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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BURTON RICHTER, an individual; **LINDA COLLINS CORK**, an individual; **GEORGIA L. MAY**, an individual; **THOMAS MERIGAN**, an individual; **ALFRED SPIVACK**, an individual; and **JANICE R. ANDERSON**, an individual; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CC-PALO ALTO, INC., a Delaware corporation; **CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP**, an Illinois limited partnership; and **CC-DEVELOPMENT GROUP, INC.**, a Delaware corporation,

Defendants.

Case No. 5:14-cv-00750-EJD

PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE AND OBJECTIONS TO EVIDENCE

Date: May 14, 2015
Time: 9:00 a.m.
Courtroom: 4, 5th Floor
Judge: Hon. Edward J. Davila

OPPOSITION TO REQUEST TO JUDICIAL NOTICE

AND OBJECTIONS TO EVIDENCE

I. THE EVIDENCE SUBMITTED BY DEFENDANTS

A. Declaration of Hilary Weddell (Docket No. 70)

Exhibit A: California Department of Social Services ("DSS") publication of certain statutes, dated January 1, 2003.

Exhibit B: DSS publication of certain statutes obtained from the Internet Archive, dated March 28, 2002

Exhibit C: Westlaw "editorial note" for Cal. Health and Safety Code § 1793.

Exhibit D: Pamphlet titled "Your Guide to Navigating Continuing Care and Life Care Retirement Communities (Bates label DEF00002348-2352).

B. Declaration of Gary Smith (Docket No. 71)

Exhibit A: April 24, 2012 Notice from DSS.

Exhibit B: September 18 2012 letter from Gregory T. Zebolsky of Milliman to Gary Smith, Chief Financial Officer, Vi.

Exhibit C: December 31, 2010 and December 31, 2009, audited financial statements of CC-Palo Alto, Inc.

Exhibit D: December 31, 2011 and December 31, 2010, audited financial statements of CC-Palo Alto, Inc.

C. Declaration of Diana D. Digennaro (Docket No. 66)

Exhibit A: Letter from CC-Palo Alto, Inc. to Robert Thompson and Allison Nakatomi (both of DSS) dated October 3, 2012.[1]

II. LEGAL STANDARD

"When the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), 'review is limited to the complaint.' *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993)." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). "As a general

[1] Ms. Digennaro indicates that the letter is a true and correct copy "upon information and belief."

rule, 'a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.' *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (citation omitted). Rule 12(b)(6) expressly provides that when: 'matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' Fed. R. Civ. P. 12(b)(6) (emphasis added)."[2] *Id.*

This rule is subject to two exceptions: (1) a court may consider "material which is properly submitted as part of the complaint" (*Branch*, 14 F.3d at 453) or documents whose "authenticity … is not contested" and "the plaintiff's complaint necessarily relies" on them (*Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998)); and, (2) a court may take judicial notice under Federal Rule of Evidence 201 of "matters of public record (*Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). In considering the propriety of judicial notice, a court may only take judicial notice of "matters of public record" without converting a motion to dismiss into a motion for summary judgment if the matter the party seeks to have noticed is not "subject to reasonable dispute." *See* Fed. R. Evid. 201(b); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Thus, if the matter sought to be noticed is reasonably disputable, consideration of that "fact" is inappropriate on a motion to dismiss.

III. PLAINTIFFS' OBJECTIONS

Plaintiffs object to the judicial notice, admission or consideration of each of these exhibits, with the exception of Weddell Ex. D.[3] Plaintiffs' objections are explained below.

A. DSS' publication of the statutes (Weddell Exs. A, B)

Defendants argue that Health and Safety Code § 1793 is no longer valid law in California and has been superseded by Health and Safety Code § 1792.6. This argument is addressed by

[2] While this decision refers to a prior version of Rule 12(b)(6), the same instruction is now found in Fed. R. Civ. P. 12(d) (" If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.") (emphasis added).

[3] Weddell Ex. D is what Defendants characterize as a "full version" of what Plaintiff has submitted to the Court as Exhibit 21to the First Amended Complaint. While Plaintiffs have not had the opportunity to confirm this is true during the discovery process, or to examine any witness(es) about this document or the others, Defendants' characterization appears to be correct.

Plaintiffs in their oppositions to Defendants' Motions to Dismiss and will not be repeated here. However, Defendants' attempt to "prove" that § 1793 is not good law based upon publications by DSS is unavailing.

First, DSS is a creature of the executive branch in California. DSS' job is not to interpret the statutes at issue in this case, but instead to enforce the law. This Court's job is to determine what the law means, including determining whether § 1793 remains good law in California. The executive branch cannot usurp the authority of this Court to make such an interpretation. As such, Defendants' Request for Judicial Notice of the DSS publications is simply irrelevant.

Second, to the extent the DSS publications are relevant to the Court's determination of application of § 1793, judicial notice of the matter is improper. Neither Weddell Ex. A nor Weddell Ex. B contain any indication as to who wrote the publications, what the basis of their "conclusion" that § 1793 was "superseded" was, or any other potentially relevant information regarding how those publications were created, who they were sent to, or why DSS reached the conclusion Defendants contend it reached. In order for the DSS publications to have any evidentiary value, these relevant questions must be asked and answered.

Third, judicial notice is also improper because the purported "fact" Defendants' seek notice of (§ 1793 was superseded), is reasonably disputed by Plaintiffs. The existence of the publications, and the fact that they list § 1793 as being "superseded" by § 1792.6 could be noticed, but the purported "fact" that the statute was superseded is a legal question for this Court, is reasonably disputable and is not the proper subject of judicial notice. *See Lee v. City of Los Angeles*, 250 F.3d at 690 (finding district court committed error when "the court did more than take judicial notice of *undisputed* matters of public record. The court took judicial notice of *disputed* facts stated in public records") (emphasis in original).

Finally, DSS' "position" in those publications is not entitled to deference as it is not a regulation which was subject to notice and comment provisions. These are not DSS official regulatory interpretations of the Health and Safety Code statutes, nor are they regulations issued by DSS which were subject to the administrative procedures of the regulatory process. Thus, they are entitled to no deference at all by this Court.

B. The Westlaw Editorial Note (Weddell Ex. C)

For the same reasons that judicial notice and consideration of the DSS publications is improper, notice of Westlaw's "editorial note" is also improper – the purported "fact" to be noticed is subject to reasonable dispute, and this Court has no obligation to follow the "opinions" of Westlaw's attorneys. Westlaw provides information to its customers containing the context in which its "editorial notes" are prepared that makes clear that the matters are simply the opinions of attorneys paid by Westlaw. The notes are not "law" in any sense of the word, they are merely an attorneys' opinion about interpretations of the law. *See* Declaration of Eric J. Buescher in support of Plaintiffs' Objections to Evidence, Ex . 1 (a description of the "22 step" editorial process conducted by the "attorney-editors" employed by Westlaw).

Defendants reliance on Weddell Exs. A, B and C is nothing more than an attempt to take the authority of this Court to interpret the law away, and force the Court to acquiesce to the opinions of various other unknown persons purporting to express their opinions about the relationship between §§ 1793 and 1792.6.

C. Correspondence between DSS, Defendants and Milliman (Smith Exs. A, B and Digennaro Ex. A)

Smith Ex. A is a letter from DSS to from April 2012. Smith Ex. B is a letter arguing about how to interpret and analyze an actuarial study written by Milliman to Mr. Smith. Digennaro Ex. A is a letter from Gary Smith to DSS, along with seven attachments, consisting of three excerpts from an actuarial study, two pieces of correspondence from Milliman interpreting that study, and "conclusions" regarding appraisals from 2007 and 2008. These documents are not the proper subject of judicial notice, demonstrate that there are disputes about the factual interpretations made in those documents, and are not appropriately considered on a motion to dismiss.

Defendants have not asked the Court to take judicial notice Digennaro Ex. A. Instead, Defendants argue it can be considered because it was "produced to Plaintiffs" (Ind. Defs. Mot. to Dismiss at 8, n. 2) and because portions of the attachments were allegedly submitted by Defendants to DSS in response to DSS' August 2, 2012 letter, attached to the FAC as Exhibit 5 (*id.* at 8:9-12), and because it purportedly "clarifies the Milliman Report attached to the FAC as

Exhibit 4" (*id.* at 8:12-13). The incorporation by reference doctrine, on which Defendants rely, is not appropriate here, and Defendants' reliance and argument demonstrates that Digennaro Ex. A merely creates arguments and disputes about the factual interpretation of the actuarial analysis, which cannot be resolved on a motion to dismiss. Indeed, the Individual Defendants explicitly state that "the conclusions that Plaintiffs seek to draw from the CC-PA balance sheet are contradicted by the facts." *Id.* at 8:6-7. These factual disptues – how to properly interpret the actuarial analysis, the Milliman Report, and the correspondence between Milliman, appraisers, Defendants and DSS – cannot be resolved at this stage without the benefit of discovery. To the extent Defendants rely on these materials, the law requires their motion to be considered as a Rule 56 motion for summary judgment and requires that the parties be given a reasonable opportunity to present all material made pertinent to such a motion. *See* Fed. R. Civ. P. 12(d) (when the court considers material outside the scope of the complaint, "the motion must be treated as one for summary judgment under Rule 56, and all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.") (emphasis added). Here, Plaintiffs have not been afforded that opportunity, and the Court should not consider these disputed factual matters at this stage.

Smith Exs. A and B are no different. Smith Ex. A is a one page notice with no context, no explanation and no indication as to why or how the facts contained in it are "undisputable." Smith Ex. B is even less appropriately considered, and any consideration of Ex. B reveals there are disputed facts which cannot be resolved on a motion to dismiss. Smith Ex. B consists of a letter from Milliman to DSS which sought to clarify the actual study Milliman conducted for Defendants. Given that Milliman and Defendants interpret the study one way, and that DSS and Plaintiffs each interpret it a different way, the material is not "undisputable" and this Court should only resolve those disputed facts with the benefit of a complete factual record after discovery.

D. The Financial Statements (Smith Exs. C and D)

The financial statements provided as Smith Exs. C and D should not be considered by the Court. Plaintiffs concede that these materials are referenced in the FAC and its attached exhibits; however, that does not make Defendants interpretation of what those statements purportedly

disclose proper. At best for Defendants, consideration of these material simply creates disputes of fact about the propriety and sufficiency of any alleged disclosure in those statements. Nothing in the statements provides sufficient or reliable evidence to dismiss Plaintiffs' claims at this stage.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs object to the consideration of the evidence submitted by Defendants described herein and oppose Defendants' Request for Judicial Notice.

Dated: March 20, 2015

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