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[1] respectfully submit their Objections to the Request for Judicial Notice (Dkt. No. 38) 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 Emergency Motions (Dkt. Nos. 36 and 37) (the "Request"). FilmOnX asks the Court to take judicial notice of (1) Aereo, Inc. ("Aereo") press releases and (2) a docket report and a pleading from a case pending in the District of Massachusetts, *Hearst Stations Inc. v. Aereo, Inc.*, Case No. 13-cv-11649-NMG ("*Hearst* Case"). Because the Request: (1) seeks to introduce materials that are an improper subject for judicial notice under Federal Rule of Evidence 201, (2) is an improper attempt to exceed the page limits on memoranda supporting

[1] 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.

motions and to incorporate arguments not properly before this Court, and (3) seeks to introduce new evidence at an improper time, the Court should deny the Request.

Press Releases. FilmOnX asks the Court to take judicial notice of nine press releases FilmOnX obtained from its alleged competitor, Aereo's, website, announcing Aereo's launch dates for and/or expansion into various cities around the nation. FilmOnX's request should be denied for two reasons. *First*, FilmOnX is not asking the Court to take judicial notice of the mere fact that Aereo issued such press releases, but rather to judicially notice the contents of those press releases detailing where Aereo's services are currently available or will become available. Such a request is an improper attempt to sidestep Federal Rule of Evidence 201(b)'s mandate that 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." These press releases do not represent undisputed facts about where Aereo is or will be. Rather, these facts are subject to dispute and their accuracy can be reasonably questioned.

Second, even if the press releases were judicially noticeable, they should not be considered here since FilmOnX has not provided any reason why its evidence could not have been presented along with its opposition to the Plaintiffs' motion for a preliminary injunction, which the Court granted. *Schoenbohm v. F.C.C.*, 204 F.3d 243, 250 (D.C. Cir. 2000) (evidence that was "previously available" is not "new evidence" supporting reconsideration); *Olson v. Clinton*, 630 F. Supp. 2d 61, 63 (D.D.C. 2009) ("Even if evidence is newly raised, it is not considered new evidence if it was previously available.") (internal quotation marks omitted); *Bao Ge v. Li Peng*, 209 F.R.D. 250, 251 (D.D.C. 2000) (denying motion for reconsideration because the plaintiffs "failed to present any new evidence that was not previously available and which would alter this Court's conclusions"); *see also James v. England*, 226 F.R.D. 2,

7 (D.D.C. 2004) ("[A]rguments that should have been previously raised, but are only raised for the first time in a motion for reconsideration, will not be entertained by this Court."); *Summitt Investigative Serv., Inc. v. Herman*, 34 F. Supp. 2d 16, 26 (D.D.C. 1998) ("Furthermore, it is a cardinal tenet of federal-civil practice that a court — trial or appellate — will not consider matters raised for the first time in a motion for reconsideration.").

***Hearst* Case Materials.** FilmOnX also asks the Court to judicially notice the docket report and a particular pleading from the *Hearst* Case. FilmOnX contends that the docket and pleading show that "there is a substantially similar pending case in the First Circuit" (Request at 3) and the District of Massachusetts court "will hear a motion for preliminary injunction – similar to the motion brought by plaintiffs in this case – on September 18, 2013" (Memorandum re Emergency Motion for Reconsideration ("Memo Re Recon") at 1; Memorandum re Emergency Motion for Stay ("Memo Re Stay") at 1). And, in its emergency motion memoranda, FilmOnX cites to the docket and pleading as support for the contention that "there is ongoing litigation in the First … Circuit[] concerning the same subject matter as this lawsuit." Memo Re Recon at 1; *see* Memo Re Stay at 1.

The Court should deny FilmOnX's request for judicial notice of the *Hearst* Case materials for three reasons. *First*, FilmOnX is not really requesting that the Court take judicial notice of the existence of various filings in the *Hearst* Case. Rather, FilmOnX is requesting that the Court take judicial notice of the substance of those pleadings. This is evident from statements in FilmOnX's emergency motion memoranda about the *Hearst* Case's similarity to this case. 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 various documents were filed in the *Hearst* Case, the contents of those filings, and the similarity between their subject matter and this case, are "subject to reasonable dispute," and thus the Court may not take judicial notice of more than the fact of filing. *See 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 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 *Hearst* docket attached to the Request provides no information that supports the contentions for which FilmOnX relies upon in the Request, specifically, the subject matter and claims at issue in that case. Thus, this Court would need to review the content of the filings themselves to determine their similarity, 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"). What is more, the mere fact that pleadings were filed in another action involving FilmOnX's supposed competitor 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 seeks to have this Court examine the contents of the pleadings in the *Hearst* Case, the Request is an improper attempt to expand the page limits of FilmOnX's memoranda, as set forth in LCvR 7(e), and to incorporate by reference arguments not properly before the Court here, such as those made by FilmOnX's alleged competitor, Aereo. *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") (citing *Calence, LLC v. Dimension Data Holdings, PLC*, 222 F. App'x 563, 566 (9th Cir. 2007)).

Third, even if the *Hearst* Case materials releases were judicially noticeable, they should not be considered here since FilmOnX has not provided any reason why its evidence could not have been presented along with its opposition to the Plaintiffs' motion for a preliminary injunction, which the Court granted. *Schoenbohm*, 204 F.3d at 250; *Olson*, 630 F. Supp. 2d at 63; *Bao Ge*, 209 F.R.D. at 251; *see also James*, 226 F.R.D. at 7; *Summitt Investigative Serv., Inc.*, 34 F. Supp. 2d at 26.

Conclusion. For all the foregoing reasons, Plaintiffs respectfully request that the Court deny the Request in its entirety.

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