

Case No. S259215

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BLAKELY MCHUGH AND TRYSTA M. HENSELMEIER
Plaintiffs, Appellants, and Petitioners,
vs.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH DISTRICT, DIVISION ONE, CASE No. D072863

(ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
THE HONORABLE JUDITH M. HAYES, JUDGE
CASE No. 37-2014-00019202-CU-IC-CTL)

OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

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OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

Plaintiffs have asked this Court to take judicial notice of two documents. Respondent Protective Life Insurance Company has no objection to Plaintiffs' request as to the first document, but objects to Plaintiffs' request as to the second document.

1. Protective has no objection to Plaintiffs' request that the Court take judicial notice of the document they have attached as Exhibit A: the copy of the California Department of Insurance Notice of Motion and Motion to Quash Subpoenas and Motion for Protective Order; Declarations of Michael J. Levy and Charles Tsai, previously filed in the federal district court (N.D. Cal.) on December 18, 2018, in the matter of *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS (S.D. Cal.). It appears that Plaintiffs are submitting this document to inform the Court of legal positions taken by the Department of Insurance. (See Pet. 34.) This Court can take judicial notice of that motion to quash under Evidence Code section 452, subdivision (d), because it encompasses "records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." And Plaintiffs do not appear to be submitting the documents for the truth of the matter asserted therein, but only to demonstrate litigation positions taken by the Department of Insurance in other proceedings.

2. Protective objects, however, to Plaintiffs' request that the Court take judicial notice of the document Plaintiffs have attached as Exhibit B: the Declaration of Jack B. Winters, Jr., in Support of Michele L. Moriarty's Response to and Joinder in California Department of Insurance's Motion to Quash Subpoenas and For Protective Order, previously filed in the federal district court (N.D. Cal.) on January 2, 2019, in the matter of *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS (S.D. Cal.). Plaintiffs have asked this Court to take judicial notice of that document because they are trying to establish the truth of certain testimony their attorney offered in that declaration, as well as testimony that was offered by an officer of the American Council of Life Insurers in deposition excerpts attached to their attorney's declaration. (See Pet. 34-35.)

Plaintiffs assert that the testimony of their attorney and the officer of the American Council of Life Insurers is subject to judicial notice as a court record, but they are incorrect. The California courts have repeatedly explained that “taking judicial notice of court records” does not “mean[] taking judicial notice of the existence of facts asserted in *every document* of a court file, including *pleadings* and *affidavits*. [Citation.]” (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548.) Instead, the courts of this State have repeatedly concluded, “while the existence of any document in a court file may be judicially noticed, the truth of the matters asserted in those documents, including the factual

findings of the judge who was sitting as the trier of fact, is not entitled to notice. [Citation.]” (*Steed v. Dep't of Consumer Affairs* (2012) 204 Cal. App. 4th 112, 121.) This Court therefore should deny Plaintiffs’ request for judicial notice of the testimony attached to their Request for Judicial Notice as Exhibit B.

Respectfully submitted,

MAYNARD, COOPER & GALE, P.C.
GRIGNON LAW FIRM, LLP
NOONAN LANCE BOYER & BANACH LLP

s/ John C. Neiman, Jr. _____

John C. Neiman, Jr. (application for *pro hac vice*
admission pending)

*Counsel for Defendant and Respondent Protec-
tive Life Insurance Company*

PROOF OF SERVICE

I am a citizen of the United States. I am over the age of 18 and not a party to this action. My business address is 1901 Sixth Avenue North, Birmingham, Alabama 35203.

On December 4, 2019, I filed this document through the TrueFiling system, which will serve an electronic copy of this document on the Court of Appeal and the attorneys for Appellants and amicus curiae at the following addresses:

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I also served the trial court by placing a paper copy of this document, in a sealed envelope, for collection and mailing on December 4, 2019, from my law firm whose address appears above, following our ordinary business practices. I am readily familiar with my law firm's practices regarding mailing. On the same day that correspondence is placed for mailing, it is deposited with the U.S. Postal Service with postage prepaid. I addressed the envelope to the following:

San Diego Superior Court, Central Div.
Attn: Hon. Judith F. Hayes
330 W. Broadway, Dept. 68
San Diego, CA 92101

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

DATED: December 4, 2019

s/ John C. Neiman, Jr.
John C. Neiman, Jr.
(application for admission *pro hac*
vice pending)

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **McHUGH v. PROTECTIVE LIFE
INSURANCE**

Case Number: **S259215**

Lower Court Case Number: **D072863**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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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.

12/4/2019

Date

/s/John Neiman

Signature

Neiman, John (pro hac)

Last Name, First Name (PNum)

Maynard, Cooper & Gale, P.C.

Law Firm