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Plaid Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE PLAID INC. PRIVACY LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Case No. 4:20-cv-03056-DMR

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

Date: TBA
Time: 1:00 p.m.
Dept: Courtroom 4 – 3rd Floor
Judge: Donna M. Ryu

Trial Date: None Set
Date Action Filed: May 4, 2020

I. ARGUMENT

A. Plaid's Documents are Proper for Judicial Notice

Plaintiffs argue this Court should decline to take judicial notice of Exhibits A-E to Mr. Dettmer's Declaration (ECF Nos. 79-1, 79-2, 79-3, 79-4, 79-5) because (1) Plaid submitted the current version of its End User Privacy Policy rather than versions in place when Plaintiffs linked their payments apps to their financial institutions, (2) websites are not proper for judicial notice, and (3) the documents were not properly authenticated. None of these arguments has merit.

1. Plaid's Current Privacy Policy is Relevant and Incorporated By Reference in Plaintiffs CAC

Plaintiffs ask the Court to ignore Plaid's current End User Privacy Policy ("Privacy Policy") by claiming they are irrelevant to their individual claims. But this argument is disingenuous given the heavy emphasis that Plaintiffs place on the current Privacy Policy in the Consolidated Amended Complaint ("CAC"). Indeed, Plaintiffs' Opposition to this motion acknowledges that the CAC repeatedly refers to, and directly quotes from, the current Privacy Policy and current Venmo link process.¹ Opp. 1. These references include selected screenshots of parts of the Plaid Link process in the Venmo app (e.g., CAC ¶¶ 67, 72), and alleging that the Policy is "deceptive" (e.g., CAC ¶¶ 74(h), 74(i) 74(j)). For example, the CAC alleges that "[b]y stating in its privacy policy that the company collects '[i]nformation about account transactions'. . . Plaid *deceives consumers*'" as to Plaid's role in applications like Venmo. CAC ¶ 74(j). *See, also, e.g.,* CAC ¶¶ 264, 280, 308, 331, 334, 360. The current Privacy Policy thus forms a key part of the foundation for Plaintiffs' claims and judicial notice is appropriate because Plaintiffs "necessarily rel[y]" on its terms.² *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). *See also Khoja v.*

¹ Plaintiffs' difficulty in forming their argument on this point is immediately notable. First, Plaintiffs claim the CAC "does not refer" to Plaid's documents, yet concedes the opposite just two sentences later. Opp. at 5. Plaintiffs' attempt to walk the line between "refer to" and "rely on" is belied by the CAC. *See, e.g.,* CAC ¶101.

² Moreover, each of the named Plaintiffs admits that to the extent that they recall the details of linking their bank accounts with participating apps like Venmo, "those details are consistent with the discussion of Plaid's interface" in the CAC. ¶¶ 101, 112, 122, 131, 140, 151, 131, 160, 169, 179, 190, 200. By their own account, the CAC "necessarily relies" on the "discussion of Plaid's interface" within the complaint, explicitly including the Privacy Policy and the screenshots of the Plaid link process in the Venmo application.

Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018) (materials are incorporated by reference and subject to judicial notice where a party relies on them to “form[] the basis” of their claims).³

2. Judicial Notice is Proper for Privacy Policies Listed on Websites

Plaintiffs fare no better with their suggestion that private websites cannot be the province of judicial notice. Courts routinely consider the contents of parties’ websites and the policies contained therein. *See, e.g., Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1197 & n.1 (N.D. Cal. 2014) (taking judicial notice of Apple’s iOS License Agreements and granting in part motion to dismiss based on those agreements); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (taking judicial notice of, *inter alia*, Apple’s privacy policy, because it was “publicly available, standard documents that [were] capable of ready and accurate determination”) (citations omitted); *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 983, 985 (N.D. Cal. 2010) (taking judicial notice of Microsoft’s software license, Terms of Use, and website printouts, because they were standard documents that were publicly available online and thus capable of accurate and ready determination); *Caldwell v. Caldwell*, No. 05-cv-4166 PJH, 2006 WL 618511, at *4 (N.D. Cal. Mar. 13, 2006), *order clarified*, 2006 WL 734405 (N.D. Cal. Mar. 20, 2006) (agreeing that “as a general matter, websites and their contents may be proper subjects for judicial notice”). Moreover, Plaintiffs’ CAC quotes from and cites directly to the URL containing Plaid’s current Privacy Policy that their Opposition seeks to exclude. CAC ¶ 91 n.71. Plaintiffs should not be permitted to cherry-pick sections of Plaid’s policy but preclude the Court from reviewing it in its entirety.

Plaintiffs’ additional argument questioning the accuracy of the websites is similarly unavailing for two reasons. First, because the materials at issue are publicly accessible, their

³ Though Plaintiffs do not expressly mention the Privacy Policies from Venmo, CashApp and Coinbase (what Plaintiffs call the “Participating Apps”), the CAC discusses the apps themselves at length. *See e.g., CAC* § 5.A, ¶¶ 32, 38, 66, 90, 213. As noted in Plaid’s opening motion – but ignored in Plaintiffs’ opposition – the disclosures within these policies are fatal to Plaintiffs’ invasion of privacy claims and undermine the entire complaint. Mot. at 3 *citing Gonzales v. Uber Techs., Inc.*, 305 F. Supp. 3d 1078, 1094 (N.D. Cal. 2018). The policies of the Participating Apps are therefore “crucial” to the Plaintiffs’ claims and should be judicially noticed to “prevent[] plaintiffs from surviving a 12(b)(6) motion by deliberately omitting references to [these] documents.” *Parrino*, 146 F.3d at 706.

1 contents can be “accurately and readily determined from sources whose accuracy cannot reasonably
 2 be questioned.” Fed. R. Evid. 201(b)(2). Second, Plaintiffs’ purported concern regarding the
 3 accuracy of these documents because the particular policies came into effect after Plaintiffs
 4 allegedly connected to their financial institutions through Plaid is nothing more than a second bite
 5 at the relevance argument discussed above. Opp. 3.

6 Plaintiffs’ own cases do not help their argument. In *In re Easysaver Rewards Litig.*, the
 7 court denied judicial notice but because it was “confident” doing so would not prejudice the
 8 defendant because “Defendants [did] not cite[] any language from their proposed exhibits that
 9 contradicts a quotation from the Complaint.” 737 F. Supp. 2d 1159, 1169 (S.D. Cal. 2010). In
 10 *Moorer v. Stemgenex Medical Group, Inc.* the court denied plaintiffs’ request for judicial notice of
 11 defendant’s website because plaintiff *did not attach screenshots of the website* or provide specific
 12 webpage addresses for the content. No. 16-02816, 2017 WL 1281882, at *4 (S.D. Cal. Apr. 6,
 13 2017). Plaid’s request for judicial notice suffers no such deficits. Plaid offers complete versions
 14 of the documents at issue, therefore providing the full context for considering Plaintiffs’ selective
 15 quotations and characterizations in the CAC. *See e.g.*, ¶¶ 74(i), 74(j). Moreover, Plaid attached a
 16 true and correct copy of each exhibit to the motion, stated that each document was publicly
 17 available, and provided a direct website link to the documents’ location on the internet. Mot. at 3-
 18 4. All exhibits are therefore proper for judicial notice.⁴

19 3. The Documents Are Properly Authenticated

20 Finally, Plaintiffs argument that Plaid’s documents lack proper authentication because they
 21 are attached to an attorney declaration is unsupported. This court has granted requests for judicial
 22 notice regarding similar materials based on attorney declarations on numerous occasions. *See e.g.*,

23 _____
 24 ⁴ Plaintiffs also argue that Plaid seeks judicial notice to improperly establish facts subject to dispute.
 25 Opp. at 4. Not so. Plaid’s request for judicial notice seeks to give the Court the ability to read the
 26 document in its entirety rather than rely on the Plaintiff’s cherry-picked sections. This is a
 27 legitimate purpose for judicial notice. *See Knievel v ESPN*, 393 F.3d 1068, 1076 (9th Cir.
 28 2005)(finding it was proper to take notice of defendant’s entire webpage because “a viewer
 accessing the Knievels photograph must also access the surrounding pages on the EXPN.com
 website”)(sic); *In re New Century*, 588 F. Supp. 2d 1206, 1221 (C.D. Cal. 2008) citing *In re Enron*
Corp. Secs. Litig., No. MDL-1446, 2005 WL 3504860, at *11, n. 20 (S.D. Tex. Dec. 22,
 2005)(where a complaint refers to a document subject to a request for judicial notice, “the Court
 can view any statement selectively quoted or referenced in the context from which it was drawn to
 protect against any misrepresentation or misinterpretation.”).

1 *In re Facebook, Inc. Sec. Litig.* No. 5:18-cv-01725-EJD (N.D. Cal. Aug. 7, 2020) (granting RJN of
 2 publicly available information supported by attorney declaration); *In re Google Assistant Priv.*
 3 *Litig.* No. 19-cv-04286-BLF (same).

4 Moreover, Plaintiffs’ cited cases do not aid their argument. In both cases, the courts
 5 “declined to infer that the [parties’] attorney could attest to the authenticity of the exhibits attached
 6 to his affidavit *solely* on the basis of his status as [] counsel.” *Garcia v. Fannie Mae*, 794 F. Supp.
 7 2d 1155, 1163 (D. Or. 2011) *citing Blount v. Conn. Gen. Life Ins. Co.*, No. CV 01-1341-BR, 2002
 8 WL 31974405, at *4 (D. Or. July 2, 2002) (emphasis added). Likewise, in both those cited cases,
 9 the attorney affidavits sought to authenticate documents or facts expressly within the personal
 10 control of the parties – in *Garcia*, a contract between the plaintiff and defendant, and in *Blount*, a
 11 personal fact about the plaintiff. *Garcia*, 794 F. Supp. 2d at 1163 (striking notices of cancellation
 12 of loan between plaintiff and defendant attached to attorney declaration); *Blount*, 2002 WL
 13 31974405, at *4 (holding an attorney affidavit insufficient to authenticate the single fact that
 14 “[d]uring his lifetime, neither Mr. Blount nor Plaintiff returned the converted policy to CGLIC.”)
 15 This is not at all the situation here. Mr. Dettmer did not authenticate the document “solely” based
 16 his role as outside counsel, but rather as an attorney in this case *and* as a member of the public,
 17 with access to the Internet. Unlike in Plaintiffs’ cited cases, Plaid seeks only notice of *publicly*
 18 *available* information. RJN at 1. The Dettmer Declaration identifies the publicly available domain
 19 Exhibits A-D and states that Exhibit E, a login process in a publicly available application, was
 20 created under his supervision. Declaration of Ethan P. Dettmer (EFC No. 79) at 1. This is sufficient
 21 personal knowledge to support a request for judicial notice of documents generally available to the
 22 public at large. *Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 WL 2573493, at *2 (S.D.
 23 Cal. June 24, 2010) (denying motion to strike parts of complaint supported by an attorney
 24 declaration discussing publicly available information.)

25 **II. CONCLUSION**

26 For the foregoing reasons, this Court should grant Plaid’s request to judicially notice
 27 Exhibits A through E, and consider Mr. Dettmer’s declaration in full.
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1 Dated: December 11, 2020

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