice for the period between August 1 and
13 31, 2011 (attached as Exhibit 1 to the Declaration of Randolph Shackelford);
- 14 • The first page of Chewey's monthly invoice for the period between July 19 and
15 August 18, 2011 (attached as Exhibit 2 to the Shackelford Declaration);
- 16 • Text messages sent to Roberts on December 11, 2011; August 25, 2012;
17 September 20, 2012; October 18, 2012; November 17, 2012; December 11, 2012;
18 January 13, 2013; February 19, 2013; March 18, 2013; April 14, 2013; May 18,
19 2013; June 17, 2013; July 11, 2013; August 13, 2013; September 14, 2013;
20 October 15, 2013; November 15, 2013; December 9, 2013; January 9, 2014;
21 February 12, 2014; March 10, 2014; April 13, 2014; May 11, 2014; June 9, 2014;
22 July 10, 2014; September 15, 2014 (Munzenrider Decl. Ex. 13);
- 23 • Text messages sent to the Cheweys on December 11, 2011; December 27, 2011;
24 December 30, 2011; February 12, 2012; February 17, 2012; March 18, 2012; May
25 11, 2012; August 16, 2012; August 19, 2012; and November 8, 2013 (*id.* Ex. 4);

26 _____
27 ⁵ As noted above, for the convenience of the Court, the previously filed Munzenrider
28 Declaration and these exhibits have been attached to the Ranlett Declaration submitted with this
motion.

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and

- Text messages sent to the Cheweys on June 16, 2012; July 17, 2012; September 6, 2012; October 1, 2012 (*id.* Ex. 5).

CONCLUSION

When considering AT&T’s motion to dismiss, the Court should take judicial notice of the materials attached as Exhibits 3-5 to the Headley Declaration (Dkt. 30), Exhibits 1-12 to the Ranlett Declaration, Exhibits 1-2 to the Shackelford Declaration, and Exhibits 4-5 and 13 of the Munzenrider Declaration (Dkt. 29).

Dated: May 14, 2020

MAYER BROWN LLP

/s/ Archis A. Parasharami

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