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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA - FRESNO

12 MATTHEW GARRETT, PH.D., an
individual; and PROFESSOR ERIN
13 MILLER, an individual,

14 Plaintiffs,

15 v.

16 CHRISTOPHER W. HINE, General
Counsel of Kern Community College
17 District, in his individual and official
capacity; BILLIE JO RICE, Vice
18 President of Bakersfield College, in
her individual and official capacity,
19

20 Defendants.
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Case No.: 1:21-cv-00845-ADA-CDB

[Honorable Christopher D. Baker]

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' REQUEST FOR JUDICIAL
NOTICE**

22 TO THE ABOVE REFERENCED COURT, PLAINTIFFS, AND THEIR
23 ATTORNEY OF RECORD:

24 Defendants Christopher Hine and Billie Jo Rice ("Defendants") hereby submit their
25 opposition to Plaintiffs' Request for Judicial Notice in support of their Opposition to
26 Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC").

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1 **I. INTRODUCTION**

2 Defendants filed a Rule 12 motion to dismiss Plaintiffs Matthew Garrett and Erin
3 Miller’s (“Plaintiffs”) SAC on August 8, 2022. Plaintiffs filed their opposition to
4 Defendants motion on September 2, 2022. Briefing for the motion to dismiss has been
5 completed since September 12, 2022, and the Court has taken the motion under
6 submission without oral argument. Nonetheless, on March 21, 2023, Plaintiffs filed what
7 they have titled as a “Request for Judicial Notice in Support of Its Opposition to
8 Defendants’ Motion to Dismiss.” The Request for Judicial Notice is unrelated to
9 Defendants’ motion to dismiss. Plaintiffs have filed it to either improperly persuade the
10 Court to deny Defendants motion by placing before the Court personnel actions that have
11 occurred since the motion was filed, to improperly use this case as an avenue to publicize
12 Plaintiff Garrett’s termination proceedings, or both. Regardless of Plaintiffs’ motive, the
13 filing is clearly improper.

14 Plaintiffs ask this Court to take judicial notice of: (1) Exhibit A: The Board of
15 Trustees of the Kern Community College District Statement of Charges in the Matter of
16 the Dismissal of Matthew Garrett, a tenured academic employee; (2) the Statement of
17 Charges seeks dismissal of Dr. Garrett’s employment with Kern Community College
18 District; and (3) the existence of the allegations set forth in the Statement of Charges.
19 Plaintiffs cite Federal Rule of Evidence Section 201 to support their request but fail to
20 provide any authority authorizing this Court to take judicial notice of the documents or the
21 information contained within them. Indeed, Plaintiffs’ SAC does not refer to the
22 Statement of Charges, nor does the Plaintiffs’ Request for Judicial Notice contain even a
23 short explanation of how the Statement of Charges “support” Plaintiffs’ opposition to the
24 motion to dismiss. Not only should the Court deny Plaintiffs’ request, but the Court
25 should sanction Plaintiffs and their attorneys for abusing the judicial system in this
26 manner.

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1 **II. ARGUMENT**

2 **A. PLAINTIFFS' REQUEST DOES NOT MATCH WHAT IS ATTACHED TO**
 3 **THEIR ATTORNEY'S DECLARATION**

4 As a preliminary matter, Plaintiffs' request does not match what their attorney has
 5 attached to his declaration. Their Request for Judicial Notice lists: (1) "Exhibit A: The
 6 Board of Trustees of The Kern Community College District Statement of Charges In the
 7 Matter of the Dismissal of Matthew Garrett, A Tenured Academic Employee; (2) The
 8 Statement of Charges seeks the dismissal of Dr. Garrett's employment with Kern
 9 Community College District; and (3) The existence of the allegations set forth in the
 10 Statement of Charges." Their attorney, Arthur Willner, then inexplicably submits a
 11 declaration that has a number of un-related documents. The four exhibits attached to his
 12 declaration are: (1) The Statement of Charges against Garrett; (2) an email from Plaintiff
 13 Garrett; (3) a webpage printout showing the President of the District's Board of Trustees;
 14 and (4) a printout of an Internet web page showing the District's next regularly scheduled
 15 Board of Trustees meeting. There is no explanation or authority cited in Plaintiffs'
 16 Request regarding why the Court can supposedly take judicial notice of the documents,
 17 except for the Statement of Charges, which Plaintiffs falsely argue is a public record. The
 18 Statement of Charges is a disciplinary document that is not a public record, but has now
 19 become public due to Plaintiffs' improper Request for Judicial Notice.

20 **B. THE DOCUMENTS AND INFORMATION ARE UNRELATED TO**
 21 **PLAINTIFFS' ALLEGATIONS IN THE SAC**

22 For a Rule 12(b)(6) motion, the Court generally should not consider materials
 23 outside of the pleadings unless (1) the extrinsic documents are incorporated into the
 24 Complaint by reference; or (2) are matters of which a court may take judicial notice.
 25 *Orellana v. Mayorkas*, 6 F.4th 1034, 1042-43 (9th Cir. 2021). Judicial notice under
 26 Federal Rule of Evidence 201 permits a court to notice an adjudicative fact if it is "not
 27 subject to reasonable dispute." Fed. R. Evid. 201(b). A fact is "not subject to reasonable
 28 dispute" if it is "generally known within the trial court's territorial jurisdiction," or "can

1 be accurately and readily determined from sources whose accuracy cannot reasonably be
 2 questioned.” Fed. R. Evid. 201(b)(1)–(2). But a court “may not take judicial notice of a
 3 fact that is ‘subject to reasonable dispute.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 689
 4 (9th Cir. 2001) (quoting Fed. R. Evid. 201(b)).

5 Here, Plaintiffs are asking this Court to take judicial notice of the Board of
 6 Trustees of the Kern Community College District’s (“KCCD’s”) Statement of Charges In
 7 the Matter of the Dismissal of Matthew Garrett, A Tenured Academic Employee, that the
 8 Statement of Charges seeks Dr. Garrett’s dismissal from his employment with KCCD, and
 9 the allegations set forth therein asserted by KCCD against Dr. Garrett. (See Plaintiff’s
 10 Request for Judicial Notice at pp. 2-3 “Plaintiff’s RJN.”) Indeed, Plaintiffs rely on *Khoja*
 11 *v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998-1003 (9th Cir. 2018), to support their
 12 assertion. However, in *Khoja*, the Ninth Circuit criticized “[t]he overuse and improper
 13 application of judicial notice and the incorporation-by-reference doctrine” in Rule
 14 12(b)(6) motions, and *Khoja* very clearly applies here.

15 First, the Statement of Charges regarding the dismissal of Matthew Garrett are not
 16 referenced in the SAC. The Ninth Circuit in *Khoja* has made clear that the proponent
 17 requesting judicial notice must make a genuine showing that the document was
 18 incorporated by reference in the complaint. *Khoja*, 899 F.3d 988, 1003. For a plaintiff to
 19 incorporate by reference a document into her complaint, she must “refer[] extensively to
 20 the document or the document [must] form the basis of the plaintiff’s claim.” *Id.* at 1002
 21 (citing *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)). Routinely, where a
 22 party has not incorporated a document by reference to a complaint, courts will refuse that
 23 party’s request to have the court take judicial notice. *Yoon v. Lululemon*, 549 F. Supp. 3d
 24 1073, 1079 (C.D. Cal. 2021) (denying, in part, the plaintiff’s request for judicial notice of
 25 a blog post because it was not incorporated by reference).

26 Here, Plaintiffs ask the Court to take judicial notice of Matthew Garrett’s
 27 Statement of Charges for the termination of his employment. But this is not appropriate
 28 under the law as Plaintiffs’ claims in their SAC are not premised on the Statement of

1 Charges or Garrett’s termination. Plaintiffs do not refer to a Statement of Charges
 2 anywhere in their SAC. Nor does this document form the basis of Plaintiffs’ claims.
 3 Specifically, none of the claims concerns a Statement of Charges or the allegations stated
 4 therein. Plaintiffs fail to explain how the Statement of Charges is relevant to any
 5 allegations in this lawsuit or how it relates to Defendants’ pending Motion to Dismiss.
 6 Indeed, judicial notice of irrelevant documents is improper. *See Ruiz v. City of Santa*
 7 *Maria*, 160 F.3d 543, 548 n. 13 (9th Cir.1998) (denying request for judicial notice, in part
 8 because information to be noticed did not bear on the “relevant issue” before the court).

9 Next, Plaintiffs rely on *Perry v. Vilorio*, 2020 WL 6145102, *3 (C.D. Cal. Sept.
 10 17, 2020), to support their proposition that Matthew Garrett’s Statement of Charges is a
 11 public record and not subject to reasonable dispute. Not only is the cited authority
 12 confusing but it is irrelevant to Plaintiff’s request for judicial notice. Specifically, the
 13 Court in *Perry* granted a request for judicial notice of a school district’s bylaws and
 14 schoolboard’s resolution. Plaintiff makes no such request here. Additionally, Plaintiff’s
 15 assumption that Matthew Garrett’s Statement of Charges *may* be addressed at the April
 16 13, 2023 public hearing (RJN at p. 3), is nothing more than speculation and is not
 17 sufficient to demonstrate the Statement of Charges is a public record. Plaintiffs fail to cite
 18 any authority to support their proposition that a disciplinary notice may be judicially
 19 noticed, because there is no such authority.

20 **C. PLAINTIFFS HAVE NOT EVEN ATTEMPTED TO EXPLAIN HOW THE**
 21 **DOCUMENTS SUPPORT THEIR OPPOSITION TO THE PENDING**
 22 **MOTION TO DISMISS**

23 Because Plaintiffs have disingenuously requested judicial notice, they put very
 24 little effort into the legal authority supporting their request. The most conspicuous
 25 omission is the connection between their Request and the pending motion to dismiss.
 26 Neither Plaintiffs’ Request for Judicial Notice nor Mr. Willner’s declaration contain even
 27 one sentence explaining how the documents they have submitted support, or even relate
 28 to, their opposition to the pending motion to dismiss. They did not make such an

1 argument because they cannot, despite the fact that they have titled their Request as
2 relating to their opposition. This is a clear abuse of process, and the Court should sanction
3 them accordingly. *Acevedo v. Russell Cellular, Inc.*, 2023 WL 2640185, *2 (E.D. Cal.
4 Mar. 24, 2023) (“The Court . . . possesses inherent authority to impose sanctions to
5 manage its own affairs so as to achieve the orderly and expeditious disposition of cases.”).

6 **III. CONCLUSION**

7 Based on the foregoing, Defendants respectfully request that this Court reject
8 Plaintiffs’ request for judicial notice and use its inherent authority to deter such abuses of
9 the legal process in the future.

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11 Dated: April 3, 2023

LIEBERT CASSIDY WHITMORE

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14 By: /s/ David A. Urban

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