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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE PLAID INC. PRIVACY LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 4:20-cv-03056-DMR

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT PLAID INC.'S MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

Action Filed: May 4, 2020

Judge: Hon. Donna M. Ryu

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Evidence 201, Defendant Plaid Inc. ("Defendant") hereby requests that the Court take judicial notice of the following documents listed below. The authenticity of the exhibits is established through the Declaration of Ethan D. Dettmer in Support of Defendant Plaid Inc.'s Motion to Dismiss Plaintiffs' Consolidated Amended Complaint ("Dettmer Declaration"), which is filed concurrently with this Request for Judicial Notice.

1. **Exhibit A** – Plaid's End User Privacy Policy.
2. **Exhibit B** – Venmo's Privacy Policy.
3. **Exhibit C** – Cash App's Additional Cash Terms of Service - Annotated.
4. **Exhibit D** – Coinbase's Global Privacy Policy.
5. **Exhibit E** – Screenshots that show the consumer experience when connecting a bank account to Venmo using Plaid Link.

The Court may take judicial notice of the above-listed documents pursuant to Federal Rule of Evidence 201 because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). When ruling on a motion to dismiss, the Court may look beyond the four corners of the complaint to documents subject to judicial notice. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts *must* consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.") (emphasis added); Fed. R. Evid. 201(b).

Courts regularly take judicial notice of a company's privacy notice in privacy disputes and "if a party requests [judicial notice] and the court is supplied with the necessary information[,]" then the Court "*must* take judicial notice." Fed. R. Evid. 201(c)(2) (emphasis added); *see also Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1094 (N.D. Cal. 2018) (taking judicial notice of another company's (Lyft's) app terms of service in dismissing invasion of privacy claims against Uber because Lyft disclosed that it may share the data of which the plaintiff claimed an expectation of privacy); *Garcia v. Enter. Holdings, Inc.*, 78 F. Supp. 3d 1125, 1136 (N.D. Cal. 2015) (taking judicial notice of terms of service and a privacy policy that disclosed the practices of which plaintiff complained and granting motion to dismiss).

"Necessary information" includes the source from which the fact to be noticed may be ascertained and information from which the court can conclude that it is a source "whose accuracy cannot reasonably be questioned." Charles Alan Wright, et al., 21B Fed. Prac. & Proc. Evid. § 5108 (2d ed. 2020) (Discretionary Judicial Notice—Necessary Information). Here, Plaid has provided the necessary information by supplying the Court with copies of the relevant privacy policies and terms of service, and has indicated where they are publicly available. The screenshots that show the consumer experience when connecting a bank account to Venmo using Plaid Link are publicly available using the Venmo app.

Additionally, the Court may consider the documents through incorporation by reference, which allows a court to consider a document if its authenticity is not contested and the complaint "necessarily relies" upon it. *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1114 (C.D. Cal. 2003) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)) (quotation marks omitted). This policy prevents a plaintiff from surviving a motion to dismiss by intentionally "omitting references to documents upon which their claims are based." *Id.* (citation and quotation marks omitted). The Privacy Policy (Exhibit A) is repeatedly referenced by Plaintiffs throughout the CAC (Plaintiffs' Consolidated Amended Complaint, ECF No. 61). Similarly, Plaintiffs include screenshots of the consumer experience when linking a bank account to Venmo with Plaid Link. With respect to the other documents (Exhibits B, C, and D), Plaintiffs' CAC depends on the contents, and they are thus subject to judicial notice. For example, in *Knievel v. ESPN* the Ninth Circuit held that the "incorporation by reference doctrine" may be extended to "situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute [its] authenticity," even if "the plaintiff does not explicitly allege the contents of that document in the complaint." 393 F.3d 1068, 1076 (9th Cir. 2005) (citation omitted).

There, "[t]he Knievels attached to their complaint only the photograph and caption that they argue[d] was defamatory, and they d[id] not allege or describe the contents of the surrounding pages in their complaint." *Id*. The Ninth Circuit held it was proper to take into account the defendant's attachment of the surrounding web page and additional photos because "a viewer accessing the Knievels photograph must also access the surrounding pages on the EXPN.com website …." *Id*. Here, Plaintiffs similarly allege the use of apps but omit the privacy policies and terms disclosed by those apps, which disclose the activities that form the basis of the CAC and would, as a matter of course, immediately precede any connection via Plaid. *See*, *e.g.*, CAC ¶¶ 100-01. They also allege and portray only a subset of screens in the series of screens that a user sees in linking their chosen financial app to a financial account through Plaid Link (CAC ¶¶ 38, 67, 72), but do not allege or portray the other screens that an end user necessarily sees in these circumstances. As in *Knievel*, this Court should not allow such selective and misleading presentation of the facts.

Indeed, the content of these documents threaten survival of Plaintiffs' claims on a motion to dismiss. The Northern District holds that in an invasion of privacy litigation, the disclosures in privacy policies of apps may eviscerate an individual's reasonable expectation of privacy, when other parties obtain information about the user through the app. *See Gonzales*, 305 F. Supp. 3d at 1091.

Attached to the Dettmer Declaration as **Exhibit A** is a true and correct copy of Plaid's End User Privacy Policy. This is a publicly available document (available at https://plaid.com/legal/#end-user-privacy-policy) that is not subject to reasonable dispute. Further, Plaintiffs' claims depend on the contents of the privacy policy. *See*, *e.g.*, CAC ¶¶ 101, 112, 122, 131, 141, 151, 160, 169, 179, 190, 200 (alleging ignorance of the details in any "privacy policy from Plaid when [he/she] linked [his/her] bank account."); ¶ 360 (alleging that Plaid's privacy policy conceals and fails to disclose material facts and otherwise makes false statements).

Attached to the Dettmer Declaration as **Exhibit B** is a true and correct copy of Venmo's Privacy Policy. This is a publicly available document (available at https://venmo.com/legal/us-privacy-policy) that is not subject to reasonable dispute. Plaintiffs claim to have used Venmo but conspicuously omit their knowledge of Venmo's Privacy Policy and its disclosures that undermine their CAC. *See*, *e.g.*, CAC ¶¶ 100-01, 111-12, 121-22, 130-31, 140-41, 150-51, 159-60, 168-69, 178-79, 188-90, 199-200. The content of this privacy policy specifically refutes Plaintiffs' alleged ignorance of Venmo's data collection and third-party involvement. *See*, *e.g.*, Ex. B at 2, 6 (explaining that Venmo collects: "Identification Information - your name, street address, email address, date of birth, and SSN (or other governmental issued verification numbers)[,]" "Financial Information - bank account online login information, bank account and routing numbers and credit cards linked to your Venmo account[,]" and "[i]f you connect your Venmo account to other financial accounts … [Venmo] may have access to your account balance and account and transactional information, such as purchases and funds transfers."); Ex. B at 5, 6 (explaining that Venmo may share user information with "[t]hird party service providers who assist us in providing services to you or who provide fraud detection or similar services on our or any vendor's behalf[,]" and "[i]nformation that we share with a third-party based on an account connection will be used and disclosed in accordance with the third-party's privacy practices. Before authorizing an account connection, you should review the privacy notice of any third party that will gain access to your personal information as part of the account connection.").

Attached to the Dettmer Declaration as **Exhibit C** is a true and correct copy of Cash App's Additional Cash Terms of Service - Annotated. This is a publicly available document (available at https://cash.app/legal/us/en-us/legal/us/en-us/tos) that is not subject to reasonable dispute. Plaintiffs Anderson, Mitchell, and Umali claim to have used Cash App but conspicuously omit their knowledge of Cash App's Additional Cash Terms of Service and its disclosures that undermine their complaint. *See*, *e.g.*, CAC ¶¶ 100-01, 140-41, 188-89. The content of this document specifically refutes Plaintiffs' alleged ignorance of Cash App's data collection and Plaid's involvement. *See*, *e.g.*, Ex. C at 10 ("If you choose to link your Eligible Bank Account to your Cash App by providing the username and password you use to access your bank information online, you acknowledge your personal and financial information is being provided to Plaid Inc., that your personal and financial information will be collected, processed, transferred, or stored in accordance with Plaid Inc.'s Privacy Policy, and that you acknowledge and agree to Plaid Inc's Privacy Policy.").

Attached to the Dettmer Declaration as **Exhibit D** is a true and correct copy of Coinbase's Global Privacy Policy. This is a publicly available document (available at https://www.coinbase.com/legal/privacy) that is not subject to reasonable dispute. Plaintiff Umali claims to have used Coinbase ("CB") but conspicuously omits his knowledge of Coinbase's Global

Privacy Policy and its disclosures that undermine his complaint. *See*, *e.g.*, CAC ¶¶ 188-89. The content of this privacy policy specifically refutes Plaintiff Umali's alleged ignorance of Coinbase's data collection and third-party involvement. Ex. D at 3 ("We may collect the" "Full name, date of birth, nationality, gender, signature, utility bills, photographs, phone number, home address, and/or email." "Transaction Information: Information about the transactions you make on our Services, such as the name of the recipient, your name, the amount, and/or timestamp."); Ex. D at 7-8 ("If you are based in the US, CB may use Plaid, Inc. ('Plaid') to connect your Coinbase account with your bank account, verify your bank account and confirm your bank account balance prior to approving a transaction. Information shared with Plaid is treated by Plaid in accordance with its Privacy Policy, available at https://plaid.com/legal/#end-user-privacy-policy.").

Attached to the Dettmer Declaration as **Exhibit E** is a true and correct copy of a series of screenshots captured from the Venmo application on August 31, 2020 that show the *complete* consumer experience when connecting a bank account to Venmo using Plaid Link. Bank account balance information has been redacted. This is a publicly available set of images (available through the Venmo app, which may be downloaded from the Apple App Store at https://apps.apple.com/us/app/venmo/id351727428)) that is not subject to reasonable dispute. Plaintiffs include a *subset* of these screenshots of the consumer experience when linking a bank account to Venmo with Plaid Link in their CAC. CAC ¶¶ 38, 67, 72. Plaintiffs claim they "would not have connected" their bank accounts had they known about Plaid's role. CAC ¶¶ 105, 116, 126, 135, 145, 155, 164, 173, 183, 194, 204. The complete set of screenshots, however, specifically refutes these allegations, as the screen Plaintiffs do not include in the CAC also explains in plain language what Plaid does, explains that end users can choose to link their accounts to Venmo without Plaid, and that they can always "turn off Venmo's use of Plaid." Dettmer Declaration ¶ 6. For these reasons, Plaid respectfully requests that the Court take judicial notice of the above-referenced documents.

Dated: September 14, 2020

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

/s/ Ethan D. Dettmer
By: Ethan D. Dettmer

Attorneys for Defendant Plaid Inc.