

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

STEPHANIE SMITH,

Plaintiffs and
Respondent,

v.

PALISADES NEWS, SUE PASCOE,
& MATT SANDERSON,

Defendants and
Appellants,

Case No. B292107

Los Angeles County Superior Court
Case No. SC128999

Hon. Gerald Rosenberg,
Presiding

MOTION FOR JUDICIAL NOTICE BY *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWS EDITORS, ASSOCIATED PRESS MEDIA EDITORS, ASSOCIATION OF ALTERNATIVE NEWSMEDIA, CALIFORNIA NEWS PUBLISHERS ASSOCIATION, CALIFORNIANS AWARE, DIGITAL FIRST MEDIA, THE E.W. SCRIPPS COMPANY, FIRST AMENDMENT COALITION, FOX TELEVISION STATIONS, LLC, GANNETT CO., INC., GREATER LOS ANGELES PRO CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, LOS ANGELES TIMES COMMUNICATIONS LLC, THE MCCLATCHY COMPANY, THE MEDIA INSTITUTE, MPA–THE ASSOCIATION OF MAGAZINE MEDIA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NEWS MEDIA ALLIANCE, THE NORTHERN CALIFORNIA CHAPTER OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, REUTERS AMERICA LLC, SOCIETY OF PROFESSIONAL JOURNALISTS, AND TULLY CENTER FOR FREE SPEECH; DECLARATION OF NICOLETTE VAIRO WITH EXHIBIT A

*Katie Townsend (SBN 254321)

**Counsel of Record*

Bruce D. Brown**

Kelli Sager (SBN 120162)

Rochelle Wilcox (SBN 197790)

Nicolette Vairo (SBN 311592)

Caitlin Vogus**
Daniel J. Jeon**
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 1020
Washington, D.C. 20005
Telephone: (202) 795-9300
Facsimile: (202) 795-9310
ktownsend@rcfp.org

** *Of counsel*

Davis Wright Tremaine LLP
865 S Figueroa Street,
Suite 2400
Los Angeles, CA 90017
Telephone: (213) 663-6821
Facsimile: (213) 633-6899
kellisager@dwt.com

TABLE OF CONTENTS

I. SUMMARY OF ARGUMENT 6

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF
THE ATTACHED WEB PAGE 7

III. CONCLUSION 10

TABLE OF AUTHORITIES

CASES

<i>Ampex Corp. v. Cargle</i> (2005) 128 Cal.App.4th 1569 [27 Cal.Rptr.3d 863].....	7
<i>Brophy v. Almanzar</i> (C.D. Cal. 2018) 359 F.Supp.3d 917	9
<i>Cairns v. Franklin Mint Co.</i> (C.D. Cal. 2000) 107 F.Supp.2d 1212	8
<i>Gentry v. Ebay, Inc.</i> (2002) 99 Cal.App.4th 816 [121 Cal.Rptr.2d 703].....	8
<i>Hogen v. Valley Hospital</i> (1983) 147 Cal.App.3d 119 [195 Cal.Rptr. 5].....	7
<i>Holmes v. City of Oakland</i> (1968) 260 Cal.App.2d 378 [67 Cal.Rptr. 197].....	7
<i>Makaeff v. Trump Univ., LLC</i> (9th Cir. 2013) 715 F.3d 254	8, 9
<i>McKelvey v. Boeing N. Am., Inc.</i> (1999) 74 Cal.App.4th 151 [86 Cal.Rptr.2d 645].....	9
<i>Pollstar v. Gigmania Ltd.</i> (E.D. Cal. 2000) 170 F.Supp.2d 974	8
<i>Signature Mgmt. Team, LLC v. Automattic, Inc.</i> (N.D. Cal. 2013) 941 F.Supp.2d 1145	8
<i>Taliaferro v. County of Contra Costa</i> (1960) 182 Cal.App.2d 587 [6 Cal.Rptr. 231].....	7
<i>Von Saher v. Norton Simon Museum of Art at Pasadena</i> (9th Cir. 2010) 592 F.3d 954	8, 9

STATUTES

California Evidence Code

§ 452..... 6, 7
§ 452(h)..... 7
§ 459..... 6
§ 459, subd. (a)..... 6

OTHER AUTHORITIES

<https://www.facebook.com/StephanieSmithOfficial/>..... 10

I. SUMMARY OF ARGUMENT

Pursuant to Evidence Code sections 452 and 459, the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, Digital First Media, The E.W. Scripps Company, First Amendment Coalition, Fox Television Stations, LLC, Gannett Co., Inc., Greater Los Angeles Pro Chapter of the Society of Professional Journalists, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MPA–The Association of Magazine Media, National Press Photographers Association, News Media Alliance, The Northern California Chapter of the Society of Professional Journalists, Reuters America LLC, Society of Professional Journalists, and Tully Center for Free Speech (collectively, “*amici*”) respectfully request that the Court take judicial notice of a printout of Respondent Stephanie Smith’s (“Respondent”) Facebook page that is submitted with this Request for Judicial Notice as **Exhibit A** to the Declaration of Nicolette Vairo (“Vairo Decl.”). As *amici* establish below, this Court is authorized to take judicial notice of this social media web page, and it should do so because it is relevant to a key issue in this appeal—whether Respondent is a limited purpose public figure with respect

to her role in the cannabis industry.¹

II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF THE ATTACHED WEB PAGE

California Evidence Code section 459, subdivision (a) provides in part that “[t]he reviewing court *shall* take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452.” In turn, Section 452, subdivision (h) authorizes this Court to take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

California courts regularly take judicial notice of a party’s statements about that party posted on the party’s website or on a third-party site. (*See, e.g., Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 n.2 [27 Cal.Rptr.3d 863] (taking judicial notice of “various computer printouts from [respondent’s] Web site and [a] Yahoo! Message board”);

¹ This Court may take judicial notice of the documents submitted with this Request, although no similar request was made to the lower courts. (*Taliaferro v. County of Contra Costa* (1960) 182 Cal.App.2d 587, 592 [6 Cal.Rptr. 231]; *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 125 [195 Cal.Rptr. 5] (citing *Holmes v. City of Oakland* (1968) 260 Cal.App.2d 378, 384 [67 Cal.Rptr. 197]).)

Gentry v. Ebay, Inc. (2002) 99 Cal.App.4th 816, 820 n.1 [121 Cal.Rptr.2d 703] (taking judicial notice of “the manner in which eBay describes its operations from its Web site”); *Pollstar v. Gigmania Ltd.* (E.D. Cal. 2000) 170 F.Supp.2d 974, 978 (taking judicial notice of printout from plaintiff’s web site); *Cairns v. Franklin Mint Co.* (C.D. Cal. 2000) 107 F.Supp.2d 1212, 1216 (taking judicial notice of pages from the Warhol Museum’s web site); *Signature Mgmt. Team, LLC v. Automattic, Inc.* (N.D. Cal. 2013) 941 F.Supp.2d 1145, 1147–48 (taking judicial notice of existence of blog postings, news articles, and Internet websites, which were “all readily verifiable by reference to the web addresses listed”).) Similar to news articles, the existence of Internet web pages, including social media pages, and the posts contained on them is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Under these authorities, this Court may take judicial notice of the printout of Respondent’s Facebook page, which is attached to the Vairo Declaration as **Exhibit A**.

Exhibit A also is subject to judicial notice in order “to indicate what was in the public realm.” (*Von Saher v. Norton Simon Museum of Art at Pasadena* (9th Cir. 2010) 592 F.3d 954, 960 (“Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.”) (citations and quotations omitted); *Makaeff v. Trump Univ., LLC*

(9th Cir. 2013) 715 F.3d 254, 259 n.2 (taking judicial notice of books, newspaper and magazine articles, and web pages in defamation case); *Brophy v. Almanzar* (C.D. Cal. 2018) 359 F.Supp.3d 917, 924–925 n.2 (taking judicial notice of snapshots from defendants’ social media accounts, as the exhibits “were retrieved from websites available to the public, but only insofar as they represented what was in the public realm when the exhibits were retrieved”). *See also McKelvey v. Boeing N. Am., Inc.* (1999) 74 Cal.App.4th 151, 162 [86 Cal.Rptr.2d 645] (taking notice of newspaper articles and transcripts of radio and television broadcasts “to show the extent of the widespread publicity” of an incident to demonstrate that plaintiff had notice before statute of limitations expired).)

It also is appropriate to take judicial notice of web pages in determining whether an individual or entity is a public figure. (*See Makaeff*, 715 F.3d at 259 n.2 (in the context of deciding whether an entity was a public figure, the court judicially noticed “newspaper and magazine articles, and web pages”) (citing *Von Saher*, 592 F.3d at 960).) Therefore, judicial notice may be taken of **Exhibit A**, Respondent’s Facebook page, to establish her self-proclaimed public prominence in the California cannabis industry.

Respondent’s Facebook page—in which she identifies herself as a

public figure²—contains posts by Plaintiff opining about the debate in her community on the issue of cannabis, explaining her prominent and influential role in the cannabis industry, and providing her thoughts as to how this burgeoning industry should be regulated. The Court need not accept the truth of the claims in her postings, because they are not presented to establish the underlying facts. Instead, Respondent’s Facebook page is presented to show her public advocacy and outreach concerning the integration of legal cannabis into her community for purposes of determining whether she is a limited purpose public figure in that context—a proper subject of judicial notice.

For these reasons, *amici* respectfully request this Court take judicial notice of the following Internet web page, which is attached as **Exhibit A**:

Exhibit A: “Stephanie Smith (@StephanieSmithOfficial),”

Facebook (accessed April 8, 2019), available at

<https://www.facebook.com/StephanieSmithOfficial/>.

III. CONCLUSION

As addressed above, the web page printout submitted with this Motion for Judicial Notice establishes important facts for this Court’s consideration. Therefore, for the foregoing reasons, *amici* respectfully

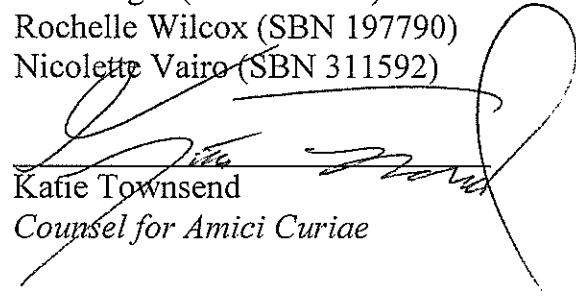
² The “public figure” designation is in the “About” box on the right side of the cover page. (Vairo Decl. Ex. A.)

request that the Court take judicial notice of the web page printout attached to this Request as **Exhibit A**.

Respectfully Submitted,

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
Katie Townsend (SBN 254321)
Bruce D. Brown**
Caitlin Vogus**
Daniel J. Jeon**
***Of counsel*

DAVIS WRIGHT TREMAINE LLP
Kelli Sager (SBN 120162)
Rochelle Wilcox (SBN 197790)
Nicolette Vairo (SBN 311592)



Katie Townsend
Counsel for Amici Curiae

DECLARATION OF NICOLETTE VAIRO

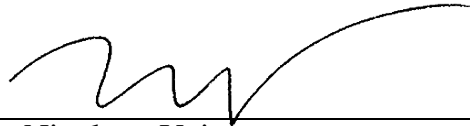
I, Nicolette Vairo, declare:

1. I am an attorney admitted to practice before all the courts of the State of California and before this Court. I am an associate in the law firm Davis Wright Tremaine LLP (“DWT”) and I am one of the attorneys for the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, Digital First Media, The E.W. Scripps Company, First Amendment Coalition, Fox Television Stations, LLC, Gannett Co., Inc., Greater Los Angeles Pro Chapter of the Society of Professional Journalists, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MPA–The Association of Magazine Media, National Press Photographers Association, News Media Alliance, The Northern California Chapter of the Society of Professional Journalists, Reuters America LLC, Society of Professional Journalists, and Tully Center for Free Speech (collectively, “*amici*”). I have personal knowledge of the following facts and, if called upon to testify, I could and would competently testify to these facts.

2. Attached as **Exhibit A** is a true and correct copy of Respondent Stephanie Smith’s Facebook web page. My assistant Frank Romero printed this web page as a PDF from the Internet at my request on

April 8, 2019.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was signed on April 18, 2019 at Los Angeles, California.

A handwritten signature in black ink, appearing to read 'Nicolette Vairo', is written above a horizontal line. The signature is stylized with a large initial 'N' and a long, sweeping tail that curves upwards and to the right.

Nicolette Vairo

[PROPOSED] ORDER

This Court, having considered the Motion For Judicial Notice by *Amici Curiae* the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, California News Publishers Association, Californians Aware, Digital First Media, The E.W. Scripps Company, First Amendment Coalition, Fox Television Stations, LLC, Gannett Co., Inc., Greater Los Angeles Pro Chapter of the Society of Professional Journalists, Los Angeles Times Communications LLC, The McClatchy Company, The Media Institute, MPA–The Association of Magazine Media, National Press Photographers Association, News Media Alliance, The Northern California Chapter of the Society of Professional Journalists, Reuters America LLC, Society of Professional Journalists, and Tully Center for Free Speech and good cause having been shown therefore,

IT IS ORDERED that the Court takes judicial notice of the following document:

Exhibit A: “Stephanie Smith (@StephanieSmithOfficial),”
Facebook (accessed April 8, 2019), available at
<https://www.facebook.com/StephanieSmithOfficial/>.

Dated: _____

By: _____
Hon. _____
Justice of the Court of Appeal
Second Appellate District, Division One