

2d Civil No. B 178428

**In the Court of Appeal
Of the State of California
Second Appellate District
Division Four**

TOBY HARRIS, K EVIN O'CONNOR, MICHAEL SANDERCOCK,
ALEX LANE and MICHAEL BEY, on behalf of themselves, the general
public, and all others similarly situated,

Plaintiffs and Appellants,

vs.

INVESTOR'S BUSINESS DAILY, INC., a California Corporation, DIRECT
MARKETING SPECIALISTS, INC., a California corporation, DATA ANALYSIS
INC., WILLIAM O'NEIL & CO., etc., et al,

Defendants and Respondents.

Appellants' Request for Judicial Notice

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Request for Judicial Notice

Pursuant to Evidence Code sections 452(c)(1), 453 and 459, appellants move the
court to take judicial notice of the following:

- (1) Press release issued by the Commission on Judicial Performance dated
December 7, 2005 (posted on the Commission's public website cjp.ca.gov) (Ex. A);
- (2) Notice of Formal Proceedings issued by the Commission on Judicial
Performance to Judge Rodney E. Nelson (posted on the Commission's public website cjp.ca.gov) (Ex. B);
- (3) Answer of Judge Rodney E. Nelson to Notice of Formal Proceedings (posted
on the Commission's public website cjp.ca.gov) (Ex. C).

Appellants further move the court pursuant to Evidence Code sections 452 (d)(1), 453 and 459 to take judicial notice of the following:

(3) Declaration of Barry D. Hovis filed April 20, 2005 in *Morgan v. California Federal Bank*, LASC Case No. BC308284 (Ex. D);

(4) Notice of Motion and Motion to Disqualify the Honorable Rodney E. Nelson, Judge Presiding; Points and Authorities and Declaration of James R. Robie in Support Thereof filed April 23, 2005 in *Hunter v. State Farm Fire and Casualty Co.*, LASC Case No. BC262742 (Ex. E).

Argument

An appellate court can take judicial notice of matters that were not before the trial court, although the courts generally will not do so absent exceptional circumstances. (*See Vons Cos., Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *Brosterhous v. State Bar of Calif.* (1995) 12 Cal.4th 315, 325.) This case presents exceptional circumstances.

In a concurrently filed motion to augment the record, appellants establish that there appears to be a grave question concerning the ability of Judge Rodney Nelson, who awarded almost \$550,000 in attorneys' fees and costs which are the subject of this appeal, to understand the nature of the proceedings before him. The Commission on Judicial Performance has informed the public that it has begun proceedings to inquire whether Judge Nelson suffers from a disability that seriously interferes with the performance of his judicial duties and has given formal notice to Judge Nelson of the proceedings, although Judge Nelson has denied the allegations. (Exs. A, B, C.) These official records of the Commission on Judicial Performance are properly subject to judicial notice. (*Cf. Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 362, fn. 4 [official records of the Judicial Council are properly judicially noticed] ; *In re Visciotti* (1997) 14 Cal.4th 325, 349-350 [Supreme court took judicial notice of State Bar Court proceedings to assist in determining whether defendant received ineffective assistance of counsel].) They are relevant to determining whether appellants were deprived of their due process to have their case heard by a court which could understand the proceedings before it and exercise the discretion it was called upon to exercise in making the attorneys' fees award. The fact that the Commission on Judicial Performance has determined that sufficient evidence of Judge Nelson's incapacity exists to begin a formal inquiry tends to show that Judge Nelson may be suffered from an incapacity which affected the outcome of this case.

The court should also take judicial notice of the declarations filed in the *Morgan* and *Hunter* cases. (Exs. D, E.) Appellants do not request that the court take judicial notice of the truth of the allegations made in those declarations, *i.e.*, appellants do not claim that these declarations establish that Judge Nelson was incapacitated. Instead, appellants ask that the court judicially notice that these declarations were filed, evidencing a belief—true or false—by the persons who made the declarations that Judge Nelson was not capable of understanding the proceedings before him. That information is relevant because the two declarations were filed in April 2005, at precisely the time Judge Nelson heard respondents' motion in this case

for attorneys' fees and costs on April 12, 2005 and just before he issued the minute order on May 5, 2005 which awarded those costs.

For these reasons, appellants request that the court take judicial notice of these matters.

Dated: January 13, 2006

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By _____

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