

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

E.K.D., by her next friend Melissa K.)	
Dawes, and C.M.D., by his next friend)	
Jennifer E. DeYong, individually and on)	
behalf of all others similarly situated,)	No: 3:11-cv-00461-GPM-SCW
)	
Plaintiffs,)	CLASS ACTION
)	
v.)	
)	
FACEBOOK, INC.,)	
)	
Defendant.)	

**MOTION FOR JUDICIAL NOTICE IN SUPPORT OF
MOTION FOR MORE DEFINITE STATEMENT OR DISMISSAL**

Pursuant to Federal Rule of Evidence 201, Defendant Facebook, Inc. (“Facebook”) hereby moves the Court for judicial notice of the following documents in support of its Motion for More Definite Statement or Dismissal (“Motion”). Both exhibits referenced are attached to the supporting Declaration of Matthew D. Brown (“Brown Decl.”), filed herewith:

1. **Exhibit A:** A page from Facebook’s Help Center, entitled “What does it mean to ‘Like’ a piece of content that’s been posted?,”
<http://www.facebook.com/help/new/?faq=116118951805237#!/help/?faq=110920455663362> (last visited Aug. 1, 2011).
2. **Exhibit B:** A screenshot from the page of Facebook’s Help Center, entitled “What are Facebook Ads?,”
<http://www.facebook.com/help/?page=856#!/help/?faq=116118951805237> (last visited Aug. 1, 2011).

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDICIAL NOTICE**

In ruling on a motion to dismiss, “courts must consider the complaint in its entirety, as well as . . . , in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Here, Exhibits A and B are properly before the Court on Facebook’s Motion because they are “incorporated by reference” in Plaintiffs’ complaint (the “Complaint”), and because they are “matters of which [the] court may take judicial notice.” *Id.* Plaintiffs’ request for judicial notice should be granted on both bases.

1. The Court Should Consider Exhibits A and B Because They Are “Incorporated” by the Complaint.

It is well established that “[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to [the] claim.” *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). The Seventh Circuit also takes a “relatively liberal . . . approach” to this rule. *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009).

The Complaint refers to and quotes from Facebook’s online “Help Center,” albeit without attribution.¹ At paragraph 18, the Complaint excerpts two partial paragraphs from Facebook’s Help Center page in support of its allegation that “Facebook promotes the ability to use [sic] its use this personal data to market products and services[.]” (Brown Decl. ¶ 4, Ex. C.) Paragraph 19 excerpts another Help Center page to suggest how “Facebook explains the appearance of [Users’] friends in advertisements.” (Brown Decl. ¶ 5, Ex. D.) These allegations are central to

¹ Facebook’s Help Center Page is available in full at <http://www.facebook.com/help>. (Brown Decl. ¶ 2.)

Plaintiffs' claim that "Defendant used and continues to use Plaintiffs' name and photographs for the purpose of marketing, advertising, selling and soliciting the purchase of goods and services[.]" (Compl. ¶ 37.) Consequently, Exhibits C and D are both "referred to in the plaintiff's complaint and are central to [the] claim," *Venture*, 987 F.2d at 431, and should be considered on that basis.

Consistent with the policy underlying this "incorporation" rule, the Court should consider Exhibits A and B, which are also part of the Help Center documents from which Plaintiffs selectively quote, to prevent Plaintiffs from "surviving a motion to dismiss by artful pleading [and] by failing to attach relevant documents." *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) (citing *Beddall v. State St. Bank & Trust Co.*, 137 F.3d 12, 17 (1st Cir. 1998)). While relying heavily on the Help Center for propositions they like, Plaintiffs omit the pages that contradict their misstatements as to how Facebook actually works – Exhibits A and B. In particular, Plaintiffs represent that Facebook creates ads by "collecting personal information from its users, (name, picture, friends, brand preferences), combining that information with additional information provided by its paid advertisers and applying that data to [sic] facebook designed templates to produce its 'targeted' or 'enhanced' advertisements." (Compl. ¶ 17.) In reality, however, Facebook takes the information Plaintiffs have *voluntarily* shared with a specific audience ("Annie likes this page"), and republishes *the same content to the same audience*. (See Brown Decl., Ex. A (when a user "Likes" a web site, product or service, their Friends "will get a notification that [the User] liked" the content); Ex. B (friends may see previous social actions Users have taken, such as "liking a Page" paired with ads).) Plaintiffs' omission of the contents of Exhibits A and B thus distorts the facts, and deprives the Court of "document[s] that prove[] that [t]his claim ha[s] no merit." See *Tierney v. Vahle*, 304 F.3d 734,

738 (7th Cir. 2002). In fairness, these exhibits should be considered together with the Motion.

2. The Court Should Also Consider Exhibits A and B Because They Are Matters Subject to Judicial Notice.

Federal Rule of Evidence 201 provides that, when requested by a party, a court “shall” take judicial notice of a fact that is “not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b), (d). In the Seventh Circuit, many cases extend this rule to matters contained on a publicly available website, so long as the website’s authenticity is not in dispute. *See, e.g., Laborers’ Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607-08 (7th Cir. 2002) (taking judicial notice of a website and criticizing plaintiffs for failing to “look[] to information readily available in the public domain”); *Thermapure, Inc. v. Temp-Air, Inc.*, No. 10-CV-4724, 2010 WL 5419090, at *1 n.3 (N.D. Ill. Dec. 22, 2010) (taking “judicial notice of the information provided on the defendants’ websites”); *Robert F. Booth Trust v. Crowley*, No. 09 C 5134, 2010 WL 748201, at *3 n.1 (N.D. Ill. Feb. 26, 2010) (same); *Labella Winnetka, Inc v. Vill. of Winnetka*, No. 07 C 6633, 2009 WL 721136, at *8 n.6 (N.D. Ill. Mar. 18, 2009) (“The Court may take judicial notice of the contents of the [defendant’s] website.”); *Shen Wei (USA) Inc. v. Sempermed, Inc.*, No. 05 C 6004, 2007 WL 328846, at *3 n.3 (N.D. Ill. Jan. 30, 2007) (“For purposes of a 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party’s website, as long as the website’s authenticity is not in dispute and it is capable of accurate and ready determination.” (quoting *Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 n.8 (S.D.N.Y. 2006))).

Here, there can be no dispute as to the authenticity of the pages from the Help Center Pages on Facebook’s website, which this Court can readily confirm by visiting Facebook’s web address. *See, e.g., O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224-25 (10th Cir.

2007) (judicial notice was proper where information was beyond dispute, and plaintiff “gave the complete address for the [web]page” to be noticed). Further, Plaintiffs have effectively conceded the authenticity of Facebook’s Help Center pages by citing them and attributing their statements to Facebook. (E.g., Compl. ¶¶ 18 (citing Help Center Page), 19 (same), 21 (citing Facebook’s Statement of Rights and Responsibilities, also available on its website²).

Thus, Exhibits A and B – part of Facebook’s Help Center page, which is publicly available on the Internet – are matters subject to judicial notice.

* * * * *

For these reasons, Facebook respectfully requests that the Court consider Exhibits A and B in connection with its Motion.

Date: August 1, 2011

Respectfully submitted,

/s/ Matthew D. Brown

Matthew D. Brown (*admitted pro hac vice*)

Jeffrey M. Gutkin (*admitted pro hac vice*)

COOLEY LLP

101 California Street, Fifth Floor

San Francisco, CA 94111-5800

Phone: (415) 693-2000

Fax: (415) 693-2222

brownmd@cooley.com

jgutkin@cooley.com

Charles Swartwout

BOYLE BRASHER LLC

5000 West Main Street

P.O. Box 23560

Belleville, IL 62223

Telephone: 618-277-9000

cswartwout@boylebrasher.com

Attorneys for Defendant Facebook, Inc.

² See <http://www.facebook.com/terms.php?ref=pf>, last accessed on August 1, 2011.

Certificate of Service

I hereby certify that on August 1, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notifications of such filings to the following:

Attorneys for Plaintiffs

Aaron M. Zigler
Steven A. Katz
KOREIN TILLERY
One U.S. Bank Plaza
505 North 7th Street, Suite 3600
St. Louis, MO 63101-1625
Phone: (314) 241-4844
Fax: (314) 241-3525
azigler@koreintillery.com
skatz@koreintillery.com

Respectfully submitted,

/s/ Matthew D. Brown
Matthew D. Brown (*admitted pro hac vice*)
Jeffrey M. Gutkin (*admitted pro hac vice*)
COOLEY LLP
101 California Street, Fifth Floor
San Francisco, CA 94111-5800
Phone: (415) 693-2000
Fax: (415) 693-2222
brownmd@cooley.com
jgutkin@cooley.com

Charles Swartwout
BOYLE BRASHER LLC
5000 West Main Street
P.O. Box 23560
Belleville, IL 62223
Telephone: 618-277-9000
cswartwout@boylebrasher.com

Attorneys for Defendant Facebook, Inc.