

SUPREME COURT COPY COPY

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Case No. S194708

**IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

SIERRA CLUB,

*Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
COUNTY OF ORANGE,

*Respondent.*

SUPREME COURT  
FILED

DEC 18 2009

Frederick K. Ohlrich Clerk

Deputy

COUNTY OF ORANGE.

*Real Party in Interest.*

After A Decision By The Court Of Appeal  
Fourth Appellate District, Division Three, Case No. G044138  
(195 Cal.App.4th 1537, 125 Cal.Rptr.3d 913)

Appeal from Orange County Superior Court  
Honorable James J. Di Cesare, Judge  
Trial Court Case No. 30-2009-00121878

**OPPOSITION OF REAL PARTY IN INTEREST COUNTY OF ORANGE  
TO REQUEST FOR JUDICIAL NOTICE FILED BY PETITIONER THE  
SIERRA CLUB**

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## **I. INTRODUCTION**

Real Party in Interest County of Orange (“County”) hereby opposes the Request for Judicial Notice (“RJN” or “Request”) filed by the petitioner the Sierra Club on November 28, 2011. The Sierra Club seeks judicial notice of eight documents, including portions of a report entitled “GIS Needs Assessment Study” (hereinafter “the Study”) as well as excerpts from a book called *A History of Modern Computing* (MIT Press 1998) (hereinafter “book excerpts”). (RJN, Ex. 2 & Ex. 6.) The Study was identified as Exhibit 45 during the evidentiary hearing before the respondent court. (PA, Tab 5, p. 1159; RT 98-100.) While the Sierra Club attempted to move the Study into evidence, the respondent court sustained the County’s objections on the grounds of hearsay and lack of foundation. (RT 98-100.) The Fourth District also denied the Sierra Club’s request to judicially notice portions of the same document. (Slip Op., p. 4, fn. 3.)

In addition, the book excerpts contained in the Sierra Club’s Exhibit 6 to its Request were never presented to the trial court or the court of appeal and are otherwise not judicially noticeable by this court. Accordingly, the County respectfully requests an Order denying the Sierra Club’s Request as to the Study and the book excerpts.

## **II. ARGUMENT**

### **A. The Court May Not Take Judicial Notice of Improper Matter**

“Judicial notice may not be taken of any matter unless authorized or required by law.” (Evid. Code, § 450.) “Reviewing courts generally do not take judicial notice of evidence not presented to the trial court.” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) “Rather, normally ‘when reviewing the correctness of a trial court's

judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.’’ (*Ibid.*) Appellate courts will also generally disregard statements in briefs that are based on such improper matter. (See *Truong v. Nguyen* (2007) 156 Cal.App. 4th 865, 882.) Finally, even if the existence of a document were relevant and judicially noticeable, a court cannot take judicial notice of the truth of hearsay statements contained in such documents. (See *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 130 [court did not take judicial notice of the truth of hearsay statements contained in court files, including pleadings, affidavits, testimony, or statements of fact filed in a separate court proceeding].)

In *Truong v. Nguyen*, an appellant attempted to judicially notice an industry report and proposed model code, and a magazine article regarding the safety of personal watercraft. (*Id.* at p. 881-882.) In denying the appellant’s request for judicial notice, the court explained:

[W]e are not persuaded that the industry report, the industry’s model code, or the magazine article are properly judicially noticeable under either Evidence Code section 452, subdivision (g) (“Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute”) or Evidence Code section 452, subdivision (h) (“Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy”).

(*Id.* at p. 882.)

Likewise, in *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, an appellant relied on an unauthenticated, internal memorandum purportedly authored by the Deputy Chief of the California Department of Industrial Relations, which was attached to the appellant attorney’s declaration. (*Id.* at p. 1700.) The court found that mere

secondhand reports of conversations with employees of the Division of Labor Standards and unauthenticated internal documents of the division were not sources of reasonably indisputable accuracy that justified taking judicial notice on appeal of these matters. (*Ibid.*)

**B. The GIS Needs Assessment Study is Not the Proper Subject of Judicial Notice**

Here, the Sierra Club's request to judicially notice portions of the Study should be denied on multiple grounds. First, the Sierra Club makes no attempt to argue that the County's objections on the basis of hearsay and lack of foundation were improperly sustained. (See RJN, pp. 6-7; RT 98-100.) "When the trial court excludes relevant, admissible evidence over the defendant's objection, the proper standard of review is whether there is a reasonable probability that there would have been a different result had the evidence been admitted." (*People v. Husted* (1999) 74 Cal.App.4th 410, 422.) Thus, the Request should be denied because the Sierra Club does not, and cannot, demonstrate that respondent's court evidentiary ruling as to the Study was erroneous or that the exhibit's recommendations for future GIS implementation are relevant to the consideration of this matter.

Second, the Sierra Club fails to explain why this Court should consider the Study, and the statements in its briefs that are based on the document, even though the document was not before the respondent court. The County's evidentiary objections to this exhibit were sustained. (RT 98-100.) Nonetheless, the Sierra Club does not articulate how the Study sheds light on the correctness of respondent court's judgment given that the Sierra Club failed to properly introduce it into evidence.

Third, as was the case in *Truong* and *Leibert, supra*, the Sierra Club does not, and cannot, demonstrate that the statements contained in the

Study are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (See Petitioner’s Opening Brief [hereinafter “POB”], pp. 9-10, 51-52.)

Fourth, the Sierra Club cites the Study for the truth of the matters set forth therein. (POB, pp. 9-10, 51-52.) Even if the existence of the Study was somehow relevant and subject to judicial notice, the Sierra Club would still be precluded from relying on the truth of the matters set forth in the exhibit. (See *Williams v. Wraxall*, *supra*, 33 Cal.App.4th at p. 130.)

Finally, it is significant that the Sierra Club only seeks judicial notice of certain portions of the Study. (RJN, pp. 1, 3, 6-7, 10-11.) If the contents of the Study were, in fact, subject to judicial notice on the grounds that the Study contains “facts and propositions with respect to government’s use of GIS technology that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy,” then the Sierra Club would necessarily concede that the Study’s definition of GIS—“an organized collection of computer hardware, software, geographic data and personnel designed to efficiently capture, store, update, manipulate, analyze, and display all forms of geographically referenced information”—is correct and not subject to dispute. (POB, pp. 10-11; see Leeds Decl., ¶2, Exhibit “A.”) However, the Sierra Club’s Opening Brief directly contradicts the aforementioned definition of a GIS, thus the Sierra Club itself disputes the contents of the Study, which precludes judicial notice of this document. (POB, p. 8.)

**C. The Book Excerpts are Also Not the Proper Subject of Judicial Notice**

Similarly, the Sierra Club requests that the court take judicial notice of the book excerpts pursuant to Evidence Code sections 454(a)(1) and 452(h), claiming that the author is “a learned person in the subject matter of computer technology and its historical context, and the excerpts requested for judicial notice are not reasonably subject to dispute...” (RJN, pp. 11-12.) However, the Sierra Club not only concedes that this exhibit was never presented to either the trial court or the appellate court, but the Sierra Club also does not assert any exceptional circumstances that warrant consideration of the book excerpts in light of the fact that they were never presented to the trial court. (See *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 fn. 8 [court declined to take judicial notice of materials not before trial court, citing lack of exceptional circumstances].)

Moreover, the Sierra Club does not lay any foundation for its assertion that the author of the book, Paul E. Ceruzzi, “is a learned person in the subject matter of computer technology and its historical context,” nor does it establish how “the excerpts requested for judicial notice involve facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (See RJN, pp. 11-12.) As stated in *People v. Maxwell*, (1978) 78 Cal.App.3d 124, “The burden is on the party requesting judicial notice to supply the court with sufficient, reliable and trustworthy sources of information about the matter.” (*Id.* at p. 130.) Here, the Sierra Club has not provided the court with any information about the book or its author.





**DECLARATION OF REBECCA S. LEEDS**

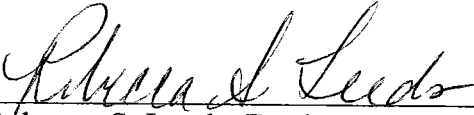
I, Rebecca S. Leeds, declare:

1. I am an attorney licensed to practice before the Courts of the State of California. I am a Deputy County Counsel with Office of the County Counsel for the County of Orange, counsel of record for the real party in interest, the County of Orange. I have personal knowledge of the facts stated herein, and could and would testify competently thereto under oath.

2. Attached hereto as Exhibit "A" is a true and correct copy of page 1-6 of the document entitled "GIS Needs Assessment Study," which was identified as Exhibit 45 during the evidentiary hearing before the respondent court, and which is referenced in the Sierra Club's Request for Judicial Notice. Exhibit 45 was not admitted into evidence before the respondent court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

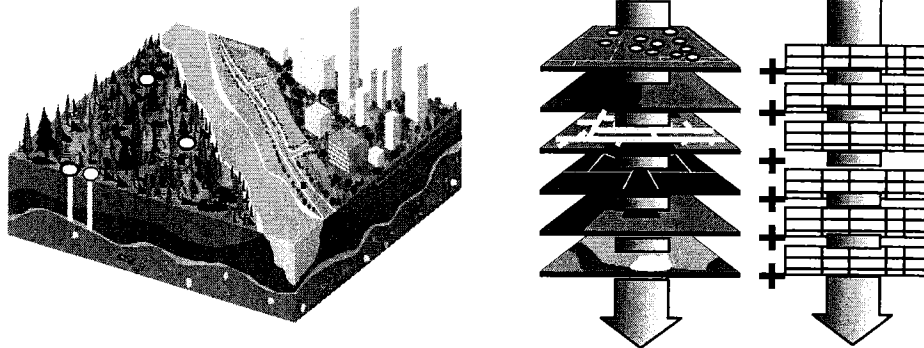
Executed this 12th day of December, 2011.

  
\_\_\_\_\_  
Rebecca S. Leeds, Declarant

GIS has emerged as a powerful and sophisticated means to manage vast amounts of geographic data. This growth of GIS over the past 30 years can clearly be linked to technological advancements in the computer, digitizers and plotters, coupled with an increasing demand for geographic information. GIS provides the capability to collect, manage, manipulate, analyze, and distribute data in map-based layers which provide a better visual image of location, patterns and relationships.

Because of the very nature of GIS, and the rapid growth of associated disciplines, many definitions of this technology exist. The following is a useful definition because it addresses functionality as well as components:

"GIS is an organized collection of computer hardware, software, geographic data and personnel designed to efficiently capture, store, update, manipulate, analyze, and display all forms of geographically referenced information." –ESRI



Others have attempted to use the name itself to better understand the functions and components of GIS. GIS can be viewed in this way:

- Geographic:** The system is concerned with data relating to geography and geographic scales of measurement. This is referenced by some coordinate system to locations on the surface of the earth.
- Information:** The system allows for the storage and extraction of specific and meaningful attribute information. These data are connected to some geography, and are organized around a model of the real world. Spatial and a-spatial queries are made possible.
- System:** An automated system should include an integrated set of procedures for the input, storage, manipulation, and output of geographic information.

**PROOF OF SERVICE**

I do hereby declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 333 West Santa Ana Boulevard, Suite 407, Santa Ana, California 92701. I am not a party to the within action.

On December 12, 2011 I served the foregoing

**OPPOSITION OF REAL PARTY IN INTEREST COUNTY OF ORANGE TO REQUEST FOR JUDICIAL NOTICE FILED BY PETITIONER THE SIERRA CLUB**

on all other parties to this action by placing a true copy of said document in a sealed envelope in the following manner:

(BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

(BY OVERNIGHT DELIVERY) I placed such envelope(s) addressed as shown below for collection and delivery with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by overnight delivery.

(BY FACSIMILE) I caused such document to be telefaxed to the addressee(s) and number(s) shown below, wherein such telefax is transmitted that same day in the ordinary course of business.

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 12, 2011

  
\_\_\_\_\_  
Marzette L. Lair

(See Attached Service List)

**NAME(S) AND ADDRESS(ES) TO WHOM SERVICE WAS MADE**

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<p>Clerk of Court, on behalf of Honorable James J. Di Cesare, Dept. C-18 Superior Court of the State of California County of Orange, Central Justice Center 700 Civic Center Drive West Santa Ana, CA 92701</p>	