Docket No. 10-56521

In the

United States Court of Appeals

For the

Ninth Circuit

RINCON MUSHROOM CORPORATION OF AMERICA,
a California Corporation,

Plaintiff-Appellant,

v.

BO MAZZETTI, JOHN CURRIER, VERNON WRIGHT, GILBERT PARADA, STEPHANIE SPENCER, CHARLIE KOLB and DICK WATENPAUGH,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, No. 09-CV-02330 · Honorable William Q. Hayes

APPELLANT'S OPPOSITION TO MOTION REQUESTING JUDICIAL NOTICE

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To the Honorable Chief Judge and Other Judges of the United States Court of Appeals for the Ninth Circuit:

In connection with their petition for panel rehearing and suggestion for rehearing *en banc,* Appellees have requested the panel take judicial notice pursuant to Rule 201, Federal Rules of Evidence, of five orders of the Intertribal Court of Southern California entered during the pendency of this appeal, on dates from July 12, 2011 through March 26, 2012, inclusively.

Appellant respectfully files this objection to Appellees' request for judicial notice, for the reason none of the documents as to which judicial notice is sought was ever before the District Court, and all thereof are outside the record -- that is, none of these five documents is included in the excerpts of record herein.

In the panel's Memorandum Disposition filed April 20, 2012, it is pointed out that Appellees had, but failed to carry, their burden of establishing, in the District Court, applicability of the *Montana* second exception; this alone should show the impropriety of permitting Appellees to adduce herein "additional evidence in support of tribal jurisdiction" from records of the Intertribal Court of Southern California (Panel Disposition, p. 4, fn. 1).

It is well settled in this Circuit that appeals are properly to be decided only on evidence that was before the district court. Judicial notice of documents outside

the record is rarely appropriate in this Circuit. For example, in *Jespersen v. Harrah's Operating Co., Inc.,* 444 F.3d 1104, 1110 (9th Cir. 2006), then Chief Judge Schroeder pointed out:

> "Our rules thus provide that a plaintiff may not cure her failure to present the trial court with facts sufficient to establish the validity of her claim by requesting that this court take judicial notice of such facts ...."

In *Yagman v. Republic Ins. Co.,* 987 F.2d 622 (9th Cir. 1993), a well-known attorney-litigant asked this Court to take judicial notice of numerous out-of-record newspaper articles, in connection with his emergency petition for writ of mandamus. In refusing this invitation, former Chief Judge Hug noted (987 F.2d at 627, fn. 3):

> "... These articles were not presented to the district court during the consideration of the recusal motion and they were not provided in conjunction with this appeal. Though Yagman asks us to take judicial notice of them, we decline to do so...."

In *Inward Laboratories v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982), Justice O'Connor questioned the appropriateness of the Second Circuit's having taken judicial notice of facts that "reflected knowledge that was not available when the District Court rendered its decision...." (456 U.S. at 857, fn. 19.).

Appellees' motion to take judicial notice should be denied.

Dated this 15th day of June, 2012

Respectfully submitted,

s/ GEORGE E. McGILL
GEORGE E. McGILL
Attorney for Appellant,
Rincon Mushroom Corporation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, 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.

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.

s/ Stephen Moore