

1 James A. Quadra (SBN 131084)
 Email: jquadra@calvoclark.com
 2 Rebecca M. Coll (SBN 184468)
 Email: rcoll@calvoclark.com
 3 **CALVO & CLARK, LLP**
 One Lombard Street, Second Floor
 4 San Francisco, California 94111
 Telephone: (415) 374-8370
 5 Facsimile: (415) 374-8373

6 Rosemary M. Rivas (SBN 209147)
 Email: rrivas@finkelsteinthompson.com
 7 Tracy Tien (SBN 253930)
 Email: ttien@finkelsteinthompson.com
 8 **FINKELSTEIN THOMPSON LLP**
 100 Bush Street, Suite 1450
 9 San Francisco, California 94115
 Telephone: (415) 398-8700
 10 Facsimile: (415) 398-8704

James Pizzirusso (*Pro hac vice*)
 Email: jpizzirusso@hausfeldllp.com
HAUSFELD LLP
 1700 K. Street NW, Suite 650
 Washington, DC 20006
 Telephone: (202) 540-7200
 Facsimile: (202) 540-7201

11 *Interim Co-Lead Counsel and Counsel for Plaintiffs*

12 [Additional Counsel Listed On Signature Page]

13 **IN THE UNITED STATES DISTRICT COURT**
 14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 15 **SAN FRANCISCO DIVISION**

17 IN RE SONY PS3 "OTHER OS"
 18 LITIGATION

CASE NO. CV-10-1811-RS (EMC)

**PLAINTIFFS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 OPPOSITION TO DEFENDANT'S
 REQUEST FOR JUDICIAL NOTICE**

Date: November 4, 2010
 Time: 1:30 p.m.
 Judge: Honorable Richard Seeborg
 Courtroom: 3

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION.....1

II. ARGUMENT.....2

 A. The Applicable Law Regarding a Court’s Consideration of Matters Outside of the Pleadings..... 2

 B. The Documents Annexed to the Ott Declaration Are Not Central to Plaintiffs’ Claims, and Many of Them are Not Even Referred to in the Complaint..... 4

 1. The Service Terms and License Agreements.....4

 2. “Screenshots” of Internet Blogs.....6

 3. Pleadings filed in Other Courts.....7

III. CONCLUSION.....7

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases	Page(s)
<i>Alvarez v. Lake County Bd. of Supervisors</i> , No. 10-1071, 2010 U.S. Dist. LEXIS 95109 (N.D. Cal. Sept. 13, 2010)	3
<i>Barron v. Reich</i> , 13 F.3d 1370 (9th Cir. 1994).....	2
<i>Berenblat v. Apple, Inc.</i> , No. 08-4969, 2009 U.S. Dist. LEXIS 80734 (N.D. Cal. Aug. 21, 2009).....	5
<i>Best Buy Stores, L.P. v. Manteca Lifestyle Ctr.</i> , No. 10-389, 2010 U.S. Dist. LEXIS 47193 (E.D. Cal. May 12, 2010).....	2, 3, 5
<i>Blasko v. Wash. Mut. Bank</i> , No. 09-2376, 2010 U.S. Dist. LEXIS 90020 (S.D. Cal. Aug. 30, 2010)	3
<i>Cash Energy, Inc. v. Weiner</i> , 768 F.Supp. 892 (D. Mass. 1991)	2
<i>Contino v. BMW of North Am., LLC</i> , No. 07-5755, 2008 U.S. Dist. LEXIS 59027 (D.N.J. July 29, 2008).....	6
<i>Datel Holdings, Ltd. v. Microsoft Corp.</i> , No. 09-5535, 2010 U.S. Dist. LEXIS 40021 (N.D. Cal. Apr. 23, 2010)	5
<i>Falk v. GMC</i> , 496 F. Supp. 2d 1088 (N.D. Cal. 2007)	6
<i>Hannan v. Maxim Integrated Prods.</i> , No. 02-36120, 2010 U.S. App. LEXIS 18606 (9th Cir. Sept. 3, 2010)	2
<i>Henderson v. Volvo Cars of N. Am. LLC</i> , No. 09-4146, 2010 U.S. Dist. LEXIS 73624 (D.N.J. July 21, 2010).....	6
<i>Knieval v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005).....	2
<i>Lussier v. Runyon</i> , 50 F.3d 1103 (1st Cir. 1995)	4
<i>Marder v. Lopez</i> , 450 F.3d 445 (9th Cir. 2006).....	3

1 *Pollstar v. Gigmania Ltd.*,
170 F. Supp. 2d 974 (E.D. Cal. 2000) 7

2

3 *Fant v. Residential Servs. Validated Publ'ns*,
No. 06-00934, 2007 U.S. Dist. LEXIS 23010 (E.D. Cal. Mar. 16, 2007) 5

4 *Sommer v. United States*,
No. 09-2093, 2010 U.S. Dist. LEXIS 94292 (S.D. Cal. Sept. 10, 2010) 2

5

6 *Stoner v. Santa Clara County Office of Educ.*,
502 F.3d 1116 (9th Cir. 2007)..... 3

7

8 **Rules**

9

10 Fed. R. Civ. P. 12(b) 2, 3, 4

11 Fed. R. Civ. P. 12(d).....2

12 Fed. R. Evid. 201 1, 3, 5, 8

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 **I. INTRODUCTION**

2 Carter Ott is an attorney at DLA Piper LLP and counsel of record in this case for Defendant
3 Sony Computer Entertainment America LLC (“SCEA”). On September 10, 2010, he submitted to
4 this Court a four page declaration “in support of defendant’s motions to dismiss and strike.” *See*
5 Docket Entry No. 98 (the “Ott Declaration”). Annexed to the Ott Declaration are twenty-four
6 exhibits, of which SCEA requests that the Court take judicial notice. *See id.* These exhibits
7 include “true and correct” copies of service terms, licensing and user agreements purportedly
8 obtained from SCEA’s website; eight different complaints filed against SCEA in various
9 jurisdictions; and “screenshots” and “copies of excerpts of postings from Internet webpages cited in
10 Plaintiffs’ Consolidated Class Action Complaint.”¹ According to the Ott Declaration, six of the
11 exhibits (C, F, S, T, U, and V) were retrieved “using an Internet archive.” *Id.* at ¶¶ 4, 7, 20-23.
12 Significantly, Exhibit Q is the only document in the Ott Declaration that SCEA claims is “relied
13 on” or “cited in” by Plaintiffs in the amended complaint. *Id.* at 18; *see also* SCEA’s Request for
14 Judicial Notice in Support of Defendant’s Motions to Dismiss and Strike (“RJN”) at 3.²

15 The Ott Declaration and accompanying use of these exhibits in SCEA’s motion to dismiss
16 brief (“MTD”) does far more than simply attach for this Court’s review exhibits that were
17 referenced in or integral to the operative Consolidated Class Action Complaint (“Complaint”).
18 Instead, the references to the exhibits in the Ott Declaration are replete with unsupported factual
19 assertions, personal characterizations of documents, and references to several documents and
20 exhibits that, in large part, are nowhere mentioned in or annexed to the complaint. Further, SCEA
21 has failed to properly authenticate any of these documents, nor has it demonstrated that any of the
22 documents annexed to the Ott Declaration contain the indicia of reliability required under FED. R.
23 EVID. 201 for this Court to take judicial notice. As such, the exhibits to the Ott Declaration run
24 afoul of controlling Ninth Circuit authority regarding the consideration of matters outside of the
25

26
27 _____
¹ *See* Ott Declaration at ¶ 18.

28 ² Docket Entry No. 99.

1 pleadings, and should therefore not be considered in connection with the disposition of the motion
2 to dismiss.

3 4 **II. ARGUMENT**

5 **A. The Applicable Law Regarding a Court’s Consideration of Matters Outside of the** 6 **Pleadings.**

7 In deciding a motion to dismiss, a district court must “accept all factual allegations in the
8 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
9 *Hannan v. Maxim Integrated Prods.*, No. 02-36120, 2010 U.S. App. LEXIS 18606, at *2 (9th Cir.
10 Sept. 3, 2010) (quoting *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005)). Given this
11 standard of review, “[i]n general a court may not consider items outside the pleadings upon
12 deciding a motion to dismiss...” *Best Buy Stores, L.P. v. Manteca Lifestyle Ctr.*, No. 2:10-389,
13 2010 U.S. Dist. LEXIS 47193, at *5 (E.D. Cal. May 12, 2010) (citing *Barron v. Reich*, 13 F.3d
14 1370, 1377 (9th Cir. 1994)).

15 Subject to limited exceptions which are inapplicable here, relying on evidence that is not
16 alleged by the plaintiff in connection with a FED. R. CIV. P. 12(b)(6) motion to dismiss is also
17 specifically prohibited by Rule 12(d), which provides in pertinent part:

18
19 If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are
20 presented to and not excluded by the court, the motion must be treated as one for
21 summary judgment under Rule 56. All parties must be given a reasonable
22 opportunity to present all the material that is pertinent to the motion.

23 FED. R. CIV. P. 12(d); *see also Cash Energy, Inc. v. Weiner*, 768 F.Supp. 892, 896 (D. Mass. 1991)
24 (“A 12(b)(6) motion is ordinarily judged on the pleadings alone.”) (*citing* 5A CHARLES ALAN
25 WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990));
26 *Sommer v. United States*, No. 09cv2093, 2010 U.S. Dist. LEXIS 94292, at *21-22 (S.D. Cal. Sept.
27 10, 2010) (“In order to consider ‘matters outside the pleadings,’ a court must generally convert a
28 motion to dismiss into a motion for summary judgment and give all parties a reasonable
opportunity to present all the material that is pertinent to the motion. At this early stage in the

1 proceedings, no discovery has been conducted, and converting the motion to dismiss into a
2 summary judgment motion would be inappropriate.”) (internal citations omitted). As a general
3 rule, therefore, a defendant cannot submit “matters outside the pleadings” in support of a motion to
4 dismiss pursuant to FED. R. CIV. P. 12(b) unless the district court converts it into one for summary
5 judgment, *and* provides the plaintiff with an adequate opportunity to conduct the discovery
6 necessary to oppose that motion.³ FED. R. CIV. P. 12(b).

7 There are, however, a handful of “narrow exceptions” to this rule.⁴ Specifically, the Ninth
8 Circuit has explained that “[a] court may consider evidence on which the complaint ‘necessarily
9 relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s
10 claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”
11 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (citations omitted; emphasis supplied).

12 A district court may also take judicial notice of matters in the public record without
13 converting a motion to dismiss into a motion for summary judgment. *See Best Buy Stores, L.P.*,
14 2010 U.S. Dist. LEXIS 47193, at *5. Under FED. R. EVID. 201(b), “[j]udicial notice may be taken
15 of facts ‘not subject to reasonable dispute’ because they are either ‘(1) generally known within the
16 territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort
17 to sources whose accuracy cannot reasonably be questioned.’” *Blasko v. Wash. Mut. Bank*, No.
18 09cv2376, 2010 U.S. Dist. LEXIS 90020, at *4 (S.D. Cal. Aug. 30, 2010) (quoting FED. R. EVID.
19 201(b)(1)-(2)). “Courts have tended to apply Rule 201(b) stringently -- and well they might, for
20 accepting disputed evidence not tested in the crucible of trial is a sharp departure from standard
21

22
23
24 ³ A motion to dismiss need not be converted into a motion for summary judgment, however, if the
25 “documents that are not properly subject to judicial notice and that are outside the pleadings” are
not considered. *Alvarez v. Lake County Bd. of Supervisors*, No. 10-1071, 2010 U.S. Dist. LEXIS
95109, at *14, n.3 (N.D. Cal. Sept. 13, 2010).

26 ⁴ *See, e.g., Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007)
27 (“...the documents at issue do not fall within the narrow exception to the general rule that the
28 scope of this court’s review on a motion to dismiss for failure to state a claim is limited to the
contents of the complaint...”) (emphasis added; citations omitted).

1 practice.” *Lussier v. Runyon*, 50 F.3d 1103, 1113-14 (1st Cir. 1995). As discussed below, these
2 narrow exceptions are inapplicable here.

3 **B. The Documents Annexed to the Ott Declaration Are Not Central to Plaintiffs’ Claims,**
4 **and Many of Them are Not Even Referred to in the Complaint.**

5 The documents attached to the Ott Declaration do not fall within the “narrow” categories of
6 materials that can be considered by the Court in addressing a Rule 12(b)(6) motion to dismiss
7 without converting it into a motion for summary judgment, and/or are unnecessary for the Court to
8 review in connection with the resolution of the MTD. Moreover, SCEA has not established that
9 any of these documents contain judicially noticeable facts, nor has it properly authenticated these
10 materials. As such, the Declaration and related exhibits are fundamentally improper and should
11 not be considered based on controlling Ninth Circuit authority.

12 **1. The Service Terms and License Agreements.**

13 Exhibits A-G and S-X to the Ott Declaration purportedly consist of five different versions
14 of SCEA’s “System Software License Agreement” for the PS3,⁵ seven different versions of the
15 “Terms Of Service And User Agreement” for the “PlayStation® Network,”⁶ and a the single
16 version of the “Limited Hardware Warranty and Liability for the PlayStation®3.”⁷ These
17 documents are cited in SCEA’s motion to dismiss memorandum as being the “applicable”
18 documents that “authorized SCEA to Issue Firmware Update 3.21.” *See* MTD at 3-5.

19 The Ott Declaration does not – and cannot – contend that any of these documents are cited
20 in the operative complaint. To the contrary, the pertinent materials referenced in the complaint are
21 SCEA’s “advertising, statements, brochures, website information, public statements, owner’s
22 manuals, and other representations that the functionality of the PS3 would include both the ‘Other
23 OS’ and the various other advertised functions.” *See* Complaint ¶ 79. SCEA attempts to
24 characterize the documents attached to the Ott Declaration as being the “applicable” agreements
25

26 ⁵ *See* Exhibits B, C, D, S and T

27 ⁶ *See* Exhibits E, F, G, U, V, W, and X.

28 ⁷ *See* Exhibit A.

1 and terms of service. *See* MTD at 3. But even SCEA acknowledges, for example, that “[t]here
2 have been several different versions of the Terms of Service...” *Id.* at 5. As such, it would be
3 premature and procedurally improper to decide, in connection with the motion to dismiss, that one
4 (or more) of the documents selected by SCEA are the “applicable” contracts.

5 Nor are these documents sufficiently reliable. As discussed above, the Ott Declaration
6 acknowledges that six of these agreements were obtained using a third-party Internet archive
7 website as opposed to discovery materials from Mr. Ott’s client’s files. As such, the Court should
8 decline to take judicial notice of these materials. *See Best Buy Stores, L.P.*, 2010 U.S. Dist. LEXIS
9 47193, at *6 (declining to take judicial notice of, *inter alia*, a computer printouts obtained from a
10 website – and submitted with the motion to dismiss by the defendant – because “they do not satisfy
11 Federal Rule of Evidence 201(b).”). *See also, Fant v. Residential Servs. Validated Publ'ns*, No.
12 06-CV-00934-SMS, 2007 U.S. Dist. LEXIS 23010, at *11 (E.D. Cal. Mar. 16, 2007) (declining to
13 take judicial notice of “newspaper articles from the internet” because the “facts in the articles in
14 question in the present case are not easily determined facts not subject to reasonable dispute
15 because they are not generally known or capable of accurate and ready determination by resort to
16 sources whose accuracy cannot reasonably be questioned.”).

17 The authorities relied upon by SCEA are readily distinguishable. *See* RJN at 4, n.7. In *In*
18 *re Samsung Elecs. Am., Inc.*, the plaintiffs “specifically acknowledge[d] the existence of [the
19 applicable] warranty information in each Player's packaging” in the complaint. No. 08-0663
20 (JAG), 2008 U.S. Dist. LEXIS 105199, at *5-6, n.2 (D.N.J. Dec. 31, 2008). Similarly, in
21 *Berenblat v. Apple, Inc.*, there were not multiple versions of a contract presented to the Court, as
22 the pertinent express warranty was referenced in the complaint and at least two of the plaintiffs in
23 had actually “exercised their rights under the express warranty.” No. 08-4969 JF, 2009 U.S. Dist.
24 LEXIS 80734, at *2, n.3 (N.D. Cal. Aug. 21, 2009) (emphasis added). And while the Court in
25 *Datel Holdings, Ltd. v. Microsoft Corp.*, an antitrust case, ultimately granted the defendant’s
26 request for judicial notice, it did so for the limited purpose of recognizing “the existence and
27 content of these documents, though not of their legal effect.” No. 09-5535, 2010 U.S. Dist. LEXIS
28

1 40021, at *20 (N.D.Cal. Apr. 23, 2010). This Court need not and should not take judicial notice of
2 the multiple versions of agreements attached to the Ott Declaration. Even if it does take judicial
3 notice, however, the documents cannot serve as the legal basis by which to dismiss Plaintiffs’
4 Complaint.

5 **2. “Screenshots” of Internet Blogs.**

6 Exhibits H, Q, R, consist of “excerpts of postings from Internet webpages cited in
7 Plaintiffs’ Consolidated Class Action Complaint,” an “Open Platform” document obtained from
8 SCEA’s website, and a set of “FAQs” from the “PlayStation® Knowledge Center.” *See Ott*
9 *Declaration* at ¶¶ 9, 18-19. The RJN claims that these extraneous materials should be considered in
10 resolving the motion to dismiss because the complaint “fail[s] to provide actual screenshots of
11 those webpages [where people have commented on the PS3, and Other OS feature], which include
12 other comments made by PS3 users, many of which respond directly to the postings Plaintiffs
13 quote and thereby contradict Plaintiffs’ allegations.” *See RJN* at 5.

14 SCEA does not explain, however, how these “screenshots” of other postings somehow
15 “contradict” the allegations in the complaint. Nor does it contend that these other postings are
16 “central” to Plaintiffs’ claims. And even if it could do so, it would not make this extraneous
17 material proper for consideration on a motion to dismiss. Indeed, there are numerous motion to
18 dismiss opinions that have cited to and relied upon postings in the complaint that putative class
19 members made on websites – without considering whether there might also be a contradictory
20 view also posted on the Internet. *See Falk v. GMC*, 496 F. Supp. 2d 1088, 1092 (N.D. Cal. 2007)
21 (“In the complaint, plaintiffs present a number of consumer postings on the Internet which detailed
22 consumer problems with GM speedometers.”); *see also Henderson v. Volvo Cars of N. Am. LLC*,
23 No. 09-4146 (DMC), 2010 U.S. Dist. LEXIS 73624, at *3-4 (D.N.J. July 21, 2010) (citing to
24 “widespread complaints...on the internet” cited in the complaint in a motion to dismiss opinion);
25 *Contino v. BMW of North Am., LLC*, No. 07-5755, 2008 U.S. Dist. LEXIS 59027, at *5 (D.N.J.
26
27
28

1 July 29, 2008) (same). These additional documents relied upon by SCEA should, therefore, not be
2 considered.⁸

3 3. Pleadings filed in Other Courts.

4 Finally, Exhibits H through P to the Ott Declaration are seven complaints recently filed
5 against SCEA related to the same subject matter of this case, as well as a notice of removal in
6 another related case. While Plaintiffs do not contest the authenticity of these documents, the Court
7 should nonetheless decline SCEA's invitation to take judicial notice of them in connection with the
8 MTD. These previously filed complaints have no relevance to this Court's disposition of the
9 motion to dismiss claims in Plaintiffs' operative consolidated complaint. Pursuant to the Case
10 Management Order, to which SCEA agreed, entered by the Court June 30, 2010, this complaint
11 "shall be deemed the operative complaint, superseding all complaints filed in this action, or any of
12 the actions to be consolidated hereunder or in any related cases." See Docket Entry No. 65 at ¶ 11.
13 As such, these previously-filed, superseded complaints are not necessary or proper for this Court's
14 analysis on the MTD. See *Alvarez*, 2010 U.S. Dist. LEXIS 95109, at *15-16 (declining to take
15 judicial notice of previously filed pleadings); see also *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d
16 974, 979 (E.D. Cal. 2000) ("there is no authority for judicial notice of pleadings in an unrelated
17 case...").

19 II. CONCLUSION

20
21 The materials annexed to the Ott Declaration go far beyond what is needed for the Court to
22 resolve SCEA's pending motion to dismiss. These documents are not "central" to Plaintiffs'
23 claims, many of them are nowhere referenced in the complaint, SCEA has failed to properly
24 authenticate these materials and – with the exception of irrelevant previously filed pleadings – they

25
26 _____
27 ⁸ In the alternative event that the Court grants SCEA's motion to take judicial notice of these
28 materials, Plaintiffs respectfully request to have an opportunity to submit additional website
postings that contradict those relied on by SCEA. This, in and of itself, illustrates why this
exercise is premature to conduct on a motion to dismiss.

1 do not contain the indicia of reliability required for the Court to take judicial notice under FED. R.
2 EVID. 201. Accordingly, Plaintiffs respectfully request that the Court decline to take judicial
3 notice of the exhibits attached to the Ott Declaration.

4
5 Dated: October 12, 2010

CALVO & CLARK, LLP

6 /s/ James A. Quadra

7 James A. Quadra

8 Rebecca Coll
9 One Lombard Street
10 San Francisco, California 94111
11 Telephone: 415-374-8370
12 Facsimile: 415-374-8373

13
14 Dated: October 12, 2010

FINKELSTEIN THOMPSON LLP

15 /s/ Rosemary M. Rivas

16 Rosemary M. Rivas

17 Tracy Tien
18 100 Bush Street, Suite 1450
19 San Francisco, California 94104
20 Telephone: 415-398-8700
21 Facsimile: 415-398-8704

22
23 Dated: October 12, 2010

HAUSFELD LLP

24 /s/ James Pizzirusso

25 James Pizzirusso (*Pro hac vice*)

26 1700 K St., NW, Suite 650
27 Washington, DC 20006
28 Telephone: 202-540-7200
Facsimile: 202-540-7201

Co-Interim Lead Counsel for Plaintiffs

29 Douglas G. Thompson
30 **FINKELSTEIN THOMPSON LLP**
31 1050 30th Street, NW
32 Washington, DC 20007
33 Telephone: 202-337-8000
34 Facsimile: 202-337-8090

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Michael P. Lehmann
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, California 94104
Telephone: 415-633-1908
Facsimile: 415-358-4980

Bruce L. Simon
**PEARSON, SIMON, WARSHAW &
PENNY, LLP**
44 Montgomery Street, Suite 2450
San Francisco, California 94104
Telephone: 415-433-9000
Facsimile: 415-433-9008

Daniel L. Warshaw
**PEARSON, SIMON, WARSHAW &
PENNY, LLP**
15165 Ventura Boulevard, Suite 400
Sherman Oaks, California 91403
Telephone: 818-788-8300
Facsimile: 818-788-8104

Joseph G. Sauder
Matthew D. Schelkopf
Benjamin F. Johns (*Pro hac vice*)
CHIMICLES & TIKELIS LLP
361 W. Lancaster Ave.
Haverford, Pennsylvania 19041
Telephone: 610-642-8500
Facsimile: 610-649-3633

Ralph B. Kalfayan
**KRAUSE, KALFAYAN, BENINK & SLAVENS,
LLP**
625 Broadway, Suite 635
San Diego, California 92101
Telephone: 619-232-0331
Facsimile: 619-232-4019

Jeffrey Carton (*Pro hac vice*)
D. Greg Blankinship (*Pro hac vice*)
**MEISELMAN, DENLEA, PACKMAN, CARTON
& EBERZ P.C.**
1311 Mamaroneck Avenue
White Plains, New York 10605

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Telephone: 914-517-5000
Facsimile: 914-517-5055

John R. Fabry (*Pro hac vice*)
**WILLIAMS KHERKHER HART BOUNDAS,
LLP**
8441 Gulf Freeway, Suite 600
Houston, Texas 77017
Telephone: 713-230-2200
Facsimile: 713-643-6226

Rosemary Farrales Luzon
**SHEPHERD, FINKELMAN, MILLER & SHAH,
LLP**
401 West A. Street, Suite 2350
San Diego, California 92101
Telephone: 619-235-2416
Facsimile: 619-234-7334

Counsel for Plaintiffs

I, Rosemary M. Rivas, am the ECF User whose identification and password are being used to file the foregoing PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S REQUEST FOR JUDICIAL NOTICE. I hereby attest that James A. Quadra and James Pizzirusso have concurred in this filing.

Dated: October 12, 2010

FINKELSTEIN THOMPSON LLP

By: /s/ Rosemary M. Rivas

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, Julia Dito, declare as follows:

I am employed by Finkelstein Thompson, 100 Bush Street, Suite 1450, San Francisco, California 94104. I am over the age of eighteen years and am not a party to this action. On October 12, 2010, I served the following document(s):

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

BY CM/ECF ELECTRONIC SERVICE: Electronically filing the foregoing with the Clerk of the Court using the CM/ECF system sent notification of such filing to the e-mail addresses of registered participants.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 12th day of October 2010 at San Francisco, California.


Julia Dito