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A Note on Judicial Notice of Blogs and Admissibility of Electronically Stored Information

In a trade secret case, the Defendants attempted to strike the Plaintiffs' complaint pursuant to the California Anti-SLAPP statute. The Defendants failed to make a prima facie showing that the complaint arose from protected activity. *World Fin. Group v. Hbw Ins. & Fin. Servs.*, 2009 Cal. App. LEXIS 553 (Cal. App. 2d Dist. Apr. 16, 2009).



The Defendants on appeal requested judicial notice of blogs, online articles and websites. This argument and request was made for the first time on appeal. The Defendants claimed the online material showed the content of the communications at issue here involve a matter of public interest. Defendants claimed the Court needed to take judicial notice of the evidence pursuant to California Evidence Code section 459(a)(2). *World Fin. Group*, fn 7, 13-14.

California Evidence Code 459(a)(2) states, in relevant part:

The reviewing court shall take judicial notice of :... (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

The Court pointed out one an error in Defendants' use of California Evidence Code 459(a)(2): The statute does not compel judicial notice of documents that were NOT offered in the trial court. *World Fin. Group*, fn 7, 14. The argument that Defendants' speech involved a matter of public interest (as evidenced by the online material) was being advanced for the first time on appeal and had not been presented to the trial court. *Id.* This ran counter to the judicial notice status and was denied for additional reasons.

Judicial Notice was designed so a party does not have to formally present evidence to prove a fact that is "outside the area of reasonable controversy." Michael R. Arkfeld, *Arkfeld on Electronic Discovery and Evidence*, §8.6(B), citing FED. R. EVID. 201, Advisory Committee Note.

Examples of judicial notice for electronically stored information include:

Online videos of “The Guy from Boston” on local news channel, other websites and a blog. *Ligotti v. Garofalo*, 2008 DNH 123, fn 15, 21-22 (D.N.H. 2008).

Website information from Amazon.com and American Academy of Allergy Asthma & Immunology in ERISA action. *Arkfeld*, §8.6(C), citing *Wible v. Aetna Life Ins. Co.*, 375 F. Supp. 2d 956 (C.D.Cal.Jun.20, 2005).

Online meeting minutes from the City's Board of Mayor and Aldermen attached to an attorney's affidavit as a public record. *Williams v. City of Franklin*, 586 F. Supp. 2d 890, 894 (M.D. Tenn. 2008).

The admissibility of electronically stored information can take many paths in court, from party admissions on blogs, present sense impressions on Twitter or layered hearsay on cell phone video sent with an accompanying text message. However, these issues almost always have to be raised at the trial court and not for the first time on appeal.