

No. S165549

IN THE SUPREME COURT OF CALIFORNIA

ALAN RICHARD KLEIN; et al.

Plaintiff and Appellant,

vs.

UNITED STATES OF AMERICA; et al.

Defendant and Appellee.

On Certification from the United States Court of Appeals
for the Ninth Circuit
Ninth Circuit Court of Appeals No. 06-55510
United States District Court No. CV 05-5526-PA

**APPELLANTS' OPPOSITION TO MOTION FOR
JUDICIAL NOTICE**

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SUPREME COURT
FILED

MAR - 4 2009

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INTRODUCTION

Appellee United States of America attempts to request judicial notice of certain documents in connection with their answering brief. Appellants request that the Court exercise its discretion to deny Appellee's motion for judicial notice as the documents are not subject to judicial notice.

LEGAL ARGUMENT

I. THE COURT SHOULD NOT TAKE DISCRETIONARY JUDICIAL NOTICE OF ENROLLED BILL REPORTS, BECAUSE THESE DOCUMENTS ARE UNRELIABLE INDICIA OF LEGISLATIVE INTENT

While the Court has discretion to take judicial notice of published legislative materials, some appellate courts, such as Third and Fourth districts, have questioned the propriety of taking judicial notice of enrolled bill reports. These courts have reasoned that the enrolled bill reports are not reliable in determining legislative intent because it is not reasonable to infer that they were ever read by the Legislature. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 40-41, 34 Cal.Rptr.3d 520, 530-531.

United States of America has included categories of extrinsic legislative materials such as:

- a. Unitemized enrolled bill reports
- b. Author's letter to the Governor
- c. Other correspondence to the Governor

[See Declaration of AUSA Anoiel Khorshid in support of Motion for Judicial Notice, Exhibit A, pp. 13-19 and Exhibit B, pp. 28-43].

The Court should not take discretionary judicial notice of these documents because they are unreliable indicia of the legislative intent behind Civil Code section 846. As some appellate courts have noted, it cannot be reasonably inferred that the Legislature ever read or considered these materials.

II. THE COURT SHOULD NOT TAKE JUDICIAL NOTICE OF LAW REVIEW ARTICLES BECAUSE THEY ARE NOT PROPER SUBJECT OF JUDICIAL NOTICE

Further, law review articles are not a proper subject of judicial notice. *County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1450, 34 Cal.Rptr.3d 383, 395.

United States of America has improperly included law review articles in its Motion for Judicial Notice and its request should be denied. [See Declaration of AUSA Anoiel Khorshid in support of Motion for Judicial Notice, Exhibits A, p. 20-22 and Exhibit B, p. 111-115.]

III. THE COURT SHOULD DENY APPELLEE'S REQUESTS FOR JUDICIAL NOTICE FOR MATTERS THAT ARE NOT PROPERLY SUBJECT TO JUDICIAL NOTICE

Appellee's request for discretionary judicial notice in this instance is governed by Evidence Code sections 452. Appellee seeks to introduce a bevy of source materials which are clearly unreliable.

The Court should decline to exercise its discretion under Evidence Code section 459 to take judicial notice in this case because United States of America has not furnished the Court with information sufficient to show the matter is capable of "immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evidence Code §452(h); See *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1700, 39 Cal.Rptr.2d 65, 68.

While United States of America asserts that certain documents should be subject to judicial notice under Evidence Code sections 452(c) and 452(h), the following matters are not properly subject to judicial notice:

- a. Bill analysis worksheet (background information) and attachments, if any
- b. Assembly policy committee analysis
- c. Assembly floor analysis
- d. Bill analysis worksheet (background information) and attachments, if any
- e. Senate policy committee analysis
- f. Senate floor analyses: "Third Reading"
- g. Author's file (Draft or background materials, correspondence in chronological order, miscellaneous)
- h. Assembly policy committee file - Judiciary (correspondence in chronological order, amendments, miscellaneous)
- i. Senate policy committee file - Judiciary (Correspondence in

chronological order)

[See Declaration of AUSA Anoiel Khorshid in support of Motion for Judicial Notice, Exhibits B, pp. 12-27, 44-110].

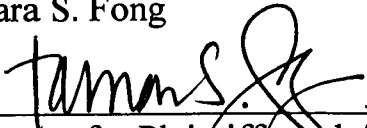
These items are not matters properly subject to judicial notice and United States of America's request for judicial notice should be denied accordingly.

CONCLUSION

For the foregoing reasons, this Court should deny Appellee United States of America's motion for judicial notice accordingly.

Dated: March 3, 2009

Respectfully submitted,
SANTIAGO RODNUNSKY & JONES
David G. Jones
Tamara S. Fong

By: 
Attorneys for Plaintiffs and Appellants
ALAN RICHARD KLEIN AND
SHERYLL KLEIN

CERTIFICATE OF SERVICE

I, Annabelle Hanshaw, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 5959 Topanga Canyon Boulevard, Suite 220, Woodland Hills, California, 91367, in said County and State.

On March 3, 2009, I served the following document(s):

APPELLANTS' OPPOSITION TO MOTION FOR JUDICIAL NOTICE

on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHMENT A

- BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing on affidavit.

- BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00p.m. on the above-mentioned date.

- BY FACSIMILE:** From facsimile number (818) 593-7086, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated above, pursuant to Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission.


- BY FEDERAL EXPRESS NEXT DAY AIR:** On the above-mentioned date, I placed a true copy of the above-mentioned document(s) in a sealed envelope or package designated by Federal Express with delivery fees paid or provided for, addressed to the person(s) as indicated above and deposited same in a box or other facility regularly maintained by Federal Express or delivered same to an authorized courier or driver authorized by Federal Express to receive documents.

- I am employed in the office of David G. Jones, a member of the bar of this court, and that the foregoing document(s) was (were) printed on recycled paper.

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

- (FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2009


Annabelle Hanshaw

ATTACHMENT A

Klein et al. v. United States of America et al.
California Supreme Court Case No. S165549

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