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By: J Nelson, Deputy

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COUNTY OF SANTA CRUZ, et al.
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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF FRESNO

15 COUNTY OF SANTA CRUZ, ET AL.,
16

Case No.: 19CECG01224

17 Plaintiffs,

18 v.

19 BUREAU OF CANNABIS CONTROL, ET
20 AL.,

21 Defendants.
22
23

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' CORRECTED
FORMAL OBJECTIONS TO
EVIDENCE OFFERED BY
PLAINTIFFS**

COMPLAINT FILED: April 4, 2019
TRIAL DATE: November 16, 2020
DEPARTMENT: 502

1 **I. INTRODUCTION**

2 Defendants Bureau of Cannabis Control and Lori Ajax (collectively “BCC”) have objected
3 to all items submitted by Plaintiffs that are outside of the rulemaking record on the ground that
4 these “extra-record” matters are not proper evidence to support an action brought under
5 Government Code section 11350, and BCC further claims that these items are not relevant to the
6 issue of whether Regulation 5416(d)¹ conflicts with Business and Professions Code sections 26090
7 and 26200. BCC is mistaken.

8 BCC’s failures to follow Administrative Procedures Act (“APA”) procedures gave rise to
9 this dispute, and therefore Government Code section 11350, subdivision (d)(4), allows this Court
10 to consider all of this disputed evidence. Moreover, each of the items to which BCC objects is
11 certainly the proper subject of judicial notice: First, the court records for a case in which the Santa
12 Cruz County Superior Court considered whether Regulation 5416(d) conflicts with the same
13 ordinance that is before this Court now is certainly relevant and may be judicially noticed. Second,
14 a Senate Bill that directly addressed preservation of local control of commercial cannabis
15 deliveries, and which is a record of an official act by the California Legislature, is likewise relevant
16 and is the proper subject of judicial notice.

17 Also admissible are the ordinances of the Plaintiffs, which are at issue in this lawsuit
18 because they directly conflict with Regulation 5416(d). Finally, the Legislative Counsel’s Digest
19 of two Assembly Bills, which documents are official acts of the legislative branch, and which are
20 relevant because they speak directly to the issue of local control of commercial cannabis delivery
21 and interpretation of Business and Professions Code section 26090 and 26200. These issues are at
22 the core of the dispute in this case.

23 For all of these reasons, and as explained further below, this Court should overrule BCC’s
24 objections to Plaintiffs’ Request for Judicial Notice and grant the Request.

25 **II. THIS COURT MAY PROPERLY TAKE JUDICIAL NOTICE OF THE**
26 **RECORDS OF OFFICIAL ACTS OF A COURT OF THIS STATE**

27 _____
28 ¹ References herein to “Regulation” are to Title 16, California Code of Regulations.

1 **A. The East of Eden Pleadings Are Properly Before this Court**

2 BCC’s primary objection to the Plaintiffs’ Request for Judicial Notice (“RJN”) of court
3 records of *East of Eden, et al. v. Santa Cruz County, et al.* (“*East of Eden*”), Santa Cruz County
4 Superior Court Case No. 19CV02072 (Filed July 12, 2019) is that they are “extra-record materials”
5 and therefore beyond the scope of review under Government Code 11350(d). (RJN, Exhs. 36-44.)
6 This objection is also asserted for all of Plaintiffs’ submissions. However, Government Code
7 section 11350, subdivision (d)(4), states that in any proceeding brought under section 11350, the
8 court may consider “[a]ny evidence relevant to whether a regulation used by an agency is required
9 to be adopted under this chapter.” The Law Revision Comments note to section 11350, explains:

10 Subdivision (d)(4) permits consideration of any relevant evidence for the
11 purpose of determining whether a regulation used by an agency is required
12 to be adopted under this chapter C i.e., whether it is an invalid
13 “underground regulation.” See Section 11340.5 (issuance or use of
14 regulation that has not been adopted is prohibited).
15 (30 Cal. Law Revision Comm. Com., Rep. (2000) p. 725.)

16 Regulation 5416(d) is just such a regulation. Plaintiffs allege that it does not comply with
17 APA requirements. According to the complaint, “[t]he APA requires that a regulation be consistent
18 with statutory provisions.” (Complaint, ¶ 23.) “Consistency means being in harmony with, and not
19 in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” (*Ibid.*,
20 citing Gov. Code, § 11349, subd. (d).) “No regulation adopted is valid or effective unless consistent
21 and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.”
22 (*Ibid.*, citing Gov. Code, § 11342.2.) Regulation 5416(d) is before this Court because it directly
23 conflicts with Business and Professions Code sections 26090, subdivision (e), and 26200,
24 subdivision (a)(1), and therefore must be declared void under Government Code section 11342.2.

25 This Court must consider all evidence relevant to show whether or not BCC’s interpretation
26 of these statutes is proper. “A court reviewing the validity of an interpretive rule... must consider
27 more than simply whether the rule is within the scope of the authority conferred, and whether the
28 rule is reasonably necessary to effectuate the statute’s purpose. Rather, a court must also consider
whether the administrative interpretation is a proper construction of the statute.” (*Association of
California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 397.) To properly assess the

1 administrative interpretation of the statutes, a reviewing Court will need to consider factors relating
2 to (1) the agency’s technical knowledge and expertise; and (2) the care with which the
3 interpretation was promulgated. (*Id.* at p. 390.) This calls for a consideration of whether the
4 regulation exceeded the authority granted to it by the legislature. (*Ibid.*) This consideration must
5 necessarily include all documents relevant to the issue at hand, including the records of a court of
6 this state interpreting the Business and Professions Code sections, official acts of local
7 governments to pass ordinances based on those statutes, and the legislative history of those statutes.

8 Therefore, this Court does have the authority to consider any evidence “relevant” to the
9 resolution of this conflict in this case, under Government Code section 11350, subdivision (d)(4).
10 This evidence is vital to this Court’s determination. “When an administrative agency construes a
11 statute in adopting a regulation or formulating a policy, the court will respect the agency
12 interpretation as one of several interpretive tools that may be helpful. In the end, however, [the
13 court] must independently judge the text of the statute.” (*Rabuck v. Superior Court* (2013) 221
14 Cal.App.4th 1334, 1348, citing *In re Lucas* (2012) 53 Cal.4th 839, 849.) “If a regulation does not
15 properly implement the statute, the regulation must fail.” (*Ibid.*; see also *Carmel Valley Fire*
16 *Protection District v. State of California* (2001) 25 Cal.4th 287, 299. [“Regulations that alter or
17 amend the statute, or enlarge or impair its scope, are void” (citation omitted)].)

18 Further, the rulemaking history confirms BCC failed to follow APA procedures. As
19 Plaintiffs allege:

20 In 2017, the BCC adopted emergency regulations to implement and
21 interpret MAUCRSA. (Cal. Reg. Notice Register 2017, No. 51-Z, p. 1958
22 [operative Dec. 7, 2017].) The regulations would have been repealed by
23 operation of law on June 6, 2018. However, the BCC refiled the
24 emergency regulations with amendments. (Cal. Reg. Notice Register
2018, No. 24-Z, p. 934 [operative June 6, 2018].) Notably, Regulation
5416(d) was never part of the 2017 emergency regulations or the
emergency regulations readopted on June 4, 2018.

(Complaint, ¶ 15.)

25 The Complaint further alleges that “[o]n July 13, 2018, the BCC issued the formal notice
26 required by the APA to adopt the emergency regulations as ‘permanent’ regulations... [and]
27 [t]his permanent rulemaking package included for the first time, Subsection (d) of Regulation
28

1 5416.” (Complaint, ¶ 16.) These and other failures to comply with APA requirements are
2 detailed in the Complaint.

3 **B. The *East of Eden* Filings Are Directly Relevant to This Dispute**

4 BCC’s further objection that the *East of Eden* filings are irrelevant to the dispute here,
5 i.e., whether Regulation 5416(d) is consistent with Business and Professions Code sections
6 26090 and 26200, is also meritless. *East of Eden* was the one and only time a court of this state
7 evaluated whether Regulation 5416(a) could withstand a challenge on the ground that it
8 contradicts local ordinances. That is precisely the same dispute here. The local ordinances at
9 issue in this case are consistent with, and passed in accordance with, Business and Professions
10 Code sections 26090, subdivision (e), and 26200, subdivision (a)(1), which together express
11 allow local governments to “completely prohibit the establishment or operation” of cannabis
12 delivery businesses within their limits. The fact that those local ordinances contradict Regulation
13 5416(d) was before the Court in *East of Eden* and therefore the *East of Eden* filings are indeed
14 “relevant” to the Court’s determination in this case.

15 BCC asserts that the facts of *East of Eden* are not before this Court and therefore “it
16 would be improper to review and discuss them to support [this Court’s] decision on the merits of
17 the instant case.” (Defendants’ Corrected Formal Objections to Evidence Offered by Plaintiffs
18 (“BCC Objections”), 4:4-6, citing *Pacific Legal Foundation v. Cal. Coastal Commission* (1982)
19 33 Cal.3d 158, 169 (“*Pacific Legal*”).)

20 This argument too is unpersuasive. First, the *East of Eden* records show, at a minimum
21 (1) that a Santa Cruz County ordinance—the same Santa Cruz ordinance before this Court—
22 limits cannabis deliveries, inconsistent with Regulation 5416(d); (2) that the ordinance was
23 challenged and an injunction was sought against enforcement; and (3) that a court of this state
24 issued a decision and order relative to that ordinance. Second, *Pacific Legal* does not preclude
25 consideration of the *East of Eden* court records. The Plaintiffs in *Pacific Legal* had attempted to
26 bootstrap the ripeness requirement articulated by the Court in that case by pointing to parallel
27 cases to support their argument that the challenged guidelines affected them as well. (*Id.* at p.
28 168.) The court in *Pacific Legal* recognized the cases cited by the parties, and even conceded

1 that they are relevant “in the general sense that they indicate the guidelines are actually being
2 applied by the Commission,” but found that these parallel cases could not demonstrate ripeness.
3 (*Id.* at p. 169.)

4 In this case, by contrast, as argued in the Plaintiffs’ concurrent brief on this issue,
5 ripeness is established as each and every Plaintiff has in place an ordinance that either directly
6 contradicts Regulation 5416(d) or is substantially affected by it. The same Santa Cruz ordinance
7 that conflicted with Regulation 5416(d) in *East of Eden* is also at issue here, and for the same
8 reason. Accordingly, the court records of the *East of Eden* case are indeed relevant as they tend
9 to show facts of consequence to the determination of this action, and they are therefore are the
10 proper subject of judicial notice. (Evid. Code, §§ 210, 452, subd. (c).) BCC’s objection to these
11 items lacks merit and should be overruled.

12 **III. THIS COURT MAY PROPERLY CONSIDER DOCUMENTS RELATED TO**
13 **SENATE BILL 1302**

14 **A. This Court May Properly Consider SB 1302 Documents Under Government**
15 **Code section 11350, subdivision (d)(4)**

16 BCC also objects to Exhibits 48 and 49 of the RJN, which are related to Senate Bill 1302,
17 on two primary grounds. First, BCC argues that these items are also “external to the rulemaking
18 record and are therefore not to be considered by the Court” in this action. (BCC Objections,
19 4:15-16.) For the reasons stated above, these objections must be overruled on the ground that
20 these Exhibits are properly before this Court under Government Code section 11350, subdivision
21 (d)(4), as they are “[a]ny evidence relevant to whether a regulation used by an agency is required
22 to be adopted under this chapter.”

23 **B. SB 1302 Documents Are Relevant to This Dispute**

24 Second, BCC objects on the ground that all matters associated with SB 1302 are
25 irrelevant to the issue of whether Regulation 5416(d) is consistent with Business and Professions
26 Code sections 26090 and 26200. As support, BCC cites to cases stating that failed bills are weak
27 evidence of legislative intent. (BCC Objections, 4:19-25, citing *People v. Superior Court* (2017)
28 3 Cal.5th 230, 243; *Dyna-med v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379,

1 1395; *People v. Anderson* (2002) 122 Cal.4th 767, 780.) However, this argument is irrelevant to
2 the admissibility of these documents. The Court may assign whatever appropriate weight it
3 deems necessary to these documents, but that does not change that they are relevant and must be
4 considered. (Evid. Code, §§ 350, 351.)

5 RJN Exhibit 48 is the Legislative History of SB 1302 (2017-2018 Reg. Sess.), obtained
6 from the Official California Legislative Information, which shows that SB 1302 was ordered to
7 inactive file on request of Senator Lara on May 31, 2018, and died on the inactive file on
8 November 30, 2018. Exhibit 48 reflects “[o]fficial acts of the legislative, executive, and judicial
9 departments of...any state of the United States.” (Evid. Code, § 452, subd. (c).) The Legislative
10 History of SB 1302, from the Official California Legislative Information, is properly before the
11 Court here because the language of the statutes at issue conflict with Regulation 5416(d).
12 (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th
13 26, 29-30.) Exhibit 48 is relevant as it tends to establish that the California legislature
14 considered a bill regarding cannabis delivery, which is a fact of consequence to the
15 determination of this action. (Evid. Code, § 210.) It is therefore admissible under Evidence
16 Code sections 350 and 351.

17 Similarly, RJN Exhibit 49 is an Analysis of SB 1302 by the Senate Committee on
18 Governance and Finance (2017-2018 Reg. Sess.), as amended April 26, 2018, obtained from the
19 Official California Legislative Information. The Legislative History of SB 1302, including an
20 analysis from a legislative committee, as part of the Official California Legislative Information,
21 is also properly before this Court because the meaning of the statutes conflicts with Regulation
22 5416(d). (*Hutnick v. U.S. Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7 [“reports of
23 legislative committees and commissions are part of a statute's legislative history and may be
24 considered when the meaning of a statute is uncertain”].) Exhibit 49 is relevant because it tends
25 to establish facts showing that local governments have banned or limited cannabis deliveries
26 within their jurisdictions. These are facts of consequence to the determination of this action.
27 (Evid. Code, § 210.) For these reasons, Exhibits 48 and 49 are properly before this Court, and
28 may be considered in connection with this dispute.

1 **IV. PLAINTIFFS’ ORDINANCES ARE PROPERLY BEFORE THIS COURT**

2 BCC argues that Plaintiffs’ Ordinances, like the *East of Eden* court records, are “extra-
3 record materials” that this Court should not consider under Government Code section 11350,
4 subdivision (d). These Ordinances, however, are the very basis of this dispute. There can be no
5 question as to their relevance. (Evid. Code, §§ 350, 351.)

6 Each of the documents included in Exhibits 1-35 to the Plaintiffs’ Request for Judicial
7 Notice is an ordinance passed by a local government, either a city or county. BCC does not dispute
8 that each of the Ordinances is an official act of a legislative body, and “issued under the authority
9 of...any public entity in the United States” and therefore may be judicially noticed pursuant to
10 Evidence Code section 452, subdivisions (b) and (c). Nor does BCC dispute that a legislative
11 enactment of a municipality is the proper subject of a Request for Judicial Notice. (*City of*
12 *Monterrey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1077, fn. 5.) Likewise, legislative
13 enactments of counties are also the proper subject of judicial notice. (See, e.g., *Curcini v. County*
14 *of Alameda* (2008) 164 Cal.App.4th 629, 647, fn 13.) Each of the submitted Ordinances is relevant
15 because it establishes that each government entity Plaintiff in this action has adopted ordinances
16 or resolutions regulating—or in some cases prohibiting—commercial cannabis deliveries within
17 its jurisdiction, which is a fact of consequence to the determination of this action. (Evid. Code, §
18 210.)

19 **V. THE LEGISLATIVE COUNSEL’S DIGESTS ARE PROPERLY BEFORE THIS**
20 **COURT**

21 BCC finally states that Exhibits 50 and 54 to the Plaintiffs’ RJN are also “extra-record
22 materials” that this Court should not consider under Government Code section 11350,
23 subdivision (d). This is not correct under Government Code section 11350, subdivision (d)(4),
24 for the same reasons as the *East of Eden* records, the SB 1302 documents, and the local
25 ordinances – these are relevant to show that Regulation 5416(d) was not adopted in compliance
26 with APA requirements. They are admissible and are the proper subject of judicial notice. (Evid.
27 Code, §§ 350, 351.)

28 Exhibit 50 is the Legislative Counsel Digest’s of Assembly Bill No. 2020 (2017-2018

1 Reg. Sess.), obtained from the Official California Legislative Information. Exhibit 50 is
2 judicially noticeable under California Evidence Code section 452, subdivision (c), as these
3 documents reflect “[o]fficial acts of the legislative, executive, and judicial departments of...any
4 state of the United States.” (Evid. Code, section 452, subd. (c).) Legislative Counsel’s Digests
5 are properly the subject of judicial notice. (*Kaufman & Broad Communities, Inc. v. Performance*
6 *Plastering, Inc., supra*, 133 Cal.App.4th at 35, citing *Pacific Gas & Electric Co. v. Department*
7 *of Water Resources* (2003) 112 Cal.App.4th 477, 482–483.) This document is relevant as it
8 pertains to the Official California Legislative Information regarding Assembly Bill 2020
9 regarding Legislative Counsel’s statements regarding the AUMA, licensing for cannabis
10 delivery, and local control, which is a fact of consequence to the determination of this action.
11 (Evid. Code, § 210.) BCC does not and cannot dispute Exhibit 50’s relevance.

12 Likewise, Exhibit 54, the Legislative Counsel Digest’s of Assembly Bill No. 97 (2019-
13 2020 Reg. Sess.), obtained from the Official California Legislative Information, is also judicially
14 noticeable under Evidence Code section 452, subdivision (c), as this document reflects “[o]fficial
15 acts of the legislative, executive, and judicial departments of...any state of the United States.”
16 (Evid. Code, § 452, subd. (c).) Legislative Counsel’s Digests are properly the subject of judicial
17 notice. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., supra*, 133
18 Cal.App.4th 26, 35, citing *Pacific Gas & Electric Co. v. Department of Water Resources, supra*,
19 112 Cal.App.4th 477, 482–483.) The Legislative Counsel’s Digest of AB 97 is relevant as it
20 tends to confirm the facts of dual levels of regulation, and that both a state license and
21 compliance with “applicable local ordinances” are required to engage in any commercial adult-
22 use cannabis activity. These are facts of consequence to the determination of this action. (Evid.
23 Code, § 210.)

24 **VI. CONCLUSION**

25 For the foregoing reasons, Plaintiffs request that this Court overrule BCC’s belated
26 objections to Plaintiffs’ Request for Judicial Notice, and admit for consideration all documents
27 objected to, all of which are properly the subject of judicial notice.

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DATED: September 21, 2020

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