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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

IN RE GOOGLE INC. GMAIL LITIGATION

Master Docket No.: 13-MD-02430-LHK

THIS DOCUMENT RELATES TO:
 ALL ACTIONS

**PLAINTIFFS' OPPOSITION TO
 DEFENDANT GOOGLE INC.'S
 REQUEST FOR JUDICIAL NOTICE IN
 SUPPORT OF ITS MOTION TO DISMISS
 PLAINTIFFS' CONSOLIDATED
 INDIVIDUAL AND CLASS ACTION
 COMPLAINT**

Date: September 5, 2013
 Time: 1:30 p.m.
 Judge: Hon. Lucy H. Koh
 Place: Courtroom 8—4th Floor

I. INTRODUCTION.

COME NOW the Plaintiffs, by and through counsel, who Oppose Google's Request for Judicial Notice as to the certain documents identified below to the respective Declarations. *See* [D.E. 47]. Ignoring the fact that in deciding a motion to dismiss the Court must "accept all factual allegations in the complaint as true," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 2509 (2007), Google, through the Rothman and Wong Declarations and exhibits, improperly interjects facts and documents (a) specifically refuted by the Complaint, (b) which exceeds the scope of FED. R. CIV. P. 12(b)(6), and (c) which serves as additional argument by Google that improperly exceeds the thirty (30) page briefing limitation. Among these matters are documents that require legal interpretation and demonstrate that there exists a controversy to be litigated. The interpretation, and even more importantly the reliability and relevance of these documents, are "subject to reasonable dispute" and are thus inappropriate as support of a motion to dismiss under Fed. Rule Civ. Pro. 12(b)(6). *See* Fed. Rule of Evid. 201; *In re American Continental Corp./Lincoln Sav. & Loan Securities Litig.*, 102 F.3d 1524, 1537 (9th Cir. 1996). Accordingly, Plaintiffs oppose the below-identified documents as proper for Judicial Notice.

II. LEGAL STANDARD

As a general rule, a court may not consider "any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *United States v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). A court "may, however, consider materials that are submitted with and attached to the Complaint . . . [and] may also consider unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Id.* at 998-99 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.2006)); *Lee*, 250 F.3d at 688. However, the court must still accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996).

Pursuant to Federal Rule of Evidence 201, a court may also take judicial notice of “matters of public record,” *but not of facts that may be* “subject to reasonable dispute.” *Id.* 250 F.3d at 689. More specifically, a court may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to Defendants that could reasonably be disputed. *See id.* at 689–90.¹

III. ARGUMENT

Plaintiffs oppose the Court taking judicial notice of the following documents on the basis provided as to each below:

- (1) Exhibit AA;
- (2) Exhibit BB;
- (3) Exhibit MM; and
- (4) Exhibit NN.

In addition to the arguments below, Plaintiffs hereby incorporate, as if stated herein, Plaintiffs’ objections to Exhibits AA, BB, MM, and NN as asserted in Plaintiffs’ Objections to the Declarations of Aaron Rothman and Kyle Wong and Exhibit Thereto, contemporaneously filed with this Opposition.

A. Exhibit AA to the Wong Declaration

Defendant requests this Court to take judicial notice of Exhibit AA to the Wong Declaration, which claims to be a website printout of the Yahoo! Mail Privacy Policy as of June 10, 2013 at 4:31 pm. Plaintiffs oppose Defendant’s request for judicial notice of this document for four reasons.

First, the content of this webpage is not generally known within the Court’s jurisdiction and it is not a source whose accuracy cannot reasonably be questioned. *See Ibey v. Taco Bell Corp.*, No. 12-cv-0583, 2012 U.S. Dist. LEXIS 91030, at *3-4 (S.D. Cal. June 18, 2012)

¹ A judicially noticed fact must be: one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b) (emphasis added). In other words, for a fact to be judicially noticed, “indisputability is a prerequisite.” *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1354 (7th Cir. 1995).

(declining to take judicial notice of a website printout from LinkedIn because it was not generally known within the Court's jurisdiction and it was not a source whose accuracy cannot reasonably be questioned). Second, the Yahoo! Mail Privacy Policy cannot be properly authenticated by Google. *See Natural Wellness Ctrs. of Am., Inc. v. J. R. Andorin Inc.*, No. 11-04642, 2012 U.S. Dist. LEXIS 7877, at *8-10 (N.D. Cal. Jan. 24, 2012) (refusing to take judicial notice of websites because websites were not capable of being properly authenticated). Third, "given the changing and changeable nature of internet websites," the Yahoo! Mail Privacy Policy's appearance on June 10, 2013 is neither timely nor relevant to this action, does not support any proposition advanced by Google in its Motion to Dismiss, and therefore the Court should decline to take judicial notice of it. *See Caldwell v. Caldwell*, No. C-05-4166 PJH, 2006 U.S. Dist. LEXIS 13688, at *12 (N.D. Cal. Mar. 13, 2006).

Fourth, the website printout of the Yahoo! Mail Privacy Policy is not reliable or relevant. In fact, Plaintiffs' counsel in this action investigated Yahoo!'s procedures and practices regarding the scanning of emails and Yahoo! filed a sworn declaration stating that it does not engage in the type of conduct that is at issue in this lawsuit. *See* Exhibit A attached hereto (Declaration of Amir Doron, Engineering Manager at Yahoo! Mail filed in support of unopposed motion to dismiss in *Sheppard v. Google Inc. and Yahoo! Inc.*, No. 4:12-cv-04022 SOH (W.D. Ark. Nov. 28, 2012)).

B. Exhibits BB, MM, and NN of the Wong Declaration

Defendant asks this Court to take notice of the legislative history of Cal. Penal Code § 629 in Exhibits MM and NN of the Wong Declaration. However, Plaintiffs' Complaint is based upon Cal. Penal Codes §§ 631 and 632, not § 629. Plaintiff concedes that legislative history may properly be judicially noticed in situations where the history is that of the statute relied upon in the Complaint. *See, e.g., Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *Zephyr v. Saxon Mortg. Servs., Inc.*, 873 F. Supp. 2d 1223, 1226 (E.D. Cal. 2012); *Louis V. McCormack and Schmick Restaurant Corp.*, 460 F. Supp. 2d 1153, 1156 n.4 (C.D. Cal. 2006). However, Defendant here seeks to draw inferences in support of its arguments regarding the meaning and interpretation of Cal. Penal Code Sections 631 and 632 by reference to the

legislative history of Cal. Penal Code Section 629, which is a separate statute under a different Chapter of the Penal Code. Inferential use of such authority is inappropriate to interpret the meaning of a separate and distinct Chapter of the Penal Code.

Defendant then seeks judicial notice of the legislative history of the federal Electronic Communications Privacy Act of 1986 (“ECPA”), which is attached at Exhibit BB of the Wong Declaration. While Plaintiffs do reference this statute in the Complaint at Paragraph 16, defendant presents this legislative history in order to draw inferences regarding Cal. Penal Code Sections 631 and 632, which is not proper. In fact, Plaintiffs’ Opposition to Defendant’s Motion to Dismiss includes contrary arguments and interpretations regarding Defendant’s analysis of this legislative history, demonstrating that there exists a matter in controversy to be resolved in litigation regarding ECPA. This necessarily means that judicial notice of this Exhibit is inappropriate and should not be taken by the Court.

III. Conclusion

For the reasons set forth herein, Plaintiffs object to and oppose Google’s Request for Judicial Notice in regards to Exhibits AA, BB, MM and NN of the Wong Declaration.

Respectfully submitted,

Dated: July 11, 2013

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