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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,
Plaintiff,

v.

DARRYL COTTON, an individual; and
DOES 1 through 10, inclusive,
Defendants.

DARRYL COTTON, an individual,
Cross-Complainant,

v.

LARRY GERACI, an individual,
REBECCA BERRY, an individual, and
DOES 1 THROUGH 10, INCLUSIVE,
Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil

**PLAINTIFF/CROSS-DEFENDANTS'
OPPOSITION TO DEFENDANT/CROSS-
COMPLAINANT'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT OR,
ALTERNATIVELY, SUMMARY
ADJUDICATION**

[IMAGED FILE]

DATE: May 23, 2019

TIME: 9:00 a.m.

DEPT: C-73

Filed: March 21, 2017

Trial Date: June 28, 2019

Plaintiff and Cross-Defendants, Larry Geraci and Rebecca Berry, hereby object to the documents presented in Defendant/Cross-Complainant Darryl Cotton's Request For Judicial Notice in Support of Motion for Summary Judgment or in the Alternative, Summary Adjudication by Defendant/Cross-Complaint Darryl Cotton.

1 **I. Introduction**

2 First, Cotton's request must be denied on procedural grounds. Cotton has requested judicial
3 notice pursuant to Evidence Code 459. Evidence Code § 459 applies only to a reviewing court, i.e.,
4 "The reviewing court shall take judicial notice of...". (Cal. Evid. Code § 459) (See Law Revision
5 Commission Comments – "Section 459 sets forth a separate set of rules for the taking of judicial notice
6 by a reviewing court.")

7 Second, Cotton's request for judicial notice must be denied on substantive grounds. Judicial
8 notice is a substitute for proof, "a judicial shortcut, a doing away with the formal necessity for evidence
9 because there is no real necessity for it." *Varco v. Lee* (1919) 180 C. 338, 344; *Sosinsky v. Grant* (1992)
10 6 Cal.App.4th 1548, 1564.)| Here Cotton does not request judicial notice to affirmatively prove a fact;
11 instead, he requests judicial notice to prove the absence of a fact, i.e., that in prior pleadings Plaintiff
12 Geraci did not allege or state the fact that his response to the so-called "affirmation email"¹ referred to
13 by Cotton as the "disavowment allegation"², was in fact only a response to the first sentence of that
14 email. This is an erroneous use of the judicial notice procedures. It erroneously presupposes that
15 Plaintiff Geraci had an affirmative duty to plead that fact which clearly is not the case.

16 **II. Summary of California Judicial Notice Law**

17 Matters that may be judicially noticed can support a motion for summary judgment. (Code Civ.
18 Proc., § 437c(b)(1).) "Judicial notice may not be taken of any matter unless authorized or required by
19 law." (Evid. Code, § 450.) "Matters that are subject to judicial notice are listed in Evidence Code
20 sections 451 and 452. A matter ordinarily is subject to judicial notice only if the matter is reasonably
21 beyond dispute. [Citation.]" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th
22 97, 113.) "Taking judicial notice of a document is not the same as accepting the truth of its contents or
23 accepting a particular interpretation of its meaning." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184
24 Cal.App.3d 369, 374.) "...A court may take judicial notice of the existence of each document in a
25

26 ¹ The "affirmation email" is Attorney Austin's short-hand reference to the November 2, 2016 email from Mr. Cotton to Mr.
27 Geraci attempting to add terms to the November 2, 2016 Agreement.

28 ² The "disavowment allegation" is a descriptor contrived by Attorney Austin to refer to the phone-call Mr. Geraci made to
Mr. Cotton on November 3, 2016 in which he confirmed with Mr. Cotton that he did not agree to any equity or other
agreements outside the written November 2, 2016 written agreement.

1 court file, but can only take judicial notice of the truth of facts asserted in documents such as orders,
2 findings of fact and conclusions of law, and judgment.” (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914,
3 citing 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Judicial Notice, § 47.2, p. 1757.) For
4 example, although the existence of statements contained in a deposition transcript filed as a part of the
5 court record can be judicially noticed, their truth is not subject to judicial notice. Consequently, the
6 court could not conclude that any part of the defendant’s answer was false based upon his allegedly
7 conflicting deposition testimony. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17.) “While judicial
8 notice may be taken of court records (Evid. Code, § 452, subd. (d)), the truth of matters asserted in such
9 documents is not subject to judicial notice.” (*Coenbarger v. Morris Cerullo World Evangelism, Inc.* 29
10 Cal.App.4th 1, citing *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 597;
11 see *Ragland v. U.S. Bank national Assn.* (2012) 209 Cal.App.4th 182, 193 [“ ‘When judicial notice is
12 taken of a document, however, the truthfulness and proper interpretation of the document are
13 disputable’ ”].)

14 Generally, the court may take judicial notice of statutorily proscribed materials if they are
15 *relevant* to the issues before it. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063.)

16 **III. Cotton’s Specific Requests for Judicial Notice**

17 Defendant/Cross-Complainant Darryl Cotton has requested the Court take judicial notice of 11
18 documents pursuant to Cal. Evid. Code § 459³. Cotton’s specific requests are as follows:

19 **Cotton’s Request for Judicial Notice No. 1:** Defendant Darryl Cotton’s Verified Petition for
20 Alternative Writ of Mandate filed on October 6, 2017 against the City of San Diego, of which Plaintiff
21 Larry Geraci is a Real Party in Interest.

22 **Reason for Request No. 1.** “Cotton argues the existence of the JVA and attached the
23 Confirmation Email as evidence of his bargained-for 10% equity position. SOF ¶26.” (Cotton
24 Memorandum of Points and Authorities’ in Support of Motion for Summary Judgment, or
25 Alternatively, Summary Adjudication by Def./Cross-Complainant Darryl Cotton, p. 11, lines 18-19.)

26 **Geraci’s Response to Request for Judicial Notice No. 1:** Cotton requests the Court to take
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28 ³ As previously noted, Evidence Code Section 459 only applies to judicial notice in a reviewing court. Thus, Cotton has cited an
improper code section in support of his request. For this reason alone, Cotton’s request should be denied.

1 judicial notice of Cotton's own Verified Petition filed in a different action against the City of San
2 Diego in which Geraci and Berry were Real Parties in Interest. The court may take judicial notice that
3 the pleading was filed in this other action, but may not take judicial notice of the truth of the matters
4 alleged by Cotton in his Verified Petition in that other case.

5
6 **Request for Judicial Notice No. 2:** Verified Answer filed by Plaintiff/Real Party in Interest
7 Larry Geraci to Defendant Darryl Cotton's Verified Petition for Alternative Writ of Mandate filed on
8 October 6, 2017 against the City of San Diego.

9 *Reason for Request No. 2: "On November 30, 2017, Geraci filed a Verified Answer to Cotton's*
10 *Petition, SOF ¶ 29. Geraci's Verified Answer admits the Confirmation Email is Authentic, but he does*
11 *not alleged he sent the Confirmation Email by mistake or the Disavowment Allegation. SOF ¶ 30".*
12 *(Cotton Memorandum of Points and Authorities' in Support of Motion for Summary Judgment, or*
13 *Alternatively, Summary Adjudication by Def./Cross-Complainant Darryl Cotton, p. 11, lines 26-28.)*

14 **Geraci's Response to Request for Judicial Notice No. 2:** Cotton requests the Court to take
15 judicial notice of Geraci's Verified Answer to Cotton's Verified Petition filed in a different action
16 against the City of San Diego in which Geraci and Berry were Real Parties in Interest. The court may
17 take judicial notice that the pleading was filed in this other action, but may not take judicial notice of
18 the truth of the matters alleged by Geraci in his Verified Answer in that other case. Moreover, here
19 Cotton requests the Court to take judicial notice of the absence of an allegation in Geraci's Verified
20 Answer. In that Verified Answer, Geraci admitted that he sent the November 2, 2016 email; however,
21 that is merely evidence that he sent the email and, on its face, is not evidence of any factual matter
22 beyond the fact that he sent the email. The absence of an allegation in a pleading does not prove or
23 disprove the existence of any fact. Having no evidentiary value, the matter is irrelevant to Cotton's
24 Motion for Summary Judgment/Summary Adjudication and judicial notice should be denied. (Court
25 may take judicial notice of statutorily proscribed materials if they are *relevant* to the issues before it.
26 *(Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal.4th 1057, 1063).)*

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1 **Request for Judicial Notice No. 3:** Plaintiff Larry Geraci's Complaint filed March 21, 2017.

2 *Reason for Request No. 3. "The Complaint does not allege Geraci sent the Confirmation*
3 *Email by mistake or the Disavowment Allegation. SOF ¶25."* (Cotton Memorandum of Points and
4 Authorities' in Support of Motion for Summary Judgment, or Alternatively, Summary Adjudication by
5 Def./Cross-Complainant Darryl Cotton, p. 11, lines 12-13.)

6 **Geraci's Response to Request for Judicial Notice No. 3:** Cotton requests the Court to take
7 judicial notice of Geraci's unverified Complaint in this action. The court may take judicial notice that
8 the pleading was filed in this action, but may not take judicial notice of the truth of the matters set forth
9 in this unverified pleading. Moreover, here Cotton requests the Court to take judicial notice of the
10 absence of an allegation in Geraci's Complaint. The absence of an allegation in a pleading does not
11 prove or disprove the existence of any fact. Having no evidentiary value, the matter is irrelevant to
12 Cotton's Motion for Summary Judgment/Summary Adjudication and judicial notice should be denied.
13 (Court may take judicial notice of statutorily proscribed materials if they are *relevant* to the issues
14 before it. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063).)

15
16 **Request for Judicial Notice No. 4:** Cotton's Cross-Complaint.

17 *Reason for Request No. 4. "Geraci filed his Answer to Cotton's cross-complaint, he did not*
18 *allege he sent the Confirmation Email by Mistake or the Disavowment Allegation. SOF ¶27."* (Cotton
19 Memorandum of Points and Authorities' in Support of Motion for Summary Judgment, or
20 Alternatively, Summary Adjudication by Def./Cross-Complainant Darryl Cotton, p. 11, lines 19-21.)

21 **Geraci's Response to Request for Judicial Notice No. 4:** Cotton requests the Court to take
22 judicial notice of his own unverified Cross-Complaint in this action. The court may take judicial notice
23 that the pleading was filed by Cotton in this action, but may not take judicial notice of the truth of the
24 matters alleged by Cotton in his own unverified Cross-Complaint. Having no evidentiary value, the
25 matter is irrelevant to Cotton's Motion for Summary Judgment/Summary Adjudication and judicial
26 notice should be denied. (Court may take judicial notice of statutorily proscribed materials if they are
27 *relevant* to the issues before it. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063).)

1 **Request for Judicial Notice No. 5:** Geraci's Answer to Cotton's Cross-Complaint.

2 *Reason for Request No. 5: "On November 20, 2017, Geraci filed his Answer to Cotton's cross-*
3 *complaint, he did not allege he sent the Confirmation Email by mistake or the Disavowment Allegation.*
4 *SOF ¶27."*

5 **Geraci's Response to Request for Judicial Notice No. 5:** Cotton requests the Court to take
6 judicial notice of Geraci unverified Answer to Cotton's unverified Cross-Complaint in this action. The
7 court may take judicial notice that Geraci filed the pleading, but may not take judicial notice of the truth
8 of the matters alleged by Geraci in his unverified Answer to Cotton's Cross-Complaint (and which
9 Answer is in the form of a general denial). Having no evidentiary value, the matter is irrelevant to
10 Cotton's Motion for Summary Judgment/Summary Adjudication and judicial notice should be denied.
11 (Court may take judicial notice of statutorily proscribed materials if they are *relevant* to the issues
12 before it. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063).)

13
14 **Request for Judicial Notice No. 6:** Demurrer by Cross-Defendant Larry Geraci to Second
15 Amended Cross-Complaint by Daryl Cotton.

16 *Reason for Request No. 6: To demonstrate that Geraci did not allege the Confirmation Email*
17 *was a mistake or the Disavowment Allegation. (Cotton Memorandum of Points and Authorities' in*
18 *Support of Motion for Summary Judgment, or Alternatively, Summary Adjudication by Def./Cross-*
19 *Complainant Darryl Cotton, p. 12, line 24- p. 13, line 1.)*

20 **Geraci's Response to Request for Judicial Notice No. 6:** A demurrer is not based on
21 affidavits or sworn testimony and has no evidentiary value. Therefore the demurrer is irrelevant to any
22 issue before the Court.

23
24 **Request for Judicial Notice No. 7:** Cotton's Opposition to Larry Geraci's Demurrer to the
25 Second Amended Cross-Complaint.

26 *Reason for Request No. 7: To show that Cotton argued the Confirmation Email is evidence of*
27 *the JVA and Cotton's bargained for 10% equity position in the business. SOF ¶44. (Cotton*
28 *Memorandum of Points and Authorities' in Support of Motion for Summary Judgment, or*

1 Alternatively, Summary Adjudication by Def./Cross-Complainant Darryl Cotton, p. 13, lines10-13.)

2 **Geraci's Response to Request for Judicial Notice No. 7:** A response to a demurrer is not
3 based on affidavits or sworn testimony and has no evidentiary value. Therefore Cotton's Opposition to
4 Larry Geraci's Demurrer to the Second Amended Cross-Complaint is irrelevant to any issue before the
5 Court.

6
7 **Request for Judicial Notice No. 8:** Reply Memorandum of Points and Authorities in Support
8 of Cross-Defendant Larry Geraci's Demurrer to Second Amended Cross-Complaint by Darryl Cotton.

9 *Reason for Request No. 8: None can be found in Cotton's Memorandum of Points and*
10 *Authorities' in Support of Motion for Summary Judgment, or Alternatively, Summary Adjudication by*
11 *Def/Cross-Complainant Darryl Cotton.*

12 **Geraci's Response to Request for Judicial Notice No. 8:** A Memorandum of Points and
13 Authorities in Support of Cross-Defendant Larry Geraci's Demurrer to Second Amended Cross-
14 Complaint by Darryl Cotton is not based on affidavits or sworn testimony and has no evidentiary value.
15 Therefore it is irrelevant to any issue pending before the Court.

16
17 **Request for Judicial Notice No. 9:** Declaration of Larry Geraci in Support of Motion by
18 Plaintiff/Cross-Defendant Larry Geraci for a Preliminary Injunction or Other Order to Compel Access
19 to the Subject Property for Soil Testing.

20 *Reason for Request No. 9: "Geraci does not allege he sent the Conformation Email by mistake*
21 *or the Disavowment Allegation." (Cotton Memorandum of Points and Authorities' in Support of*
22 *Motion for Summary Judgment, or Alternatively, Summary Adjudication by Def./Cross-Complainant*
23 *Darryl Cotton, p. 14, lines 20-21; Bold original)*

24 **Geraci's Response to Request for Judicial Notice No. 9:**

25 Again, Cotton is requesting the Court to take judicial notice of the absence of a fact. The
26 absence of that fact in a pleading has no evidentiary value one way or the other. It does not prove or
27 disprove that fact. As such, it is irrelevant to any issue pending before the Court.

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1 **Request for Judicial Notice No. 10:** Declaration of Larry Geraci in Opposition to Defendant
2 Darryl Cotton's Motion to Expunge Lis Pendens.

3 *Reason for Request No. 10: "Geraci raised for the first time the Disavowment Allegation:*
4 *Geraci's story that he sent the Confirmation Email by mistake because he only meant to respond to the*
5 *first sentence of Cotton's email thanking him for meeting that day. SOF ¶52.*

6 **Geraci's Response to Request for Judicial Notice No. 10**

7 Again, Cotton is requesting the Court to take judicial notice of the absence of a fact, i.e., that the
8 "disavowment allegation" had not been previously disclosed. The absence of that fact in a pleading has
9 no evidentiary value one way or the other. It does not prove or disprove that fact. As such, the matter
10 is irrelevant to any issue pending before the Court. Nevertheless, this is the one document of which the
11 Court may take judicial notice of the truth of the contents as it is a declaration of a party under oath.

12
13 **Request for Judicial Notice No. 11:** Motion to Compel Minute Order dated 2/8/19.

14 *Reason for Request No. 11:* No reference to this Minute Order was located in Mr. Cotton's
15 Separate Statement or his Points and Authorities. The reason for the request is unknown.

16 **Geraci's Response to Request for Judicial Notice No. 11**

17 Apparently the request is irrelevant to any issue now before the Court because it is not
18 referenced in Mr. Cottons' Separate Statement of Fact nor in his Memorandum of Points and
19 Authorities.

20 **IV. Conclusion**


21 Cotton requests the Court take judicial notice of filed pleadings in this and a separate action.
22 The court may not take judicial notice of the truth of the matters stated in those filed pleadings.
23 Moreover, it appears further that Mr. Cotton is not seeking judicial notice to prove the truth of any
24 statements contained within those documents, but instead to a) point out that prior to his testimony set
25 forth in his Declaration filed in opposition to Mr. Cotton's motion to expunge the lis pendens, Mr.
26 Geraci did not affirmatively allege certain facts regarding the circumstances and events surrounding the
27 November 2 email and November 3 telephone call with Mr. Cotton, and b) to argue that this is *evidence*
28 that Mr. Geraci's testimony regarding the circumstances and events surrounding the November 2 email

1 and November 3 telephone call with Mr. Cotton set forth in that Declaration is false. This is
2 nonsensical and is a non sequitur by Cotton's counsel. The lack of certain allegations in these prior
3 pleadings is not evidence relevant to prove or disprove the facts testified to by Mr. Geraci as set forth in
4 that Declaration.⁴

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6 Dated: May 8, 2019

Respectfully submitted,

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9 By 
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28 ⁴ Mr. Geraci repeats that testimony in his Declaration filed concurrently herewith in opposition to the instant motion for summary judgment/summary adjudication.