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 19
 20 **UNITED STATES DISTRICT COURT**
 21 **CENTRAL DISTRICT OF CALIFORNIA**

22 **MATTHEW BRACH**, an individual,
 23 *et al.*,
 24 Plaintiffs,
 25 v.
 26 **GAVIN NEWSOM**, in his official ca-
 27 pacity as the Governor of California, *et*
 28 *al.*,
 Defendants.

Case Number: 2:20-CV-06472-SVW-AFM

**PLAINTIFFS OPPOSITION TO DE-
 FENDANTS' REQUEST FOR JUDI-
 CIAL NOTICE [DOC. 36]**

Judge: Hon. Stephen V. Wilson
 Courtroom: 10A



1 I. INTRODUCTION

2 Defendants rely on 41 exhibits attached to their Request for Judicial Notice
3 (“RJN”), ECF No. 36, to oppose Plaintiffs’ application for a TRO and preliminary in-
4 junction. Although Defendants do not explain the purpose for which they ask the
5 Court to take judicial notice of these documents, they presumably want the Court to
6 accept the statements contained therein for the truth of the matters asserted. But De-
7 fendants do not even attempt to show how any of the attached documents satisfy the
8 requirements of Federal Rule of Evidence 201, which permits a court to take judicial
9 notice of a fact *only if* it “is not subject to reasonable dispute because it: (1) is gener-
10 ally known within the trial court’s territorial jurisdiction; or (2) can be accurately and
11 readily determined from sources whose accuracy cannot reasonably be questioned.”
12 The accuracy of the *facts* asserted in Defendants’ exhibits is hotly contested, and this
13 court cannot “verify the factual data and calculations contained” therein. *Herwick v.*
14 *Budget Rent A Car Sys. Inc.*, 2011 WL 13213626, at *11 (C.D. Cal. Mar. 22, 2011).

15 Defendants were free to present evidence in the form of sworn declarations sub-
16 mitted by experts competent to testify to the facts asserted—just as Plaintiffs did in
17 support of their TRO application. Defendants declined to do so, submitting a single
18 declaration by Dr. Watt that fails to discuss any of the scientific studies or documents
19 attached to the RJN. Yet in the absence of expert testimony, Defendants now ask the
20 Court to take judicial notice of dozens of government publications and news articles—
21 and presumably accept the facts and analysis presented in those documents as correct.
22 This request is wildly improper, and the Court should reject it. While Plaintiffs do not
23 object to the Court taking judicial notice of the fact that the various reports and news
24 articles *were published*, the Court should not take judicial notice of any of the facts
25 and conclusions contained in those documents.

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27 ///

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1 **II. OBJECTIONS**

2 Plaintiffs do not object to Exhibits A, B, E, DD, JJ, or NN. However, Plaintiffs
3 do object to Exhibits C-D, F-CC, EE-II, KK-MM, and OO on the grounds set forth as
4 follows:

5 1. **Newspaper Articles, Press Releases, and Press Conferences should**
6 **not be admitted for the truth of the matter asserted.**

- 7 a. **Exhibit V:** is a California Department of Public Health press release;
- 8 b. **Exhibit X:** is a news article published by *Fatherly*;
- 9 c. **Exhibit Y:** is a news article published by *NPR*;
- 10 d. **Exhibit Z:** is a news article published by *The New York Times*;
- 11 e. **Exhibit AA:** is a news article published by *The Washington Post*;
- 12 f. **Exhibit BB:** is a news article published by *The New York Times*;
- 13 g. **Exhibits KK – MM:** are press releases by the California Department
14 of Education;
- 15 h. **Exhibit OO:** is a transcript of Gov. Newsom’s July 17th Press Confer-
16 ence published by *Rev.*

17 Plaintiffs object to Defendants’ request for judicial notice as to Exhibits V, X-
18 BB, KK-MM, and OO. “The cases in which courts take judicial notice of newspaper
19 articles and press releases” are “limited to a narrow set of circumstances.” *Gerristen v.*
20 *Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1028 (C.D. Cal. 2015). The veracity
21 of the information contained in these exhibits cannot be judicially noticed, “because
22 often [] the accuracy of information in newspaper articles and press releases cannot
23 be readily determined and/or can be reasonably questioned.” *Id.* (citing FED. R. EVID.
24 201).

25 This Court has held that while the “court can take judicial notice of a published
26 newspaper for the mere fact of publication,” the Court cannot take judicial notice “for
27 the truth of the contents therein.” *L.A. Printex Industries, Inc. v. Forever 21, Inc.*,
28 2009 WL 10698834, *6 (C.D. Cal, Oct. 27, 2009).

1 Judicial notice would be especially inappropriate here, as the articles attached to
 2 Defendants' RJN mischaracterize and misrepresent the scientific studies they discuss.
 3 As Dr. Jayanta Bhattacharaya explains in his Declaration in support of Plaintiffs' Op-
 4 position, Exhibits Y & Z cited "no viral sequencing analysis ... to verify the direction
 5 of disease spread." (Decl. Bhattacharya ¶ 5). Dr. Bhattacharaya also explains the prob-
 6 lem with Exhibit AA, which is that the article does not establish how the students re-
 7 ceived the virus. (Decl. Bhattacharya ¶ 14). Exhibit BB is also inappropriate for judi-
 8 cial notice because the article does not provide the necessary evidence of whether the
 9 student "transmitted the virus or even suffered any adverse effects." (*Id.*).

10 Because news articles, press releases, and press conferences are inappropriate
 11 subjects for judicial notice, Defendants' request for Judicial Notice as to Exhibits V,
 12 X-BB, KK-MM, and OO should be denied.

13 **2. Studies are not proper for Judicial Notice:**

- 14 a. **Exhibit D:** is an "Update on California's Pandemic Roadmap" study
 15 presentation;
 16 b. **Exhibits Q - U:** are "COVID-19 County Data Monitoring" study
 17 overviews;
 18 c. **Exhibit W:** is a Center for Disease Control ("CDC") a weekly report
 19 study;
 20 d. **Exhibit CC:** is a CDC study titled "Contact Tracing during the Coro-
 21 navirus Disease Outbreak";

22 Plaintiffs object to Defendants' request for judicial notice as to Exhibits D, Q-
 23 U, W, and CC. A court can take judicial notice of a study for "background material,
 24 without relying on it to resolve any factual dispute[s]." *U.S. v. 14.02 Acres of Land*
 25 *More of Less in Fresno County*, 547 F.3d 943, 955 (9th Cir. 2008). However, as this
 26 Court has ruled, a "[s]tudy is not appropriate for judicial notice" when the facts "are
 27 not generally known in this Court's territorial jurisdiction." *Duy Nam Ly V. J.B. Hunt*
 28

1 *Transport Inc.*, 2019 WL 2902501 (C.D. Cal. Apr. 25, 2019) (denying request for ju-
 2 dicial notice because “the Court [was] not confident that the accuracy of the Study
 3 cannot reasonably be questioned”).

4 Many of these studies provide hospital trend statistics, predictions on the lon-
 5 gevity of COVID-19, preventative measure directives, indicators—presumably based
 6 on scientific studies—and predictions as to where COVID-19 is most prevalent. The
 7 fact that the State has frozen its monitoring list due to a “data meltdown” involving
 8 “hundreds of thousands of missing COVID-19 test results” further illustrates that the
 9 accuracy of the data is questionable.¹

10 Judicial notice would be especially inappropriate here, as two of the studies at-
 11 tached to Defendants’ RJN lack necessary information for the court to take Judicial
 12 Notice as to the points that Defendants desire this Court to take. As Dr. Jayanta
 13 Bhattacharaya explains in his Declaration in support of Plaintiffs’ Opposition, the
 14 problem with the South Korea study (Ex. CC) is that the authors “do not sequence the
 15 genome of the viruses identified to documented mutation patterns. Consequently, they
 16 cannot distinguish whether the index patient passed the virus to the contact or the
 17 other way around.” (Decl. Bhattacharya ¶ 9). Furthermore, the CDC article regarding
 18 the overnight camps in Georgia (Ex. W) is not analogous to the school setting, and
 19 many of the students developed symptoms at a time that clearly show that they did not
 20 contract the virus at the camp. (Decl. Bhattacharya ¶ 15). Dr. Bhattacharya concluded
 21 that “there is no indication of whether the transmission was from staff to student, or
 22 student to student.” (*Id.*).

26 ¹ Dustin Gardiner & Erin Allday, *California’s coronavirus response is in crisis mode,*
 27 *as computer glitch makes case data unreliable*, SAN FRANCISCO CHRONICLE (Aug. 7,
 28 2020, 9:23 AM), <https://tinyurl.com/yxs4qyot>.

1 As such, it is clear the contents contained in these exhibits are not generally
2 known and may be subject to error or alternative analysis by others. There is no evi-
3 dence as to the scientific bases upon which the State relies in producing these studies
4 and the Court should not take Judicial Notice as to Exhibits D, Q-U, W, and CC.

5 3. **Government Documents should not be admitted unless the facts are**
6 **beyond controversy.**

- 7 a. **Exhibit C:** is a March 22, 2020 Public Health Officer’s Directive that
8 is unexecuted and purports to list “Essential Critical Infrastructure
9 Workers”;
- 10 b. **Exhibits F - H:** are orders of the State Public Health Officer;
- 11 c. **Exhibits I - M:** are California Department of Public Health guidance
12 documents;
- 13 d. **Exhibits N – P:** are documents associated with a waiver process for
14 schools to open;
- 15 e. **Exhibit EE:** is a guidebook published by the California Department
16 of Education (“CDE”);
- 17 f. **Exhibit FF:** is a FAQ page found on the CDE website;
- 18 g. **Exhibit GG:** is a document produced by the CDE which appears to be
19 a summary of Senate Bill 98;
- 20 h. **Exhibit HH:** appears to be a form that teachers or schools are to fill
21 out in response to Exhibit GG;
- 22 i. **Exhibit II:** is a letter dated July 15, 2020 by CDE in which they sum-
23 marize the 2020 Budget Act.

24 Defendants have produced hundreds of pages of documents that appear to be
25 official government documents (Exhibits C, F-P, EE-II). The general rule is that “judi-
26 cial notice is appropriate for records and reports of administrative bodies.” *Gonzales v.*
27 *Marriott International, Inc.*, 142 F.Supp.3d 961, 968 (C.D. Cal. 2015) (quoting *United*
28 *States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943, 955 (9th

1 Cir. 2008)). However, because “the effect of judicial notice is to deprive a party of an
 2 opportunity to use rebuttal evidence, cross-examination, and argument to attach con-
 3 trary evidence, caution must be used in determining that a fact is beyond controversy
 4 under Rule 201(b).” *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142 (9th Cir. 2005). As
 5 this Court has previously explained when addressing a request for judicial notice of a
 6 similar government document: “The Court may take judicial notice of the fact that
 7 this document exists, however, it would be inappropriate to accept all of the contents
 8 within the document as facts beyond reasonable dispute. Defendant is free to cite to
 9 these public records and make arguments in its brief regarding the appropriate level of
 10 deference that the Court should give to the documents; judicial notice is unnecessary
 11 and therefore, the Court will not take judicial notice of the entirety of these docu-
 12 ments.” *Delarosa v. Boiron, Inc.* 818 F.Supp.2d 1177, 1182 n.3 (C.D. Cal. 2011). The
 13 Court should take the same approach here. While Plaintiffs do not object to this Court
 14 taking judicial notice that these official documents exist, it is inappropriate for the
 15 Court to accept all the contents within the document as fact.²

16 4. **Paragraph 24 is asking the court to take judicial notice of Defend-**
 17 **ant’s Work Product**

18 Paragraph 24 of Defendants’ RJN is merely a recitation of specific numbers and
 19 figures from the study evidenced in Exhibit W. Defendants’ should have had an expert
 20 witness review the study and provide the court with these numbers if Defendants
 21 wanted the Court to rely on them as a basis for denying Plaintiffs’ Application for a
 22
 23

24 ² Furthermore, many of these documents appear to be guidance documents which have
 25 not followed the California Administrative Procedure Act. (Gov. Code, § 11340 *et*
 26 *seq.*) (“APA”). As such, these guidance documents may be unenforceable under Cali-
 27 fornia law as they might be deemed “underground regulations”. *See, Patterson Flying*
 28 *Service v. California Dept. of Pesticide Regulation*, 161 Cal. App. 4th 411, 429
 (2008).

1 Temporary Restraining Order. Because the contents of the study itself are not judi-
2 cially noticeable, the Court should also deny Defendants' request for judicial notice as
3 to the contents of Paragraph 24 of the RJN.

4 **III. CONCLUSION**

5 Defendants' Request for Judicial Notice as to Exhibits C-D, F-CC, EE-II, KK-
6 MM, OO, and the contents of Paragraph 24 of the RJN should be denied.

7
8 Respectfully submitted,

9 Date: August 12, 2020

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