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8 COURT OF APPEAL OF THE STATE OF CALIFORNIA
9 FOURTH APPELLATE DISTRICT- DIVISION ONE

10 BRUCE KELMAN, GLOBALTOX, INC.,)
11 Plaintiffs and Respondents,)

12 v.)

13 SHARON KRAMER,)
14 Defendant and Appellant.)

) Appellate Case No.: D047758
) Superior Court Case No.: GIN044539
) APPLICATION AND REQUEST FOR AN
) ORDER THAT THE COURT OF APPEAL
) TAKE JUDICIAL NOTICE;
) DECLARATION OF WILLIAM J. BROWN
) III; MEMORANDUM OF POINTS AND
) AUTHORITIES; PROPOSED ORDER
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17 COMES NOW APPELLANT, through her attorney of record, who requests that the
18 Court take judicial notice pursuant to Evidence Code section 452(d), 455, and 459 of the
19 following documents:

- 20 1. The deposition transcript of Bruce Kelman from the Mercury v Kramer action,
21 case number GIN024147 at pages 45:20-25, 46: 8-12, 102, 103 and 107.
22 2. Settlement documents from the Court file of the Mercury v Kramer action dated
23 October, 2003 and indicating court recorded \$450,000 settlement to the Kramers.
24 Honorable Judge Michael P. Orfield presiding.

- 1 3. Trial transcript of Bryan Hardin (additional Veritox principal, shareholder and
2 party to this litigation undisclosed to this court) dated August 11, 2005 from the
3 Oregon case entitled O’Hara v David Blain Construction, Inc., County of Lane
4 Case number 160417923 at pages 136 and 154.
- 5 4. Trial transcript of Bruce J. Kelman dated April 14, 2006 from the Arizona case
6 entitled ABAD v. Creekside Place Holdings, case number C-2002 4299, P. 31-32,
7 P. 67-68, describing Kelman and five additional principals of Veritox.
- 8 5. Case entitled Harold v. California Casualty Insurance Company, et al., County of
9 Sacramento Superior Court case number O2AS04291. Motion to exclude
10 testimony regarding Veritox principal authored “Risk from inhaled mycotoxins in
11 indoor office and residential environments.” Robbins CA, Swenson LJ, Hardin
12 BD. Included are parts of the deposition of Veritox principal, Robbins.
- 13 6. Excerpts from the Order re: Coreen Robbins, excluding testimony determining
14 human health solely from extrapolated rodent study data under Kelly-Frye, in
15 case number O2AS04291 dated 4/16/06.

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18 DATED: June 29, 2006

19 William J. Brown III
20 Attorneys for Defendant/ Appellant
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DECLARATION OF WILLIAM J. BROWN III

I, William J. Brown III, hereby declare that I am the attorney of record for the Defendant/
Appellant in the within action. As such, if called as a witness, I could and would of my own
personal knowledge testify to the following:

1. The deposition testimony of Bruce Kelman in the Mercury v. Kramer case reveals that he could not testify about health effects of mold exposure regarding Erin Kramer, Defendant's daughter.

2. The settlement documents in the same case show that there was a substantial settlement which occurred on October 0f 2003, thus impeaching Plaintiffs' thesis of a bitter sour-grapes litigant, and impeaching Bruce Kelman's declaration in opposition to the 425.16 motion.

3. The testimony of Hardin in the O'Hara case shows that he is a principal and a shareholder in GlobalTox/ Veritox.

4. The deposition of Bruce Kelman in the ABAD case shows that there are six principals in Veritox.

5. The motion under Kelly-Frye in the Harold case shows that Coreen Robbins is yet another principal in GlobalTox/ Veritox and that relying on one rat study to extrapolate a conclusion regarding health risks in humans is not scientifically supportable.

6. The Court's ruling on the Kelly-Frye hearing regarding Coreen Robbins professed testimony in the Harold matter concludes that:

THE COURT: I can. With regard to Dr. Robbins relying upon her literature review and then jumping to animal studies and then jumping to modeling conclusions, my ruling there is she will not be allowed to present that. There is not a generally accepted view of that particular approach in the scientific community and so therefore

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it's inappropriate to present that to the jury.

This greatly impeaches Plaintiffs' assertions regarding their greater science and the flimsy façade of argument (not evidence) that defendant Kramer had actual malice towards Bruce Kelman.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. This declaration is executed on June 29, 2006 at Encinitas, California.

William J. Brown III

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **The Court May Take Judicial Notice as Requested**

4 California Evidence Code § 452(d) states:

5 Judicial notice may be taken of the following matters to the extent that they are not
6 embraced within Section 451:

7 (d) Records of (1) any court of this state or (2) any court of record of the United
8 States or of any state of the United States.

9 California Evidence Code § 459 gives that same authority to the reviewing court:

10 a) The reviewing court shall take judicial notice of (1) each matter properly noticed
11 by the trial court and (2) each matter that the trial court was required to notice under
12 Section 451 or 453. The reviewing court may take judicial notice of any matter
13 specified in Section 452. The reviewing court may take judicial notice of a matter in
14 a tenor different from that noticed by the trial court.

15 (b) In determining the propriety of taking judicial notice of a matter, or the tenor
16 thereof, the reviewing court has the same power as the trial court under Section 454.

17 (c) When taking judicial notice under this section of a matter specified in Section 452
18 or in subdivision (f) of Section 451 that is of substantial consequence to the
19 determination of the action, the reviewing court shall comply with the provisions
20 of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed
21 in the action.

22 (d) In determining the propriety of taking judicial notice of a matter specified in
23 Section 452 or in subdivision (f) of Section 451 that is of substantial consequence
24 to the determination of the action, or the tenor thereof, if the reviewing court resorts
25 to any source of information not received in open court or not included in the record
of the action, including the advice of persons learned in the subject matter, the
reviewing court shall afford each party reasonable opportunity to meet such
information before judicial notice of the matter may be taken.

See also this court's taking judicial notice in footnote 4 of its prior, unpublished ruling in
a companion case in Allegretti & Co. v. County of Imperial, (2006) 138 Cal.App. 4th 1261:

1 We take judicial notice of our prior unpublished opinion in this case, *Allegretti*
2 & Company v. County of Imperial (Apr. 19, 2000, D031154) [nonpub. Opn.]
(*Allegretti I*). (Evid. Code, §§ 452, subd. (d), 459, subd.(a).)

3 California Evidence Code § 455 states:

4 With respect to any matter specified in Section 452 or in subdivision (f) of Section 451
5 that is of substantial consequence to the determination of the action:

6 (a) If the trial court has been requested to take or has taken or proposes to take judicial
7 notice of such matter, the court shall afford each party reasonable opportunity, before the
8 jury is instructed or before the cause is submitted for decision by the court, to present to
the court information relevant to (1) the propriety of taking judicial notice of the matter
and (2) the tenor of the matter to be noticed.

9 (b) If the trial court resorts to any source of information not received in open court,
10 including the advice of persons learned in the subject matter, such information and its
11 source shall be made a part of the record in the action and the court shall afford each
party reasonable opportunity to meet such information before judicial notice of the matter
may be taken.

12 Therefore, the application for judicial notice is well-taken and it is requested that this
13 Court take judicial notice as prayed.

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15 DATED: June 29, 2006

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17 William J. Brown III

18 Attorneys for Defendant/ Appellant
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