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18  
19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 MATTHEW CAMPBELL, MICHAEL  
HURLEY, and DAVID SHADPOUR, on  
22 behalf of themselves and all others  
similarly situated,

23 Plaintiffs,

24 v.

25 FACEBOOK, INC.,

26 Defendant.

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Case No. 4:13-cv-05996

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT'S REQUEST FOR  
JUDICIAL NOTICE**

**HEARING**

Date: September 17, 2014

Time: 9:00 a.m.

Place: Courtroom 3, 3rd Floor  
The Honorable Phyllis J. Hamilton

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**I. INTRODUCTION**

Plaintiffs oppose Facebook’s Request for Judicial Notice filed together with its Motion to Dismiss Plaintiffs’ Consolidated Amended Complaint (“RJN”), on the grounds that all the documents they seek to have judicially noticed have been altered to reflect Facebook’s position, and some of the documents are not publicly accessible, and therefore all the documents lack the proper foundation to be judicially noticed.

All of the documents are not proper subjects for judicial notice because they are *not* “true and correct cop[ies]” of the documents they purport to be. Rather, Facebook has altered these documents by highlighting them to indicate the aspects of the documents that defense counsel asserts are relevant and important. Documents altered to convey the arguments of counsel are not properly judicially noticed. Plaintiffs, in a separately filed Request for Judicial Notice, are seeking to have three of these documents judicially noticed, but without alteration from counsel’s highlighting.

Further, Facebook improperly seeks to have three of its own internally generated documents, which are not even readily accessible to the public, judicially noticed. Because Facebook provides no link, either in its RJN or on its website, to any online versions of its archived disclosures (Facebook’s Exhibits B, C, E and F) they cannot be independently verified and lack the requisite foundation to be judicially noticed.

Therefore, Facebook’s Request for Judicial Notice should be denied.

**II. ARGUMENT**

**A. Legal Standard.**

When ruling on a Rule 12(b)(6) motion to dismiss, courts must take all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). “[F]actual challenges to a plaintiff’s complaint have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6).” *Scooter’s Pals Rescue v. Cnty. of Placer*, No. 12-01736, 2012 U.S. Dist. LEXIS 151682, at \*14 (E.D. Cal. Oct. 19, 2012) (quoting *Lee v. City of Los Angeles*, 250 F. 3d 668, 688 (9th Cir. 2001)). Thus, “[a]s a general rule, a

1 district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6)  
2 motion.” *U.S. ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 998 (9th Cir. 2011) (quoting *Lee*,  
3 250 F.3d at 688).

4 There are two limited exceptions to this rule: (1) courts may consider documents attached  
5 to or incorporated by reference into the complaint *if* no party questions their authenticity, and  
6 (2) courts may consider adjudicative facts that are not subject to reasonable dispute. *See Lee*,  
7 250 F. 3d at 688-89. The key to both exceptions is that the documents or facts must be  
8 undisputed—if any party contests the authenticity or veracity of a fact or document, judicial  
9 notice cannot be taken of it.

10 The Ninth Circuit cautions district courts to avoid taking judicial notice unless the “matter  
11 is beyond controversy.” *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (citing  
12 the advisory committee’s notes to Fed. R. Evid. 201(a) & (b), which explain “[a] high degree of  
13 indisputability is the essential prerequisite” to taking judicial notice). Put simply, a court may not  
14 “take judicial notice of facts favorable to Defendants that could reasonably be disputed.”  
15 *Corinthian Colleges*, 655 F.3d at 999 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)).

16 **B. Facebook’s Request for Judicial Notice Should be Denied in its Entirety.**

17 Facebook’s Request for Judicial Notice for documents altered by counsel should be  
18 denied. By presenting counsel’s version of the documents, Facebook essentially attempts to  
19 present the underlying facts in a light *least* favorable to the Plaintiffs, in contravention to the  
20 standard under Rule 12(b)(6).

21 Facebook requests that the Court consider several documents, extrinsic to the pleadings, in  
22 ruling on its Motion to Dismiss:

- 23 • Exhibit A, which Facebook claims is a “true and correct copy of Facebook’s  
24 current Statement of Rights and Responsibilities, dated November 15, 2013”;
- 25 • Exhibit B, which Facebook claims is a “true and correct copy of Facebook’s  
26 Statement of Rights and Responsibilities, dated April 26, 2011”;
- 27 • Exhibit C, which Facebook claims is a “true and correct copy of Facebook’s  
28 Statement of Rights and Responsibilities, dated June 8, 2012”;

- 1 • Exhibit D, which Facebook claims is a “true and correct copy of Facebook’s
- 2 current Data Use Policy, dated November 15, 2013”;
- 3 • Exhibit E, which Facebook claims is a “true and correct copy of Facebook’s Data
- 4 Use Policy, dated September 7, 2011”;
- 5 • Exhibit F, which Facebook claims is a “true and correct copy of Facebook’s Data
- 6 Use Policy, dated June 8, 2012”
- 7 • Exhibit 1, which Facebook claims is a “true and correct copy of Senate Report
- 8 No. 99-541, dated October 17, 1986.”

9 Def’s. RJN at 1.

10 Facebook’s Request for Judicial Notice should be rejected in its entirety. Facebook’s

11 Exhibits A-F are improper subjects for judicial notice because they contain Defendant’s attorney

12 work-product, in the form of highlighting sections of Facebook’s purported disclosures that

13 Defendant viewed as helpful to its case. Likewise, Facebook’s presentation of ECPA’s legislative

14 history (Exhibit 1) inaccurately emphasizes, by highlighting it, the one paragraph that Facebook

15 has (mistakenly) identified as supporting its interpretation of ECPA. Even if the underlying text

16 *were* a true and accurate representation of Facebook’s disclosures—a fact that Plaintiffs dispute

17 with respect to Facebook’s Exhibits B, C, E, and F—Facebook’s insertion of misleading

18 highlighting to portions of that text, is not. For this reason, none of Facebook’s Exhibits

19 accurately depict the documents they purport to be—they are not true representations of the

20 documents that Plaintiffs relied upon when using Facebook’s service or drafting the CAC. *See*

21 Fed. R. Evid. 201. Thus, Facebook’s Request for Judicial Notice should be denied in its entirety.

22 With respect to Exhibits 1, A, and D, Plaintiffs, in a separately filed Request for Judicial

23 Notice, seek to have them judicially noticed, but without alteration or highlighting.

24 With respect to Exhibits B, C, E, and F, Facebook’s Request for Judicial Notice should be

25 denied for an additional reason. Those documents purport to be versions of Facebook’s

26 Statement of Rights and Responsibilities and Data Use Policy in effect prior to November 15,

27 2013. Facebook argues that the truth of these documents “can be accurately and readily

28 determined from sources whose accuracy cannot reasonably be questioned.” RJN at 3 (citing

1 Fed. R. Evid. 201(b) & (b)(2)). But Facebook fails to identify any source from which to verify  
2 these documents. It provides *no* link to any website in its RJN, in the Jordan Declaration in  
3 support of Defendant's Motion to Dismiss, or even on its website, to an original, accessible,  
4 source of these documents. Indeed, a reasonable search by Plaintiffs has turned up no such  
5 website. *See* Sobol Decl. ¶ 6. Thus, even putting aside Facebook's self-interested modifications  
6 to its exhibits, Plaintiffs simply cannot concede the authenticity of Exhibits C-F. At this stage of  
7 the proceedings, it is not possible to verify that these documents are, in fact, what Facebook  
8 claims they are, or to assess the truth of the matters asserted in them.

9 **III. CONCLUSION**

10 Plaintiffs respectfully request that the Court deny Facebook's Request for Judicial Notice  
11 of its self-serving, altered versions of the documents.

12  
13 Dated: July 30, 2014

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