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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Case No. 6:15-cv-01517-TC

Plaintiffs,

**DEFENDANTS' RESPONSE TO
MOTION *IN LIMINE* SEEKING
JUDICIAL NOTICE (ECF No. 254)**

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

RESPONSE TO MOTION *IN LIMINE* SEEKING JUDICIAL NOTICE

Defendants hereby respond to Plaintiffs' motion *in limine* seeking judicial notice, ECF No. 254. In that motion, Plaintiffs seek judicial notice of 386 documents identified in nine appendices. *Id.* For the reasons that follow, and as specifically delineated in the table attached

hereto as exhibit A, Defendants do not object to the Court taking judicial notice of the 286 identifiable documents that were created by defendant agencies and are believed by Defendants, after review of Plaintiffs' motion *in limine*, to be authentic.¹ These 286 documents comprise nearly 75 percent of the total documents listed in Plaintiffs' motion. Defendants take no position as to the 58 documents that are government documents that were not created by agency defendants or could not be identified or authenticated by Defendants. Finally, with regard to the 42 documents that are not government reports from government sources but are instead reports, news articles, videos, and scientific articles produced by third parties as well as documents which are purported to be government documents but for which no source is provided, or the source is a third-party website, Plaintiffs have not yet provided an adequate foundation for the Court to take judicial notice of such documents. Defendants respectfully request that the Court take judicial notice of the existence and authenticity of documents for which Defendants have "no objection," and that it decline to take judicial notice of documents for which Plaintiffs have not proffered an adequate foundation.

Federal Rule of Evidence 201 allows the Court to "judicially notice a fact that is not subject to reasonable dispute" because it is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Judicial notice may be taken of documents available on government websites." *Jarvis v. JP Morgan Chase Bank, N.A.*, No.

¹ Defendants maintain that this case should be dismissed and have moved to terminate it on multiple jurisdictional and substantive grounds. Defendants recognize that this Court disagrees and has entered orders governing trial and pretrial proceedings. *See e.g.* April 12, 2018 Minute Order, ECF No. 192 (scheduling expert disclosure deadlines and setting an October 29, 2018 trial date). Defendants' compliance with Court orders, however, cannot and should not be viewed as a concession that these proceedings are proper; nor can or should Defendants' compliance be viewed as a waiver of Defendants' objections to these proceedings.

CV 10-4184-GHK, 2010 WL 2927276, at *1 (C.D. Cal. July 23, 2010). By contrast, “courts are hesitant to take notice of information found on third party websites and routinely deny requests for judicial notice, particularly when the credibility of the site’s source information is called into question by another party.” *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1028 (C.D. Cal. 2015).

Importantly, “[w]hile matters of public record are proper subjects of judicial notice, a court may take notice only of the existence and authenticity of an item, not the truth of its contents.” *Romero v. Securus Techs., Inc.*, 216 F. Supp. 3d 1078, 1085 n.1 (S.D. Cal. 2016) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001)); *see also Shaterian v. Wells Fargo Bank, Nat. Ass'n*, No. C-11-920 SC, 2011 WL 2314151, at *1 (N.D. Cal. June 10, 2011) (“[T]he Court may not take judicial notice of the truth of the facts recited within a judicially noticed document.”); *Gerritsen*, 112 F. Supp. 3d 1011, 1029 (C.D. Cal. 2015) (noting court can take judicial notice of new articles “only to ‘indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.’” (quoting *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010))).

Plaintiffs allege that the documents for which they seek judicial notice “are official government reports and data” from “sources of information the accuracy of which cannot reasonably be questioned.” *Id.* at 2. As set forth in detail in the attached exhibit, however, many of the documents for which Plaintiffs seek judicial notice are not official government reports, but are instead reports produced by third parties. *See, e.g., id.* Exs. 66-69, 102, 108, 293. They include documents of international entities such as the United Nations, *see, e.g. id.* Exs. 23, 27, as well as news articles, videos, and scientific articles produced by non-governmental entities. *See, e.g. id.*, Exs. 68, 80, 100, 102, 282, 322, 360. Plaintiffs also seek notice of documents

produced by government entities that are not a party to this law suit, including prior presidential administrations, *see, e.g.*, Exs. 1, 2, 4, 28-29, 32, Congress, *see, e.g., id.* Exs. 34, 39, 43, and other federal agencies which are not Defendants to this action. *See, e.g.*, Exs. 184, 268. 287. Some of the links to these documents are from third party, non-governmental websites making it difficult to identify the original source of the document; others have no source listed. *See, e.g.*, Exs. 1, 55, 69, 343, 299. The foregoing examples are illustrative, not comprehensive.

Defendants have reviewed the list of documents for which Plaintiffs seek judicial notice, identified those documents that are the documents of defendant agencies, and determined the authenticity of those. The documents that can be located based on the information Plaintiffs provided and the authenticity of which can be determined are listed in the “Gov’t Response” column of the attached exhibit as “no objection,” meaning Defendants do not object to the Court taking judicial notice of the existence and authenticity of those documents. Defendants would object, however, to the extent Plaintiffs seek judicial notice of the truth of the content of those documents.

The documents created by government entities that are not parties to this lawsuit are listed in the “Gov’t Response” column of the attached exhibit as “no position,” meaning Defendants do not have sufficient information at this time to determine whether such documents are authentic. For these documents, while Defendants make no objection, it nonetheless remains Plaintiffs burden under Federal Rule of Evidence 201 to establish that the existence and authenticity of each document is “generally known” within the District of Oregon or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

For the documents that are not government reports from government sources, but are instead reports, news articles, videos, and scientific articles produced by third parties as well as documents which are purported to be government documents but for which no source is provided, or the source is a third-party website, Plaintiffs have not yet provided an adequate foundation for the Court to take judicial notice of the authenticity of such documents, and the request for judicial notice as to those documents should be denied on that basis. These documents are listed in the “Gov’t Response” column of the attached exhibit as “inadequate foundation.”

Dated: July 24, 2018

Respectfully submitted,
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