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November 6, 2004

Via UPS Next Day Air (tracking no. 1Z 749 09E 22 1002 311 8)

Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street
Room 102
New Orleans, LA 70130

Re: Complaint of Judicial Misconduct

Dear Sir or Madam:

I am an attorney licensed to practice in the State of Texas and was the appellant in Hatteberg v. Red Adair Co., Inc. Employees' Profit Sharing Plan and its Related Trust, 2003 WL 22510848 (5th Cir.(Tex.)) (unpublished, No. 00-51109). I am writing to draw your attention to judicial misconduct on the part of Judge Royal Furgeson of the Western District of Texas and Judges Emilio Garza, E. Grady Jolly, and Jerry E. Smith of the United States Court of Appeals for the Fifth Circuit with respect to their handling of this matter. The misconduct arises out of the refusal of these judges to perform the duties of their office impartially and diligently in ruling upon claims of professional misconduct and violations of law by lawyers from a prominent Texas firm. The judgments and rulings of these judges show a lack of integrity, independence, and impartiality and amount to conduct prejudicial to the effective and expeditious administration of the business of the court. The following facts warrant an investigation into the conduct of these judges.

On November 6, 2003, a panel of this court consisting of Judges Garza, Jolly, and Smith allowed entry of the above-referenced unpublished, *per curiam* opinion affirming Judge Furgeson's dismissal on summary judgment of allegations of serious professional misconduct and violations of law by lawyers from the firm of Fulbright & Jaworski, L.L.P. The actions of these lawyers occurred with respect to a tax-qualified retirement plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Settled law required that the panel review the record *de novo* to determine whether reasonable and fair-minded persons could conclude from the summary judgment evidence that there was a genuine issue as to a material fact warranting a trial. The panel concluded that there was not.

However, the panel also noted that the district court had appointed and received extensive reports and recommendations from two special masters. The panel characterized these court-appointed masters as having expertise in the intricate, difficult and unfamiliar area of ERISA law. Although the panel stated that the special masters were appointed to "bring focus" to the case, the special masters were tasked by Judge Furgeson with submitting a report and recommendation on motions for summary judgment filed by the parties. The special masters reviewed both the facts and the law presented by the parties and concluded that defendants had committed "appalling multiple violations of ERISA." The special masters characterized the defense mounted by the lawyers on behalf of themselves and their co-defendants as, among other things, intentionally misleading with respect to both the facts and the law and personally insulting to the special masters. After characterizing the special masters' reports as "helpful" and their service as "exceptional" and admitting that the defendants had "contributed in no small part to the length and complexity of [the] litigation," Judge Furgeson granted defendants' motion for summary judgment and unceremoniously dismissed the claims after nearly three years of extensive, abusive, and largely unnecessary litigation.

The appeal of Judge Furgeson's dismissal remained fully briefed and under consideration by the panel for an additional two and one-half years. At oral argument, the Fulbright & Jaworski lawyer appearing on behalf of all defendants admitted that he and his co-defendants probably should have done things differently. In its opinion, the panel did not mention the fact that Judge Furgeson's conclusions about the evidence (let alone about the law) were diametrically opposed to the conclusions reached by the special masters in many respects. The panel failed to note that, in fact, reasonable and fair minded persons (the special masters) had concluded from the summary judgment evidence that the defendants had engaged in serious violations of the law. In other words, the panel, as had Judge Furgeson, ignored the law requiring a trial if a "reasonable jury could return a verdict for the nonmoving party," ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986) or if a "rational trier of fact [could] find for the nonmoving party," ***Matsushita Electric Industrial Co. v. Zenith Radio Corp.***, 475 U.S. 574, 599 (1986). In allowing entry of the opinion, each individual judge on the panel perpetuated conduct prejudicial to the effective and expeditious administration of the business of the courts by violating his oath to "administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon [him] under the Constitution and laws of the United States." 28 U.S.C. §453.

In addition to refusing to employ the correct standard of review with respect to the facts, the panel opinion contains numerous misstatements of the law. In one of the more egregious examples of this, the opinion quotes directly from Judge Furgeson's order on appeal and attributes the quote to a published opinion of this court. According to the panel, "the district court correctly noted that this court has held that the 'actual authority which a person exercises over a plan' is a more important factor than their organization

title with respect to a plan. See ***Donovan v. Mercer***, 747 F.2d 304, 308-09 (5th Cir. 1984)." The quoted language does not, in fact, appear in ***Donovan v. Mercer*** but is lifted directly from the opinion being reviewed by the panel and is a deliberate misstatement of the holding of that case. I have serious doubts that the panel opinion was either written or seriously reviewed by any of the three distinguished, experienced panel judges.

There is more than sufficient evidence in the record that the district and panel judges manipulated the procedural and substantive law in order to deliver an outcome favorable to the Fulbright & Jaworski lawyers. Along with violating their oaths of office, these judges violated the Code of Conduct for United States Judges by allowing social or other relationships to influence their conduct and judgment; using the prestige of their office to advance the private interests of others; being swayed by fear of criticism; failing to maintain order and decorum in these proceedings; failing to show respect and courtesy during these proceedings and refusing to require similar conduct from others under their control; deliberately undermining the fundamental right of litigants to be heard according to law; failing to promptly dispose of this matter; failing to conduct the proceedings so as to eliminate dilatory practices, avoidable delays and unnecessary costs; failing to respond appropriately to unprofessional conduct by other judges and lawyers; making unnecessary appointments; and acting upon personal biases or prejudices.

These claims of judicial misconduct should not be dismissed on the grounds they are a substitute for a proper appeal under the Federal Rules of Appellate Procedure or that they are directly related to the merits of the decisions or procedural rulings by these judges. Erroneous judgments resulting from a procedure that affords a meaningful opportunity to participate in the process are nonetheless legitimate. Because these judges misused summary judgment procedures in order to circumvent a proper trial and in order to reach the outcome they personally desired, regardless of the facts or the law, this was not a legitimate judgment. As evidenced by the reports of the special masters, a proper trial of these claims most certainly would have resulted in a finding that these lawyers engaged in serious violations of the law. Judge Furgeson impermissibly substituted his own interpretations of the facts for those of a rational, reasonable trier of fact for his own personal interest, and the panel judges abdicated their responsibility to properly review his summary dismissal on appeal.

As our newly re-elected President stated in a speech at West Point Academy on June 1, 2002, "[t]he twentieth century ended with a single surviving model of human progress, based on non-negotiable demands of human dignity, the rule of law, limits on the power of the state, respect for women and private property and free speech and equal justice and religious tolerance." Corruption of the rule of law and abuse of the legal process for private gain threatens the very essence of a free and democratic society. The conduct of the numerous Fulbright & Jaworski lawyers leading up to and throughout this litigation and its acceptance by these judges is a perfect example of the reason for the steady erosion of the public's view of the integrity of the legal profession and our judicial system. In the coming months and years, the selection of federal judges, especially

Supreme Court justices, will be an issue of paramount interest to the American voters and their elected representatives. It appears likely that interested parties will want to closely scrutinize the written opinions of any nominee for the Supreme Court. It appears unlikely that any judge who is willing to ignore the rule of law if it conflicts with his own personal desires and predilections will not be confirmed or, if confirmed, will be confirmed only after substantial public scrutiny. As a result of my experience with these lawyers and the judges in the state and federal courts, I am very interested in this process and intend to work very hard to help insure that judges who decline to follow the laws embodied in the Constitution and enacted by elected legislators are appropriately identified and opposed.

I urge the Chief Judge to address the serious claims of judicial misconduct raised in this complaint in order to avoid further discredit to this court and the individual panel members. Thank you for your cooperation.

Sincerely,

Andrea D. Arnold

Oath

I declare under penalty of perjury that the statements made in this Complaint of Judicial Misconduct are true.

Andrea D. Arnold

November 6, 2004

Date