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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

18 STARLA ROLLINS and PATRICIA WILSON,
19 on behalf of themselves, individually, on behalf
20 of all others similarly situated, and on behalf of
the Dignity Plan,

21 Plaintiffs,

22 v.

23 DIGNITY HEALTH, a California Non-profit
24 Corporation, HERBERT J. VALLIER, an
25 individual, DARRYL ROBINSON, an
26 individual the Dignity Health Retirement Plans
Subcommittee, and JOHN and JANE DOES,
each an individual, 1-20,

27 Defendants.
28

Case No. 13-CV-1450 JST

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS**

Date: March 22, 2018

Time: 2:00 p.m.

Courtroom: 9

Judge: Hon. Jon S. Tigar

Trial Date: None Set

1 **I. STATEMENT OF ISSUE**

2 Whether the Court should disregard exhibits submitted by Defendants with their Notice
3 of Motion and Motion to Dismiss; Memorandum of Points and Authorities (“Motion”), ECF No.
4 249, because they are extrinsic to Plaintiffs’ Amended Class Action Complaint (“AC”), ECF No.
5 243, are inappropriate subjects for judicial notice, and are improperly relied upon for the truth of
6 matters asserted therein.

7 **II. INTRODUCTION**

8 In moving to dismiss Plaintiffs’ AC, Defendants rely on extrinsic documents submitted
9 through the Declaration of Elizabeth Meckenstock in Support of Defendants’ Motion to Dismiss
10 (“Meckenstock Declaration”), ECF No. 249-1 (attaching Exhibits (“Ex.”) 1-13). Defendants filed
11 a separate Request for Judicial Notice in Support of Motion to Dismiss (“RJN”), ECF No. 249-2,
12 requesting judicial notice of Exhibits 1-11, *see* RJN 1, and they also appear to request judicial
13 notice of Exhibit 13. *See id.* at 4.¹

14 Plaintiffs object to the Court’s consideration of the following documents because they are
15 not incorporated by reference into the AC and are not proper subjects of judicial notice:

16 Ex. 3: Dignity Health’s (“Dignity”) “Mission” printed from Dignity’s website;

17 Ex. 4: “Standards for Mission Integration” printed from Dignity’s website;

18 Ex. 5: The “Ethical and Religious Directives for Catholic Health Care” (“ERDs”);

19 Ex. 6: A “Statement of Common Values” printed from Dignity’s website;

20 Ex. 7: An Article written by Sister Judith Carle, RSM, who is the Vice Chair of Dignity’s
21 Board of Directors, entitled “Dignity Health: New Name, Same Mission,” which
22 was printed from the website of the Catholic Health Association of the United
23 States;

24 Ex. 9: Charters for the Dignity Health Retirement Plans Subcommittee
25 (“Subcommittee”); and

26 Ex. 10: Excerpts from “The Official Catholic Directory.”

27 ¹ Defendants do not seek judicial notice of Exhibit 12, which relates only to their “factual attack”
28 on jurisdiction with respect to Plaintiffs’ alternative state law claims. That document is
addressed in Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (“Plaintiffs’ MTD
Opposition” or “MTD Opp’n”).

1 that even refers to, much less “necessarily relies” upon, such charters.²

2 Exhibits 3-7 and 9-10 also are not judicially noticeable. None of these documents is a
 3 “matter[] of public record.” *See United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir.
 4 2011) (citing *Lee*, 250 F.3d at 689). These documents were not created by or filed with a
 5 governmental entity. *See, e.g., Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1106
 6 (N.D. Cal. 2011) (“public records are those documents obtained from government and
 7 administrative agencies”) (citing *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994)).
 8 Defendants’ contrary arguments fail.

9 **1. Not All “Publicly Accessible Websites” Are Judicially Noticeable.**

10 Defendants’ sole basis for seeking judicial notice of Exhibits 3, 4, 6, and 7 is to argue that
 11 they are available on “publicly accessible websites.” RJN 2-3. But Defendants conflate *public*
 12 *records*, which may be considered on a motion to dismiss, and private documents that are
 13 *publicly available*, which generally are not judicially noticeable on a motion to dismiss. *See, e.g.,*
 14 *In Re Bare Escentuals, Inc. Sec. Litig.*, 745 F. Supp. 2d 1052, 1067 (N.D. Cal. 2010) (denying
 15 “request that the court take judicial notice of Bare’s sales policy, as posted at an undisclosed date
 16 on Bare’s website.”); *Raquel v. United Healthcare Ins. Co.*, 2015 WL 7720911, at *2 (N.D. Cal.
 17 Nov. 30, 2015) (declining to take notice of “printouts from the internet” because defendant did
 18 “not provide authenticating information beyond the web addresses and therefore the printouts’
 19 accuracy could be disputed.” (citing *Estate of Fuller v. Maxfield & Oberton Holdings, LLC*,
 20 906 F. Supp. 2d 997, 1004 (N.D. Cal. 2012) (“[I]t is inappropriate for the Court to take judicial
 21 notice of facts on a webpage whose source and reliability are unknown.”)).

22 The cases cited by Defendants do not support their blanket assertion that all publicly
 23

24 ² Defendants cite *Lorenz v. Safeway, Inc.*, 241 F. Supp. 3d 1005, 1012-13 (N.D. Cal. 2017), but
 25 *Lorenz* took judicial notice of governing plan agreements and disclosures filed with the
 26 Department of Labor and relied on the fact that the complaint referenced and necessarily relied
 27 on such documents. Here, the purported Subcommittee charters are not relied upon in the AC
 28 and are not filed with the government. Nor do they contain the “terms and benefits” of the Plan.
See B.R. v. Beacon Health Options, 2017 WL 2351973, at *3 (N.D. Cal. May 31, 2017).
 Whether or how the Subcommittee charters relate to the maintenance or administration of the
 Plan cannot be determined without discovery.

1 available websites are judicially noticeable. In *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1190
2 (N.D. Cal. 2014), the court took judicial notice of publicly accessible websites only where the
3 complaint cited or relied upon the webpage or where the parties did not oppose the consideration
4 of the webpage, *id.* at 1204-05. Moreover, in *Perkins* the defendant's website was the focus of
5 the case. *Id.* at 1195. Here, however, Dignity's website is irrelevant to Plaintiffs' claims.

6 Defendants' reliance on *Lorenz* also is misplaced. There the court took judicial notice of
7 the definition of a collective investment fund from the Investopedia website. *Lorenz*, 241 F.
8 Supp. 3d at 1012. Investopedia was not a party to the suit, but rather a reputable third-party
9 authority on investment education. Dignity, in contrast, seeks to rely on *its own* website, with no
10 independent indicia of reliability, and its request should be rejected. *C.f. Gonzales v. Unum Life*
11 *Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) ("The Court declines Plaintiff's
12 request to take judicial notice of the Wikipedia definition of Parkinson's Disease because the
13 internet is not typically a reliable source of information.") (citation omitted).

14 Indeed, the self-serving exhibits posted on Dignity's own website, Exs. 3, 4, and 6, or
15 authored by Dignity officials, Ex. 7, are, for this reason alone, not judicially noticeable. *See, e.g.,*
16 *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536-37 (5th Cir. 2003) (declining to take judicial
17 notice of a "defendant-created report" available on the internet because it was neither "generally
18 known" within the jurisdiction nor "capable of accurate and ready determination by resort to
19 sources whose accuracy cannot reasonably be questioned"); *Bare Escentuals*, 745 F. Supp. 2d
20 at 1067.

21 **2. Defendants' Reliance on *Overall v. Ascension* Is Misplaced.**

22 Defendants rely on *Overall v. Ascension*, 23 F. Supp. 3d 816 (E.D. Mich. 2014), to argue
23 that the Court should take judicial notice of the ERDs, Ex. 5, and the Official Catholic Directory,
24 Ex. 10. However, *Overall* applied a standard for incorporation by reference that is far more
25 lenient than that applicable in the Ninth Circuit, stating that it could rely on extrinsic documents
26 if they "filled in the contours and details" of a complaint. *Overall*, 23 F. Supp. 3d at 824 (citing
27 *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997)). In so concluding,
28 *Overall* erroneously relied on *Yeary*, ignoring that the materials in *Yeary* "added nothing new."

1 *Yeary*, 107 F.3d at 445 (emphasis added).

2 Moreover, the cases on which *Overall* relied in taking judicial notice of the Official
 3 Catholic Directory, 23 F. Supp. 3d at 824, were not decided on motions to dismiss, but on
 4 motions for summary judgment. *See Marshall v. Sisters of Holy Family of Nazareth*,
 5 399 F. Supp. 2d 597, 606 (E.D. Pa. 2005); *Catholic Charities of Me., Inc. v. City of Portland*,
 6 304 F. Supp. 2d 77, 85-86 (D. Me. 2004); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200,
 7 202-03 (D. Conn. 2000). Regarding the ERDs, *Overall* asserted that United States Council
 8 Conference of Bishops is “a source whose accuracy cannot be questioned,” 23 F. Supp. 3d at
 9 825, but failed to consider that the ERDs are not “matters of public record.” *Lee*, 250 F.3d at 689
 10 (citation omitted).

11 **B. None of Defendants’ Exhibits May be Considered for the Truth of Matters Asserted**
 12 **Therein.**

13 Even if a document is judicially noticeable, judicial notice of a document submitted in
 14 response to a Rule 12(b)(6) motion to dismiss is limited to the *existence* of the document or its
 15 contents and may not extend to the *truth* of the matters asserted therein. *See, e.g., Lee*, 250 F.3d
 16 at 690 (“On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of [a
 17 document], it may do so ‘not for the truth of the facts recited therein, but for the existence of the
 18 [document], which is not subject to reasonable dispute over its authenticity.’”) (citation omitted);
 19 *Shenwick v. Twitter, Inc.*, 2017 WL 4642001, at *2 (N.D. Cal. Oct. 16, 2017) (“the Court [may]
 20 take[] judicial notice only of the statements contained therein, but not for the purpose of
 21 determining the truth of those statements.”) (citations omitted). Indeed, this Court has previously
 22 concluded that some of Defendants’ same documents were “inappropriate for judicial notice” on
 23 a motion to dismiss because “Dignity cite[d] to [those] documents for the truth of the matters
 24 asserted within.” *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 912 n.2 (N.D. Cal. 2013), *rev’d*
 25 *on other grounds*.

26 Defendants once again improperly rely on the truth of assertions stated within the
 27 Exhibits. For example, Defendants rely on an article written by the Vice Chair of Dignity’s
 28 board—*after this litigation commenced*—in support of their contention that Dignity,

1 “in association with the Catholic Church, remains based on Gospel values as expressed through
2 our Catholic heritage.” Motion 7-8 (citing Ex. 7). They cite various portions of Dignity’s website
3 for the purported truth of Dignity’s history, mission, and religious character. *Id.* at 5 (citing
4 Exs. 3-6); *see also id.* at 19. They cite Dignity’s Bylaws, Exhibit 1, for the purported truth of
5 Dignity’s “religious character” and for the contention that Dignity is “deeply connected to the
6 Catholic Church.” Motion 7-8, 19-20. They cite a *nihil obstat* for the purported truth of the
7 purpose of Dignity’s 2012 organization, *Id.* at 27 (citing Ex. 11), though notably, Defendants
8 misconstrue this document. *See* MTD Opp’n 19-20.

9 Defendants also cite Bylaws, Plan documents, and Subcommittee Charters, not merely
10 for the existence of their provisions, but to argue that such provisions prove that entities in fact
11 engage in certain conduct. *See* Motion 4-7, 20, 22-24 (citing Ex. 1); *id.* at 9 (citing Ex 8);
12 *id.* at 20 (citing Ex. 9). *Contra Rhodes v. Sutter Health*, 2012 WL 662462, at *3 (E.D. Cal. Feb.
13 28, 2012) (“While the court will take judicial notice of the articles of incorporation, it will not
14 assume that they were complied with by defendants.”). Likewise, Defendants improperly cite
15 various standards of conduct, not for their mere existence, but in an attempt to demonstrate that
16 Dignity in fact complies with such standards. *See, e.g.,* Motion 5 (citing Ex. 3-6); *id.* at 6-7
17 (citing Exs. 1, 6); *id.* at 9 (citing Ex 9). Whether the actions of Defendants comply with any
18 documents they may have created is a question of fact that cannot be decided on a motion to
19 dismiss.

20 Defendants’ reliance on the Official Catholic Directory is also improper, as the
21 significance of an entity being listed therein is disputed. Motion 6 (citing Ex. 10). *See United*
22 *States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993) (“There is no dispute that the NRC Report
23 exists, but there is considerable dispute over the significance of its contents.”); *Faulkner v. Beer*,
24 463 F.3d 130, 134 (2d Cir. 2006) (judicial notice requires “that there exist no material disputed
25 issues of fact regarding the relevance of the document”); *Coto Settlement v. Eisenberg*, 593 F.3d
26 1031, 1038 (9th Cir. 2010).

27 Ultimately, the Court should disregard Defendants’ Exhibits because they are offered for
28 the improper purpose of engaging in factual disputes on a motion to dismiss. *In re: Immune*

1 *Response Sec. Litig.*, 375 F. Supp. 2d 983, 995 (S.D. Cal. 2005) (“[C]onsideration of the exhibits
2 encourages a weighing of factual disputes; a process that is improper on a motion to dismiss
3 At this stage, the Court must resolve any ambiguities in Plaintiffs’ favor.”); *Corinthian Colls.*,
4 655 F.3d at 999 (“[W]e may not, on the basis of evidence outside of the Complaint, take judicial
5 notice of facts favorable to Defendants that could reasonably be disputed.”).

6 **V. CONCLUSION**

7 Defendants’ Request for Judicial Notice should be denied.

8
9 DATED February 9, 2018.

10 KELLER ROHRBACK L.L.P.

11 *s/ Matthew M. Gerend*

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which in turn sent notice to all counsel of record.

/s/ Matthew M. Gerend

Matthew M. Gerend

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