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

13 RYAN UNG, CHI CHENG and ALICE
 ROSEN, on Behalf of Themselves and All
 14 Others Similarly Situated,

15 Plaintiffs,

16 v.

17 FACEBOOK, INC.,

18 Defendant.

Case No. 11-CV-02829-JF-PSG

**FACEBOOK, INC.'S REQUEST FOR
 JUDICIAL NOTICE IN SUPPORT OF
 MOTION TO DISMISS PLAINTIFFS' CLASS
 ACTION COMPLAINT**

Date: To be determined
 Time: To be determined
 Judge: Hon. Jeremy Fogel
 Courtroom: 3
 Trial Date: Not yet set

21 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

22 **PLEASE TAKE NOTICE THAT** pursuant to Federal Rule of Evidence 201, Defendant
 23 Facebook, Inc. ("Facebook") hereby requests that the Court take judicial notice of the following
 24 documents in support of its Motion to Dismiss the Class Action Complaint ("Complaint"). All
 25 referenced exhibits are attached to the supporting Declaration of Ana Yang Muller ("Yang
 26 Decl."), filed herewith:

27 **Exhibit A:** Facebook's Statement of Rights and Responsibilities.

28 **Exhibit B:** Facebook's Privacy Policy.

1 **POINTS AND AUTHORITIES IN SUPPORT OF JUDICIAL NOTICE**

2 The documents listed above (Exhibits A and B to the Declaration of Ana Yang Muller) are
3 proper subjects for judicial notice and the Court should consider them when ruling on Facebook’s
4 Motion to Dismiss the Class Action Complaint.

5 **I. Legal Standards**

6 When ruling on a motion to dismiss, a court may consider any matter that is subject to
7 judicial notice. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Tellabs, Inc.*
8 *v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Judicial notice is appropriate for facts
9 “not subject to reasonable dispute” that are either generally known within the jurisdiction of the
10 trial court or are “capable of accurate and ready determination by resort to sources whose
11 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Courts in this District have
12 held that “as a general matter, websites and their contents may be proper subjects for judicial
13 notice” provided that the party provides the court with a copy of the relevant web page. *Caldwell*
14 *v. Caldwell*, No. C 05-4166, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006); *see also Frances*
15 *Kenny Family Trust v. World Sav. Bank FSB*, No. C 04-03724 WHA, 2005 WL 106792, at *1
16 (N.D. Cal. Jan. 19, 2005) (finding content on plaintiffs’ website to be proper matter for judicial
17 notice).

18 Moreover, the Ninth Circuit has recognized that in ruling on a motion to dismiss, “in order
19 to ‘[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting . . .
20 documents upon which their claims are based,’ a court may consider a writing referenced in a
21 complaint but not explicitly incorporated therein if the complaint relies on the document and its
22 authenticity is unquestioned.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (citing
23 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (incorporating by reference insurance
24 terms of service and administrative documents because the claim necessarily relied on plaintiff
25 having been a member of the insurance plan); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d
26 1102, 1108-09 (N.D. Cal. 2003) (judicially noticing press releases cited in the complaint). This
27 allows the court to consider the full text of a document that the plaintiff’s complaint relies on but
28

1 only partially references. *See, e.g., In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 864
2 (N.D. Cal. 2004).

3 **II. The Court Should Take Judicial Notice of Exhibits A and B**

4 The accuracy of each of the referenced exhibits is not subject to reasonable dispute and
5 can be readily determined from sources whose accuracy cannot reasonably be questioned.
6 Furthermore, the Complaint references and necessarily relies on these exhibits. Therefore,
7 Defendant's Request for Judicial Notice should be granted as to each exhibit.

8 Plaintiffs' Complaint relies on Facebook's "Statement of Rights and Responsibilities"
9 ("SRR") and Privacy Policy (which the SRR incorporates by reference). Each Facebook user
10 ("User") agrees to the SRR and Privacy Policy when he or she registers for, and continues using,
11 the Facebook site. The Complaint references the terms of the SRR, noting that Facebook
12 registrants are required to provide their real names. (Compl. ¶ 9.) Even if Plaintiffs had not
13 explicitly referenced the SRR, because Plaintiff Ung (*id.* ¶ 4) and the "members" subclass (*id.*
14 ¶¶ 15, 19) are alleged to be registered members of Facebook, the Complaint necessarily relies on
15 and is subject to the agreements and conditions outlined in the SRR and the Privacy Policy. *See*
16 *Parrino*, 146 F.3d at 706 (incorporating by reference insurance terms of service and
17 administrative documents because the claim necessarily relied on plaintiff having been a member
18 of the insurance plan). The existence of these terms and the accuracy of the printouts of the terms
19 attached as Exhibits A and B to the Declaration of Ana Yang Muller cannot be questioned.

20 Further, Plaintiffs may not seek to survive a Rule 12(b)(6) motion by omitting these
21 documents. *See Swartz*, 476 F.3d at 763. Plaintiffs claim that they were unaware that Facebook
22 used cookies associated with its "Like" button and Facebook Connect. (*See* Compl. ¶ 14.) But
23 this allegation is contradicted by Facebook's Privacy Policy, to which all Users agree when they
24 register for the site:

25 **Cookie Information.** We use "cookies" (small pieces of data we
26 store for an extended period of time on your computer, mobile
27 phone, or other device) to make Facebook easier to use, to make
28 our advertising better, and to protect both you and Facebook. For
example, we use them to store your login ID (but never your
password) to make it easier for you to login whenever you come
back to Facebook. We also use them to confirm that you are

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logged into Facebook, and to know when you are interacting with Facebook Platform applications and websites, our widgets and Share buttons, and our advertisements. You can remove or block cookies using the settings in your browser, but in some cases that may impact your ability to use Facebook.

(Yang Decl., Ex. B (Privacy Policy) § 2.) These terms support dismissal of the Complaint for failure to state a claim for violation of the California constitutional right to privacy. Among other reasons, Plaintiffs fail to establish a reasonable expectation of privacy for individuals in their “members” subclass (including Plaintiff Ung), because Facebook plainly discloses its use of cookies in its Privacy Policy, which is published on its website and agreed to by all Users as a condition to using the website.

III. Conclusion

For the foregoing reasons, Defendant respectfully requests that the Court take judicial notice of Exhibits A and B.

Dated: July 20, 2011

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