

1 Joseph R. Saveri (State Bar No. 130064)
 Cadio Zirpoli (State Bar No. 179108)
 2 Christopher K.L. Young (State Bar No. 318371)
 David W. Lerch (State Bar No. 229411)
 3 Elissa A. Buchanan (State Bar No. 249996)
 Kathleen J. McMahon (State Bar No. 340007)
 4 **JOSEPH SAVERI LAW FIRM, LLP**
 601 California Street, Suite 1000
 5 San Francisco, CA 94108
 Telephone: (415) 500-6800
 6 Facsimile: (415) 395-9940
 Email: jsaveri@saverilawfirm.com
 7 czirpoli@saverilawfirm.com
 cyoung@saverilawfirm.com
 8 dlerch@saverilawfirm.com
 eabuchanan@saverilawfirm.com
 9 kmcmahon@saverilawfirm.com

10 Matthew Butterick (State Bar No. 250953)
 1920 Hillhurst Avenue, #406
 11 Los Angeles, CA 90027
 Telephone: (323) 968-2632
 12 Facsimile: (415) 395-9940
 Email: mb@buttericklaw.com

13 *Counsel for Individual and Representative*
 14 *Plaintiffs and the Proposed Class*

15 [Additional Counsel Listed on Signature Page]

16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **SAN FRANCISCO DIVISION**

18 SARAH ANDERSEN, et al.,
 19 Individual and Representative Plaintiffs,
 20 v.
 21
 22 STABILITY AI, LTD., et al.,
 23 Defendants.

Case No. 3:23-CV-00201-WHO

**PLAINTIFFS’ OPPOSITION TO
 DEFENDANT MIDJOURNEY, INC.’S
 REQUEST FOR JUDICIAL NOTICE AND
 CONSIDERATION OF DOCUMENTS
 INCORPORATED BY REFERENCE IN
 SUPPORT OF DEFENDANT
 MIDJOURNEY’S MOTION TO DISMISS
 PLAINTIFFS’ FIRST AMENDED
 COMPLAINT**

Date: May 8, 2024
 Time: 2:00 p.m.
 Location: Videoconference
 Before: Hon. William H. Orrick

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION..... 1

II. ARGUMENT 1

 A. The Proposed Exhibits are Not Incorporated by Reference and are Being Introduced Merely to Dispute Plaintiffs’ Well-Pleaded Allegations. 2

 1. It is improper to assume the truth of the contents of Exhibit 1. 2

 2. It is improper to incorporate Exhibits 2 or 3 and, in the alternative, improper to assume the truth of the contents therein. 3

 B. The Truth of the Contents of Exhibits 1-4 Should Not be Judicially Noticed..... 4

 1. The Court should not take judicial notice of documents for truth of the matters asserted therein when facts are disputed..... 4

 2. The Court may not consider a transcript from an outside proceeding for the truth of the matter asserted..... 5

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Al-Ahmed v. Twitter, Inc., 603 F. Supp. 3d 857 (N.D. Cal. 2022)4

Anschutz Corp. v. Merrill Lynch & Co. Inc., 785 F. Supp. 2d 799 (N.D. Cal. 2011)..... 1, 6

Cal. Sportfishing Protection All. v. Shiloh Grp., LLC, 268 F. Supp. 3d 1029 (N.D. Cal. 2017)4

Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992 (9th Cir. 2010)5

Gallagher v. Bayer AG, No. 14-CV-04601-WHO, 2015 WL 1056480 (N.D. Cal. Mar. 10, 2015)5, 6

In re Google Assistant Priv. Litig., 457 F. Supp. 3d 797 (N.D. Cal. 2020) 1

Jen v. City & Cnty. of S.F., No. 15-CV-03834-HSG, 2016 WL 3669985 (N.D. Cal. July 11, 2016)6

Kadrey v. Meta Platforms, Inc., No. 23-CV-03417-VC (N.D. Cal. Nov. 20, 2023)6

Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988 (9th Cir. 2018) *passim*

Love v. Ashford San Francisco II LP, No. 20-CV-08458-EMC, 2021 WL 1428372 (N.D. Cal. Apr. 15, 2021)5

Marder v. Lopez, 450 F.3d 445 (9th Cir. 2006).....2

Morrison v. Peterson, No. C 11-1896 LHK PR, 2013 WL 942723 (N.D. Cal. Mar. 11, 2013).....6

Nelson v. F. Hoffmann-La Roche, Inc., 642 F. Supp. 3d 1115 (N.D. Cal. 2022)4

Pirani v. Netflix, Inc., No. 22-CV-02672-JST, 2024 WL 69069 (N.D. Cal. Jan. 5, 2024) 1

Reynolds v. Binance Holdings Ltd., 481 F. Supp. 3d 997 (N.D. Cal. 2020)3, 4

Rollins v. Dignity Health, 338 F. Supp. 3d 1025 (N.D. Cal. 2018)4, 5

Smith v. Kohlweiss, Inc., No. C 11-00239 SBA, 2012 WL 1156338, at *2 (N.D. Cal. Mar. 30, 2012)6

Thompson v. Permanente Med. Grp., Inc., No. 12-CV-01301-JST, 2013 WL 1808897 (N.D. Cal. Apr. 29, 2013).....6

United States v. Ritchie, 342 F.3d 903 (9th Cir. 2003).....4

1 *Whitaker v. Montes*, No. 21-CV-00679-EMC, 2021 WL 1839713 (N.D. Cal. May 7,
2021)5
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Faced with Plaintiffs’ sufficiently alleged First Amended Complaint (“FAC”), Defendant
3 Midjourney Inc. (“Midjourney”) attempts to improperly bolster its motion to dismiss by asking
4 the Court to consider documents beyond the four corners of the complaint. Namely,
5 Midjourney’s Request for Judicial Notice and Consideration of Documents Incorporated by
6 Reference, Doc. 161 (the “RJN”), seeks to incorporate by reference and/or notice two
7 screenshots of a Discord message thread, a screenshot of a page on the Midjourney website, and a
8 transcript from a hearing in a separate case. RJN at 2; Exs. 1-4.

9 Although the FAC references some of the materials that Defendant seeks to incorporate
10 or notice, neither Exhibits 2 nor 3 are “central” to Plaintiffs’ direct infringement claim against
11 Midjourney. Further, Defendant aspires to use Exhibits 1-3 for the sole purpose of contesting
12 Plaintiffs’ factual allegations and in clear contravention of the Court’s obligation at the motion to
13 dismiss stage to “assume that the plaintiff’s allegations are true and . . . draw all reasonable
14 inferences in the plaintiff’s favor.” *Anschutz Corp. v. Merrill Lynch & Co. Inc.*, 785 F. Supp. 2d 799,
15 810 (N.D. Cal. 2011). Defendant’s arguments to judicially notice the truth of facts within Exhibits
16 1-4 also fail. Plaintiffs respectfully request that the Court heed the warning of the Ninth Circuit
17 Court of Appeals to avoid “the unscrupulous use of extrinsic documents to resolve competing
18 theories against the complaint” at the risk of “premature dismissals of plausible claims that may
19 turn out to be valid after discovery.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th
20 Cir. 2018).

21 **II. ARGUMENT**

22 In general, courts “may not consider any material beyond the pleadings in ruling on a Rule
23 12(b)(6) motion.” *Pirani v. Netflix, Inc.*, No. 22-CV-02672-JST, 2024 WL 69069, at *6 (N.D. Cal.
24 Jan. 5, 2024) (quoting *United States v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011)).
25 However, two doctrines allow a court to consider material beyond the complaint: incorporation by
26 reference in the complaint and judicial notice under Federal Rule of Evidence 201. *In re Google*
27 *Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 812 (N.D. Cal. 2020). Regardless, the Ninth Circuit has
28 warned that “[i]f defendants are permitted to present their own version of the facts at the

1 pleading stage—and district courts accept those facts as uncontroverted and true—it becomes
2 near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently ‘plausible’
3 claim for relief.” *Khoja*, 899 F.3d at 999 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

4 **A. The Proposed Exhibits are Not Incorporated by Reference and are Being**
5 **Introduced Merely to Dispute Plaintiffs’ Well-Pleaded Allegations.**

6 Incorporation by reference is a “judicially created doctrine that treats certain documents
7 as though they are part of the complaint itself.” *Id.* at 1002. “A court may consider evidence on
8 which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the
9 document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the
10 copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)
11 (quoting *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994), *overruled on other grounds by*
12 *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)). Although it is “generally true”
13 that a court may assume the truth of the contents of an incorporated document, it is also
14 “improper to assume the truth of an incorporated document if such assumptions *only serve to*
15 *dispute facts stated in a well-pleaded complaint.*” *Khoja*, 899 F.3d at 1003 (emphasis added); *see also*
16 *id.* (“[W]hat inferences a court may draw from an incorporated document should . . . be
17 approached with caution.”).

18 Defendant Midjourney requests that the Court consider three documents on the grounds
19 that they have been incorporated by reference in the FAC. Midjourney RJN at 2. Two of these
20 documents are screenshots of messages in a public Discord message board, *see* Midjourney RJN,
21 Exs. 1, 2, and a screenshot of a page on Midjourney’s website. *Id.* at Ex. 3.

22 **1. It is improper to assume the truth of the contents of Exhibit 1.**

23 The purpose of Midjourney’s request to incorporate Exhibit 1 is solely to contest the
24 factual allegations contained in the FAC. The FAC clearly alleges that Midjourney used the
25 names of artists to promote the capabilities of its image generator and that the name list created a
26 likelihood of confusion over the association that the Midjourney Plaintiffs had with the image
27 product. FAC at ¶¶ 304-17. Midjourney seeks to rely on Exhibit 1 in its motion to dismiss to
28 contradict Plaintiffs’ factual allegations, an entirely improper tactic at this pre-discovery stage of

1 litigation. For this reason, the Court should reject Defendant’s motion to admit Exhibit 1. *See*
2 *Khoja*, 899 F.3d at 1003 (“[I]t is improper to assume the truth of an incorporated document if
3 such assumptions only serve to dispute facts stated in a well-pleaded complaint.”).

4 **2. It is improper to incorporate Exhibits 2 or 3 and, in the alternative,**
5 **improper to assume the truth of the contents therein.**

6 As a preliminary matter, Plaintiffs dispute Midjourney’s contention that either Exhibit 2
7 or 3 are “central” to the direct copyright claim against Midjourney. RJN at 3. The claim that
8 Midjourney Model v. 5.2 could reproduce protected expression does not “necessarily depend[]”
9 on the exhibits. *See Khoja*, 899 F.3d at 1002 (citing *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
10 2005)). In fact, the FAC also makes allegations that the Midjourney Model can output works that
11 are “obvious variations” and “substantially similar” to the plaintiffs’ works. *See* FAC ¶¶ 174, 176.

12 Further, Defendant is transparent in its attempt to incorporate Exhibits 2 and 3 for the
13 purpose of disputing the FAC’s well-pleaded allegation that Midjourney’s AI product’s image-
14 prompt feature “look as the ‘concepts’ and ‘vibes’” of the input image. Midjourney RJN at 3-4;
15 FAC ¶ 188. This type of maneuver is a primary example of what the *Khoja* court warned
16 against—the use of documents “to resolve competing theories against the complaint” at the
17 “risk[of] premature dismissal[] of plausible claims that may turn out to be valid after discovery.”
18 *Khoja*, 899 F.3d at 998 (9th Cir. 2018). Plaintiffs wholly disagree with Defendant’s interpretation
19 that the contents of Exhibits 2 and 3 demonstrate that the “concept and vibes” language
20 describes the /blend command, as opposed to the image-prompting feature. Midjourney RJN at
21 3. In fact, Exhibit 3 itself clearly states that, “[t]he /blend command is a simplified **image**
22 **prompting process** optimized for mobile users.” Ex. 3 at 2. Defendant’s attempt to smear the
23 integrity of the FAC by claiming that “the cited Discord post . . . makes clear that it does not say
24 what plaintiffs claim” is not only inaccurate but, most importantly, asks the Court to improperly
25 weigh factual information at the motion to dismiss stage. *See Reynolds v. Binance Holdings Ltd.*,
26 481 F. Supp. 3d 997, 1002 (N.D. Cal. 2020) (“[T]he Court may not take judicial notice of the
27 facts contained in the articles.”).

28 For these reasons, the Court should decline to incorporate Exhibits 1, 2, and 3.

1 **B. The Truth of the Contents of Exhibits 1-4 Should Not be Judicially Noticed.**

2 Judicial notice is a limited rule of evidence that allows the court or the finder of fact to
3 consider adjudicative facts that are “not subject to reasonable dispute.” *United States v. Ritchie*,
4 342 F.3d 903, 908-09 (9th Cir. 2003) (quoting Fed. R. Evid. 201(b)). Courts may take judicial
5 notice of a fact that is “not subject to reasonable dispute because it: ‘(1) is generally known within
6 the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from
7 sources whose accuracy cannot reasonably be questioned.’” *Reynolds*, 481 F. Supp. 3d at 1002
8 (quoting Fed. R. Evid. 201(b)). But, as Midjourney’s RJN conveniently omits, “[c]ourts may take
9 judicial notice of ‘undisputed matters of public record,’ but generally may not take judicial notice
10 of ‘disputed facts stated in public records.’” *Al-Ahmed v. Twitter, Inc.*, 603 F. Supp. 3d 857, 866
11 (N.D. Cal. 2022) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)).

12 **1. The Court should not take judicial notice of documents for truth of the**
13 **matters asserted therein when facts are disputed.**

14 Despite Defendant’s insinuations to the contrary, “[a] document is not judicially
15 noticeable simply because it appears on a publicly available website.” *Nelson v. F. Hoffmann-La*
16 *Roche, Inc.*, 642 F. Supp. 3d 1115, 1126-27 (N.D. Cal. 2022); *see also Rollins v. Dignity Health*, 338 F.
17 Supp. 3d 1025, 1032 (N.D. Cal. 2018) (“[T]his Court rejects the notion that a document is
18 judicially noticeable simply because it appears on a publicly available website, regardless of who
19 maintains the website or the purpose of the document.”). Contrary to Midjourney’s assertion
20 that an online message board and a Defendant-created website are akin to a matter of public
21 record, the case law is clear that “courts should be cautious before taking judicial notice of
22 documents simply because they were published on a website.” *Rollins*, 338 F. Supp. 3d at 1033.
23 The Court’s caution should be particularly heightened “when a party seeks to introduce
24 documents it created and posted on its own website.” *Id.*

25 Further, unlike documents incorporated into a complaint, “[c]ourts cannot take judicial
26 notice of the contents of documents for the truth of the matters asserted therein when the facts
27 are disputed.” *Cal. Sportfishing Protection All. v. Shiloh Grp., LLC*, 268 F. Supp. 3d 1029, 1038
28 (N.D. Cal. 2017); *see id.* at 1039 (taking judicial notice of a printout of a website, “but *only* as to

1 the existence of the document, the date of the document, and the existence of the contents
2 therein because the facts contained in the document are disputed”) (emphasis added).
3 Importantly, although Midjourney argues that “[c]ourts regularly take judicial notice” of
4 information on webpages referenced in a complaint, *see* Midjourney RJN at 4, the courts in
5 Midjourney’s cited cases limited their notice to the existence of the webpages, but not the
6 truthfulness of the contents therein. *See Whitaker v. Montes*, No. 21-CV-00679-EMC, 2021 WL
7 1839713, at *1 (N.D. Cal. May 7, 2021) (noticing the existence of accessibility features on
8 defendant’s website sufficient to satisfy American with Disabilities Act requirements, but not the
9 truth of whether those accessibility features actually existed); *Love v. Ashford S.F. II LP*, No. 20-
10 CV-08458-EMC, 2021 WL 1428372, at *3 (N.D. Cal. Apr. 15, 2021) (granting uncontested
11 request to notice website to determine adequacy of accessibility feature descriptions per ADA
12 requirements, but did consider truth of website contents); *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
13 F.3d 992, 998 (9th Cir. 2010) (noticing a list of vendors “displayed publicly” on school district
14 website for their existence, but not for their truth, in ERISA compliance case); *Gallagher v. Bayer*
15 *AG*, No. 14-CV-04601-WHO, 2015 WL 1056480, at *3 n.1 (N.D. Cal. Mar. 10, 2015) (judicially
16 noticing screenshot following request of both parties but not truth of facts within screenshot).

17 Defendant Midjourney seeks to improperly notice Exhibits 1, 2, and 3 for the purpose of
18 factually rebutting the sufficiently pleaded allegations in Plaintiffs’ FAC. *See Rollins*, 338 F. Supp.
19 3d at 1031 (“Defendants repeatedly do what *Khoja* [899 F.3d at 988-99] forbids—ask the Court to
20 take judicial notice of documents that they then use as a basis to challenge the factual averments
21 in the complaint.”). The Court should limit its notice of Exhibits 1 through 3 solely for their
22 existence and not for the truth of the matters asserted therein. To notice the truth of these
23 exhibits would improperly exceed the bounds of judicial notice.

24 **2. The Court may not consider a transcript from an outside proceeding**
25 **for the truth of the matter asserted.**

26 Midjourney attempts to smuggle in factual information from the transcript of proceedings
27 in a separate case. Midjourney RJN at 5 (citing *Kadrey v. Meta Platforms, Inc.*, No. 23-CV-03417-
28 VC (N.D. Cal. Nov. 20, 2023)). However, courts in in this district routinely decline similar

1 requests to notice the truth of matters addressed in the transcripts of trial or other court
2 proceedings. *See Anschutz Corp.*, 785 F. Supp. 2d at 834 (granting judicial notice of a hearing
3 transcript “for the purpose of noting the Court’s decision, but not for the truth of the facts
4 recited therein”); *Thompson v. Permanente Med. Grp., Inc.*, No. 12-CV-01301-JST, 2013 WL
5 1808897, at *4 n.4 (N.D. Cal. Apr. 29, 2013) (“The Court does not assume the truth of any
6 factual assertions or legal arguments made at the hearing, but merely takes notice of what was
7 said.”); *Jen v. City & Cnty. of San Francisco*, No. 15-CV-03834-HSG, 2016 WL 3669985, at *4
8 (N.D. Cal. July 11, 2016) (“[T]he Court will not take notice of facts from other proceedings for
9 the truth of the matters they assert.”). Midjourney’s contention that the “contents of that
10 transcript cannot be subject to reasonable dispute,” Midjourney RJN at 5, is of no consequence
11 because the doctrine of judicial notice is limited, regardless of whether the document is a matter
12 of public record. *See Khoja*, 899 F.3d at 998-99 (“The overuse and improper application of
13 judicial notice and the incorporation-by-reference doctrine ... can lead to unintended and harmful
14 results.”). This Court has, on numerous occasions, refused to “take judicial notice of the veracity
15 of any arguments or facts presented in the documents subject to judicial notice.” *Smith v.*
16 *Kohlweiss, Inc.*, No. C 11-00239 SBA, 2012 WL 1156338, at *2 (N.D. Cal. Mar. 30, 2012) (listing
17 cases); *see also Morrison v. Peterson*, No. C 11-1896 LHK PR, 2013 WL 942723, at *1 n.1 (N.D. Cal.
18 Mar. 11, 2013) (same; listing cases). Because the Court’s notice of the *Kadrey* transcript would be
19 limited, Plaintiffs do not see how Exhibit 3 is relevant to Defendant’s motion to dismiss and,
20 therefore, request that the Court deny this request. *See Gallagher*, 2015 WL 1056480 at *3 n.1
21 (request for judicial notice was moot where material was “irrelevant” to the motion to dismiss
22 analysis).

23 **III. CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Midjourney’s
25 request to incorporate by reference in the complaint and judicially notice Exhibits 1, 2, 3, and 4. In
26 the alternative, the Court should decline to notice the truth of the matters asserted within these
27 Exhibits.

1 Dated: March 21, 2024

Respectfully Submitted,

2 By: /s/ Joseph R. Saveri
3 Joseph R. Saveri

4 Joseph R. Saveri (State Bar No. 130064)
5 Cadio Zirpoli (State Bar No. 179108)
6 Christopher K.L. Young (State Bar No. 318371)
7 David W. Lerch (State Bar No. 229411)
8 Elissa A. Buchanan (State Bar No. 249996)
9 Kathleen J. McMahon (State Bar No. 340007)

10 **JOSEPH SAVERI LAW FIRM, LLP**
11 601 California Street, Suite 1000
12 San Francisco, CA 94108
13 Telephone: (415) 500-6800
14 Facsimile: (415) 395-9940
15 Email: jsaveri@saverilawfirm.com
16 czirpoli@saverilawfirm.com
17 cyoung@saverilawfirm.com
18 dlerch@saverilawfirm.com
19 eabuchanan@saverilawfirm.com
20 kcmahon@saverilawfirm.com

21 Matthew Butterick (State Bar No. 250953)
22 1920 Hillhurst Avenue, #406
23 Los Angeles, CA 90027
24 Telephone: (323) 968-2632
25 Facsimile: (415) 395-9940
26 Email: mb@buttericklaw.com

27 Brian D. Clark (*pro hac vice*)
28 Laura M. Matson (*pro hac vice*)
Arielle S. Wagner (*pro hac vice*)
Eura Chang (*pro hac vice*)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Telephone: (612)339-6900
Facsimile: (612)339-0981
Email: bdclark@locklaw.com
lmmatson@locklaw.com
aswagner@locklaw.com
echang@locklaw.com