

Michael M. Maddigan (Bar No. 163450)
michael.maddigan@hoganlovells.com
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 785-4600

Jiaxing (Kyle) Xu (Bar No. 344100)
kyle.xu@hoganlovells.com
HOGAN LOVELLS US LLP
4 Embarcadero Center, Suite 3500
San Francisco, CA 94103
Telephone: (415) 374-2300

Neal Kumar Katyal, *pro hac vice*
neal.katyal@hoganlovells.com
Anna Kurian Shaw, *pro hac vice*
anna.shaw@hoganlovells.com
Lauren Cury, *pro hac vice*
lauren.cury@hoganlovells.com
Hadley Dreibelbis, *pro hac vice*
hadley.dreibelbis@hoganlovells.com
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, D.C. 20004
Telephone: (202) 637-5600

*Attorneys for Defendants Automattic Inc. and
Matthew Charles Mullenweg*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

WPENGINE, INC., a Delaware corporation,

Plaintiff,

vs.

AUTOMATTIC INC., a Delaware
corporation; and MATTHEW CHARLES
MULLENWEG, an individual,

Defendants.

Case No. 3:24-cv-06917-AMO

**DEFENDANTS AUTOMATTIC INC. AND
MATTHEW CHARLES MULLENWEG'S
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF MOTION TO DISMISS**

Judge: Hon. Araceli Martinez-Olguin

Courtroom: 10

REQUEST FOR JUDICIAL NOTICE

Defendants respectfully request that the Court take judicial notice of the following exhibits, in support of Defendants' Special Motion to Strike Causes of Action 9, 10, and 11 of WP Engine's Complaint. True and correct copies of which are attached hereto or referenced herein.

- Selected pages from the WP Engine website, available at:
 - <https://wpengine.com/headless-wordpress/> as it appeared on September 26, 2024 and October 9, 2024, with emphasis added (**Exhibits 1A and 1B**);
 - <https://wpengine.com/wordpress-hosting/> as it appeared on September 26, 2024 and October 2, 2024, with emphasis added (**Exhibits 2A and 2B**);
 - <https://wpengine.com/plans/> as it appeared on September 26, 2024 and October 2, 2024, with emphasis added (**Exhibits 3A and 3B**);
 - <https://wpengine.com/woocommerce/> as it appeared on September 26, 2024 and October 9, 2024, with emphasis added (**Exhibits 4A and 4B**);
 - <https://wpengine.com/> as it appeared on September 25, 2024 and October 03, 2024, with emphasis added (**Exhibits 5A and 5B**);
 - <https://wpengine.com/blog/wp-engine-decode-2024-whats-next-in-modern-web-development/> as it appeared on October 29, 2024 (**Exhibit 6**);
 - <https://wpengine.com/blog/decode-registration-open/> as it appeared on October 29, 2024 (**Exhibit 7**); and
 - <https://wpengine.com/blog/wp-engine-pledges-five-for-the-future/> as it appeared on October 29, 2024 (**Exhibit 8**).
- Selected pages from the webpage for Trustpilot.com (www.trustpilot.com), including:
 - <https://www.trustpilot.com/review/wpengine.co.uk> as it appeared on October 30, 2024 (**Exhibit 9**);
 - <https://www.trustpilot.com/review/wpengine.com?sort-recency&stars=1> as it appeared on October 29, 2024 (**Exhibit 10**); and

- 1 • <https://www.trustpilot.com/review/wpengine.com?sort=recency&stars=2> as it
2 appeared on October 29, 2024 (**Exhibit 11**)
- 3 • Selected pages from the techcrunch.com website, including an article related to
4 Silverlake’s investment in WP Engine, available at [https://techcrunch.com/2018/01/04/wp-](https://techcrunch.com/2018/01/04/wp-engine-a-managed-wordpress-platform-raises-250m-from-silver-lake/)
5 [engine-a-managed-wordpress-platform-raises-250m-from-silver-lake/](https://techcrunch.com/2018/01/04/wp-engine-a-managed-wordpress-platform-raises-250m-from-silver-lake/) as it appeared on
6 October 29, 2024 (**Exhibit 12**).
- 7 • A news article from Bloomberg.com, available at
8 [https://www.bloomberg.com/news/articles/2018-01-04/silver-lake-takes-250-million-](https://www.bloomberg.com/news/articles/2018-01-04/silver-lake-takes-250-million-stake-in-austin-startup-wp-engine)
9 [stake-in-austin-startup-wp-engine](https://www.bloomberg.com/news/articles/2018-01-04/silver-lake-takes-250-million-stake-in-austin-startup-wp-engine) as it appeared on October 29, 2024. (**Exhibit 13**).
- 10 • A copy of pages from the website of the Stack Overflow Blog, available at
11 <https://stackoverflow.blog/2023/11/08/the-product-approach-to-open-source-communities/>
12 as it appeared on October 29, 2024 (**Exhibit 14**).
- 13 • A copy of pages from the Andreessen Horowitz website for an episode of the a16z podcast
14 entitled “Learning from Open Source Communities,” available at
15 <https://a16z.com/podcast/learning-from-open-source-communities/>, as it appeared on
16 October 29, 2024 (**Exhibit 15**).
- 17 • A copy of a Harvard Business Review digital article entitled “The Digital Economy Runs
18 On Open Source. Here’s How to Protect It.”, available from the Harvard Business Review
19 website at [https://hbr.org/2021/09/the-digital-economy-runs-on-open-source-heres-how-to-](https://hbr.org/2021/09/the-digital-economy-runs-on-open-source-heres-how-to-protect-it/)
20 [protect-it/](https://hbr.org/2021/09/the-digital-economy-runs-on-open-source-heres-how-to-protect-it/) as it appeared on October 29, 2024 (**Exhibit 16**).
- 21 • A copy of pages from the Community Signal website for a podcast episode entitled “When
22 Open Source Community Software is Brought By Private Equity,” available at
23 [https://www.communitysignal.com/when-open-source-community-software-is-bought-by-](https://www.communitysignal.com/when-open-source-community-software-is-bought-by-private-equity/)
24 [private-equity/](https://www.communitysignal.com/when-open-source-community-software-is-bought-by-private-equity/) as it appeared on October 29, 2024 (**Exhibit 17**).
- 25 • A *New York Times* guest essay entitled “Private Equity is Gutting America – and Getting
26 Away With It,” by Brennan Ballou, available on the *New York Times* website at

<https://www.nytimes.com/2023/04/28/opinion/private-equity.html/> as it appeared on October 29, 2024 (**Exhibit 18**).

- A copy of the article from *The Hill* entitled “How to make private equity serve the public good,” by Daniel J. Morrissey, as it appeared on October 29, 2024 (**Exhibit 19**).
- A copy of the Wired.com story entitled “Altruism Still Fuels The Web. Businesses Love To Exploit It,” by Keith Negley, available at <https://www.wired.com/story/altruism-open-source-fuels-web-businesses-love-to-exploit-it/> as it appeared on October 29, 2024 (**Exhibit 20**).
- A copy of the Ford Foundation research report entitled “Roads and Bridges: The Unseen Labor Behind Our Digital Divide,” that appeared on the Ford Foundation website at <https://www.fordfoundation.org/work/learning/research-reports/roads-and-bridges-the-unseen-labor-behind-our-digital-infrastructure/> as it appeared on October 29, 2024 (**Exhibit 21**).
- An article on the WPTavern website entitled “Ford Foundation Publishes Non-Technical White Paper on Open Source Software and the Challenges of Sustaining Digital Infrastructure,” by Sarah Gooding, available at <https://wptavern.com/ford-foundation-publishes-non-technical-white-paper-on-open-source-software-and-the-challenges-of-sustaining-digital-infrastructure> as it appeared on October 29, 2024 (**Exhibit 22**).
- An article on the WPTavern website entitled “Sustain Event Draws 100 Attendees to Discuss the Sustainability of Open Source Software,” by Sarah Gooding, available at <https://wptavern.com/sustain-event-draws-100-attendees-to-discuss-the-sustainability-of-open-source-software> as it appeared on October 29, 2024 (**Exhibit 23**).
- A copy of *Sustain the Report*, dated on June 19, 2017 and published by GitHub HQ (SF), obtained from the website <https://sustainoss.org/assets/pdf/SustainOSS-west-2017-report.pdf> on or about October 29, 2024 (**Exhibit 24**).

- 1 • A video recording by Ms. Michelle Ames dated May 7, 2019, obtained from the website
2 [https://wordpress.tv/2019/05/07/michelle-ames-keynote-address-the-care-and-feeding-of-](https://wordpress.tv/2019/05/07/michelle-ames-keynote-address-the-care-and-feeding-of-the-wordpress-community-me-you-and-us/)
3 [the-wordpress-community-me-you-and-us/](https://wordpress.tv/2019/05/07/michelle-ames-keynote-address-the-care-and-feeding-of-the-wordpress-community-me-you-and-us/) (**Exhibit 25**).
- 4 • An article that appeared on the techradar.com website entitled “Why the founder of WP
5 Engine is knee-deep in headless products,” available at
6 [https://www.techradar.com/news/why-the-founder-of-wp-engine-is-knee-deep-in-headless-](https://www.techradar.com/news/why-the-founder-of-wp-engine-is-knee-deep-in-headless-products)
7 [products](https://www.techradar.com/news/why-the-founder-of-wp-engine-is-knee-deep-in-headless-products) as it appeared on October 29, 2024 (**Exhibit 26**).
- 8 • An article from the website www.bizjournals.com entitled “Austin tech firm on fast growth
9 track snags global engineering boss from SolarWinds,” available at
10 [https://www.bizjournals.com/austin/news/2017/08/10/austin-tech-firm-on-fast-growth-](https://www.bizjournals.com/austin/news/2017/08/10/austin-tech-firm-on-fast-growth-track-snags-global.html)
11 [track-snags-global.html](https://www.bizjournals.com/austin/news/2017/08/10/austin-tech-firm-on-fast-growth-track-snags-global.html) as it appeared on October 29, 2024 (**Exhibit 27**).
- 12 • An article from The Texas Monthly entitled “The Power Issue: Heather Brunner Is
13 Championing Diversity in an Industry That Sorely Needs It,” available at
14 [https://www.texasmonthly.com/articles/power-issue-heather-brunner-championing-](https://www.texasmonthly.com/articles/power-issue-heather-brunner-championing-diversity-industry-sorely-needs/)
15 [diversity-industry-sorely-needs/](https://www.texasmonthly.com/articles/power-issue-heather-brunner-championing-diversity-industry-sorely-needs/) as it appeared on October 29, 2024 (**Exhibit 28**).
- 16 • A copy of the Business Wire article entitled “WP Announces Engine for Good,” on the
17 Business Wire website, available at
18 [https://www.businesswire.com/news/home/20190627005209/en/WP-Engine-Announces-](https://www.businesswire.com/news/home/20190627005209/en/WP-Engine-Announces-Engine-for-Good)
19 [Engine-for-Good](https://www.businesswire.com/news/home/20190627005209/en/WP-Engine-Announces-Engine-for-Good) as it appeared on October 29, 2024 (**Exhibit 29**).
- 20 • A video recording of a portion of a livestream show, posted to ThePrimeTime YouTube
21 channel on September 26, 2024, entitled “The WordPress Situation Is Wild,” available
22 at https://www.youtube.com/watch?v=Gd8h_6vYPJ8 (**Exhibit 30**).

AUTHORITY

A. Applicable Standard.

Judicial notice of a fact is proper where the fact is not subject to reasonable dispute because it is: (1) generally known within the territorial jurisdiction of the trial court or (2) “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”

1 Federal Rule of Evidence (“Rule”) 201(b)(2). Courts are required to take judicial notice of facts if
 2 requested by a party and supplied with the necessary information. Rule 201(c)(2).

3 **B. This Court May Properly Take Judicial Notice of Websites, News Articles,**
 4 **Blog Posts, and Other Material in the Public Realm.**

5 Exhibits 1-30 consist of news articles, blog posts, reports, websites, transcripts of two podcast
 6 episodes, a videorecording of a talk given at WordCamp Buffalo 2019, and a YouTube video. The
 7 Court may take judicial notice of such material as an indication of information available in the public
 8 realm. *See Unsworth v. Musk*, No. 19-MC-80224-JSC, 2019 WL 5550060, at *4 (N.D. Cal. Oct. 28,
 9 2019) (citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir.
 10 2010)); *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 813 (N.D. Cal. 2020) (taking judicial
 11 notice of Google “blog post for the fact that Google made the statements it contains”); *Greenfield*
 12 *MHP Assocs., L.P. v. Ametek, Inc.*, 145 F. Supp. 3d 1000, 1007 (S.D. Cal. 2015) (noting “[p]ress
 13 coverage and news articles are [] judicially noticeable” and taking judicial notice of newspaper
 14 articles).

15 Similarly, district courts routinely have found judicial notice proper over publicly available
 16 websites. *Loomis v. Slendertone Distrib., Inc.*, 420 F. Supp. 3d 1046, 1062-63 (S.D. Cal. 2019)
 17 (taking *sua sponte* judicial notice of the printouts from Defendant’s website and its Amazon.com
 18 listing). *See also Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190, 1204 (N.D. Cal. 2014) (noting
 19 that publicly available websites are proper subjects of judicial notice); *Caldwell v. Caldwell*, No. C
 20 05-4166 PJH, 2006 WL 618511, at *3 (N.D. Cal. Mar. 13, 2006) (finding websites as proper subjects
 21 of judicial notice but denying the request for judicial notice where the parties did not supply the
 22 Court with copies of the website and the parties failed to agree on the content of the website); *Wible*
 23 *v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956, 965 (C.D. Cal. 2005) (granting judicial notice over two
 24 Amazon.com webpages); *Castagnola v. Hewlett-Packard Co.*, C 11-05772 JSW, 2012 WL 2159385
 25 (N.D. Cal. June 13, 2012) (taking judicial notice of screenshots of Defendant’s webpages where
 26 plaintiffs did not dispute the accuracy or the authenticity).

1 In addition, WP Engine’s Complaint “relies on and references” Exhibits 6 and 7, WP
 2 Engine press releases regarding its DE{CODE} conference, and Exhibit 8, a WP Engine press
 3 release announcing its Five for the Future pledge, making them “appropriate for incorporation by
 4 reference” as well. *Bernier v. Travelers Prop. Cas. Ins. Co.*, No. 17cv1028-MMA (BLM), 2017
 5 WL 5843396, at *2 (S.D. Cal. Nov. 29, 2017); *see* Compl. ¶¶ 25, 26 (discussing “[WP Engine’s]
 6 developer conference, DE{CODE}” and WP Engine’s Five for the Future pledge). Indeed, the
 7 Ninth Circuit has explicitly “extended the ‘incorporation by reference’ doctrine to situations in
 8 which the plaintiff’s [defamation] claim depends on the contents of a document . . . and the parties
 9 do not dispute the authenticity of the document.” *Knievel v. ESPN*, 393 F.3d 1068, 1076–79 (9th
 10 Cir. 2005) (considering web pages attached to a motion to dismiss under the incorporation by
 11 reference doctrine and affirming dismissal of defamation claim).

12 For the same reasons, Exhibit 30, a portion of a livestream that was posted to YouTube, is
 13 appropriate for incorporation by reference. WP Engine’s slander claim is premised on statements
 14 Matt made during that livestream, Compl. ¶ 200, and the Complaint makes multiple references to
 15 it. *See id.* ¶ 28, 64, 89. The YouTube video contained in Exhibit 30 contains the portion of the
 16 livestream before Matt joined, which renders it cognizable on this motion. *See Knievel*, 393 F.3d
 17 at 1076 (considering surrounding web pages that gave context to photograph of webpage attached
 18 to complaint and explaining that a court must also take into account “‘all parts of the
 19 communication that are ordinarily heard or read with [a statement].’”).

20 CONCLUSION

21 For all of the foregoing reasons, Defendants respectfully request that this Court grant their
 22 request for judicial notice.
 23
 24
 25
 26
 27
 28

1 Dated: October 30, 2024

Respectfully submitted,

2 By: /s/Michael M. Maddigan

3 Michael M. Maddigan

4 **HOGAN LOVELLS US LLP**

5 Michael M. Maddigan (Bar No. 163450)

6 Neal Kumar Katyal, *pro hac vice*

7 Anna Kurian Shaw, *pro hac vice*

8 Lauren Cury, *pro hac vice*

9 Jiaxing (Kyle) Xu (Bar No. 344100)

10 Hadley Dreibelbis, *pro hac vice*

11 *Attorneys for Defendants Automattic Inc. and*
12 *Matthew Charles Mullenweg*