

1 COOLEY LLP  
 2 MICHAEL G. RHODES (116127)  
 3 (rhodesmg@cooley.com)  
 4 MATTHEW D. BROWN (196972)  
 5 (brownmd@cooley.com)  
 6 JEFFREY M. GUTKIN (216083)  
 7 (jgutkin@cooley.com)  
 8 101 California Street, 5th Floor  
 9 San Francisco, CA 94111-5800  
 10 Telephone: (415) 693-2000  
 11 Facsimile: (415) 693-2222

12 Attorneys for Defendant  
 13 FACEBOOK, INC.

14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN JOSE DIVISION

17 In re: Facebook Internet Tracking Litigation

18 Case No. 5:12-md-02314 EJD

19 **DEFENDANT FACEBOOK, INC.'S REQUEST**  
 20 **FOR JUDICIAL NOTICE IN SUPPORT OF**  
 21 **ITS MOTION TO DISMISS PLAINTIFFS'**  
 22 **CORRECTED FIRST AMENDED**  
 23 **CONSOLIDATED CLASS ACTION**  
 24 **COMPLAINT (FED. R. EVID. 201)**

25 **DATE:** September 21, 2012  
 26 **TIME:** 9:00 a.m.  
 27 **COURTROOM:** 4  
 28 **JUDGE:** Edward J. Davila  
**TRIAL DATE:** None Set

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

30 PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Evidence 201, Defendant  
 31 Facebook, Inc. ("Facebook") hereby requests that the Court take judicial notice of the following  
 32 documents in support of its Motion to Dismiss Plaintiffs' Corrected First Amended Consolidated  
 33 Complaint (the "Complaint"):

- 34 • Facebook's Statement of Rights and Responsibilities, last revised April 22, 2010

1 (“April 22, 2010 SRR”), attached as Exhibit A to the concurrently-filed  
2 Declaration of Sandeep Solanki (“Solanki Declaration”).

- 3 • Facebook’s Statement of Rights and Responsibilities, last revised April 26, 2011  
4 (“April 26, 2011 SRR”), attached as Exhibit B to the Solanki Declaration.
- 5 • Facebook’s Privacy Policy, last revised April 22, 2010 (“Privacy Policy”),  
6 attached as Exhibit C to the Solanki Declaration.
- 7 • Facebook’s Data Use Policy, last revised September 23, 2011 (“Data Use Policy”),  
8 attached as Exhibit D to the Solanki Declaration.
- 9 • CNN.com’s Privacy Statement, available at <http://www.cnn.com/privacy.html>  
10 (“CNN.com Privacy Statement”), attached as Exhibit A to the concurrently-filed  
11 Declaration of Kyle C. Wong (“Wong Declaration”).

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

13 The documents listed above are proper subjects for judicial notice and the Court should  
14 consider them when ruling on Facebook’s Motion to Dismiss the Complaint (the “Motion”).

15 **I. LEGAL STANDARDS**

16 When ruling on a motion to dismiss, a court may consider any matter that is subject to  
17 judicial notice. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (judicially  
18 noticing court documents on motion to dismiss); *see also Tellabs, Inc. v. Makor Issues & Rights,*  
19 *Ltd.*, 551 U.S. 308, 322-23 (2007) (When ruling on a 12(b)(6) motion to dismiss “courts must  
20 consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by  
21 reference, and matters of which a court may take judicial notice.”). Judicial notice is appropriate  
22 for facts “not subject to reasonable dispute” that are either generally known within the jurisdiction  
23 of the trial court or “can be accurately and readily determined from sources whose accuracy  
24 cannot reasonably be questioned.” Fed. R. Evid. 201(b).

25 Additionally, in ruling on a motion to dismiss, a court may consider a document “not  
26 explicitly refer[red] to” in a complaint but which “the complaint necessarily relies upon.” *Coto*  
27 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). This rule exists “in order to  
28 ‘[p]revent [] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting

1 documents upon which their claims are based . . . .” *Swartz v. KPMG LLP*, 476 F.3d 756, 763  
2 (9th Cir. 2007) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (judicially  
3 noticing insurance terms of service and administrative documents because the claim necessarily  
4 relied on plaintiff having been a member of the insurance plan)); *see also Coto Settlement*, 592  
5 F.3d at 1038 (judicially noticing Billing Agreement where complaint necessarily relied upon its  
6 terms).

7 Because relevant documents in certain types of cases are found only online, “as a general  
8 matter, websites and their contents may be proper subjects for judicial notice,” provided that the  
9 party provides the court with a copy of the relevant web page. *Caldwell v. Caldwell*, No. C-05-  
10 4166 PJH, 2006 WL 618511, at \*4 (N.D. Cal. Mar. 13, 2006); *see also Caldwell v. Caldwell*, 420  
11 F. Supp. 2d 1102, 1105 n.3 (N.D. Cal. Mar. 20, 2006) (noticing webpages); *Kinderstart.com, LLC*  
12 *v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at \*21 n.20 (N.D. Cal. Mar. 16, 2007)  
13 (noticing content on defendant’s website). If there is no dispute as to a document’s relevance, it  
14 can be judicially noticed as long as its authenticity may not be questioned. *Coto Settlement*, 593  
15 F.3d at 1038.

## 16 **II. ARGUMENT**

### 17 **A. Because Plaintiffs’ Claims Rely Upon Facebook’s Governing Documents, the** 18 **Court Can and Should Take Judicial Notice of Those Documents.**

19 Plaintiffs cannot reasonably dispute the authenticity or relevance of Facebook’s April 22,  
20 2010 SRR, April 26, 2011 SRR (the April 22, 2010 SRR and April 26, 2011 SRR, collectively the  
21 “SRR”), Privacy Policy, or Data Use Policy. Moreover, the Complaint references and relies upon  
22 the SRR, Privacy Policy, and Data Use Policy. Facebook’s Request for Judicial Notice should  
23 therefore be granted as to these documents.

24 As explained in further detail in the concurrently-filed declaration of Facebook in-house  
25 counsel, Sandeep Solanki (Solanki Decl. ¶ 2), the April 22, 2010 SRR and April 26, 2011 SRR  
26 are versions of Facebook’s terms of service that were in effect during the period Plaintiffs allege  
27 for their class—May 27, 2010 through September 26, 2011. As also explained in the Solanki  
28 Declaration (¶ 3), the Privacy Policy and Data Use Policy contain Facebook disclosures during

1 the class period regarding how Facebook collects and uses content and information provided by  
2 Facebook Users that were in effect. Plaintiffs reference and rely upon these documents in the  
3 Complaint. Plaintiffs allege that they are Facebook Users (Compl. ¶¶ 103-106) and that “[u]se of  
4 Facebook is governed by the Statement of Rights and Responsibilities and several other  
5 documents and policies, including a Data Use Policy and a Privacy Policy . . .” (*id.* ¶ 16).  
6 Plaintiffs allege that venue in this Court is proper in reliance upon the “Facebook Statement of  
7 Rights and Responsibilities in force during the Class Period . . . .” (*Id.* ¶ 4.) Additionally,  
8 Plaintiffs rely heavily on Facebook’s alleged contravention of the SRR, Privacy Policy, and Data  
9 Use Policy throughout the Complaint and in support of their claims against Facebook. (*See, e.g.,*  
10 *id.* ¶¶ 16, 103-06, 112, 140-41, 149, 160, 181, 220.)

11 Because they are referenced and relied upon repeatedly throughout the Complaint, the  
12 SRR, Privacy Policy, and Data Use Policy are appropriate for judicial notice. *See Harris v. Cnty.*  
13 *of Orange*, --- F. 3d ----, No. 11-55669, 2012 WL 2060666, at \*4 (9th Cir. June 8, 2012)  
14 (judicially noticing five memoranda of understanding referenced in complaint); *Coto Settlement*,  
15 593 F.3d at 1038. In fact, courts in this district have previously noticed Facebook’s SRR in  
16 connection with other actions brought against the company. *See Fraley v. Facebook, Inc.*, 830 F.  
17 Supp. 2d 785, 795 (N.D. Cal. 2011); *In re Facebook PPC Adver. Litig.*, No. 5:09-cv-03043-JF,  
18 2010 WL 5174021, at \*4 (N.D. Cal. Dec. 15, 2010).

19 Moreover, although these documents are expressly referenced in Plaintiffs’ Complaint,  
20 they have not attached them. Notice is therefore also appropriate “in order to prevent plaintiffs  
21 from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon which their  
22 claims are based . . . .” *See Swartz*, 476 F.3d at 763 (punctuation omitted).

23 For these reasons, the Court should grant Facebook’s Request for Judicial Notice as to the  
24 SRR, Privacy Policy, and Data Use Policy.

25 **B. The Court Should and Can Take Judicial Notice of the CNN.com Privacy**  
26 **Statement.**

27 The Court should also grant Facebook’s Request for Judicial Notice as to the CNN.com  
28 Privacy Statement. The authenticity of this document, printed from the CNN.com website (*see*

1 Wong Decl. ¶ 2), is not subject to reasonable dispute and can be readily determined from sources  
2 whose accuracy cannot reasonably be questioned.

3 Moreover, the Complaint implicitly relies upon the CNN.com Privacy Statement.  
4 Plaintiffs devote 47 paragraphs of the Complaint to a discussion of their browsers' alleged use of  
5 cookies, including cookies derived from Facebook social plug-ins on www.cnn.com. (Compl. ¶¶  
6 38-84.) By repeatedly referencing the CNN.com site in the Complaint, Plaintiffs necessarily rely  
7 upon the content of that site, including the CNN.com Privacy Statement, which is accessible from  
8 a link at the bottom of the site. (See Wong Decl. ¶ 2.) The CNN.com Privacy Statement is  
9 therefore an appropriate subject for judicial notice. See *Coto Settlement*, 593 F.3d at 1038.

10 **III. CONCLUSION**

11 For the foregoing reasons, Facebook respectfully requests that the Court notice the  
12 Governing Documents and the CNN.com Privacy Statement.

13 Dated: July 2, 2012

COOLEY LLP

14  
15 /s/ Matthew D. Brown  
16 Matthew D. Brown (196972)  
17 Attorneys for Defendant  
18 Facebook, Inc.

19  
20  
21 2631431/ST  
22  
23  
24  
25  
26  
27  
28