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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF SAN DIEGO

17 TERRY LEROY JONES and GABRIEL
CAMPOS, on behalf of themselves and all
18 others similarly situated;

19 Petitioners/Plaintiffs,

20 vs.

21 WILLIAM D. GORE, in his official capacity
as Sheriff of San Diego County, California,

22 Respondent/Defendant.
23
24

CASE NO: 37-2021-00010648-CU-MC-CTL
Action Filed: March 10, 2021

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
REQUEST FOR JUDICIAL NOTICE**

25 **I. INTRODUCTION**

26 Defendant William D. Gore (“Defendant”) seeks to use judicial notice to inappropriately
27 bootstrap disputed facts outside Plaintiffs’ complaint into his demurrer. Plaintiffs Terry Leroy Jones
28 and Gabriel Campos (“Plaintiffs”) respectfully request that the Court deny Defendant’s request to

1 take judicial notice of the documents and records in exhibits 5-30 to Defendant’s Request for
2 Judicial Notice (ROA #15) (“RJN”), to the extent the RJN seeks judicial notice of the truth of any
3 matters contained in those documents and records.¹ Plaintiffs do not object to judicial notice of the
4 *existence* of these documents and records, but instead to judicial notice of the *truth* of the alleged
5 facts contained or asserted within those documents and records. Plaintiffs do not object to the request
6 to take judicial notice of exhibits 1-4.

7 **II. ARGUMENT**

8 A. This Court Should Not Take Judicial Notice of the Truth of the Purported Information
9 Contained in Defendant’s Exhibits.

10 1. *The Court May Take Judicial Notice of the Existence of Defendant’s Exhibits,*
11 *but Not of the Truth of Their Contents.*

12 It is clear from the memorandum of points and authorities in support of Defendant’s
13 demurrer (ROA #14) (“Demurrer”) that Defendant is asking this Court to take notice not of the
14 existence of the submitted documents and records but of alleged facts, and inferences from those
15 facts, that he asserts are contained within them, either directly or by implication. Defendant relies
16 on these alleged facts to claim, for example, that the population of the San Diego County Jails has
17 been reduced, that Defendant has implemented “protocols to protect the health and safety of inmates
18 and staff,” and that Defendant has separated high-risk inmates “from the rest of the jail population
19 to protect them from COVID-19.” Demurrer at 2:24, 3:1-18, 8:8-9. Defendant’s request for this kind
20 of judicial notice must fail because "matters of which judicial notice is taken are considered only
21 for their existence, not for the truth of the matters asserted in them ..." *In re Marriage of Forrest &*
22 *Eaddy*, 144 Cal. App. 4th 1202, 1209 (2006).

23 2. *The Court May Not Take Judicial Notice of Disputed or Ambiguous Facts.*

24 Defendant’s request must also fail because the matters addressed in the exhibits are at the
25 heart of the current litigation and actively disputed. For example, contrary to Defendant’s claim that
26 Defendant has acted to protect incarcerated people who are at high risk by separating them from

27 _____

28 ¹ A chart listing the exhibits is included with the RJN and reproduced at the end of this brief, with
an additional column indicating Plaintiffs’ position regarding each exhibit.

1 others, the operative Complaint alleges that an individual who tested positive for COVID-19 was
2 housed with medically vulnerable people for three days while waiting for his COVID-19 test results
3 in December 2020. First Amended Petition and Complaint (ROA # 10) (“FAC”) ¶17. The contested
4 nature of these facts renders them inappropriate for judicial notice because the truth of a “matter
5 ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute.” *Unruh-*
6 *Haxton v. Regents of Univ. of California*, 162 Cal. App. 4th 343, 364 (2008) (cleaned up). It would
7 be particularly inappropriate for the Court to take judicial notice of disputed facts on demurrer,
8 where “a court's function is limited to testing the legal sufficiency of the complaint. ... The hearing
9 on demurrer may not be turned into a contested evidentiary hearing through the guise of having the
10 court take judicial notice of documents whose truthfulness or proper interpretation are disputable.”
11 *Id.*; *see also Cruz v. Cty. of Los Angeles*, 173 Cal. App. 3d 1131, 1134 (1985) (“judicial notice of
12 matters upon demurrer will be dispositive only in those instances where there is not or cannot be a
13 factual dispute concerning that which is sought to be judicially noticed.”). Defendant’s request is an
14 inappropriate attempt to have this Court resolve evidentiary disputes in his favor before Plaintiffs
15 have had any opportunity to contest his claims or probe them through discovery, and should be
16 rejected for this reason.

17 3. *There is No Basis For Taking Judicial Notice of the Truth of the Matters*
18 *Asserted in Newspaper Articles or Defendant’s Self-Serving Press Releases or*
19 *Websites.*

20 Defendant asserts that this Court may take judicial notice of Exhibits 6-30 pursuant to
21 Evidence Code section 452(h). Defendant offers no basis at all for requesting that this Court take
22 judicial notice of Exhibit 5, which is an article from the *San Diego Union-Tribune*. Defendant does
23 not claim that newspaper articles are covered by section 452(h), and offers no other authority for
24 the proposition that this Court may take judicial notice of the article. The request to take judicial
25 notice of Exhibit 5 should be denied because news articles “are not proper authorities to establish
26 the truth of the matters asserted therein.” *Voris v. Lampert*, 7 Cal. 5th 1141, 1147 n.5 (2019), *reh’g*
27 *denied* (Oct. 23, 2019); *see also People v. Ramos*, 15 Cal. 4th 1133, 1167 (1997) (newspaper
28 “articles did not come within the scope of” section 452(h)).

1 Defendant claims that this Court may take judicial notice of Exhibits 6-17 and 22-29 because
2 the Court may take “judicial notice of press releases and the content of websites” pursuant to
3 Evidence Code section 452(h). RJN a 4:12-15. But while section 452(h) might allow the Court to
4 take judicial notice of the existence of press releases, and of the fact that particular purported
5 information is posted on websites, it does not allow for judicial notice of the truth of anything
6 contained in press releases or websites. *See Ragland v. U.S. Bank Nat’l Assn.*, 209 Cal. App. 4th
7 182, 193 (2012) (“[w]hile we may take judicial notice of the existence of the ... Web sites ... we
8 may not accept their contents as true.”). Section 452(h) allows for judicial notice only of “[f]acts
9 and propositions that are not reasonably subject to dispute and are capable of immediate and accurate
10 determination by resort to sources of reasonably indisputable accuracy.” Evid. Code § 452(h).

11 By their very nature, Defendant’s press releases and websites are inherently self-serving and
12 intended to place his actions in the best possible light. They allege statistics concerning facts that
13 are at the heart of the current dispute, including such matters as the extent of vaccination in San
14 Diego County jails. They are far from being “capable of immediate and accurate determination by
15 resort to sources of reasonably indisputable accuracy.” Instead, they are based on purported data
16 controlled and possessed by Defendant alone. Neither Plaintiffs nor this Court have any way to test
17 their accuracy, and no reasonably indisputable source exists that might help with such an
18 assessment. They are therefore not subject to judicial notice under section 452(h). *See Duronslet v.*
19 *Kamps*, 203 Cal. App. 4th 717, 737 (2012) (denying request to take judicial notice about nurse
20 practitioners from the California Board of Registered Nursing Web site under Evid. Code section
21 452(h) because the appellant had “not provided the court with information sufficient to show the
22 information about nurse practitioners is ‘not reasonably subject to dispute’ and that it is ‘capable of
23 immediate and accurate determination by resort to sources of reasonably indisputable accuracy.’”).

24 *Joyce v. Ford Motor Co.*, 198 Cal. App. 4th 1478, 1493 (2011) does not support the
25 proposition that this Court may take judicial notice of the truth of a press release. In *Joyce*, the Court
26 of Appeal took judicial notice of the existence of a press release by the Governor of California, but
27 not of the truth of the purported facts mentioned in that release.

28

1 Nor does Evid. Code § 452(h) permit this Court take judicial notice of the accuracy of
2 statistics Defendant has posted to his own website. Contrary to Defendant’s assertion, *People v.*
3 *Mendoza* does not indicate section 452(h) can be used for this purpose. *Mendoza* was a drug case
4 involving transportation of cocaine on an interstate highway. The Court took judicial notice of
5 “statistics regarding the volume of border crossings and daily traffic as reported by the U.S.
6 Department of Transportation and the California Department of Transportation.” 44 Cal. App. 5th
7 1044, 1052 (2020). These agencies were not parties to the case and there was no basis for disputing
8 the accuracy or interpretation of the statistics they provided. Here, in contrast, Defendant is asking
9 the Court to take judicial notice of statistics on a website that is entirely within his control, based on
10 purported data he alone possesses. Moreover, the statistics are open to multiple interpretations.² If
11 the Court were able to take judicial notice of the truth of statistics concerning contested issues
12 presented on a Defendant’s website, the Defendant could dispose of virtually any case by simply
13 posting alleged statistics indicating a lack of culpability. It is possible that Defendant’s web site is
14 accurate, but the Court cannot assume this is the case, and Plaintiffs must be provided with the
15 opportunity to pursue in discovery the underlying data that would allow an opportunity to evaluate
16 the information on the site. Otherwise, there would be no need for discovery in any COVID-19 case,
17 as any Sheriff or warden could simply develop web pages stating that no one had ever contracted
18 the virus in their facilities, all staff and incarcerated people had been vaccinated, and social
19 distancing was always possible because facilities were always almost entirely empty.

20 One need only consider Exhibit 7 to the RJN to see this is not an extreme hypothetical. In
21 that “COVID-19 and County Jails Update,” which is apparently a press release written by
22 Defendant’s Media Relations Director, Defendant claims to “have taken immediate action to
23 safeguard the lives of people in our custody and those who work in our facilities” during the
24 pandemic, having “created as much physical distancing as possible by actively reducing our inmate
25

26 ² For instance, Exhibit 20 asserts there has been only 1 cumulative death related to COVID-19.
27 However, Plaintiffs allege there have been more, that Defendant does not count in his tally people
28 who died in hospitals after contracting COVID-19 in his jails, and that Defendant often fails to
timely report in-custody deaths. FAC ¶¶ 74-78, 89. Nevertheless, Defendant attempts to rely on
this disputed death rate to support his request for a demurrer. Def’s Demurrer at 3:22-24.

1 population.” The Update goes on to state that “our Medical Services Division, and our entire
 2 Detention Services Bureau is working diligently every single day to prevent and mitigate as much
 3 as possible.” These claims directly contradict the First Amended Complaint, which alleges, *inter*
 4 *alia*, that even people who have been incarcerated in a medical unit have been unable to maintain
 5 safe physical distance and have been forced to stand in lines with no more than a foot between
 6 people to get food or medication, and that conditions in the San Diego County Jails include
 7 “unnecessarily crowded conditions that make adequate social distancing impossible.” FAC at ¶¶16,
 8 67. The contradictions make clear that these are highly disputed facts. Yet, Defendant would have
 9 this Court take judicial notice of his claims, accepting them as true, and resolving the disputes in his
 10 favor. Defendant’s position amounts to telling the Court that it is permitted to accept that something
 11 is true simply because Defendant’s website or press releases say so. That is not the purpose of
 12 judicial notice, and it is not the law. *See Unruh-Haxton*, 162 Cal. App. 4th at 364.

13 **CONCLUSION**

14 For the foregoing reasons, the Court is respectfully requested to deny Defendant’s Request
 15 for Judicial Notice, or, in the alternative, to take judicial notice of the existence of, but not the truth
 16 of the facts contained in, Exhibits 5-30.

17 **TABLE OF EXHIBITS**

Exhibit No.	Title/Description	Plaintiffs’ Position
1.	San Diego Superior Court Order No. 040120-38A, filed on April 3, 2020	No objection
2.	San Diego Superior Court Order No. 041320-42, filed on April 13, 2020	No objection
3.	San Diego Superior Court Temporary Emergency Modification to the Bail Schedule, dated June 29, 2020	No objection
4.	San Diego Superior Court Order No. 010121-42, filed on December 31, 2020	No objection
5.	San Diego Union-Tribune Article entitled, “San Diego jail population drops in effort to open beds,” dated March 22, 2020	Object to noticing for the truth of the matters asserted

1	6.	Statement from Defendant entitled, "Detention Services Bureau Statement on Coronavirus," dated March 27, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/654/637441597358100000	Object to noticing for the truth of the matters asserted
2			
3	7.	Statement from Defendant entitled, "COVID-19 and County Jails Update," dated April 24, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/1047/637469349104030000	Object to noticing for the truth of the matters asserted
4			
5	8.	Statement from Defendant entitled, "Statement on COVID-19 Testing in County Jails," dated May 21, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/654/637441597358100000	Object to noticing for the truth of the matters asserted
6			
7	9.	Statement from Defendant entitled, "COVID-19 Testing at County Jails," dated July 2, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/644/637441591096130000	Object to noticing for the truth of the matters asserted
8			
9	10.	Statement from Defendant entitled, "The Importance of 7-Day Quarantine When Booked Into County Jails," dated July 2, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/638/637441592345970000	Object to noticing for the truth of the matters asserted
10			
11	11.	Statement from Defendant entitled, "COVID-19 at George Bailey Detention Facility," dated November 16, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/650/637441587655800000	Object to noticing for the truth of the matters asserted
12			
13	12.	Statement from Defendant entitled, "UPDATE: COVID-19," dated November 20, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/642/637441591504630000	Object to noticing for the truth of the matters asserted
14			
15	13.	Statement from Defendant entitled, "Stepped Up COVID-19 Measures," dated December 11, 2020, available at: https://www.sdsheriff.gov/home/showpublisheddocument/1421/637469355379630000	Object to noticing for the truth of the matters asserted
16			
17	14.	"Sheriff Gore Response to ACLU on COVID-19," dated January 14, 2021, available at: https://www.sdsheriff.gov/Home/Components/News/News/109/16?npage=3&arch=1	Object to noticing for the truth of the matters asserted
18			
19	15.	"UPDATE: COVID-19 Protocols in County Jails," dated March 11, 2021, available at: https://www.sdsheriff.gov/Home/Components/News/News/257/16?npage=4	Object to noticing for the truth of the matters asserted
20			
21	16.	San Diego Sheriff's Department Inmate Vaccination Plan, dated March 18, 2021, available at: https://www.sdsheriff.gov/Home/ShowDocument?id=1726	Object to noticing for the truth of the matters asserted
22			
23	17.	"Increased Inmate Vaccinations," dated March 19, 2021, available at: https://www.sdsheriff.gov/Home/Components/News/News/269/16?npage=3	Object to noticing for the truth of the matters asserted
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1	18.	San Diego County Sheriff's Department Daily Population Report, dated May 29, 2021.	Object to noticing for the truth of the matters asserted
2			
3	19.	San Diego County Sheriff's Department COVID-19 Jail Status Report, dated May 28, 2021, available at https://www.sdsheriff.gov/home/showpublisheddocument/3610	Object to noticing for the truth of the matters asserted
4	20.	San Diego County Sheriff's Department COVID-19 Jail Status Weekly Report, dated May 22, 2021, available at: https://www.sdsheriff.gov/home/showpublisheddocument/3414	Object to noticing for the truth of the matters asserted
5			
6	21.	San Diego County Sheriff's Department Inmate COVID-19 Vaccination Report, dated May 22, 2021, available at: https://www.sdsheriff.gov/home/showpublisheddocument/3412	Object to noticing for the truth of the matters asserted
7			
8	22.	San Diego County Sheriff's Department COVID-19 Response Website, available at: https://www.sdsheriff.gov/resources/covid-19-response	Object to noticing for the truth of the matters asserted
9			
10	23.	San Diego County Sheriff's Department Video entitled, "COVID-19 Testing at County Jails," available at: https://vimeo.com/434823362	Object to noticing for the truth of the matters asserted
11	24.	San Diego County Sheriff's Department Video entitled, "Treating COVID-19," available at: https://vimeo.com/411633126	Object to noticing for the truth of the matters asserted
12			
13	25.	San Diego County Sheriff's Department Video entitled, "Keeping Jails Clean," available at: https://vimeo.com/411632442	Object to noticing for the truth of the matters asserted
14	26.	San Diego County Sheriff's Department Video entitled, "Protecting our Jails from COVID-19," available at: https://vimeo.com/411197104	Object to noticing for the truth of the matters asserted
15			
16	27.	San Diego County Sheriff's Department Video entitled, "Zero Bail Order and San Diego County (04/15/20)," available at: https://vimeo.com/408200148	Object to noticing for the truth of the matters asserted
17	28.	San Diego County Sheriff's Department Video entitled, "Temperature Checks at Sheriff's Facilities," available at: https://vimeo.com/408149454	Object to noticing for the truth of the matters asserted
18			
19	29.	San Diego County Sheriff's Department Video entitled, "Preventing Coronavirus in Jails Video," available at: https://vimeo.com/398375641	Object to noticing for the truth of the matters asserted
20	30.	San Diego County COVID-19 Statistics as of May 31, 2021.	Object to noticing for the truth of the matters asserted
21			

22 DATED: July 1, 2021

23 ACLU FOUNDATION OF SAN DIEGO &
24 IMPERIAL COUNTIES

25 By: /s/ Jonathan Markovitz

26 JONATHAN MARKOVITZ

27 Attorney for PETITIONERS/PLAINTIFFS