Brent M. Giddens, State Bar No. 133652
bgiddens@cfdlaborlaw.com
Daphne P. Bishop, State Bar No. 217519
dbishop@cdflaborlaw.com
CAROTHERS DISANTE & FREUDENBERG LLP
707 Wilshire Blvd., Ste. 5150
Los Angeles, California 90017
Telephone: (213) 612-6300
Facsimile: (213) 612-6301

Daren S. Garcia, Ohio State Bar No. 0077156
dsgarcia@vorys.com
Tyler B. Pensyl, Ohio State Bar No. 0080649
tbpensyl@vorys.com
Admitted Pro Hac Vice
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Telephone: (614) 464-5446
Facsimile: (614) 719-5054

Attorneys for Defendants Abercrombie & Fitch Stores, Inc., Stephanie Charles, and Meghan Watumull

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JILLIAN HALLMAN, an individual, Plaintiff, vs. ABERCROMBIE & FITCH CO., an Ohio Corporation; STEPHANIE CHARLES, an individual; MEGHAN WATUMULL, an individual; DOES 1-25, Inclusive, Defendants.	Case No. CV13-02139 ODW ISS **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S REQUEST TO TAKE JUDICIAL NOTICE** Judge: Hon. Otis D. Wright Courtroom: 11 - Spring St. Floor Date: September 23, 2013 Time: 1:30 p.m.

Defendants Abercrombie & Fitch Stores, Inc., Stephanie Charles, and Meghan Watumull ("Defendants") hereby submit the following Memorandum of Points and Authorities in Opposition to Plaintiff Jillian Hallman's ("Hallman") Request to Take Judicial Notice (Doc. 33.)

I. INTRODUCTION

Plaintiff asks this Court to take judicial notice of the following documents:

1. The declaration of Amanda J. Myette, attaching a notice of class action settlement;
2. A class action complaint from *Gonzalez v. Abercrombie & Fitch Co., et al.*;
3. A consent decree fact sheet from *Gonzalez v. Abercrombie & Fitch Co., et al.*;
4. An order affirming special master's decision from *Gonzalez v. Abercrombie & Fitch Co., et al*.;
5. An executive summary of court-appointed monitor's fourth annual compliance report from *Gonzalez v. Abercrombie & Fitch Co., et al*.; and
6. Hallman's First Amended Complaint.

Each of these documents is inadmissible and irrelevant to Defendants' motion for summary judgment. Accordingly, Hallman's request to take judicial notice should be denied.

II. LAW AND ARGUMENT

A. Legal Standard

A court cannot take judicial notice of inadmissible or irrelevant evidence. *See United States v. Lumiguid*, 499 F.App'x 689, 691 (9th Cir. 2012) (district court properly refused to take judicial notice of information that was not relevant); *Kuba v. Sea World, Inc.*, 428 F.App'x 728, 732 (9th Cir. 2011) (refusing to take judicial

notice of materials that were not relevant); *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 n.14 (9th Cir. 2005) ("Factual findings in one case ordinarily are not admissible for their truth in another case through judicial notice"); *Becerra v. RadioShack Corp.*, No. 4:11-CV-03586, 2012 U.S. Dist. LEXIS 175522, at *18 (S.D. Cal. Dec. 10, 2012) (refusing to take judicial notice of documents that were not admissible); *Totah v. Lucasfilm Entm't Co.*, No. C-09-4051, 2010 U.S. Dist. LEXIS 133295, at *26 n.19 (N.D. Cal. Dec. 16, 2010) (refusing to take judicial notice of irrelevant evidence); *Aeschbacher v. Cal. Pizza Kitchen, Inc.*, No. CV-07-215, 2007 U.S. Dist. LEXIS 34852, at *14 (C.D. Cal. April 3, 2007) (refusing to take judicial notice of inadmissible evidence).

B. The Class Action Settlement Is Inadmissible And Irrelevant.

Hallman's request that this Court take judicial notice of documents relating to a class action settlement from a prior litigation is improper because such evidence is inadmissible and irrelevant.

First, Federal Rule of Evidence 408 precludes Plaintiff from offering evidence of a settlement agreement in the litigation styled for the purpose of proving liability or past misconduct. *See e.g., Big Baboon Corp. v. Dell, Inc.*, 2010 U.S. Dist. LEXIS 108027, 13-14 (C.D. Cal. Oct. 8, 2010) (citing *Hudspeth v. C.I.R.*, 914 F.2d 1207, 1213-14 (9th Cir. 1990) (in excluding evidence of settlement, court noted that Fed. R. Evid. 408(a) "prohibits the admission of compromises as evidence 'when offered to prove liability'…. According to the Ninth Circuit, 'two principles underlie Rule 408: (1) the evidence of compromise is irrelevant, since the offer may be motivated by desire for peace rather than from any concession of weakness of position; (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.'"); *Troutman v. Unum Life Ins. Co. of Am.*, 2008 U.S. Dist. LEXIS 53756, 20-21 (N.D. Cal. July 14, 2008) (holding that settlement agreement was inadmissible as "evidence of past misconduct" and noting that "settlement

agreement expressly provides that it shall not be offered by the parties thereto as "evidence of or an admission. . .or concession of any liability or wrongdoing whatsoever.").

Second, the class action settlement specifically provides that it shall not be construed as an admission or concession of any violations or failures to comply with any applicable law and that it shall not be admissible as evidence in any action in any manner whatsoever. (Doc. 1-22 at 15, Pageid #180.) Thus, Hallman's attempt to rely on the class action settlement is specifically prohibited by the terms of the agreement.

Finally, the class action settlement is also irrelevant to this lawsuit. Fed. R. Evid. 401, 402. The class action settlement related to an action for failure to provide meal and rest breaks. Hallman has not asserted, and is in fact barred by release from asserting, a claim for failure to provide meal and rest breaks. Thus, the class action settlement has no relevance to Hallman's claims in this case.

C. The Documents From The *Gonzalez* Lawsuit Are Inadmissible And Irrelevant.

Hallman's request that this Court take judicial notice of documents from the *Gonzalez* litigation is also improper because such evidence is inadmissible and irrelevant.

First, it is well established that Fed. R. Evid. 408 precludes Plaintiff from offering evidence of a consent decree for the purpose of proving liability or past misconduct. *See e.g., Iorio v. Allianz Life Ins. Co. of N. Am.*, 2008 U.S. Dist. LEXIS 118344, 13-14 (S.D. Cal. July 8, 2008) (holding that Fed. R. Evid. 408(a)(1) precludes evidence of defendant's prior agreement with the California Department of Insurance where plaintiffs offered the document for the purpose of proving liability); *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (holding that civil consent decrees are governed by Fed. R. Evid. 408, which "bars evidence of a compromise to prove liability for the claim."); *Bowers v. NCAA*, 563 F. Supp.

2d 508, 536 (D.N.J. 2008) (holding that Fed. R. Evid. 408's exclusionary provision applies to civil consent decrees between private parties and government agencies and precludes plaintiff from using consent decree as evidence of defendant's liability).

Second, Applying this rule, multiple courts have granted Abercrombie's motions to exclude evidence regarding this Consent Decree in previous cases on the grounds that the Consent Decree is irrelevant and admission of evidence regarding the Consent Decree would be unduly prejudicial to Abercrombie and violate Section IX.A of the Consent Decree, which specifically provides that it "shall not be deemed to be a finding or determination by the Court, nor an admission by any party, regarding the merits, validity or accuracy of any of the allegations, claims or defenses" and that the decree "shall not be discoverable, admissible or used as evidence of liability or non-liability for unlawful discrimination in any proceeding." *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc., et al.*, No. 4:08-1470 (E.D. Mo. filed Sept. 25, 2008) (Dock. Nos. 67, 68); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, No. 4:09-cv-00602-GKF-FHM (N.D. Ok. Filed Sept. 16, 2009) (Dock. No. 125).

Third, it is well established that evidence of the consent decree is inadmissible pursuant to Fed. R. Evid. 402 and 403 because the consent decree is irrelevant to the claims at issue and evidence of the consent decree would be unfairly prejudicial. *See e.g., Gribben v. UPS*, 528 F.3d 1166, 1172 (9th Cir. 2008) (United States Court of Appeals for the Ninth Circuit upholding trial court's exclusion of prior consent decree with the EEOC on the ground that its probative value was outweighed by its potential for prejudice pursuant to Fed. R. Evid. 402 and 403.); *Kramas v. Security Gas & Oil, Inc.*, 672 F.2d 766, 772 (9th Cir. 1982) (affirming district court's refusal to admit evidence of a consent decree entered in a prior SEC enforcement proceeding); *Allen v. City of L.A.*, 2012 U.S. Dist. LEXIS 65775, 5-6 (C.D. Cal. May 7, 2012) (court excluding evidence relating to prior

consent decree as unduly prejudicial pursuant to Fed. R. Evid. 403.); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1438-1439 (4th Cir. 1992) (reversing trial court's decision admitting evidence of prior consent decree between the defendant and the United States Department of Justice "because the prejudicial effect of admitting the decree is readily apparent and the probative value is slight."); *Ross v. Am. Red Cross*, 2012 U.S. Dist. LEXIS 77475, 9-11 (S.D. Ohio June 5, 2012) (holding "that evidence regarding the [prior consent decree] is inadmissible under Fed. R. Evid. 402 and 403").

Fourth, Hallman's attempt to rely on the allegations from the complaint in *Gonzalez* is also improper because such evidence is inadmissible. Allegations from a prior complaint do not constitute competent evidence that may be considered under F.R.C.P 56(e). *See e.g., Rosales v. Career Sys. Dev. Corp.*, 2009 U.S. Dist. LEXIS 101808, 17-18 (E.D. Cal. Nov. 1, 2009) (holding that facts alleged in complaint from a different lawsuit "do not constitute competent evidence for purposes of summary judgment" and excluding such evidence for the purpose of defendant's motion for summary judgment); *Thomas v. Chrysler Fin., LLC*, 278 F. Supp. 2d 922, 926 (N.D. Ill. 2003) ("Thomas cites only allegations in a complaint in another lawsuit against Chrysler--clearly not evidence that may be considered under Rule 56(e).").

Last, the allegations from the *Gonzalez* litigation are irrelevant to this lawsuit. The *Gonzalez* lawsuit was filed in 2003 and pertained to conduct that occurred prior to that date. Hallman worked for Abercrombie in 2010 and 2011. The alleged wrongful conduct that occurred prior to 2003 therefore has no bearing on whether she was subjected to racial discrimination or harassment. Thus, the allegations from the *Gonzalez* litigation are irrelevant and inadmissible in this lawsuit. Fed. R. Evid. 401, 402.

D. Hallman's First Amended Complaint Is Inadmissible.

Hallman's request that this Court take judicial notice her First Amended

Complaint is improper because such allegations are inadmissible and cannot be used to defeat Defendants' motion for summary judgment. *John M. Floyd & Assocs. v. TAPCO Credit Union*, No. 12-35307, 2013 U.S. App. LEXIS 17513, at *2 (9th Cir. Aug. 21, 2013) ("[A plaintiff] may not rely on the unverified allegations in its complaint to defeat summary judgment."); *Githere v. Consol. Amusement Corp.*, 258 F.App'x 122, 124 (9th Cir. 2007) (allegations in complaint are insufficient to defeat a motion for summary judgment).

III. CONCLUSION

For the foregoing reasons, Hallman's Request to Take Judicial Notice should be denied.

Dated: September 9, 2013

CAROTHERS DISANTE & FREUDENBERGER LLP and VORYS, SATER, SEYMOUR AND PEASE LLP

/s/ Tyler B. Pensyl
Tyler B. Pensyl

Attorneys for Defendants Abercrombie & Fitch Stores, Inc., Stephanie Charles, and Meghan Watumull