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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LARYSSA GALVEZ, <u>et al.</u>	)	Case No. CV 20-4976 FMO (SKx)
Plaintiffs,	)	
v.	)	<b>ORDER RE: PENDING MOTION</b>
DRAPER JAMES, LLC, <u>et al.</u> ,	)	
Defendants.	)	

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Having reviewed the briefing filed with respect to defendants Draper James, LLC's and Reese Witherspoon's (collectively, "defendants") Motion to Dismiss (Dkt. 25, "Motion"), the court will deny the Motion without prejudice for referencing materials outside the pleadings. See Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1366, at 159 (3d ed. 2004) ("As the language of [Rule 12(b)(6)] suggests, federal courts have complete discretion to determine whether or not to accept the submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion and rely on it, thereby converting the motion, or to reject it or simply not consider it."). Citing the doctrines of incorporation-by-reference and judicial notice, defendants ask the court to consider four exhibits filed in support of their Motion. (See Dkt. 26, Request For Judicial Notice ("RJN") at 2).

"Unlike rule-established judicial notice, incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018), cert. denied, 139 S.Ct. 2615 (2019). "[A] defendant may seek to incorporate a document into the complaint if the plaintiff refers

1 extensively to the document or the document forms the basis of the plaintiff's claim." Id. (internal  
2 quotation marks omitted). The "mere mention of the existence of a document is insufficient to  
3 incorporate the contents of a document[.]" Id. (internal quotation marks omitted). "[I]f the  
4 document merely creates a defense to the well-pled allegations in the complaint, then that  
5 document did not necessarily form the basis of the complaint." Id.

6 The instant Motion reflects improper application of the incorporation-by-reference doctrine.  
7 See Khoja, 899 F.3d at 1002-03. As an example, defendants ask the court to incorporate by  
8 reference a webpage titled, "Draper James, Teacher Appreciation FAQ's[.]" (See Dkt. 26-5, Exh.  
9 D). This document, however, was not referenced in the operative First Amended Complaint  
10 ("FAC"). (See, generally, Dkt. 23, FAC). Additionally, defendants seek incorporation-by-reference  
11 of a New York Post article and a Romper article, available online, discussing the dress offer at  
12 issue in this case. (See Dkt. 25-3, Exh. B; Dkt. 25-4, Exh. C). The operative complaint, however,  
13 never references these articles, (see, generally, Dkt. 23, FAC), and only speaks to the general  
14 circulation of the dress offer in the press. (See id. at ¶ 28). The court cannot conclude that the  
15 FAC "refers extensively to [these] document[s] [n]or that the document[s] form[] the basis of . . .  
16 plaintiff['s] claim." Khoja, 899 F.3d at 1002 (internal quotation marks omitted). Moreover,  
17 defendants use many of these documents to "create[ ] a defense to the well-pled allegations in the  
18 complaint[.]" See id. For example, defendants cite the New York Post article and the Romper  
19 article to rebut plaintiffs' contention that "Defendants did not state that there were only 250 dresses  
20 that would be made available until April 6[.]" (See Dkt. 25, Motion at 13) (internal quotation marks  
21 and citations omitted). Additionally, defendants cite the "Draper James, Teacher Appreciation  
22 FAQ's" webpage to refute "plaintiffs' claim that nothing in any initial FAQ disseminated by  
23 Defendants disclosed a limitation . . . or that [the offer] was some form of lottery[.]" (Dkt. 25,  
24 Motion at 13) (internal citation and alteration marks omitted). Such documents, however, cannot  
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1 be incorporated-by-reference because they are being used to support “a defense to the well-pled  
2 allegations in the complaint[.]”<sup>1</sup> See Khoja, 899 F.3d at 1002.

3 Defendants also assert that these same documents are subject to judicial notice. (See Dkt.  
4 26, RJN at 2-3). Facts subject to judicial notice are those which are either “generally known within  
5 the trial court’s territorial jurisdiction” or “can be accurately and readily determined from sources  
6 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(1)-(2). “A court must  
7 also consider – and identify – which fact or facts it is noticing” under Federal Rule of Evidence  
8 201(b). Khoja, 899 F.3d at 999. “Just because the document itself is susceptible to judicial notice  
9 does not mean that every assertion of fact within that document is judicially noticeable for its truth.”  
10 Id. Here, defendants do not indicate which facts within the exhibits they ask the court to judicially  
11 notice. (See, generally, Dkt. 26, RJN). Rather, defendants simply request that the court take  
12 judicial notice of the documents in their entirety. (See id.). Because defendants do not identify  
13 which facts within the exhibits they ask the court to judicially notice nor do they explain why the  
14 court can judicially notice those facts, the court declines to take judicial notice of the documents  
15 at issue.

16 The court is persuaded that the documents and the arguments raised in the pending Motion  
17 that rely upon these documents would more appropriately be considered at summary judgment.  
18 See Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1366, at 159 (“As the language of [Rule 12(b)(6)]  
19 suggests, federal courts have complete discretion to determine whether or not to accept the  
20 submission of any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6)  
21 motion and rely on it, thereby converting the motion, or to reject it or simply not consider it.”); see,  
22 e.g., Columbia River People’s Utility Dist. v. Portland Gen. Elec. Co., 40 F.Supp.2d 1152, 1153-54  
23 (D. Or. 1999) (court has discretion whether to consider materials outside the pleadings and  
24 “convert the motion to dismiss to a motion for summary judgment”); Williams v. Cty. of Alameda,

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27 <sup>1</sup> The court will, however, permit incorporation-by-reference of the Draper James Instagram  
28 post at issue in this case, (see Dkt. 26-2, Exh. A), because plaintiffs quoted and/or relied  
extensively on this document in the FAC. (See Dkt. 23, FAC at ¶¶ 4, 28-29).

1 26 F.Supp.3d 925, 935 (N.D. Cal. 2014) (“[T]he Court has discretion either to consider or reject  
2 such evidence” outside the pleadings.).

3 Based on the foregoing, IT IS ORDERED THAT:

4 1. Defendants’ Motion to Dismiss (**Document No. 25**) is **denied without prejudice**.

5 2. The parties’ Joint Stipulation to Continue Hearing Date and Briefing Schedule on Motion  
6 to Dismiss (**Document No. 29**) is **denied** as moot.

7 2. Defendants shall file their Answer to the FAC or a Rule 12(b)(6) motion without  
8 incorporating any documents by reference or attaching any exhibits, with the exception of the  
9 Draper James, LLC Instagram post, (see Dkt. 26-2, Exh. A), no later than **September 3, 2020**.

10 Dated this 27th day of August, 2020.

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12 /s/  
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14 Fernando M. Olguin  
15 United States District Judge  
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