

No. 07 – 15763 [DC# CV 99-4389-MJJ]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE; et al.,
Plaintiffs - Appellants,

vs.

MARY V. KING; et al.,
Defendants - Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**MOTION TO STAY and/or RECALL MANDATE
TO PERMIT THE COURT TO RETAIN JURISDICTION TO
ADDRESS FURTHER SUBSTANTIVE ISSUES**

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MOTION TO STAY / RECALL MANDATE

The mandate must issue seven (7) days after the time for a petition for rehearing. FRAP 41(b). As this Court's en banc opinion issued on June 1, 2012, the last day for either party to petition for hearing was June 15, 2012, making the mandate due to be issued on June 22, 2012.

Upon issuance of the mandate, the appellate court loses the power to make substantive decisions in a case, although it may still enter procedural orders. *Campbell v. Wood*, 18 F.3d 662, 688 (9th Cir. 1994).

Plaintiff-Appellants are preparing, and expect to file later today, a Motion to have this court take up the issue of damages under 28 U.S.C. § 2202 and potential sanctions in lieu of damages under U.S.C. §§ 1912, 1927 or the Court's inherent authority to control abusive litigation conduct.

Plaintiff-Appellants will concurrently file a request for prevailing party status and attorney fees and costs under 42 U.S.C. § 1988, even though such a request is not due until June 29, 2012.

If this Court is to consider the Plaintiff-Appellants' requests for relief under 28 U.S.C. § 2202 (damages) and/or their request for sanctions, then this Court must retain jurisdiction of the case and stay

issuance of the mandate, or recall the mandate if it has already issued by the time these motions are considered. *Abreu-Reyes v. I.N.S.*, 350 F.3d 966, 967 (9th Cir. 2003).

Normally, the filing of a motion to stay the mandate acts to stay its issuance temporarily. If the motion is denied, the mandate issues seven days later unless the Court directs otherwise. If the motion is granted, the mandate will issue as directed by the court after termination of the stay. [FRAP Rule 41(b) & (d), Adv. Comm. Notes]

Plaintiff-Appellant's hereby request a stay and/or recall of the mandate so that the Court can address the issue of damages under 28 U.S.C. § 2202 and/or sanctions against Appellees.

Respectfully Submitted,

/s/ Donald Kilmer

Donald Kilmer, Attorney for Appellants.

CERTIFICATE OF SERVICE

On June 22, 2012, I served the foregoing **MOTION TO STAY and/or RECALL MANDATE TO PERMIT THE COURT TO RETAIN JURISDICTION TO ADDRESS FURTHER SUBSTANTIVE ISSUES** by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. [By agreement, hard-copy service of County Counsel Richard Winnie has been previously waived by T. Peter Peirce, Attorney of Record for Appellees.]

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

Executed this June 22, 2012,

/s/ Donald Kilmer

Attorney of Record for Appellants