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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

ANTHONY DITIRRO, KATYA
 BRESLER, AND MICHELLE
 SHUMATE, individually and on behalf of
 others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware
 corporation,

Defendant.

Case No. 5:14-cv-00132-PJH

**DEFENDANT FACEBOOK, INC.'S REQUEST
 FOR CONSIDERATION OF DOCUMENTS
 INCORPORATED INTO THE FIRST AMENDED
 COMPLAINT, IN SUPPORT OF DEFENDANT'S
 MOTION TO DISMISS FIRST AMENDED
 COMPLAINT**

Date: June 11, 2014
 Time: 9:00 a.m.
 Courtroom: 3
 Judge: Hon. Phyllis J. Hamilton
 Trial Date: None Set

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on June 11, 2014 at 9:00 a.m. or as soon thereafter as this
4 motion may be heard in the above-entitled Court, located at 1301 Clay Street, Oakland,
5 California, in Courtroom 3, Third Floor, Defendant Facebook, Inc. (“Facebook”), in support of its
6 concurrently filed Motion to Dismiss the First Amended Complaint (“Motion to Dismiss”), will
7 request that the Court consider Exhibits A through D to the concurrently filed Declaration of
8 Sandeep Solanki (the “Solanki Declaration”), as incorporated by reference into Plaintiffs’ First
9 Amended Complaint (“FAC”). This request is made pursuant to Federal Rule of Civil Procedure
10 12, Federal Rule of Evidence 201, and applicable legal principles, and is based on the instant
11 request and the points and authorities in support thereof, the Motion to Dismiss and the points and
12 authorities in support thereof, the Solanki Declaration and exhibits thereto, all pleadings and
13 papers on file, and such other matters as may be presented to or properly considered by the Court.

14 **STATEMENT OF RELIEF SOUGHT**

15 Facebook seeks an order that the documents attached as Exhibits A through D to the
16 Solanki Declaration are properly before the Court on Facebook’s Motion to Dismiss because they
17 are incorporated by reference into the FAC.

18 **STATEMENT OF ISSUE TO BE DECIDED**

19 Whether the documents attached as Exhibits A through D to the Solanki Declaration are
20 incorporated by reference into the FAC and therefore must be considered by the Court in ruling
21 on the Motion to Dismiss.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. DOCUMENTS SUBJECT TO THIS REQUEST**

24 Facebook asks the Court to consider the following documents in connection with
25 Facebook’s Motion to Dismiss the FAC:

- 26 • Solanki Declaration, Exhibit A: The Facebook terms of use (also referred to as the
27 “Statement of Rights and Responsibilities” or “SRR”) that are currently in place,
28 which went into effect for all Facebook users on or about November 15, 2013.

- 1 • Solanki Declaration, Exhibit B: The Facebook terms of use that went into effect for all
2 Facebook users on or about September 23, 2008.
- 3 • Solanki Declaration, Exhibit C: The Facebook terms of use that went into effect for all
4 Facebook users on or about February 4, 2009.
- 5 • Solanki Declaration, Exhibit D: The Facebook SRR that went into effect for all
6 Facebook users on or about May 1, 2009.

7 **II. LEGAL STANDARD**

8 “[C]ourts *must* consider the complaint in its entirety, as well as other sources courts
9 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents
10 incorporated into the complaint by reference” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
11 551 U.S. 308, 322 (2007) (emphasis added); *accord, e.g., Skilstaf, Inc. v. CVS Caremark Corp.*,
12 No. 09-cv-2514 SI, 2010 WL 199717, at *2 (N.D. Cal. Jan. 13, 2010). A document is
13 “incorporated by reference into a complaint if the plaintiff refers extensively to the document or
14 the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903,
15 908 (9th Cir. 2003). The document need not be “physically attached” to the complaint, *Knievel v.*
16 *ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005), but may be considered on a motion to dismiss if “the
17 plaintiff’s claim depends on the contents of a document, the defendant attaches the document to
18 its motion to dismiss, and the parties do not dispute the authenticity of the document”
19 *Knievel*, 393 F.3d at 1076; *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (“We
20 therefore hold that a district court ruling on a motion to dismiss may consider a document the
21 authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily
22 relies.”), *superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem.*
23 *Co.*, 443 F.3d 676, 681 (9th Cir. 2006). If these elements are met, “the district court may treat
24 such a document as part of the complaint, and thus may assume that its contents are true for
25 purposes of a motion to dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at 908.

26 **III. ARGUMENT**

27 The “contract” between Facebook and Plaintiffs—referred to variously in the FAC as the
28 “contract,” “terms and conditions,” “terms,” “user agreement,” and “Statement of Rights and
Responsibilities”—lies at the heart of the FAC and forms the basis of at least five of Plaintiffs’

1 legal claims. (*See, e.g.*, FAC ¶¶ 18-20, 22, 51(g), 96, 98.) Plaintiffs’ claims for breach of
2 contract (FAC ¶¶ 97-101) and breach of the implied covenant of good faith and fair dealing (FAC
3 ¶¶ 102-106) are expressly premised on the contract, alleging that “DEFENDANT entered into a
4 contract with PLAINTIFFS . . . in part expressed in DEFENDANT’S user agreement,” under
5 which Facebook “agreed . . . not to interject false content . . . that would be visible to other
6 Facebook users,” which provision “DEFENDANT materially breached” (FAC ¶¶ 98-100;
7 *see also* FAC ¶ 103 (implied covenant claim premised on “[the] contract alleged herein above”).
8 Plaintiffs’ claims for violations of the Unfair Competition Law, False Advertising Law, and
9 Consumers Legal Remedies Act are, likewise, premised on the contract, each arising from alleged
10 “false and misleading representations” contained within the contract (among other purported, but
11 largely unidentified, locations on the Facebook website). (FAC ¶ 92; *see also, e.g.*, FAC ¶ 96
12 (alleging that Facebook “disseminat[ed] [false] statements, including but not limited to its terms
13 of use (including its Statement of Rights and Responsibilities and Data Use Policy)”). In support
14 of these claims, Plaintiffs allege that they “read Facebook’s terms and conditions and other
15 information” both “[b]efore signing up for Facebook and continually thereafter” (FAC ¶¶ 18-20),
16 and “relied on . . . false and misleading representations [therein] in deciding to register for
17 Facebook or remain registered with Facebook, provide personal information and post content”
18 (FAC ¶¶ 99, 105).

19 Although the “contract” is fundamental to Plaintiffs’ claims, the FAC fails to attach it or
20 even quote from it (much less identify any specific provisions that were breached or misleading,
21 as discussed further in the Motion to Dismiss). These circumstances present the most compelling
22 case for incorporation-by-reference, as they implicate the core “policy concern underlying the
23 rule: Preventing plaintiffs from [attempting to survive] a Rule 12(b)(6) motion by deliberately
24 omitting references to documents upon which their claims are based.” *Parrino*, 146 F.3d at 706.
25 Indeed, where plaintiffs have failed to attach an agreement that underlies their claims, courts have
26 not hesitated to consider the full terms of that agreement on a motion to dismiss. *See, e.g., id.* at
27 706 (district court properly considered “the terms of the plan, documents governing plan
28 membership, coverage, and administration” where complaint referred to and “rested upon” those

1 documents); *Ritchie*, 342 F.3d at 908 (“The doctrine of incorporation by reference may apply, for
2 example, when a plaintiff’s claim about insurance coverage is based on the contents of a coverage
3 plan, or when a plaintiff’s claim about stock fraud is based on the contents of SEC filings.”
4 (citations omitted)); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (“Here, [plaintiff]
5 brought a breach of contract claim against KPMG and referred explicitly to the engagement letter.
6 The authenticity of the letter is not in dispute. Therefore, the letter was properly considered on the
7 12(b)(6) motions.”). Otherwise, ““complaints that quoted only selected and misleading portions
8 of [the parties’ agreements] could not be dismissed [under Rule 12(b)(6)] even though they would
9 be doomed to failure.”” *In re Silicon Graphics, Inc. Secs. Litig.*, 970 F. Supp. 746, 758-59 (N.D.
10 Cal. 1997) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)).

11 As Plaintiffs appear to concede, the operative “contract” is Facebook’s “Statement of
12 Rights and Responsibilities” (FAC ¶ 96), which contains the “terms of service that governs
13 [Facebook’s] relationship with users and others who interact with Facebook” (Solanki Decl., Ex.
14 A). The current version of the SRR, applicable to all current users of Facebook (including
15 Plaintiffs), and which took effect before the original complaint in this action was filed, is attached
16 as Exhibit A to the Solanki Declaration. (Ex. A, § 14.3.) The terms of use in effect when Plaintiffs
17 registered for Facebook are attached as Exhibits B through D of the Solanki Declaration.¹

18 Because these documents are fundamental to the FAC’s claims, the Court should consider
19 them as incorporated by reference into the FAC for purposes of Facebook’s Motion to Dismiss.
20 *See, e.g., Parrino*, 146 F.3d at 706; *Knieval*, 393 F.3d at 1076; *Ritchie*, 342 F.3d at 908.²

22 ¹ As Plaintiff DiTirro’s allegations regarding when he joined Facebook do not match the publicly
23 available information in his account profile, Facebook includes in this Motion the various
versions of the SRR that may have been in effect when DiTirro joined.

24 ² The current version of the SRR is, additionally, the proper subject of judicial notice because its
25 contents are not subject to reasonable dispute and are capable of accurate and ready determination
26 by resort to Facebook’s website (*see* <https://www.facebook.com/legal/terms>). *See* Fed. R. Evid.
27 201(b) (judicial notice is proper as to matters “capable of accurate and ready determination by
28 resort to sources whose accuracy cannot reasonably be questioned”); *Caldwell v. Caldwell*, No. C
05-4166, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006) (“as a general matter, websites and
their contents may be proper subjects for judicial notice”); *Frances Kenny Family Trust*, 2005
WL 106792, at *1 (finding content on plaintiffs’ website to be proper matter for judicial notice).

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IV. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court consider Exhibits A through D to the Solanki Declaration in connection with Facebook’s Motion to Dismiss.

Dated: April 15, 2014

COOLEY LLP

/s/ Jeffrey M. Gutkin
Jeffrey M. Gutkin
Attorneys for Defendant Facebook, Inc.

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