

Testimony of Prof. John G.S. Flym
Before the Senate Judiciary Committee
Confirmation Hearing of Judge Samuel Anthony Alito, Jr.
January, 2006

Thank you, Mr. Chairman. Mr. Chairman, Ranking Member Leahy, and distinguished members of the Committee, I am honored to be here today. Growing up in a NYC Harlem tenement, where my father worked as “super”, I never imagined that someday I might appear before such an august body, to express my opinion about the qualifications of a presidential nominee to the highest court in the land. Nor did that change when, following military service as an enlistee, thanks to the GI bill, I went on to obtain degrees from Columbia University and the Harvard Law School. Nor, for that matter, when later I joined the faculty of Northeastern University School of Law. I am the prototype of an immigrant, a naturalized citizen, whose pride in this country’s greatness is affirmed by the fact that humble origins do not bar access to the highest circles of government. Again, I thank you for your invitation and courtesy.

You do not know me, of course, and it is a matter of coincidence that I happen to have information which I hope you will consider relevant to your decision whether to approve Judge Alito’s nomination to the Supreme Court of the United States. I am the attorney who assisted *pro bono*, the widow of D. Dev Monga, Shantee Maharaj, in preparing the November 24, 2003 Motion to Vacate Judge Alito’s 2002 opinion upholding a lower court decision against my client, and in favor of The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., (hereafter “Vanguard”).

My allotted time is brief, so I begin with my conclusion: I believe that Judge Alito’s participation in the appeal of D. Dev Monga¹ against Vanguard², violated the federal recusal statute, 28 U.S.C. § 455, because of his financial and ownership interests in Vanguard. I further believe that Judge Alito’s responses seeking to justify his failure to recuse himself in that case raise profound questions about Judge Alito’s integrity. These doubts about Judge Alito’s qualifications compel me to speak against his confirmation, and I hope that you will deny his bid for a seat on the Supreme Court bench of the United States.

I address below the technical reasons why I entertain grave doubts about Judge Alito’s integrity, but they boil down to an analysis of two propositions underlying his asserted defenses, each of which I believe to be untenable:

First, Judge Alito claims the law did not require that he recuse himself from the Monga/Vanguard appeal. I find it impossible to agree with Judge Alito, or even to grant him the benefit of doubt, because the statute’s language and its history leave no room for any hypothetical doubt. Centuries of jurisprudence on the principle of judicial impartiality as fundamental to the rule of law provide context for 28 U.S.C. § 455, the recusal statute enacted by Congress in its current form in 1974. Judge Alito claims to have “reviewed” that statute only after the filing of my 2003 motion challenging his active role in the Monga/Vanguard appeal. See Judge Alito’s letter to Senator Specter. However, Judge Alito turns a blind eye to the recusal

¹ M. Monga is an immigrant from India, who prior to this case, exemplified the American dream.

² Among other parties. See U.S. Court of Appeals for the Third Circuit, Docket # 01-1827.

statute's language explicitly relied upon in my 2003 motion, 28 U.S.C. § 455(b)(4), (which provides that a judge "shall" disqualify himself when "He knows that he ... has a financial interest in ... a party to the proceeding") & 28 U.S.C. § 455(d)(4), (which specifies that a "financial interest" means ownership of a legal or equitable interest, "however small"). Instead, Judge Alito chooses to focus on another, plainly irrelevant, clause in 28 U.S.C. § 455(b)(4), which provides a different basis for disqualification: in this alternative scenario which applies to other, non-financial, "interests", a judge must recuse only if such other "interest" might be "substantially affected by the outcome" of the appeal.

The relevant portion of the statute does not qualify its mandate obliging a judge to recuse in case of Vanguard investments. Since the definition of a "financial interest" is one "however small", a federal judge is required to disqualify himself independent of any calculation as to the potential effect of the appeal's, (or other proceeding's) outcome. In response to opinions taking the opposite view, I will develop this point below, as succinctly as I can, but with adequate technical detail to answer questions raised by others, under the heading "The Law".

For now, I measure my words in saying that I find deeply troubling Judge Alito's use of his academic and professional credentials, his considerable intelligence and legal skills, as well as his judicial stature and authority, to deny the statute its plain meaning by choosing to ignore the real issue and substituting a straw horse. I find it potentially dangerous to envision would-be Justice Alito applying this mode of self-serving analysis to the text of our Constitution, or laws enacted by Congress. Judge Alito's own words in this case betray a judicial temperament at odds with the standard of excellence essential in a Supreme Court Justice.

Second, Judge Alito seeks to explain away his failure to recuse at an earlier point in the Monga/Vanguard appeal by reference to a so-called computer glitch, or variations on the theme. This amounts to a claim that he was unaware of the recusal issue before it surfaced when the November 2003 motion to set aside his July 2002 decision put the question on his radar screen. At the outset, there is a self-evident contradiction in Judge Alito's alternative positions: it is axiomatic, and part of the canons of judicial ethics that, if not obliged to recuse, Judge Alito had a duty to sit. The fact that he recused himself from ruling on the 2003 recusal motion speaks for itself. However, a number of other circumstances converge to make Judge Alito's "inadvertence" defense so implausible as to undermine confidence in his integrity: Among them, (1) In 1990, as nominee for a seat on the Third Circuit, Judge Alito promised in writing that he would recuse in any future case with Vanguard as a party - reflecting the self-evident fact that Justice Alito understood all too well what the 1974 recusal statute would oblige him to do whenever an appeal's caption included the name Vanguard. (2) Despite his 1990 promise to this Committee that he would recuse from any case in which Vanguard was a party, Judge Alito appears to have listed "Vanguard" on the recusal list he was required to file with the Third Circuit Clerk's Office only after my 2003 motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex.7.³ (3) The three Vanguard entities – The Vanguard Group, Inc., Vanguard Fiduciary Trust Company, and Vanguard/Morgan Growth Fund, Inc., were clearly named as Defendants/Appellees in the caption of the documents filed in the Monga/Vanguard appeal; (4) it appears in the pre and post-judgment orders he signed; (5) it appears in his own 2002 opinion; (4) Judge Alito was required to file annual statements with the Judicial Conference listing his

³ The abbreviation "Ex." herein refers to one of the numbered documents attached hereto.

Vanguard investments. (6) Simultaneous with his participation in the Monga/Vanguard appeal, Judge Alito bought shares in Vanguard, before his 2002 Opinion, on 5/23/02, and 6/3/02, as well as on 10/7/02, a few weeks after he signed the *en banc* Order denying a rehearing.

It is hard to fathom how anyone could avoid the conclusion that Judge Alito turned a blind eye to the recusal issue. I will say a bit more on this point under the heading “The Facts”, but, much less than I could because this statement is longer than I had intended.

Judge Alito’s own words

The Questionnaire submitted to this Committee by Judge Alito includes, in relevant part, the following answer to question 23, (for ease of reference, I have separated the paragraph into seven numbered clauses):

15. Monga v. Ottenberg, No. 01-1827. ...

(1) I sat on the original panel that heard the appeal. Due to an oversight, it did not occur to me that Vanguard’s status in the matter might call for my recusal.

...

(2) My principal financial interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit.

(3) After the issue was raised, I reviewed the applicable ethical rules and guidelines. According to the Code of Conduct and parallel language in 28 U.S.C. section 455, I did not have a financial interest in the outcome of the case. This law states that a financial interest exists in this type of case only ‘if the outcome of the proceeding could substantially affect the value of the interest.’ (... 28 U.S.C. 455(d)(4)(iii)).

...

(4) Moreover, notwithstanding the fact that my vote on the unanimous panel did not affect the outcome,

(5) I took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case.

(6) The new panel of judges reached the same unanimous conclusion as the prior panel.

At page 54 (emphasis added)

Judge Alito’s December 10, 2003, letter to Chief Judge Anthony J. Scirica states in part, (again, for ease of reference, separated into consecutively numbered clauses):

(7) ... I do not own any shares in any party. ...

(8) I do not believe that I am required to disqualify myself based on my ownership of the [Vanguard] mutual fund shares.

(9) ... Nor do I believe that I am a party.

(10) ... I am voluntarily recusing in this case. This will of course necessitate the reconstitution of a panel to consider the pending motion.

(emphasis added)

The Recusal Statute

28 U.S.C. § 455 provides in relevant part:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

...

(4) He knows that he ... has a financial interest ... in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding ...;

...

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) “proceeding” includes ... appellate review ...;

...

(4) “financial interest” means ownership of a legal or equitable interest, however small ... except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities ...;

...

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

(emphasis added)

As subsection (e) makes plain, disqualification for any ground specified in subsection (b) may not be waived.

The Law

A. **28 U.S.C. § 455(d)(4)(iii), a “definitions” subsection, upon which Judge Alito purports to rely, does not apply to mutual funds.**

Judge Alito seeks refuge in the language of the “definitions” subsection (b)(4)(iii), - see clause numbered (3) above - which defines what “financial interest” means for “ ... a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest” In such cases, recusal is mandated, “... only if the outcome of the proceeding could substantially affect the value of the interest.”

However, subsection (d)(4)(iii) refers only to “policyholders” in “mutual insurance companies” and “depositors” in “mutual savings associations”, or “similar proprietary interest[s]”. That these categories do not extend to investments in mutual funds like Vanguard, is evident from subsection (d)(4)(i)’s explicit identification of “mutual or common investment funds” evidencing Congress’s intent to specifically address “mutual funds” in a separate subsection as it has done in subsection (d)(4)(i). This will become perfectly clear when mutual funds are discussed below.

Moreover, an equivalent conditional phrase,

“... that could be substantially affected by the outcome of the proceeding,”

first occurs in the subsection 455(b)(4). This substantive subsection identifies two kinds of “interests”: “financial” and “other”, but it modifies only “other” interests, not “financial” ones. That reading of the conditional phrase’s application is the only plausible one, given subsection (d)(4)’s explicit definition of a financial interest as one which, “however small”, is enough to trigger recusal. Should one seek to apply the “substantially affected by the outcome” condition to “financial”, (as well as “other”), interests, the result would be the same: Judge Alito’s “financial interest” in Vanguard, even if not “substantially affected” by the outcome of the Monga/Vanguard appeal, would remain a “financial interest”, within the meaning of subsections (b)(4) & (d)(4) - which place no limit on how small an interest might be to nonetheless mandate recusal.

B. **28 U.S.C. § 455(b)(4) & (d)(4) imposed a duty on Judge Alito to recuse himself from participating in the Monga/Vanguard appeal.**

1. **A financial interest in a party, however small, triggers the obligation to recuse.**

The statutory language is unequivocal. Its legislative history reveals that Congress explicitly considered, and rejected, alternative language which would have conditioned judicial

disqualification upon a showing that a judge's financial interest is more than *de minimis*. Instead, Congress enacted the "however small" definition:

... The next major changes to § 455 took place in 1974. ... The 1974 amendment rejected the "substantial interest" standard as too uncertain. Instead, Congress established a per se disqualification rule, enumerating several types of conflicts which automatically disqualify a judge. ... Under the new rule, even a *de minimis* financial interest required disqualification. ...

Ziona Hochbaum, "Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings," 71 *Fordham L. Rev.* 1669, 1678-80 (2003).

The Joint Committee on the Code of Judicial Conduct of the Judicial Conference of the United States reached the same conclusion in 1977:

... Following ABA approval of the Code of Judicial Conduct, the Congress in 1974 amended Section 455 of title 28 ... In so doing Congress departed from the provisions of the Canons in several respects. Most significantly the new statute requires disqualification in any case in which a judge has a financial interest "however small" and prohibits any remittal of disqualification based inter alia upon a financial interest. ...

"A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary, 1969-1976," 73 *F.R.D.* 247 (1977). Cf. Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 *Minn. L. Rev.* 657 (1996), "... The Justice may not sit where she holds even a *de minimis* financial interest 'in a party to the proceeding.' ..., " at n. 25. See also Steven Lubet, "Disqualification of Supreme Court Justices: The Certiorari Conundrum", 80 *Minn. L. Rev.* 657 (1996), disqualification is automatic whenever a judge holds so much as a share of stock in a party to a proceeding ..., at n. 9.

Congress' 1974 choice of language in amending 28 U.S.C. § 455 comports with centuries of recusal jurisprudence. Federal judges have been prohibited from sitting in cases in which they have a financial interest since 1792. *Liteky v. United States*, 510 U.S. 540, 544 (1994), citing Act of May 8, 1792, ch. 36, paragraph 11, 1 Stat. 278. As early as 1813, Chief Justice Marshall and Justice Livingston of The U.S. Supreme Court disqualified themselves because they had pecuniary interests in matters before the Court. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Livingston & Gilchrist v. Maryland Ins. Co.*, 11 U.S. (7 Cranch) 506 (1813).

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), applied 455(b)(4) to a trial judge named Collins who had ruled in favor of defendant Liljeberg. Ten months later, the plaintiff learned that Judge Collins was a member of the Loyola University board of trustees, and that Loyola stood to benefit financially if Liljeberg prevailed in the litigation. The plaintiff thereupon filed a motion in the Fifth Circuit seeking to vacate the judgment. Judge Collins defended his failure to recuse claiming that he had forgotten about his position as a trustee. Rejecting Judge Collins' inadvertence claim, the Fifth Circuit vacated his judgment, and a petition for writ of certiorari to review that decision was granted.

The Supreme Court had no difficulty concluding that the judge's failure to recuse himself violated section 455(a), 455(b)(4) and perhaps 455(c). *Id.* at 867-68. The judge's position as university trustee, according to the Supreme Court, gave an appearance of partiality in violation of §455(a); it also constituted a financial interest in the proceeding because of the judge's fiduciary duties as trustee, a violation of § 455(b)(4); and the judge's failure to stay informed of his fiduciary interest "may well" have been a separate violation of §455(c). *Id.* The Court found it "remarkable, and quite inexcusable" that Judge Collins failed to disqualify himself when he read papers which should have reminded him of his fiduciary interest in a party. *Id.* at 865-87. In affirming vacatur, the Court, commended the Fifth Circuit's "willingness to enforce section 455." *Id.* at 868.

A parallel argument applies here: It is "remarkable, and quite inexcusable" that Judge Alito failed to disqualify himself when he read papers, and signed orders, which must surely have reminded him of his financial investments in Vanguard, a party to the appeal. Judge Alito's purported failure to stay informed of his financial interest in connection with the Monga/Vanguard appeal could also represent a separate violation of §455(c).

The Second Circuit applied *Liljeberg* in *The Chase Manhattan Bank v. Affiliated FM Insurance Co.*, 343 F.3d 120 (2d Cir. 2003), where the trial judge owned stock in Chase worth \$250,000 to \$300,000, received papers reminding him of his disqualifying financial interests, and ruled for Chase. The Second Circuit held that a §455 violation does not depend on proof that his financial interest affected the judge's actions:

... [W]e emphasize that there is no possibility here that the judge ruled for the banks in order to enrich himself. The asset size of Chase Manhattan Bank is such that its portion of the sizeable judgment originally entered by the judge would not cause any discernible increase in the value of the shares he owned. Moreover, the shares of Chase New Stock held by him were not even 1% of the particular judge's personal fortune. The disqualifying appearance here is of a different character. . . . Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest"

343 F.3d at 128 (citing *In re Certain Underwriter*, 294 F.3d 297 at 306 (2d Cir. 2002), (quoting from *Liljeberg*, 486 U.S. at 860)). See also *In Re Honolulu Consolidated Oil Co.*, 243 F. 348 (9th Cir. 1917).

The Chase Court determined that a violation of 455(b)(4) also establishes a 455(a) violation: "We hold that an appearance of partiality requiring disqualification under §455(a) results when the circumstances are such that: (i) a reasonable person, knowing all the facts, would conclude that the judge had a disqualifying interest in a party under §455(b)(4), and (ii) such a person would also conclude that the judge knew of that interest and yet heard the case. In short, we hold that §455(a) applies when a reasonable person would conclude that a judge was violating §455(b)(4)." *Id.*

See also, *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982) (“[A] financial interest commands recusal if no specified exception applies and regardless of whether the outcome of the proceeding could have any effect on the interest.”); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 706 F. Supp. 776, 780 (D. N.M. 1989), (“Even the slightest financial interest by the judge, the judge’s spouse or the judge’s minor child requires disqualification”); Judicial Conference, Advisory Opinion 20, www.uscourts.gov/guide/vol2/20.html: “Ownership of even one share of stock would require disqualification.”

2. **28 U.S.C. §455 does not distinguish between investments in mutual funds and investments in stocks, treating both as “financial interests”.**

The statute’s definitions subsection provides:

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

...

(4) “financial interest” means ownership of a legal or equitable interest, however small ... except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities ...

(emphasis added)

Congress did not mean to exclude investments in mutual funds from its definition of “financial interest”. Had it meant to do so, it would not have included the otherwise unnecessary phrase, “in such securities”. Subsection (d)(4)(i) would simply provide: “Ownership in a mutual or common investment fund that holds securities is not a ‘financial interest’”.

As enacted by Congress, subsection (d)(4)(i) articulates two sensible propositions:

(1) An investment in a mutual fund that holds securities is a “financial interest”, within the meaning of subsection (b)(4); and

(2) Such a financial interest means that a judge owing mutual fund shares does not thereby have a financial interest in the particular securities held in the mutual fund portfolio, which are subject to change at any time.

As a matter of common sense, there is no basis for mandating recusal by a judge with a minimal investment in IBM, in a case where IBM is a party, and not mandating recusal by a judge with a minimal investment in Vanguard, in a case where Vanguard is a party. Congress made no such distinction in its 1974 recusal legislation. As one treatise observes:

Ownership of a mutual fund or common investment fund is not a disqualifying financial interest as to any of the stocks or securities held by the fund, unless the judge participates

in the management of the fund. Of course, the judge would be required to recuse if the common fund itself was a party to the suit. (emphasis added)

50 Am. Jur. Proof of Facts 3d 449.

The Facts

C. Judge Alito's ownership - and financial - interest in Vanguard's expenses.

Judge Alito denies being an owner of Vanguard. Vanguard explains that it is owned by its Funds, and therefore by the Vanguard funds' shareholders:

Unique organizational structure. Vanguard has a unique organizational structure. The Vanguard Group is owned by the funds and thus by the funds' shareholders, instead of being controlled by an outside management firm, as most investment firms are . . . This enables us to pass along the sizable economies of scale involved in asset management to our shareholders - our owners

Vanguard's website www.vanguard.com under the link "Why Invest Here" further states:

... the shareholders and the owners are essentially one and the same at Vanguard. Vanguard shareholders own the Vanguard funds, which are independent investment companies that jointly own The Vanguard Group.

Vanguard's website, www.vanguard.com during the relevant period, its 2002 Annual Report, and its Corporate Disclosure Statement, (Third Circuit LAR 26.1 required Vanguard to file this document which is included as part of the Monga/Vanguard appeal record).

As one of Vanguard's owners, Judge Alito, despite his denial, was therefore an owner of a "party" to the Monga/Vanguard appeal.

Indeed, the federal Judicial Conference checklist as adopted, after the 1974 statute was enacted, contains this explicit warning:

... shares in some mutual funds may convey an ownership interest in the mutual fund management company in which case that company should be included on the conflicts lists

www.uscourts.gov/guide/vol2/checklist.pdf; www.uscourts.gov/ttb/jun98ttb/reminder.html; and www.uscourts.gov/ttb/sep99ttb/interview.html.

Thus, 28 U.S.C. 455(b)(5) provides another reason why Judge Alito had a duty to recuse.

The statutory test is objective. Whether or not Judge Alito chose to ignore the checklist warning, whether or not he read the Vanguard documents telling him that he owns Vanguard, he

is an owner of Vanguard, therefore a “party” to this proceeding, and thereby disqualified by the mandatory text of 28 U.S.C. § 455(b)(5).

As an illustration of that warning, Vanguard explains, with unmistakable clarity, that its “unique” structure enables it pass along to its “owners” the benefits of economies of scale involved in management expenses. Vanguard’s Corporate Disclosure Statement explains:

... Management expenses, which are one part of operating expenses, include . . . other costs of managing a fund — such as legal . . . expenses

www.vanguard.com. Thus, among other financial interests in Vanguard was Judge Alito’s share of management operating expenses, which include “legal ... expenses”, and their contingency upon the outcome of Appellant’s case against Vanguard. Assuming Judge Alito’s investment to be 1/2 million dollars, Vanguard’s own estimate is that over a period of 10 years he would pay around \$33,600.00 in management fees.⁴

The mandatory language of 28 U.S.C. §455, “Any justice .. shall disqualify himself ...”, places upon the judge the duty to recuse himself. *Sao Paulo State v. Am. Tobacco Co.*, 535 U.S. 229 (2002). See also. *Haines v. Liggett Group Inc.*, 975 F.2d 81 (3d Cir.1992) (quoting *In re Murchison*, 349 U.S. 133 (1955)). “No action by a party is required to invoke the . . . statute;” 13A Charles Alan Wright et al., *Federal Practice and Procedure* §3550 (1984).

⁴ ANNUAL FUND OPERATING EXPENSES (expenses deducted from the Fund’s assets)

Management Expenses: 0.50%

12b-1 Distribution Fee: None

Other Expenses: 0.04%

Total Annual Fund Operating Expenses: 0.54%

The following example is intended to help you compare the cost of investing in the Fund with the cost of investing in other mutual funds. It illustrates the hypothetical expenses that you would incur over various periods if you invest \$10,000 in the Fund’s shares. This example assumes that the Fund provides a return of 5% a year and that operating expenses match our estimates. The results apply whether or not you redeem your investment at the end of the given period.

This example should not be considered to represent actual expenses or performance from the past or for the future. Actual future expenses may be higher or lower than those shown.

1 Year	3 Years	5 Years	10 Years
\$55	\$173	\$302	\$677

PLAIN TALK A BO U T

Fund Expenses

All mutual funds have operating expenses. These expenses, which are deducted from a fund’s gross income, are expressed as a percentage of the net assets of the fund. We expect Vanguard Growth Equity Fund’s expense ratio for the current fiscal year to be 0.54%, or \$5.40 per \$1,000 of average net assets. The average large-cap growth mutual fund had expenses in 2002 of 1.57%, or \$15.70 per \$1,000 of average net assets (derived from data provided by Lipper Inc., which reports on the mutual fund industry). Management expenses, which are one part of operating expenses, include investment advisory fees as well as other costs of managing a fund—such as account maintenance, reporting, accounting, legal, and other administrative expenses.

Congress and the federal judiciary have adopted and implemented a comprehensive set of rules and procedures designed to identify a disqualifying financial interest at the earliest stage. The statutory test is objective.

D. Judge Alito's inaccurate statements.

1. Judge Alito listed Vanguard funds on the Third Circuit's recusal list only after the 2003 motion accusing him of having failed to recuse himself from the Monga/Vanguard appeal.

A document which I just obtained, Ex 1, pp. 23-38, appears to show that, despite his 1990 promise that he would recuse in any Vanguard case, Judge Alito did not name Vanguard on the recusal lists he filed with the Third Circuit Clerk's Office, either before 1999 when the "system" was "automated", or before. The first such filing appears to have occurred in December 2003, after the motion challenging his failure to recuse from the Monga/Vanguard appeal, Ex. 1. pp. 25-30.

If this is accurate, then evidently Judge Alito's "oversight", computer glitch & similar excuses are specious.

If it is inaccurate, i.e. if it turns out that Judge Alito did list Vanguard on his recusal list, the same excuses would fare no better, for such evidence would show that Judge Alito knew all too well that he had no choice but to recuse in any Vanguard case.

2. Judge Alito's claim that he asked for a new panel to rehear the case.

Judge Alito claims that he "... took the extra and unnecessary step of requesting that a new panel of judges be appointed to rehear the case ...," see Alito's own words (5) above. That statement was made in 2005, as part of the questionnaire he filed with this Committee. In fact, Judge Alito's December 2003 letter to CJ Scirica observes only that his recusal, "... will of course necessitate the reconstitution of a panel to consider the pending motion" to set aside his 2002 opinion and judgment.

The distinction between recusal from the 2003 motion to vacate his 2002 judgment, as opposed to recusal from the appeal in 2002, is consequential. It, along with other inaccuracies in Judge Alito's account of his role in the Vanguard appeal, casts serious doubts on his credibility: One can't know if a discovered reason for mistrust is just the tip of an iceberg.

3. Judge Alito claims that the second panel reheard the case.

The fact that Judge Alito only recused himself from deciding the 2003 motion - entitled "Motion by Appellant to Vacate the July 30, 2002 Judgment, Disqualify Judge Alito from this Appeal and to Order a New Appeal to be Heard" - also came to have more significance than one would suspect. It may be that Judge Alito expected the new panel to absolve him of having failed to recuse from the appeal itself.

Instead, by letter dated December 17, 2004, the Clerk's office notified all parties that the case had been listed on the merits, (nothing other than the motion to vacate was pending). The Clerk requested both an acknowledgment of receipt to be sent on "an enclosed copy of this letter" with the name of the attorney who would present oral argument, and whether such attorney was a member of the Third Circuit bar. Ex. 1⁵. Ms. Maharaj gave notice that I would argue on her behalf. Letter dated 12/20/03, Ex. 2; Docket entry dated 12/21/03, Ex. 3. It happens that I have been a member of Third Circuit bar since the 1980s. Thereafter, in lieu of hearing & deciding the 2003 motion, CJ Judge Scirica issued an Order on January 12, 2004, setting aside the 7/30/02 Judgment, thereby mooting the motion Judge Alito had described as "pending", and further providing that a new panel would be appointed which would decide how to proceed:

... Because Judge Alito recused himself from this matter (sic), the judgment will be recalled and the judgment vacated.

The appeal will be resubmitted to another panel for whatever action the new panel deems appropriate. ...

Docket Sheet entry dated 1/12/04, Ex. 3. Judge Scirica evidently decided that Judge Alito's failure to recuse as of 2002 could not be justified and, acting *per curiam*, that the better part of wisdom was to treat Judge Alito's recusal from the pending motion, (recharacterized by Judge Scirica as a recusal "from this matter") as a recusal from the case. This revision of Judge Alito's "recusal" served as predicate for Judge Scirica ordering the 2002 "judgment ... recalled and ... vacated."

On January 21, 2004, I filed my appearance as counsel for the Appellants. Docket entry dated 1/21/04, Ex. 3. For the next 11 weeks, through March 31, 2004, I and my client regularly inquired of the Clerk's Office, and checked the docket sheet available through PACER, to see whether a new panel had been appointed. We found no entry concerning a new panel, and were orally advised that no new panel had been appointed. Ex. 4, Affidavit of Shantee Maharaj, dated April 13, 2004. I was therefore shocked when, on the afternoon of April 6, 2004, I received a letter dated March 30, 2004, addressed to Ms. Maharaj and all counsel of record - but conspicuously omitting my name, advising that the appeal "... was submitted on the briefs on Thursday, February 12, 2004, and, in a sentence at the bottom, below the signature, advising that "... your appeal will (sic) be submitted to the following panel ...," naming CJ Scirica as one of the three judges. A check of the docket via the internet on PACER revealed a new entry dated 2/12/04, stating that the case had been "SUBMITTED Thursday, February 12, 2004", and naming the members of the new panel, without mention of when the panel members had been designated, and without mention of what procedures had been adopted or by whom. Docket entry dated 2/12/04, Ex. 3.

In short, the appeal was being treated as if it was still a *pro se* appeal by Ms. Maharaj, relying on Ms. Maharaj's *pro se* briefs, and dispensing with oral argument. I instantly drafted "Appellant's Motion for Leave to File a Substitute Brief, or to File a Supplemental Brief, and for Oral Argument," This motion was served by hand on Vanguard's Boston counsel on April 7, 2004, served by hand on Philadelphia counsel for some Appellees early in the morning of April

⁵ "Ex." refers to exhibits attached hereto.

8, 2004, Ex. 5. This motion was also filed by hand with the Clerk's Office in Philadelphia at about 9AM, date-stamped April 8, 2004. Ex. 6. To my dismay, I learned that the new panel had filed its "NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION" the prior day, affirming the lower court's decision. Docket entries dated 4/7/04, Ex. 3. This April 7 opinion is a verbatim replica of Judge Alito's 2002 Opinion, except for the addition of one footnote.

The Docket contains no entry about the motion I filed April 8, 2004.

On April 21, 2004, I filed a petition for rehearing. Like my April 7 motion, my April 21 motion argued that the "new" panel's procedure violated both Ms. Maharaj's constitutional right to the assistance of counsel in her appeal, as well as federal appellate rules governing right to counsel and the right to oral argument.

In short, the second panel did not "rehear" the case. In fact, neither did Judge Alito's panel. There was no hearing whatsoever in this appeal.

4. Judge Alito's role in the appeal voided his 2002 Judgment

Judge Alito claims that, "... my vote on the unanimous panel did not affect the outcome," Alito's own words (4) above, and observes that, "The new panel of judges reached the same unanimous conclusion as the prior panel" - implying that his failure to recuse was a mere technicality with no impact on the disposition of the Monga/Vanguard appeal, either the first or second panel's. The fact is that his failure to recuse in the Monga/Vanguard appeal rendered his panel's own NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION void, and that the second panel's decision to proceed as it did can only be premised on the assumption that it did not regard the first panels decision as void. Otherwise, the second panel would have had to accord Ms. Maharaj a fresh appeal, with all of the accustomed procedures, including the right of her *pro bono* counsel to file briefs and present oral argument.

28 U.S.C. §46(b) mandates that a panel should consist of not less than three judges. As construed in *Khanh Phuong Nguyen v. United States*, 39 U.S. 69, 123 S.Ct. 2130 (2003), the statute requires a properly constituted panel:

"... the statutory authority for courts of appeals to sit in panels, 28 U.S.C. §46(b), requires the inclusion of at least three judges in the first instance. . . . although the two Article III Judges who took part in the decision of petitioners' appeals would have constituted a quorum if the original panel had been properly created, ... it is appropriate to return these cases to the Ninth Circuit for fresh consideration of petitioners' appeals by a properly constituted panel organized conformably to the requirements of the statute. . .

Khanh Phuong Nguyen, 123 S.Ct. at 2138-39 (emphasis added)

United States v. American-Foreign S.S. Corp., 363 U.S. 685, 690-691 (1960), vacated the judgment of a Court of Appeals sitting *en banc*, because a Senior Circuit Judge who had participated in the decision was not authorized by statute to do so. The Court declined to conduct

a prejudice inquiry as impracticable, it being impossible to determine *post hoc* the unlawful adjudicator's role in the appellate process, which is collective, deliberative, and occurs behind closed doors.

Indeed, the “mere participation [of a disqualified judge] in the shared enterprise of appellate decisionmaking . . . pose[s] an unacceptable danger of subtly distorting the decisionmaking process.” *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986). “[T]he collegial decisionmaking process that is the hallmark of multimember courts [may lead] the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity.” *Id.* at 833; *accord Crump v. Bd. of Educ.*, 392 S.E.2d 579, at 588 (N.C. 1990) (“One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations.”) See also *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372 (1893) (holding that because the composition of the panel violated a federal statute, its ruling was invalid); *Moran v. Dillingham*, 174 U.S. 153, 158 (1899); and *William Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*, 228 U.S. 645, 652 (1913).

Unsurprisingly, six federal Courts of Appeals - including the Third Circuit - have recognized the impossibility of determining the prejudicial effect of one unlawful adjudicator upon the lawfully-appointed panel members. See, e.g., *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941):

... Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured

See also *Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Hicks v. City of Watonga, Okla.*, 942 F.2d 737, 748-49 (10th Cir. 1991); *Antoniou v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966).

Accordingly, where, as here, a disqualified judge, (Judge Alito), sits on a federal Court of Appeals, this unlawful arrangement constitutes “... a structural defect that [goes] to the validity of the very proceeding under review.” *Freytag v. Comm'r*, 501 U.S. 868 at 884, 898 (1991). Such an error “undermines the structural integrity of the . . . tribunal.” *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

Errors in the composition of an appellate court are regarded as jurisdictional defects. Where an error “embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as ‘jurisdictional.’” *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

In short, the judgment rendered by the improperly constituted panel in which Judge Alito took part was void, and the fact it was rendered unanimously has no judicial relevance. The second panel's truncated process deserves the same fate, since it republished Alito's decision without affording Maharaj's new counsel an opportunity to present her case.

5. Judge Alito's motives - and mine.

Since others, friends and reporters, have asked me why Alito failed to recuse, (e.g. did I think it was “hubris”), you likely may have the same question. Indeed the recusal statute itself seems to suggest such an inquiry by using the phrase “financial interest”, the disqualifying circumstance upon which Ms. Maharaj relies. I refuse to speculate about Judge Alito’s motive(s).

The objective of the recusal statute is judicial “impartiality” and the appearance thereof, without which public respect for law and our institutions of justice would collapse. The first section 28 U.S.C. § 455 provides:

(a) Any ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section (a) charges the judge with the general obligation of recusing himself whenever his impartiality might reasonably be questioned. Section (b) goes on to list circumstances automatically mandating that a judge recuse, among them when a judge has a financial interest in a party. In other words, a violation of section (b) means that Judge Alito’s “...impartiality might reasonably be questioned ...,” and therefore necessarily also violates section (a). See e.g. the Second Circuit’s 2003 opinion in *The Chase Manhattan Bank, supra*:

... Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of §455(a) is triggered by a financial interest”

343 F.3d at 128. The trial judge in *Chase* owned Chase stock worth between \$250,000 and \$300,000. During his participation in the Monga/Vanguard appeal, Judge Alito’s investments in Vanguard far exceeded \$300,000.

So, at bottom, Judge Alito’s motives are irrelevant. What matters is what he did, not why.

On the other hand, I can speak of my motives in undertaking Ms. Maharaj’s case. After my dad died 25 years ago, my mom discovered that the pension he had left her was worth \$700. She was devastated, and as a neophyte attorney with a predominantly *pro bono* practice and personal debts, I was in no position to help her. This set of circumstances is likely one all-too-familiar to millions of Americans today, and for them it promises to get worse.

The effect of Judge Alito’s ruling is to undermine the Supreme Court’s trilogy in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990), *Patterson v. Shumate*, 504 U.S. 753 (1992) and, just last year, *Rousey v. Jacoway*, 125 S.Ct. 1561 (2005), which hold that Congress meant to protect retirement savings, such as IRAs, from the reach of creditors. On the most dubious of legal grounds, Judge Alito’s ruling fosters abuses in debt collection through just the kind of strategic manipulation of the law which *Patterson* warned against. IRAs are now ready targets for overreaching debt collectors. As happened to Ms. Maharaj, a creditor could

seize IRAs simply by by inventing allegations of fraudulent transfers into IRAs: During oral argument on Ms. Maharaj's appeal before the Massachusetts Appeals Court last Fall, after I argued that there had been no fraud whatsoever, Judge Graham asked a direct question of counsel for Vanguard: Is there any evidence of fraudulent contributions into Monga's IRAs? Vanguard's counsel replied that there is none.

I find Judge Alito's callous treatment of Ms. Maharaj an ominous sign of how he might treat the over 40 million Americans with IRAs worth over \$2.3 trillion. Though Judge Alito professes respect for separation of powers, and in particular the scope of Congress's jurisdiction, his actions in the Monga/Vanguard appeal suggest that he may do so selectively, and that his "default", (using computer terminology), allegiance is to corporate America, here symbolized by Vanguard.

Conclusion

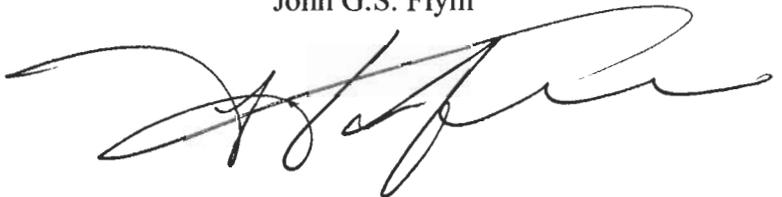
I have found it necessary to write more, and more technically than I had envisaged, because my oral presentation will, understandably, be limited to 5 minutes, and so much misinformation about Judge Alito's role in the Monga/Vanguard appeal has been so widely published. Unfortunately, several of my colleagues in academia have based their arguments in support of Judge Alito's nomination on this misinformation. I hope that this Committee will conduct its own research into Judge Alito's conduct in this case.

I end by concluding that Judge Alito's inaccurate account of his role in the Vanguard appeal, on issues of law and fact sounds like "the 13th stroke of the crazy clock that makes you wonder about the 12 which came before," (a phrase one of my Harvard Law School professors, named Braucher, liked to use when the words fit), meaning you can't trust the clock as to what time it is. Applied to Judge Alito's statements, it means you can't tell what to believe.

I urge this Committee to recommend reject the nomination of Judge Alito for the U.S. Supreme Court.

January 10, 2006

John G.S. Flym

A handwritten signature in black ink, appearing to read "John G.S. Flym", written in a cursive style.

Ex. 1

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790

MARCIA M. WALDRON
CLERK

TELEPHONE
215-597-2995

Website: pacer.ca3.uscourts.gov

December 17, 2003

Shantee Maharaj, Esq. (Jeffrey A. Lutsky, Esq. Alexander W. Moore, Esq.
(H. Robert Fiebach, Esq. (Marianne Johnston, Esq.
(Lillian E. Benedict, Esq. John Baraniak, Esq.

Re: D. Dev Monga v. John C. Ottenberg, etc., et al.
No. 01-1827

Dear Counsel:

The above-entitled case(s) has been listed on the merits at the convenience of the Court.

At the time that the Court schedules a disposition date, the Court will determine whether oral argument will be presented. Counsel will also be advised the amount of time allocated by the panel.

Kindly acknowledge receipt hereof on the enclosed copy of this letter and advise the name of the attorney who will present oral argument. In addition, please indicate whether or not s/he is a member of the bar of this Court. Membership is not necessary if counsel represents a U.S. government agency or officer thereof or if the party is appearing pro se. If the attorney is not a member of the bar of this Court, an application for admission will be forwarded, which should be completed and returned to this office without delay.

Very truly yours,
MARCIA M. WALDRON, Clerk

By: Eric Hernandez, Calendar Clerk
Direct Dial: (267) 299-4956

Receipt acknowledged by Shantee Maharaj Date 12/20/03

Name of attorney arguing Prof. JOHN G.S. FLYM

Representing: Appellant/Petitioner () Appellee/Respondent (), Intervenor (), Amicus ()

Member of Bar: Yes _____ No _____ Please see enclosed letter.

Ex. 2

SHANTEE MAHARAJ
426 Drummers Lane
Wayne, PA 19087
610-971-0185
shanteemaharaj@alumni.neu.edu

December 20, 2003

Marcia M. Waldron, Clerk
Office of The Clerk
United States Court of Appeals
for The Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Monga v. Ottenberg, et al., No. 01-1827

Dear Ms. Waldron:

I am writing in response to your December 17, 2003 letter.

As indicated on the enclosed form, Prof. John Flym will present oral argument on Appellant's behalf. Prof. Flym has previously appeared before The Third Circuit, and is a member of the Bars of The First Circuit and The Supreme Court of The United States. Should you require Prof. Flym to complete an application for admission, the form should be forwarded to:

Prof. John G. S. Flym
Northeastern Univ. School of Law
400 Huntington Ave.
Boston, MA 02115
617.373.3348
j.flym@neu.edu

Please notify me if there are any other Third Circuit requirements with which we must comply concerning Prof. Flym's appearance in this appeal.

In addition, we would like to know if there has been a ruling on our *Motion To Vacate The July 30, 2002 Judgment And Order Herein, And To Reassign The Appeal To A New Panel*. Also, does your December 17, 2003 notice relate to a hearing on said Motion, or a new hearing on the Appeal?

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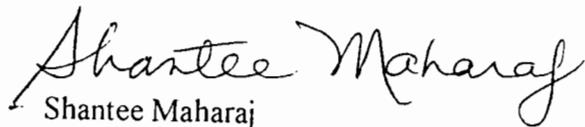
Marcia M. Waldron, Clerk
December 20, 2003

Page 2

Finally, it would be appreciated if you would provide us an approximate hearing date.

Thank you for your assistance.

Very truly yours,


Shantee Maharaj

cc: Prof. John G. S. Flym (w/enclosure)
Jeffrey Lutsky, Esq. (w/enclosure)
H. Robert Fiebach, Esq. (w/enclosure)
John R. Baraniak, Esq. (w/enclosure)
Seth B. Kosto, Esq. (w/enclosure)

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US Court of Appeals for the Third Circuit

Relevant parts of pages 10-14 of the Docket

Case Summary

Court of Appeals Docket #: 01-1827

Filed: 4/5/01

Nsuit: 3430 Banks & Banking

Monga v. Ottenberg, et al

Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 95-cv-05235

Trial Judge: Herbert J. Hutton, District Judge

01-1827 Monga v. Ottenberg, et al

7/30/02 NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED
PER CURIAM OPINION (Alito, Roth and Fuentes, Circuit Judges), filed.
Total Pages: #11. (ghb)

7/30/02 JUDGMENT: AFFIRMED. Costs taxed against Appellant, filed.
ZZ#VACATED per Court's Order of 1/12/04. (ghb)

 * * *

11/24/03 MOTION by Appellant to Vacate the July 30, 2002 Judgment, Disqualify
Judge Alito from this Appeal and to Order a New Appeal to be Heard
also construed as Motion to Recall Mandate, filed. Answer due 12/5/03.
Certificate of Service dated 11/24/03. (nmb)

12/3/03 UNOPPOSED MOTION by Appellees Vanguard Grp Inc, Vanguard
Fiduciary, Vanguard Morgan, Founders Funds Inc & Inv Fiduciary Trust
to Extend Time to File Response to Appellant's Motion to Vacate the
July 30, 2002 Judgment, filed. Certificate of Service dated 12/3/03. (nmb)

12/17/03 CALENDARED for listed at the convenience of the Court. (eh)

12/22/03 RESPONSE by Appellees Vanguard Grp Inc, Vanguard Fiduciary,
Vanguard Morgan, Founders Funds Inc & Inv Fiduciary Trust in
Opposition to Motion by Appellant to Vacate the July 30, 2002 Judgment,
received, not filed unless the Court so directs. Certificate of service dated
12/22/03. ZZ#FILED per Court's Order dated 1/12/04. (nmb)

12/30/03 JOINDER by Appellees Berry Ottenberg and John C. Ottenberg in
Response by Appellees Vanguard Group, et al. to Motion by Appellant to
Vacate the July 30,2002 Judgment, filed. Certificate of Service dated
12/30/03. (nmb)

12/30/03 UNOPPOSED MOTION by Shantee Maharaj to Extend Time to File Reply until January 24, 2004, filed. Answer due 1/12/04. Certificate of Service dated 12/29/03. (nmb)

12/31/03 Letter dated December 30, 2003 received from Marianne Johnston, counsel for Appellees (Vanguard Group, Inc., et al.), advising the Court of various issues that are currently before the Court. Forwarded for the information of the Court. (Please see letter for further specifics.) (mac)

1/12/04 ORDER (Chief Judge Scirica, Authoring Judge, Circuit Judge) considering Appellant's Motion to vacate the July 30, 2002 Judgment, disqualify Judge Alito from this appeal and to order a new appeal to be heard also construed as motion to recall mandate, Unopposed Motion by Appellees Vanguard Group, et al. for extension of time to file response, Response by Appellees Vanguard Group, et al., received not filed unless the Court so directs, Joinder in Response by Appellees John C. Ottenberg, et al. and Unopposed Motion by Appellant for extension of time to file reply. The Vanguard Appellees' motion for an extension of time is granted and the Clerk is directed to file the response as of the date of this Order. Because Judge Alito recused himself from this matter, the mandate will be recalled and the judgment vacated. The appeal will be resubmitted to another panel for whatever action the panel deems appropriate. In light of the foregoing, Appellant's motion for an extension of time is denied as unnecessary, filed. Reopening Case: on 1/12/04. (nmb)

1/12/04 Certified copy of order to Lower Court. (nmb)

1/21/04 APPEARANCE from Attorney John G. S. Flym on behalf of Appellant Shantee Maharaj, filed. (nmb)

2/3/04 APPEARANCE from Attorneys Seth B. Kosto & Gael Mahony on behalf of Appellee Founders Funds Inc, filed. (nmb)

2/12/04 SUBMITTED Thursday, February 12, 2004 Coram: Scirica, Chief Judge, Stapleton and Cowen, Circuit Judges. (eh)

4/7/04 NOT FOR PUBLICATION NOT PRECEDENTIAL UNREPORTED PER CURIAM OPINION (Scirica, Chief Judge, Stapleton and Cowen, Circuit Judges), filed. (nmb)

4/7/04 JUDGMENT, Affirmed. Costs are taxed against appellant, filed. (nmb)

4/13/04 BILL OF COSTS by Appellees Vanguard Grp Inc, Vanguard Fiduciary, Vanguard Morgan & Inv Fiduciary Trust, filed. Certificate of Service dated 4/12/04. (nmb)

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- 4/13/04 BILL OF COSTS by Appellee Founders Funds Inc, filed.
Certificate of Service dated 4/12/04. (nmb)
- 4/21/04 PETITION by Appellant for rehearing en banc, filed.
Certificate of service dated 4/21/04. (nmb)
- 4/29/04 MOTION by Appellant for Leave to File Addendum to Petition for
Rehearing with request to file an amended petition, which the Court
may wish to construe as Errata to Petition for Rehearing, filed. Answer
due 5/14/04. Certificate of Service dated 4/29/04. (nmb)
- 5/11/04 Appellant's Corrected/Amended Petition for Rehearing construed as
Errata to Petition for Rehearing filed in accordance with Court Order
dated 5/3/04, filed. Certificate of Service dated 5/11/04. (ch)
- 5/25/04 ANSWER to Appellant's Corrected/Amended Petition for Rehearing
received in accordance with the Court's request from Appellees, John C.
Ottenberg, and Berry Ottenberg, filed. (lld)
- 5/26/04 ANSWER to Appellant's Corrected/Amended Petition for Rehearing
received in accordance with the Court's request from Appellees, Grp
Inc, Vanguard Fiduciary, Vanguard Morgan, Founders Inc, and
Inv Fiduciary Trust, filed. (lld)
- 5/28/04 MOTION by Appellant for leave to file a Reply to Appellees' Responses
to Appellant's Corrected/Amended Petition for Rehearing, filed. Answer
due 6/14/04. Certificate of Service dated 5/28/04. (lld)
- 6/23/04 ORDER (Scirica, Chief Judge, Stapleton, Authoring Judge, and Cowen,
Circuit Judges) denying motion by Appellant for leave to file a Reply
to Appellees' Responses to Appellant's Corrected/Amended Petition
for Rehearing, filed. (lld)
- 6/23/04 ORDER (Scirica, Chief Judge, Nygaard, Roth, McKee, Ambro, Fuentes,
Smith, Chertoff, Fisher, Cowen*, and Stapleton*, Authoring Judge,
Circuit Judges) denying petition by Appellant for rehearing en banc,
filed. *Honorable Walter K. Stapleton, and Honorable Robert E. Cowen,
Senior United States Circuit Judges for the Third Circuit, were members
of the original panel. Their votes are limited to panel rehearing only. (lld)
- 7/1/04 MANDATE ISSUED, filed. (lld)

6

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE ESTATE of D. DEV MONGA)
Plaintiff-Appellant)
v.)
JOHN C. OTTENBERG, et al.)
Defendants-Appellees)

Docket No. 01-1827

AFFIDAVIT OF SHANTEE MAHARAJ

Shantee Maharaj, the surviving spouse of Appellant, D. Dev Monga, states under oath:

1. This Affidavit is based on my personal knowledge and file notes.
2. On February 20, 2004, I personally checked the Court's Docket and found no entry after the February 3, 2004 appearances of Attorneys Seth B. Kosto and Gael Mahony, counsel for Appellees, which was entry number 91.
3. On February 27, 2004, I again personally checked the Court's Docket and found no entry after the February 3, 2004 appearance by counsel for Appellees.
4. On March 5, 2004, I telephoned the Clerk's office and spoke with Phyllis Ruffin who confirmed that the February 3, 2004 entry was the most recent item on the Docket.
5. On March 19, 2004, I telephoned the case Manager, Nicole Bruno, and she confirmed that the February 3, 2004 entry was still the last item on the Docket.
6. On March 31, 2004, at 3:49 p.m., I telephoned the case Manager Nicole Bruno who again confirmed that the February 3, 2004 entry was the last item on the docket.
7. On April 8, 2004, I personally checked the Court's Docket at around 9:10 a.m. and discovered for the first time an entry dated February 12, 2004.

8. On April 10, 2004, John Flynn, Esq. faxed to me a copy of the Court's March 30, 2004 letter which he received in the mail on April 6, 2004. I have read said letter, and noted that my name appears as an addressee. To date, I have neither received a copy of said letter in the mail, nor by facsimile from the Court.

Commonwealth of Pennsylvania)
Chester County)ss:

SHANTEE MAHARAJ, being duly sworn states that I am the above named individual. I have read the foregoing Affidavit and the same is true of my own knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters I believe them to be true.

Shantee Maharaj
(Signature of Affiant)

SHANTEE MAHARAJ
(Print Name)

On this 13 day of April, 2004, before me personally came SHANTEE MAHARAJ, known to me to be the person described herein. Such person duly sworn to the foregoing instrument before me and duly acknowledged that she executed the same.

Deanna L. Lowery
Notary Public
Commission Expires: March 26, 2006

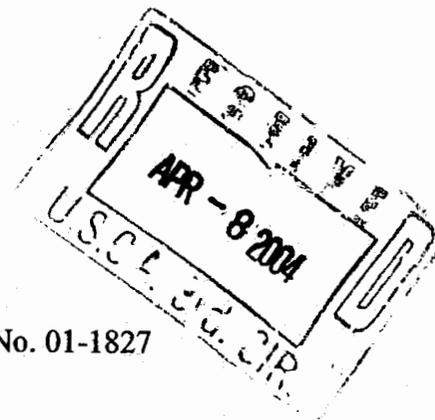
Notarial Seal
Deanna L. Lowery, Notary Public
Limerick Twp., Montgomery County
My Commission Expires Mar. 26, 2006
Member, Pennsylvania Association of Notaries



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Ex. 5

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



The Estate of D. DEV MONGA)
Plaintiff-Appellant)
v.)
John C. OTTENBERG, etc., et al)
Defendants-Appellees)

Docket No. 01-1827

APPELLANT'S MOTION
FOR LEAVE TO FILE A SUBSTITUTE BRIEF,
OR TO FILE A SUPPLEMENTAL BRIEF,
AND FOR ORAL ARGUMENT

Pursuant to FRAP 27(a), John G. S. Flym, Esq., on behalf of Appellant in the above-captioned case, hereby moves this Honorable Court:

1. For leave to file a substitute appellant's brief, (and to withdraw the *pro se* briefs drafted and previously filed by D. Dev Monga¹'s widow, Shantee Maharaj).
2. If leave to file a substitute brief is denied, then for leave to file a Supplemental brief by May 3 in order to address significant issues inadequately presented in the *pro se* briefs.
3. For an opportunity to present oral argument on the merits of this appeal.

The grounds and legal argument in support of the requested relief are set forth hereinbelow.

A. Timing of this motion.

On January 12, 2004, this Court vacated the prior judgment herein and ordered that the "... appeal be resubmitted to another panel for whatever action the panel deems appropriate"

On January 21, 2004, I filed my appearance on behalf of Appellant. Over the next three weeks, I was advised by telephone with the Clerk's Office that a new panel had not yet been appointed, but that I would be notified when this occurred.

¹ Hereinafter "Monga".

On April 6, 2004, I received a letter dated March 30, 2004, from the Calendar Clerk of this Court, advising me that on February 12, 2004, this appeal was submitted on the original briefs to the new panel, (Scirica, C.J., Stapleton, J. and Cowen, J.) This letter does not include my name among the addressees, and states that it was transmitted by Facsimile as well as by regular mail. A search of the faculty mailroom revealed a fax of this letter, also dated March 30, 2004, which was not in my box since my name does not appear on the document.

In short, this is the only notice I have received that the new panel intends to proceed on the original briefs.²

B. The *pro se* briefs are inadequate.

Acting *pro se*, Monga's widow, Shantee Maharaj, did the best she could. In my judgment, her submissions before this Court fail to present the merits of her case competently. She routinely fails to identify potentially dispositive issues and/or to cite the most relevant authorities in support of her position. For example, the lower court's action plainly amounted to a grant of summary judgment: not only had the Vanguard defendants³ filed their answer, but the district court's "Memorandum and Order", dated February 28, 2001, refers to material outside the pleadings. Thus, the judge treated Vanguard's motion to dismiss as a 12(b)(6) motion, which he then converted into one for summary judgment. In such circumstances, this Court held in ROSE v. BARTLE, 871 F.2d 331 (CTA3 1989):

When this conversion takes place all parties must be given the opportunity to present material to the court. The parties can exercise this opportunity only if they have notice of the conversion. A comparison of the requirements of Rule 56 with the procedures employed in this case demonstrates that the district court did not provide adequate notice of its conversion of the motions to dismiss.

at 340

² All statements of fact contained herein are made in the context of FRCP Rule 11 - Based either on personal knowledge, or upon the best available information, I vouch for their accuracy with my signature.

³ "Vanguard" as used herein is intended to refer both to Vanguard as well as Founders.

ROSE further adds⁴,

Inasmuch as Rule 56 appears to anticipate that a court will hold a hearing on a summary judgment motion we observe that in some cases holding a hearing may be a third prerequisite.

at 340, n. 4

The need for such notice, as well as a hearing below, is illustrated by the judge's erroneous assertion:

During a recent hearing before the Massachusetts Superior Court, Ms. Maharaj stated her understanding that the "complaint [in the Pennsylvania action] was ...voluntarily dismissed in 1998..." and that "litigation in other jurisdictions [had been] barred [by the Massachusetts Superior Court]..." See Transcript of excerpt from hearing held on June 22, 2000, at pp. 1-19, 1-21.

2/28/01 Memorandum and order, at 4.⁵

As the Supreme Court held in CARTER v. STANTON, 405 U.S. 669 (1972)

... matters outside the pleadings were presented and not excluded by the court. The court was therefore required by Rule 12(b) of the Federal Rules of Civil Procedure to treat the motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. If this is the course the District Court followed, its order is opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim. In this posture of the case, we are unconvinced that summary judgment was properly entered. The judgment of the District Court is therefore vacated and the case is remanded to that court for proceedings consistent with this opinion.

at 671-72 (emphasis added).

⁴ See also ANCHORAGE Associates v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 176-177 (CTA3 1990); DOUGHERTY v. Harper's Magazine Co., 537 F.2d 758, 761 (CTA3 1976); SEASON-ALL Industries, Inc. v. Turkiye Sise Ve Cam Fabrikalari, A. S., 425 F.2d 34, 36, 39-40 (CTA3 1970); WASKOVICH v. Morgano, 2 F.3d 1292, 1296 (CTA3 1993); HILTON v. W. T. Grant Co., 212 F.Supp. 126, 128 (D.C.Pa.1962).

⁵ This supposed quote lifts two different statements, appearing at pages 19 and 21 of the relevant transcript, combines them, and inserts the bracketed text to convey the inaccurate impression that Maharaj was referring to the instant action.

In fact, Vanguard knew that, after Monga's death, as surviving spouse and sole beneficiary of his IRAs, Maharaj in 1998 instituted her own action in the Pennsylvania District Court. However, unable to afford a lawyer to represent her, and being physically absent from Pennsylvania, she found herself constrained to voluntarily dismiss the case. That is the complaint to which the transcript actually refers, not the instant Complaint. Other instances of erroneous factual predicates for the District Court's decision to dismiss the Complaint with prejudice, as well as "controversial" assertions made by Vanguard in this Court, will promptly be supplied if the Court so requests.

Here also, the District Court's order is "... opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellants' claim" Indeed, it is entirely unclear what the basis of Vanguard's motion to dismiss was - its 3-page motion cites neither rule nor statute.

On the merits, Congress and the States have placed certain IRA assets beyond the reach of creditors.⁶ The District Judge, without notice and opportunity for documentary submissions or a hearing, seems to have rejected Appellant's claim that these IRAs predate the partnership Monga established with the individual who thereafter initiated a lawsuit against him. Nothing which was alleged to have occurred after these IRAs were established could affect their protected status. Indeed, that was the initial opinion of Vanguard's own attorneys. No Massachusetts or other Court has ever found that these IRAs received tainted funds.⁷ All that occurred is that Vanguard decided to freeze the IRAs, and several years later Vanguard obtained an order from a Massachusetts court to disburse the IRA funds, (reserving for Vanguard a sizeable fee). One of the issues presented in this case is whether Vanguard's action was lawful.

⁶ 26 U.S.C. 408:

[T]he term "individual retirement account" means a Trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries ...

...

The trustee . . . will administer the trust . . . consistent with the requirements of this section.

...

The interest of an individual in the balance in his account is nonforfeitable.

42 Pa. C.S.A. §8124 (b) (1):

... the following money or other property of the judgment debtor shall be exempt from attachment or execution on a judgment:

...

Any retirement or annuity fund provided for under . . . section 408 . . . of the Internal Revenue Code.

Mo. Ann. Stat. §513.430 (10) (f):

... [t]he following property shall be exempt from attachment and execution to the extent of any person's interest therein:

...

any interest of any participant or beneficiary in a retirement plan which is qualified under section . . . 408 . . . of the Internal Revenue Code

Mass.G.L. Ch. 235, §34A provides in relevant part:

The right or interest of any person in ... an Individual Retirement Account ... shall not be attached or taken on execution or other process to satisfy any debt or liability of such person

⁷ The Massachusetts court in the receivership proceeding explicitly stated: "The court thus has no occasion to consider which of the various statutory exemptions cited would apply, and what proportion of the assets in the accounts would be exempt." Supp. App. 349.

The Massachusetts court asserted, without citation of authority, that by refusing to turn over his IRAs to the Receiver, Monga had waived any claim that those IRAs are protected by Congressional and State statutes.⁸ This reflects a misunderstanding of the governing law: In re YUHAS, 104 F.3d 612 (CTA3 1997)⁹, holds that IRAs are not part of the bankruptcy estate:

Section 408(a) of the Internal Revenue Code, 26 U.S.C. § 408(a), defines an “individual retirement account” as “a trust” that is “created or organized in the United States for the exclusive benefit of an individual or his beneficiaries” and that meets certain requirements. IRAs that meet these requirements are said to be “qualified” and receive favorable federal income tax treatment. See Section 408(d) and (e) of the Internal Revenue Code, 26 U.S.C. § 408(d) and (e).

[1] The trustee’s first argument is that under § 541(c)(1) and (2) trusts subject to transfer restrictions are not excluded in their entirety from a bankruptcy estate but rather are included in the estate subject to those restrictions. Therefore, he argues, the debtor’s IRA should be included in the bankruptcy estate with the state-law protection against creditors’ claims remaining in effect. And since he stands in the shoes of the debtor, the trustee maintains, this restriction on creditors does not impair his ability to liquidate the IRA.

This argument, however, is inconsistent with the Supreme Court’s analysis in *Patterson v. Shumate*, 504 U.S. 753, 758, 112 S.Ct. 2242, 2246-47, 119 L.Ed.2d 519 (1992), of the interplay between § 541(c)(1) and § 541(c)(2). There are two arguable interpretations of this interplay. One is that trusts subject to the type of restriction described in § 541(c)(2) are entirely excluded from a bankruptcy estate. The other is that such trusts are included but that they remain subject to the same restrictions that applied before bankruptcy. In *Patterson*, the Court clearly chose the first interpretation, stating that “[t]he natural reading of [§ 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any applicable nonbankruptcy law.” *Patterson*, 504 U.S. at 758, 112 S.Ct. at 2246.

at 613-14

⁸ If given the opportunity to do so, Appellant will show that, contrary to the Massachusetts’ judge claim, Monga did not violate any of its orders. The Massachusetts judge misunderstood the law, at least as defined by this Court in *In re YUHAS*, 104 F.3d 612 (CTA3 1997).

⁹ See also *BUTNER v. U.S.*, 440 U.S. 48 at 55 (1979),); *In re BRUCHER*, 243 F.3d 242 (6th Cir. 2001); *In re McKOWN*, 203 F.3d 1188 (9th Cir. 2000) (“Congress regarded an IRA to be in the same general category as other retirement plans”); *In re GOLDENBERG*, 218 F.3d 1264 (11th Cir. 2000) (a physician’s IRAs held exempt from creditors’ claims to satisfy a malpractice judgment against the doctor); *In re MEEHAN*, 102 F.3d 1209 (11th Cir. 1997); *In re RAWLINSON*, 209 B.R. 501 (9th Cir. 1997); *In re DUBROFF*, 119 F.3d 75 (2d Cir. 1997) (an IRA is a “plan or contract” materially similar to pension and profit sharing plans to provide for retirement); *In re SOLOMON*, 67 F.3d 1128 (4th Cir. 1995); *In re CARMICHAEL*, 100 F.3d 375 (5th Cir. 1996) (exempting IRAs is consistent with “the very policy furthered by exemptions—protecting a debtor’s future income stream.”; *U.S. v. INFELISE*, 938 F.Supp. 1352, 1371 (N.D. Ill. 1996).

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In fact, Monga complied with the receivership order, which was general and omitted any mention of IRAs. Three later orders by the same Massachusetts Court explicitly addressed IRAs, but they were directed at Vanguard and other parties, not Monga. Moreover, the Massachusetts court ruled, after his death, that Monga had “waived” any claim he might otherwise have had that the IRAs were beyond the receiver’s reach. This “waiver” ruling was made without notice to Monga’s estate, without a hearing on that issue, and without opportunity to challenge its legality.

Whatever the scope of the Massachusetts court’s jurisdiction, its order concerning the IRAs could be enforced only in Pennsylvania. Thus, in No. 95-6637 below, Judge Giles found:

“Additionally, the Funds [Vanguard and Founders] apparently realized that their liability to Mr. Monga may not be extinguished by compliance with the order of the Massachusetts court . . .

Moreover, should the Massachusetts court order become final, and remain adverse to the Funds, the Funds could file an action in federal court in Pennsylvania seeking a declaratory judgment as to the ownership of the monies. A Massachusetts order releasing the funds to Mr. Ottenberg would not insulate the Funds [Vanguard and Founders] from an action by Mr. Monga.”

Supp. App. 225, 227

Indeed, Appellant submits that the Massachusetts order releasing the funds to Mr. Ottenberg does not insulate the Funds. Vanguard’s in-house counsel recognized this fact, as evidenced by two letters attached as Exhibits A and B, dated October 5, 1992 and June 30, 1994, written by Associate Counsel Suzanne F. Barton and Assistant General Counsel Paul F. Gallagher.

It would appear that the only summary judgment appropriate in this case would be one on behalf of Plaintiff-Appellant. By contrast, a judgment in favor of the defendants, particularly Vanguard, would have to be fact-bound, involving a determination that this case is the exception to the statutorily mandated rule that IRAs are protected from creditors. Each and all of the critical facts asserted by Vanguard is disputed by Appellant. Plainly, there are “genuine issues” as to “material facts”, within the meaning of CARTER v. STANTON, *supra*.

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My submission is that the *pro se* briefs fail to present these issues, among others¹⁰, competently.

C. Appellant is entitled to be heard by counsel in this appeal.

In the landmark case *POWELL v. ALABAMA*, 287 U.S. 45 (1932), held:¹¹

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel ... If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

at 68-69

The widowed Shantee Maharaj has struggled alone in this judicial proceeding for lack of financial resources to retain an attorney. Her status as indigent has been recognized by the Massachusetts court. It is a coincidence that she has found in me an attorney willing to represent her *pro bono*. She first approached me in connection with Appellant's petition for a writ of certiorari to the U.S. Supreme Court, and thereafter respecting Appellant's motion to recall this Court's earlier mandate. Only after this Court's December 2003 inquiry as to who would be presenting the oral argument did she formally request that I file my appearance on Appellant's behalf. I agreed. Appellant has the right, in the words of *POWELL v. ALABAMA*, "... to be heard by counsel"

Mr. Justice Sutherland's opinion for the Court in *POWELL v. ALABAMA* explains:

¹⁰ If the Court so directs, I will provide a complete list of such additional issues.

¹¹ *POTASHNICK v. Port City Const. Co.*, 609 F.2d 1101, 1117 (CTA5 1980) explains:

In view of the anomalous procedures in British criminal courts, it is not surprising that the framers of the American Constitution specifically provided for a right to retain counsel in criminal prosecutions. Because English practice had recognized the right to retain civil counsel, there was no need to reaffirm the prerogative. Therefore, the sixth amendment's rejection of the English criminal practice does not represent the denial of a right to retain counsel in civil litigation. The existence of such a right has, indeed, been generally assumed in the American legal system.

Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322, 1327 (1966).

Even the intelligent and educated layman has small and sometimes no skill in the science of law ... He is unfamiliar with the rules of evidence. Left without the aid of counsel he may ... [lose on the basis of] incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his ... [case], even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him

at 69

As applied to the case at bar, the risk has materialized in the District Court's reliance upon "... incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible ...," because none of what is alleged to have occurred in Massachusetts is relevant to Monga's complaint against the Vanguard defendants, several of those allegations are either inaccurate or misleading,¹² and most of the remaining allegations are based on incompetent or otherwise inadmissible evidence.

D. Justice requires that Appellant be accorded her right to be heard through counsel.

The ABA Model Rules of Professional Conduct (2002 ed.), "Preamble: A Lawyer's Responsibilities" states:

... when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done

¶ [8]

The implication is self-evident that when an opposing party is not "well represented", (or as here not at all), a lawyer may not "... assume that justice is being done" Given the fact that because

¹² For instance, in this Court the Massachusetts receiver Ottenberg claims that Appellant Dev Monga commingled tainted money with non-tainted funds in the IRAs. There is no evidentiary basis for this claim. As long ago as 1995 the receiver told Vanguard that he suspected such commingling had occurred because he thought the amounts in Monga's IRAs were "high for someone of Mr. Monga's age", (Receiver's Substitute Complaint, Count XI, Docket entry 295, Middlesex Superior Court, MA. C.A. 89-2851). The Massachusetts Court explicitly refused to address the question whether any commingling had occurred. Moreover, the incontrovertible documentary evidence provided by Shantee Maharaj shows that no such commingling ever occurred.

More egregious, in this Court Ottenberg asserts, "Monga intentionally removed some of his assets from the jurisdiction of the Massachusetts court in an attempt to frustrate satisfaction of the judgment and in contravention of an order from the Massachusetts court enjoining Monga from removing such assets." Appellee's Brief, p.4. This assertion is without any factual basis. Equally baseless is the assertion at page 38 of the same brief, "[Monga] has been shown to have fraudulently and in violation of a direct court order transferred assets into the IRA Funds 'in an attempt to frustrate satisfaction of [a] judgment'." The Internal Revenue Code, permits an IRA to be rolled over into a new IRA without losing its IRA status, 26 U.S.C. Section 408 (d) (3) (A) (I).

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of indigency Shantee Maharaj has acted *pro se*, there can be no assumption that justice has been done in this case.

Arrayed against Appellant is a formidable battery of lawyers: John R. Baraniak Jr., and Julie B. Fallis, (Choate Hall & Stewart, Boston, MA); H. Robert Fiebach and Lillian E. Benedict (Cozen O'Connor, Philadelphia, PA); Seth B. Kosto, (Holland & Knight LLP, Boston, MA); Jeffrey A. Lutsky and Marianne Johnston, (Stradley Ronon Stevens & Young, LLP, Philadelphia, PA); and Gael Mahony, (Holland & Knight LLP, Boston, MA). Having once been, (while at Foley, Hoag & Eliot, Boston, MA), on the other side of litigation with Mr. Mahony, I know him to be a formidable advocate. I do not pretend to be a match, either in skill or resources, for the array of defendants' lawyers, but I can at least try to provide Appellant with a "guiding hand of counsel", within the spirit of *POWELL v. ALABAMA*.

Moreover, the PREAMBLE to the ABA Model Code of Judicial Conduct states:

... The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system

1st ¶

Canon 3B.(7) further provides:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law

Appellant has not been accorded her right to be heard.

E. Oral Argument.

POWELL v. ALABAMA also reminds us:

... the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government

287 U.S. at 68

In the appellate setting, FRAP Rule 34(a)(2) provides:

17

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

- (A) the appeal is frivolous;
 - (B) the dispositive issue or issues have been authoritatively decided; or
 - (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.
- (emphasis added)

I submit that none of the three exceptions to the rule, (that "Oral argument must be allowed"), applies: (A) the appeal is not frivolous; (B) the dispositive issues have not been authoritatively decided - indeed, the Supreme Court has never addressed the question of IRAs in the context of 26 U.S.C. § 408; and (C) neither the facts nor the legal arguments are "adequately presented" in the *pro se* briefs, or in the Record Appendix compiled by the defendants, or in the unwieldy record compiled in the District Court.

Essentially the same analysis obtains under this Courts IOP 2.4: The issues in this appeal are not tightly constrained, and the *pro se* briefs are inadequate, 1(a); there is no controlling Supreme Court decision, 1(b); the record does not determine the outcome, and the briefs do not adequately refer to the record. The appeal presents substantial and novel issues, 2(a); resolution of certain issues will have both institutional as well as precedential value, 2(b); an important public interest may be affected, 2(e).

The public interest in IRAs is self-evident - tens of millions of Americans are invested in their IRAs, and official government policy has been to encourage such participation, especially by people in the socio-economic "middle class" of our population. Those people, as well as the managers of funds such as Vanguard, are entitled to clarity as to whether IRA funds may, in any or in defined circumstances, be appropriated either by creditors or by a receiver. This issue, as well

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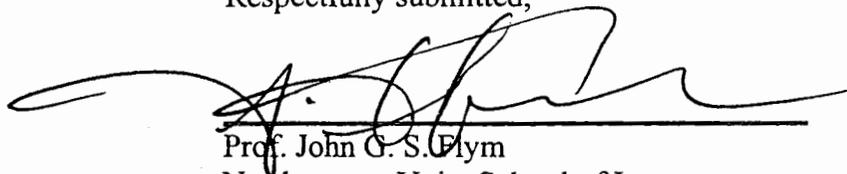
as the procedural and substantive issues upon which it may turn, deserves to be presented in an oral argument to this Court.

Furthermore, a number of issues raised by this case are matters of first impression, and it would seem therefore that oral argument, by the attorneys for both sides functioning as advocates for their respective clients, but also as officers of this Court, might be useful in the proper disposition of this appeal.

CONCLUSION

For the above-stated reasons, Appellant prays this Court for an order granting leave to file a substitute or a supplemental brief, and granting oral argument.

Respectfully submitted,



Prof. John G. S. Flym
Northeastern Univ. School of Law
400 Huntington Ave.
Boston, MA 02115
617.373.3348
j.flym@neu.edu
Attorney *pro bono* for
The Estate of D. Dev Monga

April 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2004, I served a copy of the above "Appellant's motion for leave to file a substitute brief, or to file a supplemental brief, and for oral argument" by causing to be hand-delivered 2 copies thereof to their respective offices, said delivery to occur on April 7 for attorneys with offices in Boston, MA, and in the morning of April 8, 2004 for attorneys with offices in Philadelphia, PA. The served attorneys are: John R. Baraniak Jr., and Julie B. Fallis, Choate Hall & Stewart, 53 State St., Exchange Place, Boston, MA 02109; Gael Mahony and Seth B. Kosto, Holland & Knight LLP, 10 St. James Place, Boston, MA 02116; H. Robert Fiebach and Lillian E. Benedict, Cozen O'Connor, 1900 Market St., 3rd Floor, Philadelphia, PA 19103; and Jeffrey A. Lutsky and Marianne Johnston, Stradley Ronon Stevens & Young, LLP, 2600 One Commerce Square, Philadelphia, PA 19103.



John G. S. Flym

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THE Vanguard GROUP
OF INVESTMENT COMPANIES

"Exhibit A"

October 5, 1992

VIA FEDERAL EXPRESS

John C. Ottenberg, Esquire
Miller, Ottenberg & Dunkless
Suite 1610
260 Franklin Street
Boston, Massachusetts 02110

RE: IRA of Dharam D. Monga
Vanguard/Morgan Growth Fund - Account No. 9876070674

Dear Mr. Ottenberg:

Please be advised that upon further consideration of the Monga situation, we have determined that it will be necessary for you to obtain an order from a Pennsylvania court of appropriate jurisdiction before we comply with your request to transfer the Monga IRA to Fleet Bank.

I have enclosed a copy of the Vanguard Individual Retirement Custodial Account Agreement (the "Agreement"), pursuant to which Vanguard Fiduciary Trust Company serves as Custodian of the Monga IRA. Article 8.4 of the Agreement provides that the Monga IRA shall be governed by Pennsylvania law. As you may be aware, Pennsylvania law generally prohibits attachment of IRA assets.

Should you have any questions concerning Vanguard's position in this matter, please feel free to contact me directly.

Very truly yours,



Suzanne F. Barton
Associate Counsel

cc: R. J. Klapinsky, Esq.
J. D. Rees, Esq.

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Fund
nguard Convertible
ecurities Fund
nguard Equity
Income Fund
nguard Explorer
Fund
nguard Fixed Income
Securities Fund
nguard Index Trust
nguard International
Equity Index Fund
Vanguard Money
Market Reserves
Vanguard Municipal
Bond Fund
Vanguard Preferred
Stock Fund
Vanguard Quantitative
Portfolios
Vanguard Smart
Capitalization Stock
Fund
Vanguard Specialized
Portfolios
Vanguard STAR Fund
Vanguard State
Free Funds
Vanguard World Fund

THE Vanguard GROUP
OF INVESTMENT COMPANIES

June 30, 1994

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"Exhibit B"

John C. Ottenberg, Esq.
Miller, Ottenberg, Dunkless & Grunebaum
Suite 1610
260 Franklin St.
Boston, MA 02110

Re: Sommer v. Monga, et. al.

Dear Mr. Ottenberg:

I am writing in response to your recent correspondence to Suzanne F. Barton. Ms. Barton is on maternity leave and I will be handling this matter in her absence. In reviewing our file I have not come across anything that would cause us to change the position that was set forth in Ms. Barton's correspondence to you of October 5, 1992. Namely, that jurisdiction as to the question of whether Mr. Monga's IRA assets are attachable lies with Pennsylvania courts. Accordingly, we must decline your request to transfer the assets to you. We can only take such action if we are ordered to do so by a Pennsylvania court.

Sincerely,

Paul F. Gallagher
Assistant General Counsel

cc: ✓ Thomas D. Rees, Esq.

Vanguard/
Vermont Fund

Vanguard/
Windsor Fund

Vanguard/
Windsor II

Gemin II

Vanguard/
Explorer Fund

Vanguard/
PRIMECAP Fund

Vanguard/Morgan
Growth Fund

Vanguard/Wellesley
Income Fund

Vanguard/Trustees'
Equity Fund

Vanguard Small
Capitalization Stock
Fund

Vanguard Preferred
Stock Fund

Vanguard Fixed Income
Securities Fund

Vanguard Index Trust

Vanguard Money
Market Reserves

Vanguard Municipal
Bond Fund

Vanguard Specialized
Portfolios

Vanguard STAR Fund

Vanguard World Fund

Vanguard Convertible
Securities Fund

Vanguard Quantitative
Portfolios

Vanguard Bond Index
Fund

Vanguard State
Tax-Free Funds

Vanguard Equity
Income Fund

Vanguard Asset
Allocation Fund

Vanguard International
Equity Index Fund

Vanguard Balanced
Index Fund

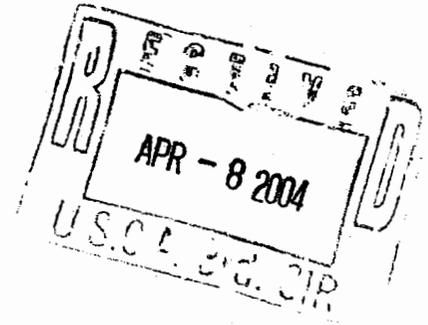
Vanguard
Admiral Funds

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B
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EX. 6

April 7, 2004



Marcia M. Waldron, Clerk
Office of The Clerk
United States Court of Appeals
for The Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Monga v. Ottenberg, et al., No: 01-1827

Dear Ms. Waldron:

Enclosed for filing, please an original and three copies of "Appellant's Motion for Leave to File a Substitute Brief, or to File a Supplemental Brief, and for Oral Argument". My certificate of service appears at the end of the Motion, (page 11, before the two attached exhibits).

Thank you for your assistance in this matter.

Very truly yours,

Prof. John G. S. Flym
Northeastern Univ. School of Law
400 Huntington Ave.
Boston, MA 02115
617.373.3348
j.flym@neu.edu
Attorney *pro bono* for
The Estate of D. Dev Monga

cc: Jeffrey Lutsky, Esq., (w/enclosure)
H. Robert Fiebach, Esq. (w/enclosure)
John R. Baraniak, Esq. (w/enclosure)
Gael Mahony, Esq. (w/enclosure)

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Ex-7

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY J. SCIRICA
CHIEF JUDGE

22614 UNITED STATES COURTHOUSE
SIXTH AND MARKET STREETS
PHILADELPHIA, PENNSYLVANIA 19106
(215) 597-2399
FAX (215) 597-7373
ascirica@ca3.uscourts.gov

January 9, 2006

Senator Arlen Specter
Chairman, Senate Judiciary Committee
711 Hart Senate Office Building
Washington, DC 20510

Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senators Specter and Leahy,

As further response, I enclose the following.

Sincerely,



Anthony J. Scirica

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TO: Chief Judge Scirica

FROM: Marcy Waldron, Clerk

DATE: January 9, 2006

Attached is the following additional information pursuant to your request: email messages from Judge Alito to Clerk's Office staff regarding Vanguard recusal (email addresses redacted), recusal list dated December 23, 2003, and prior recusal lists (before the system was automated in 1999) that were recovered from paper files of Clerk's Office staff.

Even before automation, our official policy was not to keep paper copies of a recusal list once a new list was issued. Nonetheless, all staff members searched their personal offices and we were able to discover lists from prior years for Judge Alito. There may have been other lists but we do not have them. In that sense, our existing records from that period are neither comprehensive nor complete.

Chambers of Judge To: Lynnetta Beale [REDACTED]
Samuel Alito cc:
12/23/2003 11:03 AM Subject: Re: Recusal Updates [REDACTED]

My list should include all of the funds in the Vanguard Group. Unfortunately, there are many of them. I am faxing you a list. I see no alternative **but** to put them all **on** the list in the hope that the program will pick them up in the (unlikely) event that one of them is a party in a case. When they are put on the list, the term "Vanguard" should be placed in front of the name on the list. E.g., Vanguard 500 Index Fund, Vanguard Admiral Treasury Money Market, etc.

Some of the entities on this list you sent me are not, as far as I am aware, related to the Vanguard Group. These include

Vanguard Cellular
Vanguard Commercial Leasing Corp.
Vanguard Fed Savings Bank
Vanguard Ventron Chemical

Do you know how these got on the list?

SAA

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Chambers of Judge Samuel Alito
 To: Lynette Beale
 cc: William Bradley
 Subject: Re: Recusal List Regarding Vanguard
 12/23/2003 02:32 PM

OK, except Vanguard entities must be added.

SAA

Lynette Beale/CA03/03/USCOURTS



Lynette Beale/CA03/03/USCOURTS
 12/23/2003 11:56 AM

To: William Bradley
 cc: Chambers of Judge Samuel Alito
 Subject: Re: Recusal List Regarding Vanguard

Thanks Bill!!! Judge Alito please review your revised recusal list attached below!

Lynette



SAA.pdf
 William Bradley



William Bradley
 12/23/2003 11:44 AM

To: Chambers of Judge Samuel Alito
 cc: Lynette Beale
 Subject: Recusal List Regarding Vanguard

Dear Judge Alito:

Lynette shared your memo regarding the "Vanguard" entities on your list, and these "Vanguard" parties were related in error to the "Vanguard" entities for your standing recusal list. The error has been corrected, and Lynette will send an amended list.

We will await your list of the additional "Vanguard" entities that you want to add to your

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recusal list. These will be added to the "Related Party" table so we can catch as many "Vanguard" entities as possible.

If you have any questions, please let me know.

Respectfully,

Bill Bradley

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12/23/03 TUE 13:02 FAX 1 201 645 36

Vanguard - Funds by Name

J. Alito

Vanguard Mutual Funds - 19067 Vanguard Mutual Fund

By Name | By Type | Index Fun
Select share class | Investor Shares

Fund price and performance details

Click a fund name to view standardiz

OK to use Vanguard Mutual Funds with beyond Vanguard per J. Alito 1/5/04

Name	PRID	Prname
500 Index Fund Inv	18576 - Vanguard 500 Index	14656
Admiral Tray Money Mkt	18583 - Vanguard Admiral	14665
Asset Allocation Fund Inv	18585 - Vanguard Asset	14670
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Name	PRID	Prname
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	PEID		fundname
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Inter-Term Treasury Inv	18770	Vanguard Inter Term	14900
LifeStrategy Conserv Grwth	18772	Vanguard Life	14910
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OH LT Tax-Exempt Fund	18873	Vanguard OH LT Tax	15044
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PRIMECAP Fund Investor	18905	Vanguard PRIMECAP	15087
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Selected Value Fund	18914	Vanguard Selected	15093
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Short-Term Corporate Inv	18924	Vanguard Short Term	15102

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Name	P215		Peltanc
Short-Term Federal Inv	18930	Vanguard Short Term	15107
Short-Term Tax-Exempt Inv	18937	Vanguard Short Term	15111
Short-Term Treasury Inv	18948	Vanguard Short Term	15114
Small-Cap Growth Index	18954	Vanguard Small Cap	15119
Small-Cap Index Fund Inv	18961	Vanguard Small Cap	15121
Small-Cap Value Index	18963	Vanguard Small Cap	15126
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Strategic Equity Fund	18970	Vanguard Strategic	15134
Target Retirement 2005	18974	Vanguard Target	15137
Target Retirement 2015	18976	Vanguard Target	15145
Target Retirement 2025	18984	Vanguard Target	15148
Target Retirement 2035	18986	Vanguard Target	15151
Target Retirement 2045	18988	Vanguard Target	15156
Target Retirement Income	18991	Vanguard Target	15159
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Tax-Managed Cmo Apprec Inv	19016	Vanguard Tax Managed	15169

Name			
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Total Stock Mkt Index Inv	19034	Vanguard Total Stock	15205
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3) Site glossary
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Standing Recusal List

Matchstat

Unqueid	Judge	Party	Matchstat
18529	SAA	Amer Elec Power Co	
109080	SAA	Bristol Myers Squibb	
18514	SAA	Cadwell W Caldwell	
12248	SAA	Citigroup	
15091	SAA	Disney Corp	
185501	SAA	Exxon Mobile	
17615	SAA	Fidelity Inv	
50328	SAA	GE Co	
18533	SAA	Gillette Co	
5570	SAA	Intel Corp	
205165	SAA	JP Morgan Chase & Co	
13935	SAA	McCarter & English	
73988	SAA	McDonalds Corp	
162411	SAA	SBC Comm Inc	
195084	SAA	Salomon Smith Barney	
20872	SAA	Sassower, Mr. George	
105100	SAA	Seton Hall Law Sch	
105099	SAA	Seton Hall Univ	
156945	SAA	Smith Barney	
73828	SAA	Vanguard Grp Inc	
16801	SAA	Vodafone Grp PLC	
243714	SAA	Zimmer Holdings Inc	
35740	SAA	McCarter English	Related Party Recusal
6319	SAA	McCarter & English	Related Party Recusal
7082	SAA	McCarter & English	Related Party Recusal
7218	SAA	McCarter & English	Related Party Recusal

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Uniqid	Judge	Party	Matchstat
105276	SAA	Walt Disney Co	Related Party Recusal
120089	SAA	Disney Store Inc	Related Party Recusal
182288	SAA	Disney Ent'r Inc	Related Party Recusal
44906	SAA	Walt Disney World Co	Related Party Recusal
48861	SAA	Walt Disney World	Related Party Recusal
48862	SAA	Walt Disney Prod Inc	Related Party Recusal
147012	SAA	Exxon Chem Amer	Related Party Recusal
19437	SAA	Exxon Research	Related Party Recusal
223135	SAA	Exxon Mobile Corp	Related Party Recusal
29686	SAA	Exxon Corp	Related Party Recusal
29687	SAA	Exxon Co USA	Related Party Recusal
53129	SAA	Exxon Shipping Co	Related Party Recusal
54394	SAA	Exxon Co Intl	Related Party Recusal
54413	SAA	Exxon Ins Ser Corp	Related Party Recusal
67236	SAA	Exxon Seamens Union	Related Party Recusal
155543	SAA	McDonalds Restaurant	Related Party Recusal
110924	SAA	Citicorp Railmark	Related Party Recusal
142284	SAA	Citicorp N Amer	Related Party Recusal
142285	SAA	Citicorp Sec	Related Party Recusal
146054	SAA	Citicorp Natl Ser	Related Party Recusal
146055	SAA	Citicorp Acceptance	Related Party Recusal
152800	SAA	Citicorp Venture Cap	Related Party Recusal
32843	SAA	Citicorp Mfg Inc	Related Party Recusal
54886	SAA	Citicorp Real Estate	Related Party Recusal
92263	SAA	Citicorp	Related Party Recusal
102639	SAA	NBC Inc	Related Party Recusal
109201	SAA	NBC Network	Related Party Recusal
120292	SAA	GE Astrospace	Related Party Recusal

WV

Uniquetd	Judge	Party	Matchstat
139064	SAA	GE Pension Trust	Related Party Recusal
143177	SAA	GE Corp	Related Party Recusal
158716	SAA	GE Med Sys	Related Party Recusal
179404	SAA	GE Fin Assurance	Related Party Recusal
179405	SAA	GE Cap Ser Inc	Related Party Recusal
32111	SAA	RCA	Related Party Recusal
32112	SAA	GE Consumer Elec	Related Party Recusal
36600	SAA	GE Credit Corp	Related Party Recusal
47033	SAA	NBC TV	Related Party Recusal
50809	SAA	RCA Ser	Related Party Recusal
50810	SAA	GE Govt Ser	Related Party Recusal
59857	SAA	RCA Corp	Related Party Recusal
75300	SAA	GE Pension Plan	Related Party Recusal
77575	SAA	GE Cap Mtg Ser	Related Party Recusal
80354	SAA	NBC News Worldwide	Related Party Recusal
82182	SAA	RCA GE Co	Related Party Recusal
94167	SAA	GE Cap Corp	Related Party Recusal
99077	SAA	GE Amer Comm Inc	Related Party Recusal
105099	SAA	Seton Hall University	Related Party Recusal
136983	SAA	Seton Hall Univ Board of Trustees	Related Party Recusal
105100	SAA	Seton Hall Law School	Related Party Recusal
136983	SAA	Seton Hall Univ Board of Trustees	Related Party Recusal
73827	SAA	Vanguard Grp Inv Co	Related Party Recusal
73829	SAA	Vanguard Fiduciary Trust Co	Related Party Recusal

CA

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CONFIDENTIAL RECUSAL LIST

as of 1-28-93
no changes

- 1 Carpenter Bennett & Morrissey, Esqs.
- 2 Glaxo Holdings 12-17-91
- 3 Sassower, Mr. George
(4-11-91 90-5147 per Doug recused, not because of Sassower)
(filed Judicial Discipline Complaints)
- 4 Syntex Corporation 12-17-91
- 5 U. S. Attorney's Office (Newark, NJ and some Eastern Dist. of PA cases)
- 6 Whipple, Ross & Hirsch, Esqs. (sister's law firm)
- 7 91-5197 10-3-91
- 8 91-5440 & 5441 US v Local 560 8-11-92

cc: Judge Alito
 Fran
 Kass
 Bill
 Marcia
 Jeannette

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CONFIDENTIAL RECUSAL LIST

as 3-24-94

- 1 Carpenter Bennett & Morrissey, Esqs.
- 2 First Union Corp
- 3 Glaxo Holdings
- 4 Sassower, Mr. George
(4-11-91 90-5147 per Doug recused, not because of Sassower)
(filed Judicial Discipline Complaints)
- 5 U. S. Attorney's Office (Newark, NJ and some E. Dist. of PA)
(3-17-94 Judge Alito will let Fran know when he no longer
is recused for N.J. U. S. Attorney's Office)
- 6 Whipple, Ross & Hirsch, Esqs. (sister's law firm)

4-18-94

cc: Judge Alito

Fran
Kass
Bill
Marcia
Beth
Marisa
Jeanette
Trish

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- 1 Carpenter Bennett & Morrissey, Esqs. **(old law firm)
- 2 First Union Corp.
- 3 Intel Corp.
- 4 McCarter & English, Esqs. (sister's new law firm)
- 5 Sassower, Mr. George
- 6 U. S. Attorney's Office (Newark, NJ) (CASES PENDING
MARCH 23, 1987 THROUGH JUNE 15, 1990)
- 7 Whipple, Ross & Hirsch, Esqs.

10-4-95

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MARCH 23, 1987 THROUGH JUNE 15, 1990)
- 6 Whipple, Ross & Hirsch, Esqs.

4-2-96

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4-18-94

cc: Judge Alito
 Fran
 Kass
 Bill
 Marcia
 Beth
 Marisa
 Jeanette
 Trish