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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 REPLY IN SUPPORT OF ITS MOTION**
 22 **TO DISMISS PLAINTIFFS' CORRECTED**
 23 **FIRST AMENDED CONSOLIDATED CLASS**
 24 **ACTION COMPLAINT (FED. R. EVID. 201)**

25 **DATE:** October 5, 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 Reply in support of its Motion to Dismiss Plaintiffs' Corrected First
 33 Amended Consolidated Complaint (the "Complaint"):

- 34 • Facebook's Privacy Policy, last revised December 22, 2010 ("December 22, 2010

1 Privacy Policy”), attached as Exhibit A to the concurrently-filed Declaration of
2 Sandeep Solanki (“August 22, 2012 Solanki Declaration”).

- 3 • The California Senate Judiciary Committee’s Analysis of Senate Bill No. 1016
4 (1996-1996 Reg. Sess.) as amended May 9, 1995, attached as Exhibit A to the
5 concurrently-filed Declaration of Kyle C. Wong (“Wong Declaration”).
- 6 • California Senate Bill No. 1016 (1996-1996 Reg. Sess.) as chaptered, attached as
7 Exhibit B to the Wong Declaration.
- 8 • The California Senate Committee on Public Safety’s Analysis of Senate Bill No.
9 1428 (2009-2010 Reg. Sess.) as introduced, attached as Exhibit C to the Wong
10 Declaration.

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

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

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. 2006) (noticing webpages); *Kinderstart.com, LLC v.*
12 *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 the December 22, 2010 Privacy** 19 **Policy.**

20 Plaintiffs cannot reasonably dispute the authenticity or relevance of Facebook’s December
21 22, 2010 Privacy Policy.¹ Moreover, the Complaint references and relies upon the December 22,
22 2010 Privacy Policy. Facebook’s Request for Judicial Notice should therefore be granted as to
23 this document.

24 As explained in further detail in the concurrently-filed declaration of Facebook in-house
25 counsel, Sandeep Solanki (August 22, 2012 Solanki Decl. ¶ 2), the December 22, 2010 Privacy
26 Policy contains Facebook disclosures during the class period regarding how Facebook collects

27 ¹ Indeed, Plaintiffs have not disputed the authenticity or relevance of the similar documents
28 Facebook sought judicial notice of in its July 2, 2012 Request for Judicial Notice (Dkt. 45), or
otherwise opposed that request. Plaintiffs quote from and rely upon those documents
(Facebook’s April 22, 2010 Privacy Policy and Data Use Policy) in their Opposition. (Opp. (Dkt.
No. 52), at 4 & n.6, 19.)

1 and uses content and information provided by Facebook Users that were in effect. Plaintiffs
2 identify the December 22, 2010 Privacy Policy in their Opposition to Facebook’s Motion to
3 Dismiss (Dkt. 54) (“Opposition”) as the policy “that governed Facebook’s relationship with its
4 members between December 22, 2010 and September 23, 2011.” (Opp. 19.)

5 Plaintiffs reference and rely upon Facebook’s Privacy and Data Use Policies in the
6 Complaint. Plaintiffs allege that they are Facebook Users (Compl. ¶¶ 103-106) and that “[u]se of
7 Facebook is governed by the Statement of Rights and Responsibilities and several other
8 documents and policies, including a Data Use Policy and a Privacy Policy . . .” (*id.* ¶ 16).
9 Additionally, Plaintiffs rely heavily on Facebook’s alleged contravention of Facebook’s Privacy
10 and Data Use Policies throughout the Complaint and in support of their claims against Facebook.
11 (*See, e.g., id.* ¶¶ 16, 103-06, 112, 140-41, 149, 160, 181, 220.)

12 Because it is referenced and relied upon repeatedly throughout the Complaint, the
13 December 22, 2010 Privacy Policy is appropriate for judicial notice. *See Harris v. Cnty. of*
14 *Orange*, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (judicially noticing five memoranda of
15 understanding referenced in complaint); *Coto Settlement*, 593 F.3d at 1038. In fact, courts in this
16 district have previously noticed Facebook’s SRR in connection with other actions brought against
17 the company. *See Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011); *In re*
18 *Facebook PPC Adver. Litig.*, No. 5:09-cv-03043-JF, 2010 WL 5174021, at *4 (N.D. Cal. Dec. 15,
19 2010).

20 Moreover, although the December 22, 2010 Privacy Policy is expressly referenced in
21 Plaintiffs’ Complaint, they have not attached it. Notice is therefore also appropriate “in order to
22 prevent plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting documents upon
23 which their claims are based” *See Swartz*, 476 F.3d at 763 (punctuation omitted).

24 For these reasons, the Court should grant Facebook’s Request for Judicial Notice as to the
25 December 22, 2010 Privacy Policy.

26 **B. The Court Can and Should Judicially Notice the Legislative Documents.**

27 Plaintiffs also cannot reasonably dispute the authenticity or relevance of Exhibits A
28 through C to the Wong Declaration (the “Legislative Documents”). Facebook’s Request for

1 Judicial Notice should therefore also be granted as to the Legislative Documents.

2 The Legislative Documents relate to the legislative history of California Penal Code
3 Section 629, reflecting amendments to that statute intended to encompass certain forms of
4 electronic communications. These amendments were not made to the statute Plaintiffs rely upon,
5 California Penal Code Section 631. Legislative history is a proper subject of judicial notice. *See*
6 *Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005) (noticing legislative history of
7 California statute); *Louie v. McCormick & Schmick Rest. Corp.*, 460 F. Supp. 2d 1153, 1156
8 (C.D. Cal. 2006) (same); *Joseph v. J.J. MacIntyre Cos., LLC*, 238 F. Supp. 2d 1158, 1165 n.5
9 (N.D. Cal. 2002) (noticing California Legislative Counsel’s analysis of legislative bill). The
10 Court should therefore grant Facebook’s Request for Judicial Notice as to the Legislative
11 Documents.

12 **III. CONCLUSION**

13 For the foregoing reasons, Facebook respectfully requests that the Court notice the
14 December 22, 2010 Privacy Policy and the Legislative Documents.

15 Dated: August 22, 2012

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