

No. 07 – 15763 [DC# CV 99-4389-MJJ]

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

vs.

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

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

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**APPELLANTS' OBJECTION TO REQUEST FOR  
JUDICIAL NOTICE OF EXCERPT OF RECORD  
FILED IN EARLIER APPEAL # 99-17551**

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Plaintiff/Appellants hereby object to the request for judicial notice and the latest late filing by the Defendant/Appellees of the Excerpts of Record filed under the earlier case number in this appeal. (Civil No.: 99-17551)

The grounds for the objection are:

1. The filing is late. The Court's order of July 29, 2009 gave the parties 7 days to file the required additional copies of briefs and excerpts of record. The request for judicial notice and the additional excerpts of record from Case No.: 99-17551 were received by the Court on or about August 25, 2009.

2. The request for judicial notice does not indicate the relevance of the tendered documents.

A. There is no indication that the 3-judge panel considered, or cited to, the previous record in their opinion.

B. There is no citation to the prior excerpt of record in any briefs submitted under the current case number. (07-15763)

C. The request is burdensome to both the Court and parties at this late stage of the case.

3. Any arguments that Defendant/Appellees would make to the *en*

*banc* panel at oral argument that would cite the prior excerpt of record would necessarily be a new argument not raised below, and therefore not properly before court.

Plaintiff/Appellants request that the Court deny Appellees' request for judicial notice and filing of the prior excerpts of record.

Respectfully Submitted, August 31, 2009.

s/ Donald Kilmer /

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Donald Kilmer  
Counsel for Plaintiff - Appellants

CERTIFICATE OF SERVICE  
When All Case Participants are Registered for the  
Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 07-15763

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) \_\_\_\_\_ .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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When Not All Case Participants are Registered for the  
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U.S. Court of Appeals Docket Number(s): 07-15763

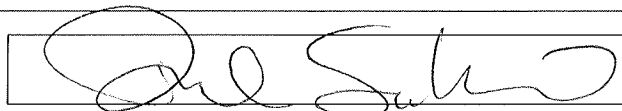
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Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Signature

 /DAVID SPEAKMAN/