S262032

In the
Supreme Court
of the
State of California

GREGORY GEISER,

Plaintiff/Petitioner, Appellant, and Cross-Respondent, and Respondent,

v.

PETER KUHNS, PABLO CAAMAL, MERCEDES CAAMAL,

Defendants/Respondents, Respondents, and Cross-Appellants, and Petitioners.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B279738
SUPERIOR COURT OF LOS ANGELES COUNTY, NOS. BS161018, BS161019& BS161020

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR JUDICIAL NOTICE

*FRANK SANDELMANN, ESQ. (186415)
JOSHUA A. VALENE, ESQ. (292109)
DINSMORE & SANDELMANN, LLP
Attorneys for Plaintiff/Petitioner, Appellant, Cross-Respondent, and Respondent Gregory Geiser
324 Manhattan Beach Boulevard, Suite 201
Manhattan Beach, California 90266
(310) 318-1220

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MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT:

Plaintiff/Petitioner, Appellant, Cross-Respondent, and Respondent Gregory Geiser ("Geiser") hereby respectfully requests that Defendants/Respondents, Respondents, Cross-Appellants, and Petitioners Peter Kuhns', Pablo Caamal's, and Mercedes Caamal's ("Petitioners") Motion for Judicial Notice (the "Motion") be denied as to Exhibits 1 through 9. Specifically, the Motion should be denied for the following reasons:

1) The Motion is untimely as to Exhibit 1 through 9;
2) Exhibits 1 through 4 and 6 through 9 are copies of internet articles taken from the internet on October 19, 2020 and October 20, 2020, without providing evidence of the original titles or the content of the articles;
3) Exhibits 1 through 9 are inadmissible hearsay and lack relevance; and
4) Exhibits 1 and 2 are not accompanied by a certified translation into English.

I. PETITIONERS' MOTION IS UNTIMELY.

"Generally, reviewing courts do not take judicial notice of facts not presented to the trial court. 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." (*Weiss v. City of Del Mar* (2019) 39 Cal.App.5th 609, 625 (*Weiss*), citing *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 internal quotation marks omitted; see also *In re Marriage of Eustice* (2015) 242 Cal.App.4th 1291.) This is especially true when there are "no

exceptional circumstances" necessitating departure from that general rule and the equities do not favor consideration of the new evidence. (*Weiss*, *supra*, 39 Cal.App.5th at 625.) It has long been recognized that in order to consider matters not enshrined in the record, "[I]t is desirable to make such a motion at as early a date as practicable." (See *People v. Preslie* (1977) 70 Cal.App.3d 486, 492.)

Petitioners admit that the internet articles attached as Exhibits 1 through 9 were cited to the Trial Court, but never entered into evidence. Petitioners did not request that the Trial Court take judicial notice of the articles. Moreover, prior to this Request For Judicial Notice, Petitioners did not bring a Motion To Augment The Record or take any other steps to properly add the articles to the appellate record. Instead, Petitioners bring this Motion in response to the Court of Appeal's critique that Petitoners failed to include the true and correct copies of the original articles in the appellate record at an earlier time. Respondent submits that Petitioners have failed to demonstrate any basis why this Court, at this point in the appellate process, should exercise its discretion and grant Petitioners' Motion.

II. EXHIBITS 1 THROUGH 4 AND 6 THROUGH 9 ARE VERSIONS OF ARTICLES TAKEN FROM THE INTERNET ON OCTOBER 19, 2020 AND OCTOBER 20, 2020, WITHOUT ANY EVIDENCE OF THE TITLES OR THE CONTENTS OF THE ORIGINAL ARTICLES.

Petitoners' index of exhibits in the Motion makes it seem as if Exhibits 1 through 4 and 6 through 9 are the articles published on the internet in 2015 and 2016. However, that is misleading. Exhibits 1 through 4 and 6 through 9 are versions of articles taken from the internet on October 19, 2020 and October 20, 2020, as indicated by the date on the top left corner or top right corner of each page of those exhibits.

Evidence Code § 452(h) provides that a court may take judicial notice of "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." Petitioners failed to attach the original versions of those articles – or the versions that existed while this case was before the Trial Court.

Without a way to immediately and accurately determine the titles or the contents of the original articles, by resort to sources of reasonably indisputable accuracy, when they were supposedly published in 2015 and 2016 or when this matter was before the Trial Court, Petitioners' Motion as to Exhibits 1 – 4 & and 6 – 9 should be denied.

III. EXHIBITS 1 THROUGH 9 ARE INADMISSIBLE HEARSAY AND LACK RELEVANCE.

Only relevant evidence is admissible. (Evid. Code, § 350.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Additionally, "[T]he hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists." (*North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 778, citing 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 25, p. 119.)

The grant of review by the California Supreme Court, limited the issues for briefing and argument to: 1) How should it be determined what public issue or issue of public interest is implicated by speech within the meaning of the anti-SLAPP statute (Code of Civ. Proc., § 425.16, subd. (e)(4)) and the first step of the two-part test articulated in *FilmOn.com Inc.*

v. DoubleVerify Inc. (2019) 7 Cal.5th 133, 149-150, and 2) should deference be granted to a defendant's framing of the public interest issue at this step.

Exhibits 1 through 9 are out-of-court statements, internet and newspaper articles, that constitute inadmissible hearsay which cannot be offered for the truth of the matters asserted therein unless subject to some exception. No such exception has been advanced by Petitioners. Moreover, the fact that articles were published, but the original titles or content of those articles was not preserved and was never admitted into evidence by the Trial Court, or presented to the Court Of Appeals, or this California Supreme Court means that it is not possible to establish any connection between the articles and the issues to be addressed in this appeal.

IV. EXHIBITS 1 AND 2 SHOULD BE EXCLUDED FOR LACK OF A CERTIFIED TRANSLATION.

Both the Legislature, in adopting the Evidence Code, and the Judicial Council of California, in adopting the California Rules of Court, recognize that written evidence submitted to the Court in a foreign language must be accompanied by sworn translations. (See Evid. Code, § 753(a) ["When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing."]; Cal. Rules of Court, 3.1110(g) ["Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter."]; see also 3 Witkin, Cal. Evid. 5th Presentation §§ 39-40.) Here, Petitioners' Exhibits 1 and 2 consist of two Spanish-language articles taken from the Internet that are not accompanied by sworn translations. As a result, this Court should decline to take judicial notice of Exhibits 1 and 2.

V. CONCLUSION

Based on the foregoing, Geiser respectfully requests that this Court deny Petitioners' Motion as to Exhibits 1 through 9.

Dated: January 8, 2021 DINSMORE & SANDELMANN LLP

By: /s/ Frank Sandelmann
Frank Sandelmann
Joshua A. Valene
Attorneys for Plaintiff/Petitioner, Appellant, Cross-Respondent, and Respondent Gregory Geiser

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within action. My business address is 324 Manhattan Beach Blvd., Suite 201, Manhattan Beach, California 90266.

On January 8, 2021, I served the foregoing document described as **RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR JUDICIAL NOTICE** on the interested parties in this action.

I caused the above document(s) to be served on each person on the attached list by the following means:

[X] BY MAIL

I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on January 8, 2021, following the ordinary business practice. As indicated in the service list attached, each listed individual or court is served as indicated.

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Executed on 8th day of January, 2021, at Manhattan Beach, California.

/s/ Frank Sandlemann

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Superior Court of Los Angeles County, Case Nos. BS161018, BS161019 and BS161020

MATTHEW D. STRUGAR (232951)
LAW OFFICES OF MATTHEW STRUGAR
3435 Wilshire Boulevard, Suite 2910
Los Angeles, California 90010
(323) 696-2299
matthew@matthewstrugar.com

-and-

COLLEEN M. FLYNN (234281)
LAW OFFICES OF COLLEEN FLYNN
3435 Wilshire Boulevard, Suite 2910
Los Angeles, California 90010
(213) 252-9444
cflynnlaw@yahoo.com

Attorneys for Defendants and Respondents/Cross-Appellants
Peter Kuhns, Pablo Caamal and Mercedes Caamal
(*Served via TrueFiling Portal*)

HONORABLE ARMEN TAMZARIAN, DEPT. 84
THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
STANLEY MOSK COURTHOUSE
111 North Hill Street
Los Angeles, California 90012
(213) 830-0784
(*One paper copy served via United States Postal Service*)

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Brett Stroud Dinsmore & Sandelmann LLP 301777	bstroud@lawinmb.com	e-Serve	1/8/2021 4:30:47 PM
David Greene Electronic Frontier Foundation 160107	davidg@eff.org	e-Serve	1/8/2021 4:30:47 PM
Alan Dettelbach Court Added	adettelbach@wedgewood-inc.com	e-Serve	1/8/2021 4:30:47 PM
Matthew Strugar Law Offices of Matthew Strugar 232951	matthew@matthewstrugar.com	e-Serve	1/8/2021 4:30:47 PM
Colleen Flynn Law Offices of Colleen Flynn	cflynnlaw@yahoo.com	e-Serve	1/8/2021 4:30:47 PM
Frank Sandelmann Dinsmore & Sandelmann LLP 186415	fsandelmann@lawinmb.com	e-Serve	1/8/2021 4:30:47 PM
Noah Grynberg Los Angeles Center for Community Law and Action 296080	noah.grynberg@laccla.org	e-Serve	1/8/2021 4:30:47 PM

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

1/8/2021

Date

/s/Joshua Valene

Signature

Valene, Joshua (292109)

Last Name, First Name (PNum)

Dinsmore & Sandelmann, LLP

Law Firm