

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

FOX TELEVISION STATIONS, INC., et al.

Plaintiffs,

v.

FILMON X, LLC, et al.

Defendants.

Civil Action No. 1:13-cv-00758-RMC  
Hon. Rosemary M. Collyer

**PLAINTIFFS' OBJECTIONS TO DEFENDANTS' REQUEST  
FOR JUDICIAL NOTICE**

Plaintiffs<sup>1</sup> respectfully submit their Objections to the Request for Judicial Notice (Dkt. No. 31-4) filed by Defendants FilmOn X, LLC (f/k/a Aereokiller LLC), FilmOn.TV Networks, Inc., FilmOn.TV, Inc., and FilmOn.com, Inc. (collectively "FilmOnX") in connection with FilmOnX's opposition to Plaintiffs' Motion for Preliminary Injunction (the "Request"). The Court should deny the Request on the grounds that (i) the materials submitted are an improper subject for judicial notice under Federal Rule of Evidence 201, and (ii) the Request is an improper attempt to exceed the page limits on an opposition memorandum and to incorporate arguments not properly before this Court.

FilmOnX asks the Court to take judicial notice of the filing of three amicus briefs in another case -- the Ninth Circuit consolidated appeal docketed as *Fox Television Stations, et al.*

<sup>1</sup> Plaintiffs are Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television, LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Allbritton Communications Company, and Gannett Co., Inc.

*v. FilmOnX, LLC, et al.*, Case Nos. 13-55156, 13-55157, 13-55226, 13-55228 (the “Appeal”). FilmOnX attached to the Request a copy of the docket in the Appeal, not the three amicus briefs that are identified in the Request. FilmOnX contends that the materials at issue in the Request show that “consumer and media advocacy groups filed amici briefs in support [sic] FilmOn X’s appeal and/or reversal of the Central District of California’s grant of a preliminary injunction against FilmOn X.” Request at 1. And, in its opposition memorandum (Dkt. No. 31), FilmOnX cites to those materials as support for the otherwise unsupported contention that “[c]ommentators and media advocacy groups have shown a strong interest in protecting broad and convenient consumer access to media . . . .” Opp’n to Mot. for Prelim. Inj. 26.

The Court should deny FilmOnX’s request for judicial notice for two reasons. *First*, FilmOnX is not really requesting that the Court take judicial notice of the mere fact that the amicus briefs were filed but, rather, that the Court take judicial notice of the arguments allegedly made in those briefs; this is evident from statements in FilmOnX’s opposition about the amicus briefs. *See, e.g.*, Opp’n to Mot. for Prelim. Inj. 26 (“Commentators and media advocacy groups have shown a strong interest in protecting broad and convenient consumer access to media . . . .”) Amici arguments are not a proper subject of judicial notice. Under Federal Rule of Evidence 201(b), a court may judicially notice a fact that is “not subject to reasonable dispute” when it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Here, while it may be proper for the Court to take judicial notice of the fact that amicus briefs were filed in the Appeal, the contents of those amicus briefs clearly are “not subject to reasonable dispute,” and thus the Court may not take judicial notice of more than the fact of filing. *See Howard v. Gutierrez*, 474 F. Supp. 2d 41, 52 n.5 (D.D.C. 2007) (“A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in

the other litigation, but rather to establish the fact of such litigation and related filings.”) (quoting *Global Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006)); *Mehle v. Am. Mgmt. Sys., Inc.*, No. 01-7197, 2002 WL 31778773, at \*1 (D.C. Cir. Dec. 4, 2002) (“The court takes judicial notice of the existence of the documents [filed in another action], not the accuracy of any legal or factual arguments made therein.”); accord *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 940 n.2 (9th Cir. 2011) (denying request for judicial notice of amicus brief filed by the Electronic Frontier Foundation and others in a different appeal); *Kahue v. Pac. Envtl. Corp.*, 834 F. Supp. 2d 1039, 1054 (D. Haw. 2011) (refusing to take judicial notice of amicus briefs in other actions because “Plaintiff . . . does not appear to rely on the proffered legal briefs . . . for any ‘adjudicative facts’ contained therein; rather, they support Plaintiff’s legal arguments.”).

Furthermore, the Appeal docket attached to the Request provides no information that supports the contentions for which FilmOnX relies upon the Request -- including the nature of any amicus party’s support, if any, for one side or the other. Thus, this Court would need to review the content of the briefs themselves to determine they support FilmOnX in this case, which is an improper use of judicial notice. See *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1142 n.8 (C.D. Cal. 2012) (denying Defendants’ request for judicial notice of amicus briefs filed in other litigation, noting that “Defendants argue that the very existence of the briefs shows that Defendants’ technology serves an important public interest. [Citation omitted.] However, it is impossible to draw that conclusion without examining the content of the proffered briefs”). The mere fact that amicus briefs were filed in another action involving many of the same parties is irrelevant to the issues presently before this

Court, and the Request can be denied on that basis. *See Whiting v. AARP*, 637 F.3d 355, 430 (D.C. Cir. 2011) (“[T]he matters to be noticed must be relevant . . .”).

*Second*, to the extent that FilmOnX’s seeks to have this Court examine the contents of the amicus briefs, the Request is an improper attempt to expand the page limits of FilmOnX’s opposition memorandum, as set forth in LCvR 7(e), and to incorporate by reference arguments not properly before the Court here, such as those made by third parties who have not sought or been granted leave to file amicus briefs in this case. *See Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 54 (D.D.C. 2011) (denying party’s request for judicial notice to the extent it was an improper attempt “to supplement his arguments in opposition to” the underlying motion); *BarryDriller*, 915 F. Supp. 2d at 1142 (“The Court would not take judicial notice of the amicus briefs because, as Plaintiffs object, the request is an implicit attempt to extend Defendants’ page limits without leave, or to file amicus briefs without leave.”) (citing *Calence, LLC v. Dimension Data Holdings, PLC*, 222 F. App’x 563, 566 (9th Cir. 2007)).

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Request in its entirety. To the extent that the Court chooses to consider the amicus briefs, Plaintiffs request that the Court give them an opportunity to fully respond to those additional arguments.

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Respectfully submitted,

/s/ Paul Smith

Paul Smith (D.C. Bar No. 358870)  
psmith@jenner.com  
JENNER & BLOCK LLP  
1099 New York Avenue, NW, Suite 900  
Washington, DC 20001-4412  
Telephone: (202) 639-6000  
Facsimile: (202) 639-6066

Richard L. Stone (admitted *pro hac*)  
rstone@jenner.com  
Julie A. Shepard (admitted *pro hac*)  
jshepard@jenner.com  
Amy Gallegos (admitted *pro hac*)  
agallegos@jenner.com  
JENNER & BLOCK LLP  
633 West 5th Street, Suite 3600  
Los Angeles, CA 90071  
Telephone: (213) 239-5100  
Facsimile: (213) 239-5199

*Attorneys for Plaintiffs Fox Television  
Stations, Inc., Twentieth Century Fox Film  
Corporation, and Fox Broadcasting Company*

/s/ Robert Garrett

Robert Alan Garrett (D.C. Bar No. 239681)  
Hadrian R. Katz (D.C. Bar No. 931162)  
Christopher Scott Morrow  
(D.C. Bar No. 491925)  
Murad Hussain (D.C. Bar No. 999278)  
ARNOLD & PORTER LLP  
555 12th St., NW  
Washington, DC 20004  
Telephone: (202) 942-5444  
Facsimile: (202) 942-5999

James S. Blackburn (admitted *pro hac*)  
james.blackburn@aporter.com  
John C. Ulin (admitted *pro hac*)  
john.uln@aporter.com  
ARNOLD & PORTER LLP  
777 South Figueroa Street, 44th Floor  
Los Angeles, CA 90017  
Telephone: (213) 243-4000  
Facsimile: (213) 243-4199

*Attorneys for Plaintiffs NBC Subsidiary (WRC-  
TV) LLC, NBC Studios LLC, Universal  
Network Television LLC, Open 4 Business  
Productions LLC, Telemundo Network Group  
LLC, American Broadcasting Companies, Inc.,  
Disney Enterprises, Inc., Allbritton  
Communications Company, CBS Broadcasting  
Inc., CBS Studios Inc., and Gannett Co., Inc.*