

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Frederick W. Keiser, Jr.,)
)
Plaintiff,)
)
vs.)
)
Christopher Johnson, Jasmine H.)
Dzhanszryan, Law Firm of Criminal)
Defense Associates, and Drew H. Wrigley,)
U.S. Attorney,)
)
Defendants.)

**ORDER DENYING MOTION TO
TAKE JUDICIAL NOTICE**

Civil No. 3:06-cv-81

Before the Court is Plaintiff’s Motion to Take Judicial Notice under Rule 201 of the Federal Rules of Evidence (Doc. #31). Defendants have not filed a response to Plaintiff’s motion.

Plaintiff filed a complaint against Defendants, alleging that they committed fraud in the inducement and violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) (Doc. #1). Plaintiff’s complaint also requested attorney discipline and sought a writ of mandamus requiring the United States Attorney to present Plaintiff’s accusations against Defendants to the grand jury. Defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(6) (Docs. #4, #15). On May 23, 2007, the Court granted Defendants’ motions to dismiss, holding that Plaintiff’s complaint failed to state a claim upon which relief could be granted (Doc. #27). Plaintiff filed a notice of appeal on June 13, 2007 (Doc. #29). The case was then transmitted to the Eighth Circuit Court of Appeals.

Several months later, on August 14, 2007, Plaintiff filed a motion requesting this Court to take judicial notice of a California court order. Plaintiff filed a photocopy of the order along with

his motion. The order in question was issued by the Superior Court of the State of California, and it is titled “Order to Show Cause; Interim Orders Assuming Jurisdiction Over the Law Practice of Robert Michael Nudelman.” Plaintiff’s motion does not state either the reason for his request or the purpose for which he intends to use the court order.

Aside from the merits of Plaintiff’s request, the Court questions whether it has jurisdiction to decide the issue when Plaintiff’s case is already on appeal and there are no other pending motions before this Court. Rule 201(f) of the Federal Rules of Evidence provides that judicial notice of adjudicative facts “may be taken at any stage of the proceeding.” The Advisory Committee Notes to that subsection further state that judicial notice may be taken “whether in the trial court or on appeal.” It is clear that a court of appeals may take judicial notice when a case is on appeal. See, e.g., Stutzka v. McCarville, 420 F.3d 757, 761 n.2 (8th Cir. 2005) (taking judicial notice of a bankruptcy judgment on appeal). Likewise, a district court may take judicial notice in proceedings before it, perhaps even in a post-trial proceeding if appropriate. See 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5110 (2d ed. 2005).

However, it is less clear whether a district court may take judicial notice in a case already pending before the court of appeals, particularly when the requested notice relates to an issue on appeal. See id. at 293 (noting that Fed. R. Evid. 201(f) “deals with issues that have received scant attention from the commentators”). Here, Plaintiff seeks judicial notice of a court order in a proceeding initiated by the State Bar of California against Robert Michael Nudelman, d/b/a Criminal Defense Associates, Inc. (“CDA”). CDA is a Defendant in this action on appeal, which involves claims of RICO violations, fraud, and violation of professional rules. The Eighth Circuit Court of Appeals clearly has the discretionary power to take judicial notice of the California court order on

appeal. Furthermore, the Eighth Circuit is in a better position to determine whether extra-record materials should be considered on appeal, when those materials were not part of the record before this Court when deciding the motions to dismiss. Based on these considerations, it would not be proper for this Court to take judicial notice in this matter which is currently on appeal.

For the foregoing reasons, Plaintiff's Motion to Take Judicial Notice is **DENIED**.

IT IS SO ORDERED.

Dated this 17th day of October, 2007.

/s/ Ralph R. Erickson
Ralph R. Erickson, District Judge
United States District Court