

No. S207313

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**ROSEMARY VERDUGO, mother, successor and heir of MARY ANN  
VERDUGO, Decedent and MICHAEL VERDUGO, brother of  
Decedent**

Plaintiffs/Appellants

v.

**TARGET STORES, a division of TARGET CORPORATION,  
a Minnesota corporation**

Defendant/Appellee.

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Following Certification of a Question of California Law from the U.S.  
Court of Appeals, Ninth Circuit, in Appeal No. 10-57008

**SUPREME COURT  
FILED**

AUG 12 2013

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**RESPONSE TO APPELLANTS'  
REQUEST FOR JUDICIAL NOTICE**

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Frank A. McGuire Clerk

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Deputy

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## INTRODUCTION

Plaintiffs ask that this Court take judicial notice of a variety of documents, asserting that the materials are “relevant in evaluating the burden on [big box retailers] of installing an AED, and the foreseeability that a customer would suffer Sudden Cardiac Arrest on store premises.” (Appellants’ Request for Judicial Notice (ARJN) 5). Although most of the documents contained in plaintiffs’ request are the proper subjects of limited judicial notice, one—an advertisement for a defibrillator—is not. Furthermore, the remaining materials may be noticed only for their existence, not for the truth of any factual conclusions Plaintiffs would have the Court draw. Target does not object to the judicial notice of the excerpts of its Forms 10-K (ARJN Exs. 1-2), however, and stands by the accuracy of the statements made as of the time they were made.

### **I. THERE IS NO BASIS FOR TAKING JUDICIAL NOTICE OF A THIRD-PARTY ADVERTISEMENT.**

Plaintiffs seek judicial notice of an advertisement on Target’s website for a “HeartStart Home Defibrillator” that Plaintiffs assert appeared on Target’s website. (ARJN 6.) “But judicial notice, since it is a substitute for proof, is always confined to those matters which are relevant to the issue at hand.” (*Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301.) The advertisement does not meet that standard.

Plaintiffs suggest the advertisement is relevant “to Target’s knowledge of the purpose and efficiency of AEDs, and also as to the burden on a landholder of keeping one on premises.” (ARJN 6.) But the advertisement is *not* “relevant to Target’s knowledge of” anything at all. (*Ibid.*)

The defibrillator in the advertisement is manufactured by Philips Medical Systems and supplied by Englewood Marketing Group, Inc. (See Decl. of Fei Macleod (Macleod Decl.) ¶ 2.) The Philips defibrillators were sold only online, not in Target stores (*id.* ¶ 4; accord ARJN Ex. 9, at 1), and whenever a customer ordered one of the defibrillators from Target’s website, the device shipped directly from the vendor, Englewood, to the customer. (Macleod Decl. ¶ 3; see also Englewood Marketing Group, Direct to Consumer Fulfillment, <http://www.emg-usa.com/services/direct.htm> [stating that Englewood provides “retailers with a ‘one price’ ... cost” that “includes ... handling costs” and then bills “shipping charges” to the retailers]).

Moreover, Englewood’s website makes clear that Englewood “provides the ... product info[rmation] and images” for the products it supplies. (Direct to Consumer Fulfillment, *supra.*) And indeed, the advertisement at issue uses the same language as advertisements for the same device on other websites. (Compare ARJN Ex. 9, at 1 [“HeartStart guides the user with calm interactive voice instructions [] which sense and

adapt to his/her actions [] and determines if the heart rhythm is shockable”], with Overstock.com<sup>1</sup> [“HeartStart guides the user with calm interactive voice instructions which sense and adapt to her/his actions and determines if the heart rhythm is shockable”], and Goshopping.com<sup>2</sup> [“HeartStart guides the user with calm interactive voice instructions which sense and adapt to her/his actions and determines if the heart rhythm is shockable”].) That advertising copy “has no bearing on the limited legal question at hand,” and this Court should therefore “decline” to take judicial notice of it. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1144, fn. 5.)

The advertisement also may not be judicially noticed as direct evidence of the supposed “purpose and efficiency” of AEDs or the burden they would impose. (ARJN 6.) As the Court of Appeal has recognized, “advertisement[s] ... by private corporations ... are not appropriate subjects of judicial notice because they do not contain matters of ‘common knowledge.’” (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 754 n.1 [quoting Evid. Code § 452(g)].)

Furthermore, contrary to plaintiffs’ suggestion (see ARJN 7), the advertisement cannot be judicially noticed under Evidence Code § 452(h), which covers “[f]acts and propositions that are not reasonably subject to

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<sup>1</sup> Available at <http://www.overstock.com/Health-Beauty/Philips-M5068AC01-HeartStart-Home-Defibrillator/5199496/product.html>

<sup>2</sup> Available at <http://www.goshopping.com/philips-m5068ac01-heartstart-home-defibrillator-p9456920.html#details>

dispute.” Although the existence of the advertisement is undisputed, the advertisement is “reasonably subject to dispute” because it does not, as plaintiffs claim, assert any purported facts about the general “purpose and efficacy of AEDs” (ARJN 6), the “burden[s]” associated with AEDs (*ibid.*), or their “ease of use” (ARJN 7). Instead, like most advertisements, it simply attempts to convince consumers that they should purchase a particular product—in this case, the HeartStart defibrillator. (ARNJ Ex. 9, at 1-2.) And even the product-specific statements are highly disputable in light of the fact that the FDA recalled hundreds of thousands of HeartStart defibrillators in January 2013. (See FDA, Class 2 Recall Phillips and Laerdal Brands of HeartStart HS1 Defibrillator Family, Recall No. Z-0643-2013 (Jan. 4, 2013), available at <http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfres/res.cfm?id=113133>.)

Finally, taking judicial notice of the advertisement for facts concerning AEDs would impermissibly treat the *content* of the advertisement as true. That would be inappropriate. (See, *e.g.*, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1141, fn. 6 [“The truth of the content of [newspaper] articles is not a proper matter for judicial notice.”].)

## II. THE TRUTH OF ANY FACTUAL MATTER IN THE REMAINING DOCUMENTS IS NOT A PROPER SUBJECT OF JUDICIAL NOTICE.

Although Target does not object to Plaintiffs' remaining requests for judicial notice, only the "existence, content, and authenticity" of those documents may be noticed. (*People v. Castillo* (2010) 49 Cal.4th 145, 157.) The published legislative history materials do not require judicial notice. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 n.9.) And Target does not object to notice of the existence of the OSHA pamphlet, though its relevance is attenuated at best.

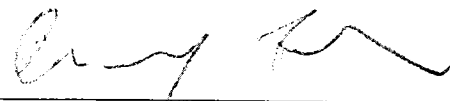
"The *truth* of critical factual matters asserted in [the] documents," however, is *not* the proper subject of judicial notice. (*Castillo, supra*, 49 Cal.4th at 157 [public records]; accord, *e.g.*, *People v. Jennings* (2010) 50 Cal.4th 616, 685 n.34 ["medical research" and other "secondary materials"]; *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["official acts and public records"], *overruled on other grounds by In re Tobacco II Cases* (2007) 41 Cal.4th 1257). That is so because the "materials [are not] embraced by both parties as accurate" (*Jennings* 50 Cal.4th at 685 n.34), and because the asserted "facts" they contain are "reasonably subject to dispute" (Evid. Code § 452(h).)

## CONCLUSION

Plaintiffs' request for judicial notice should be denied as to Exhibit 9, and the remaining exhibits should be noticed only for their existence, not for the truth of any factual assertions they contain.

Dated: August 9, 2013

Respectfully submitted,



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Attorney for Appellee Target Stores

## DECLARATION OF FEI MACLEOD

I, Fei Macleod, declare as follows:

1. I am a Buyer for Target.com. As a Buyer for Healthcare and Haircare products at Target.com, I am involved in the process of choosing which products will be offered for sale on Target.com. I either have personal knowledge of the facts stated in this declaration and if called as a witness, I could and would competently testify to them.
2. Based on my review of Target.com records, the "HeartStart Home Defibrillator," identified in Exhibit 9 of Plaintiff's Request for Judicial Notice, was first offered for sale on Target.com in 2006. The product is manufactured by Philips Healthcare and supplied to Target by Englewood Marketing Group, Inc ("Englewood").
3. The HeartStart Home Defibrillator was a drop-ship item, meaning that it was shipped directly from Englewood to any Target.com customer who purchased the product.
4. As Exhibit 9 indicates, the HeartStart Home Defibrillator was not sold in Target stores.



I declare under penalty of perjury under the laws of the State of California that the following is true and correct.

Date: August 9, 2013



By:

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On August 9, 2013, I served the foregoing document(s) described as:

**RESPONSE TO APPELLANT'S REQUEST FOR JUDICIAL NOTICE**

- By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.
- By causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.
- By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope, addressed as set forth below, to be delivered to an overnight service agent for delivery.

Benjamin R. Trachtman  
Ryan M. Craig  
TRACHTMAN & TRACHTMAN  
27401 Los Altos, Suite 300  
Mission Viejo, CA 92691

David G. Eisenstein  
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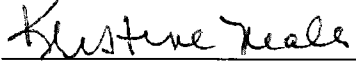
U.S. Court of Appeals for the  
Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be

deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 9, 2013, at Palo Alto, California.

  
Kristine Neale