No. 17-1740

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAMIAN STINNIE, *et al.*,

Plaintiffs-Appellants,

v.

RICHARD HOLCOMB,
in his official capacity as Commissioner of
the Virginia Department of Motor Vehicles,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(3:16-cv-00044)

RESPONSE IN OPPOSITION TO APPELLANTS' MOTION FOR JUDICIAL NOTICE

Unable to persuade the district court that their complaint asserted facts sufficient to survive a motion to dismiss, Appellants now ask this Court for remarkable relief—relief that, if permitted, many unsuccessful plaintiffs would seek. Specifically, Appellants ask that this Court take judicial notice of a slew of supplemental materials (the "Exhibits") that were not attached to their complaint or their motion-to-dismiss opposition, thereby expand the record beyond what was

before the district court when it ruled, and consider the Exhibits in assessing whether the district court was correct to dismiss the complaint without prejudice. This is Appellants' second attempt to inject the Exhibits into the record; the district court properly rejected their first attempt, striking the documents when Appellants attached them to their Rule 59 motion.

This Court should refuse Appellants' latest attempt to expand the record for two primary reasons. First, Federal Rule of Evidence 201 cannot be used as an expedient to supplement the record on appeal with new documents. It would be especially inappropriate to allow that here, where taking judicial notice of the Exhibits would work an end-run around the district court's order striking the Exhibits, a decision Appellants have appealed. Second, even if it were permissible for Appellants to use judicial notice to expand the record, what they seek notice of is not the Exhibits' existence but instead their own, untested interpretation of the Exhibits' contents. That is not permitted, and their motion therefore should be denied.

A. Judicial notice cannot be used to expand the record considered by the district court in granting the motion to dismiss.

In challenging the district court's decision, Appellants seek to use judicial notice to force appellate consideration of a dozen Exhibits that they believe show

the alleged flaws in the district court's analysis.[1] But none of the Exhibits was attached to their complaint (as other documents were), nor considered by the district court before it dismissed the complaint, and therefore they should not be considered by this Court.[2]

Appellants' request to expand the record through judicial notice should be rejected. As this Court noted in *Goldfarb v. Mayor of Baltimore*, which Appellants cite, Federal Rule of Evidence 201 is not to be used as an "expedient" to force appellate consideration of evidence that was not before the district court.[3] The rule is well-recognized, in this circuit and beyond, that appellate courts will not take judicial notice of documents that were not presented and considered below. In *Rogers v. Deane*, for instance, this Court declined to take judicial notice of an order of the Virginia Board of Accountancy that "had no bearing on any of [the district court's] rulings."[4] And other courts of appeal agree.[5] In the Fifth Circuit,

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[1] Appellants' Mot. for Judicial Notice ("Motion") at 14-15, ECF No. 18. *See also* JA 613 (submitting "corrected . . . facts" that the district court should have relied on in assessing the complaint).

[2] Exhibit 3 was presented to the district court in connection with a discovery dispute, and not until the briefing and argument on the motion to dismiss was complete; indeed, the document was created seven months after the complaint was filed. *See* JA 746 n.1.

[3] 791 F.3d 500, 511 (4th Cir. 2015).

[4] 594 F. App'x 768, 770 (4th Cir. 2014).

for instance, "a party may not avoid the rule against supplementing the record with a document not before the district court by requesting that the appellate court take judicial notice of the document."[6] In the Ninth Circuit, "a plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial notice of such facts."[7]

It is not surprising that judicial notice cannot be used to circumvent the rule against expanding the record with materials not before the district court. This Court has consistently reiterated the same principle in enforcing similar rules. For instance, parties cannot rely on addendum material filed under Local Rule 28(b) if it was not considered by the district court below.[8] Similarly, while this Court possesses the authority under Rule 10(e)(2) "to order that the record be supplemented," exercise of that authority is "unnecessary" when the document

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[5] *See, e.g.*, *U.S. ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 303 (3d Cir. 2011) ("[W]e think that ordinarily a court of appeals should not take judicial notice of documents on an appeal which were available before the district court decided the case but nevertheless were not tendered to that court, the precise situation here.").

[6] *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417 n.4 (5th Cir. 2012).

[7] *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc).

[8] *See Conaway v. Polk*, 453 F.3d 567, 579 n.14 (4th Cir. 2006) ("Because these [Local Rule 28(b)] attachments were not submitted to the district court, we have not considered them in resolving this appeal."); *Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) ("[W]e decline to consider the letter as well as the other documents not considered by the district court.").

proposed for addition to the record was not "presented to or considered by the district court in the proceedings below."[9]

These prohibitions exist for a good reason; the many "courts refusing to consider material that was not before the district court have stressed the importance of the district court's role as the first-instance finder of fact."[10] Here, Appellants denied the district court that role by only bringing forward the Exhibits on a motion for reconsideration after the district court had already dismissed the complaint. At that point, the district court correctly explained that "the documents were not part of the consultable record at the pleading stage," could not "form the basis of the Reconsideration Motion," and "should be stricken."[11] If Appellants had wished to rely on the Exhibits, Appellants should have timely presented them

[9] *Rogers*, 594 F. App'x at 770. *See also Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) ("Plaintiffs also attempt to rely on several documents that were not before the district court when it considered defendant's motion for summary judgment . . . . [W]e decline to consider the letter as well as the other documents not considered by the district court."); Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3956.4 (4th ed.) ("Rule 10(e) should not be used to insert in the record items that are not properly a part of it—such as materials that were not presented to the district court during the litigation that led to the challenged district-court ruling.") (footnote omitted); 3-28 James W. Moore et al., *Moore's Manual: Federal Practice and Procedure* § 28.15 (2017) ("The purpose of Appellate Rule 10(e) is . . . not to enable the losing party to merely add new material to the record in order to collaterally attack the trial court's decision.").

[10] *See, e.g.*, Wright & Miller, 16A Fed. Prac. & Proc. Juris. § 3956.1 (4th ed.) (explaining that "the court of appeals will not consider matter that is not part of the record on appeal") (citing cases) (footnotes omitted).

[11] JA 746.

in the district court—or, given the dismissal of the complaint *without* prejudice, filed a new suit. Permitting them to rely on the Exhibits now would undermine the judicial process.[12]

A final related reason militating against Appellants' motion is that it is obviously an alternative vehicle for accomplishing what they partly seek in this appeal: reversal of the district court's order striking the Exhibits.[13] Indeed, Appellants' 15-page motion reads like an extension of their 57-page Opening Brief, offering an alternative argument—though one not raised below—about why the Exhibits should be considered.[14] Applying Appellants' expansive view of judicial notice would effectively moot the appeal as to that point.

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[12] *Cf. Castine v. Astrue*, 334 F. App'x 175, 177 (10th Cir. 2009) ("Allowing a party to 'sand-bag' the district court by raising an issue on appeal that the party did not raise in the district court results in 'an inefficient use of judicial resources.'" (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985))).

[13] *See, e.g.*, Opening Br. of Appellants ("Opening Br.") at 6 (Issue Presented number 5: "Did the District Court err in granting the Commissioner's Motion to Strike the Exhibits attached to the Debtors' Post-judgment Motions?"), ECF No. 16.

[14] *Compare id.* at 9 n.2 ("Even if this Court does not reverse the District Court's Order granting the Commissioner's Motion to Strike the documents discussed, this Court may take judicial notice of them pursuant to the Debtors' Motion for Judicial Notice."), *with* Motion at 3 ("But even if this Court does not overturn that decision, it should still consider the Exhibits and the information contained therein in support of the Debtors' appeal pursuant to this Motion.").

B. Appellants seek judicial notice not of the existence of the Exhibits, but of their interpretation of the Exhibits' contents.

Judicial notice is also not warranted because Appellants are not asking the Court to take judicial notice of the existence of the Exhibits. Instead, what they "actually seek[is] notice of [their] own interpretation" of the Exhibits' contents.[15]

This Court has emphasized that "whether information is the proper subject of judicial notice depends on the use to which it is put."[16] Here, Appellants seek to rely on their interpretation of the Exhibits to undermine the district court's analysis of the complaint and the other materials that were actually before the court. They readily concede that their purpose in requesting judicial notice is "to show that license suspension for unpaid court debt is an administrative action, rather than a judicial order,"[17] and they devote an entire section of their Opening Brief to advance their particular reading of the Exhibits' contents.[18]

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[15] *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 217 (4th Cir. 2009) ("declin[ing] to judicially notice" documents where the "parties clearly and reasonably disagree[d] about the meaning to be ascribed to" them).

[16] *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013).

[17] Motion at 14.

[18] Opening Br. at 9-13.

But, by its terms, Federal Rule of Evidence 201 allows judicial notice only of "a fact that is *not* subject to reasonable dispute."[19] Indeed, "[a] high degree of indisputability is the essential prerequisite."[20] As this Court explained in *Rogers v. Deane*, distinguishing between the fact of a document's existence and the information it contained, "only indisputable facts are subject to judicial notice. Although the filing by the Board of an order reprimanding Deane is indisputable, the factual findings contained therein are not."[21] Thus, the Court could take notice of the existence of the Exhibits, but their bearing on Appellants' argument is obviously subject to reasonable dispute.[22]

Appellants' various arguments why the Exhibits are not subject to reasonable dispute do not carry the day. First, it is not enough to point out that many of the Exhibits are records that are publicly available.[23] Quoting *Philips v. Pitt County Memorial Hospital*, Appellants state that the Court "'may properly

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[19] Fed. R. Evid. 201(b) (emphasis added). *See also United States v. Zayyad*, 741 F.3d 452, 463 (4th Cir. 2014) ("'Only indisputable facts,' after all, 'are susceptible to judicial notice.'") (quoting *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317 n.* (4th Cir. 2004)).

[20] Fed. R. Evid. 201 advisory committee's note to 1972 proposed rule.

[21] *Rogers*, 594 F. App'x at 770-71 (internal citations omitted).

[22] *See Rogers*, 594 F. App'x at 770.

[23] *See* Motion at 12. *See also id.* at 4-8 (providing web addresses for Exhibits 1-2, 4, 8, and 11-12).

take judicial notice of matters of public record.'"[24] But "matters of public record" is not the equivalent of "matters discussed in public records." Judicial notice may not be taken on appeal of information just because it is found in a publicly available record. Indeed, if Appellants' expansive interpretation were right, then the record would never be closed, especially in litigation involving public entities; on appeal, judicial notice could always be taken of new evidence extracted from "public records."

Moreover, even if a document is a public record that does not mean that the significance of its contents is "not subject to reasonable dispute."[25] It is one thing to take judicial notice of statistics, the undisputed information at issue in multiple cases relied on by Appellants. For instance, in *Hall v. Virginia*, the Court took judicial notice of voting-age population statistics compiled by the government and placed online;[26] and in *comScore, Inc. v. Integral Ad Science, Inc.*, the court took judicial notice of court-docket statistics made available by the Administrative Office of United States Courts and the United States Patent and Trademark Office.[27] But it would be another thing altogether to accept as true the meaning

[24] Opening Br. at 12 (quoting *Philips*, 572 F.3d. 176, 180 (4th Cir. 2009)).

[25] Fed. R. Evid. 201(b).

[26] 385 F.3d 421, 424 & n.3 (4th Cir. 2004).

[27] 924 F. Supp. 2d 677, 690 n.15 (E.D. Va. 2013).

Appellants have assigned to the fragments of language they have pulled from various websites.[28]

Second, Appellants wrongly assume that information found in court records is necessarily a proper subject of judicial notice.[29] Not so. This Court has taken judicial notice of the fact of a party's guilty plea[30] and of a party's conviction,[31] for instance, but it does not accept as true everything that may be recorded in a court document.[32] Thus, Appellants may point to Exhibits 5-7 to show that the Appellants were issued summonses, but not to assert the truth of all the matters contained in those summonses.

Finally, judicial notice can also not be taken of Exhibit 3, the declaration prepared by Llezelle Dugger many months after the complaint. Even accepting as true Appellants' characterization of the declaration as "testimony from a reliable

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[28] *See* Motion at 4-9 (explaining the significance of each Exhibit). *See United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (approving district court's taking "judicial notice of the *facts* contained on the website, not any *interpretation* of what constitutes a naturalization review").

[29] *See* Motion at 10-11. *See also id.* at 6-7 (discussing Exhibits 5-7 and 9-10).

[30] *See Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1240 (4th Cir. 1989).

[31] *See Brockington v. Boykins*, 637 F.3d 503, 505 n.* (4th Cir. 2011).

[32] *Cf. id.* (expressly "not resolv[ing] the issue of whether judicial notice may be taken of the facts underlying the conviction. . . . [W]e leave for another day the question of whether such facts—including facts essential to the conviction—are properly before us on a motion to dismiss for the truth of the matter asserted, or whether such consideration is barred by the rule against hearsay.").

witness,"[33] such evidence is hardly the type of information that is "not subject to reasonable dispute."

CONCLUSION

For those reasons, Appellants' motion should be denied.

Respectfully submitted,

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in his official capacity as Commissioner of the Virginia Department of Motor Vehicles,

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[33] Motion at 13.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 2,475 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/
Trevor S. Cox

CERTIFICATE OF SERVICE

I certify that on August 21, 2017, I electronically filed this document with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/
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