

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE AMERICAN SOCIETY OF MEDIA	:	
PHOTOGRAPHERS, INC., GRAPHIC ARTISTS	:	
GUILD, PICTURE ARCHIVE COUNCIL OF	:	Case No. 10-CV-02977 (DC)
AMERICA, INC., NORTH AMERICAN NATURE	:	
PHOTOGRAPHY ASSOCIATION,	:	
PROFESSIONAL PHOTOGRAPHERS OF	:	
AMERICA, LEIF SKOOGFORS, AL	:	
SATTERWHITE, MORTON BEEBE, ED KASHI,	:	
JOHN SCHMELZER, SIMMS TABACK,	:	
LELAND BOBBE, JOHN FRANCIS FICARA,	:	
and DAVID W. MOSER,	:	
on behalf of themselves and all others	:	
similarly situated,	:	
	:	
	:	
Plaintiffs,	:	
	:	
	:	
-against-	:	
	:	
	:	
GOOGLE, INC.,	:	
	:	
	:	
Defendant.	:	

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**RESPONSE AND OBJECTION TO DEFENDANT
GOOGLE, INC.'S REQUEST FOR JUDICIAL NOTICE**

The American Society of Media Photographers, Inc., Graphic Artists Guild, Inc., Picture Archive Council of America, Inc., North American Nature Photography Association, and Professional Photographers of America (collectively, "Associational Plaintiffs") hereby respectfully submit this Response and Objection to Defendant Google Inc.'s ("Google") Request for Judicial Notice ("Request"). For the following reasons, Google's Request for Judicial Notice should be denied in its entirety. In the alternative, the Court should only grant the Request to the extent of noticing the existence of the documents annexed to it and not for the purpose of establishing any legal or factual conclusions.

Federal Rule of Evidence 201 permits a Court to take judicial notice of adjudicative facts that either (1) are “generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” However, a Court should not take judicial notice of facts if the proposed facts are irrelevant to the case at bar. See Fraterrigo v. Akal Security, Inc., 376 Fed.Appx. 40, 42 (2d Cir. 2010) (denying motion to take judicial notice where proffered facts did not enable the drawing of any relevant conclusions); U.S. v. Schulz, 517 F.3d 606, 608 (2d Cir. 2008) (denying request to take judicial notice of other Court’s Order where the Order was “unnecessary to the disposition of [the] case”).

Moreover, at the motion to dismiss stage, the effect of judicial notice of a fact is not to establish the accuracy or correctness of the fact but rather merely the existence of the fact. See Global Network Communications, Inc. v. City of N.Y., 458 F.3d 150, 157 (2d Cir. 2006) (holding that lower Court erred in using judicially noticed documents as reasoned basis for its conclusions; proper extent of use of documents was only to note their existence). This same principal applies to judicial notice of the decisions of other Courts in unrelated proceedings. See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir. 1992) (“A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.”).

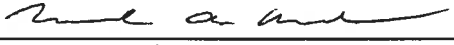
Here, Google first requests the Court to take judicial notice of an unpublished Order Granting Defendant’s Motion to Dismiss (“Order”) originating in the United States District Court for the Central District of California from an unrelated case and involving different parties. See Request at Ex. 1. As provided above, the Court may only take judicial notice of the existence of this Order. Google’s apparent attempt to have the Court recognize the Order as precedent or decisive of any issue in this case is improper and should be rejected.

Google then asks the Court to take judicial notice of selected excerpts purportedly from *ASMP Professional Business Practices in Photography*. See Request at Ex. 3. Notwithstanding that Google has failed to provide any type of context for the excerpts it submits to the Court and thus provides no basis for their relevance, the rule remains that the Court may only take judicial notice of the existence of the documents and not consider them for the purpose of adopting any fact therein as a basis for its decision on this Motion.

Dated: New York, New York
February 6, 2012

Respectfully submitted,

MISHCON DE REYA NEW YORK LLP

By: 
James J. McGuire
Mark A. Berube
Vincent Filardo, Jr.

Of Counsel:

Ronny L. Kurzman, Esq.
1200 Avenue of the Americas, 3rd Floor
New York, New York 10036
Tel: (646) 448-9990
Fax: (954) 678-0696

200 Park Avenue, 44th Floor
New York, New York 10166
Tel: (212) 612-3270
Fax: (212) 612-3297
james.mcguire@mishcon.com
mark.berube@mishcon.com
vincent.filardo@mishcon.com

*Attorneys for Lead Plaintiffs and the
Prospective Class*