IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 23-10187

GARNET TURNER, et al.,
Appellants

v.

ALLSTATE INSURANCE COMPANY,
Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 2:13-cv-0685-RAH-KFP

TURNER APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir.R.26.1-2, Appellants Garnet Turner, et al., submit the following Certificate of Interested Persons:

1. Allstate Insurance Company (ALL) (Appellee)
2. Bartlett, Taylor Christopher (attorney for Appellants Garnet Turner, et al);
3. Bentley, Vernon (Appellant);
4. Carr, Wade P.K. (attorney for Appellee Allstate Insurance Company);
5. Cartrette, James (Appellant);
6. Dentons US LLP (attorneys for Appellee Allstate Insurance Company);
7. Ekuma-Nkama, Uchenna (attorney for Appellee Allstate Insurance Company);
8. Fleenor, James E., Jr. (attorney for Appellants John E. Klaas, et al);
9. Fleenor Law, LLC (attorney for Appellants John E. Klaas, et al);
10. Freeman, Yale T. (attorney for Appellants John E. Klaas, et al);
11. Garrison, William Lewis, Jr. (attorney for Appellants Garnet Turner, et al);
12. Heninger Garrison Davis (attorneys for Appellants Garnet Turner, et al);
13. Hood, Christopher Boyce (attorney for Appellants Garnet Turner, et al);

14. Huff, William (Appellant);

15. Huffaker, Hon. R. Austin (U.S. District Court Judge, Middle District of Alabama);

16. Klaas, John E. (Appellant);

17. Lehr Middlebrooks Vreeland & Thompson, P.C. (attorneys for Appellee Allstate Insurance Company);

18. Marks, Hon. Emily C. (U.S. District Court Judge, Middle District of Alabama);

19. Middlebrooks, David J. (attorney for Appellee Allstate Insurance Company);

20. Moeller, Amanda M. (attorney for Appellee Allstate Insurance Company);

21. O'Brien, Stephen J. (attorney for Appellee Allstate Insurance Company);

22. Murdock, Glenn (co-counsel for Plaintiffs in prior appeal)

23. Pate, Hon. Kelly F. (U.S. Magistrate Court Judge, Middle District of Alabama);

24. The Pearl Law Firm, P.A. (attorneys for Appellants John E. Klaas, et al);

25. Pearl, Robert J. (attorney for Appellants John E. Klaas, et al);

26. Scholl, Richard (Appellant);

27. Shepherd, Kathy (Appellant);

28. Sleadd, Jeanie Snipes (attorney for Appellants Garnet Turner, et al);

29. Spiewak, Ted (Appellant);

30. Turner, Garnet (Appellant);

31. Vidales, Herbert (Appellant);

32. Vreeland, Albert L., II (attorney for Appellee Allstate Insurance Company);

33. Watkins, Hon. W. Keith (U.S. District Court Judge, Middle District of Alabama);

34. Wenger, Samantha J. (attorney for Appellee Allstate Insurance Company).

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This is an important case. Multiple violations of the Judicial Canons require an extraordinary remedy, rather than no remedy at all, which is the stance taken by the District Court. *De novo* review of the judgment by the disqualified judge should not whitewash the violations. Judges should never own a financial interest in a party, and safeguards should be implemented to assure such. The Supreme Court has said: justice must satisfy the appearance of justice, and this case fails that test.

Plaintiffs request oral argument so that all these issues and more can be addressed with this Court.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Alabama had subject matter jurisdiction over the *Turner* lawsuit based on 28 U.S.C. § 1346(a)(1), which creates jurisdiction for federal questions. This lawsuit arises under ERISA specifically 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3), and those two sections of ERISA give rise to the federal question. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because the order denying Plaintiffs' motion to vacate final judgment falls under said statute.

STATEMENT OF THE ISSUES

I. The District Court erred as a matter of law by failing to properly apply the "appearance of impropriety" test to remedy a violation of 28 U.S.C. § 455(a).

II. The District Court erred as a matter of law by failing to properly apply *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), to the question of remedy.

III. The District Court erred as a matter of law by applying the law in an unreasonable or incorrect manner and by denying the Plaintiffs proper procedures warranted in the circumstances.

IV. The District Court committed other errors which constitute an abuse of discretion by not vacating the summary judgment order entered by the judge who violated 28 U.S.C. § 455.

V. The District Court erred by relying upon *de novo* review of the disqualified judge's final judgment as ground for holding that there was harmless error when the record proves otherwise.

VI. The District Court erred by failing to re-assign the case to the Honorable Keith Watkins.

STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS

In 2013, the *Turner* Plaintiffs, for themselves and a proposed class, sued Allstate under ERISA to recover or have restored a life insurance benefit the company cancelled in 2013 for 14,000 of its retirees. Docs. 1 and 44 (operative complaint). The case was assigned to Chief Judge Keith Watkins on August 20, 2014. Doc. 40. Thereafter, a similar lawsuit, *Klaas v. Allstate Insurance Company*, No. 2:15-CV-406, was transferred to the District Court and consolidated with the *Turner* action. Docs. 52, 61. Soon after consolidation, Allstate filed a motion to dismiss. Docs. 63-64. All Plaintiffs opposed the motion to dismiss, and the *Turner* Plaintiffs (joined by the *Klaas* Plaintiffs) moved for preliminary injunctive relief. Doc. 74.

The District Court conducted a hearing on December 17, 2015, on Allstate's motion to dismiss and Plaintiffs' motion for a preliminary injunction. The trial court heard testimony from former employees of Allstate which included representations by Allstate to them about the retiree life insurance benefit.

After the hearing, the trial court granted a preliminary injunction enjoining Allstate from discontinuing the benefit for the consolidated Plaintiffs. Doc. 92 at 3. The trial court found that "Plaintiffs have demonstrated through credible evidence a substantial likelihood that they will prevail on their ERISA claim alleging breach

of fiduciary duty to disclose the terms of the plan and that their claims are timely under ERISA." *Id.* at 2.

On September 27, 2016, Judge Watkins entered an opinion denying Allstate's motion to dismiss finding that "Plaintiffs have stated a claim (1) that the plan did not include (or was ambiguous as to whether it included) a provision under which Allstate reserved the right to cancel the retiree life insurance policies; and, alternatively, (2) that Allstate's representations that the retiree life insurance was "permanent" and "paid-up" upon retirement constituted an informal interpretation of the ambiguity as to whether the retiree life insurance policies could be cancelled at Allstate's discretion." Doc. 122 at 19. Judge Watkins also stated "…a statement that an employer could, at some point in the future, modify or terminate the plan or plan benefits would not necessarily place a retiree on notice that he or she could lose (or one day be required to pay for) a permanent retiree life insurance policy that had already been purchased and 'fully paid up' … [u]nder the circumstances, the reservation of rights could reasonably be understood to apply to other benefits under the plan…." Doc. 122 at 19. Judge Watkins also found that Plaintiffs' breach of fiduciary duty claim under ERISA §502(a)(3) was not time-barred. Doc. 122 at 22-23, citing his Memorandum Opinion and Order on the motion for preliminary injunction, Doc. 121 at 14-22.

After Judge Watkins' granted Plaintiffs' Preliminary Injunction and denied Allstate's Motion to Dismiss, discovery and depositions continued. On June 19, 2017, Plaintiffs moved for Class Certification. Doc. 260-1. Allstate then filed motions for summary judgment against Plaintiffs. Docs. 307-310. With all motions fully briefed, on July 9, 2018, Judge Watkins issued an order setting oral arguments on the motions for September 5, 2018. Doc. 386.

One month before oral arguments on the motions for class certification and summary judgment would take place, the case was re-assigned to Chief Judge Emily Marks on August 8, 2018. Doc. 387. Judge Marks thereafter continued oral argument; it was never rescheduled. *See* Doc. 388.

During the next two years, Plaintiffs attempted multiple times to get before Judge Marks on this case. On July 3, 2019, *Klaas* Plaintiffs submitted a Motion to Determine Status of Pending Motions and Submissions. Doc. 405. Judge Marks advised the Plaintiffs that the motions remained pending. Doc. 406. On January 22, 2020, *Turner* Plaintiffs filed a motion to inform the Court that due to the extended time with which she was taking to determine this case, many of the putative class members were getting older and passing away, with 17% passing away since the case was filed (around 3,000 retirees). Plaintiffs stated that some of the class representatives had passed away, and Allstate had paid the death benefits, which, in Plaintiffs' view, meant that those Plaintiffs had "prevailed" against

Allstate, giving rise to a claim for attorney fees. The motion requested guidance from the Court whether it wanted to tee this issue up then, or a later time. The Court never acted on the motion. Doc. 409. On July 20, 2020, *Turner* Plaintiffs renewed the motion they filed in January and sought an extension of the preliminary injunction to all putative class members. Plaintiffs asked the court to enter a briefing schedule on the issue and hold a status conference. Doc. 412. Judge Marks did not respond to this request. Therefore, on August 11, 2020, Plaintiffs submitted a motion and brief for injunctive relief for the putative class. Doc. 417. Judge Marks did not rule on this motion. On September 25, 2020, Plaintiffs requested a hearing for the matters filed in 2017, which included Plaintiffs' Motion for Class Certification. Doc. 430. Judge Marks did not respond to this request.

After having motions for class certification and summary judgment before her for two years, on September 30, 2020, Judge Marks entered a final judgment denying the Plaintiffs' pending motions and granting Allstate's motions for summary judgment. Doc. 432.

On October 29, 2020, Plaintiffs filed an appeal with the Eleventh Circuit Court of Appeals. Oral arguments were set for August 26, 2021.

On July 28, 2021, ten months after final judgment and one month before oral arguments at the Eleventh Circuit, Chief Judge Marks disclosed to the parties that

in 2019, while presiding over the case, she owned shares of Allstate Corporation. Doc. 460. Due to the recusal this disclosure required (Doc. 460), the case was reassigned to Honorable R. Austin Huffaker, Jr. on August 6, 2021. Doc. 463.

In response to this disclosure, Plaintiffs filed a motion to vacate final judgment. Doc. 465. Plaintiffs also filed with the Eleventh Circuit a motion for continuance of oral argument and for limited remand. Doc. 466-1. These motions were denied (Docs. 468-1, 468-2), and oral arguments were held as scheduled.

On August 24, 2021, Judge Huffaker entered an order deferring ruling on Plaintiffs' motion to vacate (Doc. 465), until return of the mandate from the Eleventh Circuit. Doc. 469.

On December 28, 2021, the Eleventh Circuit issued a published opinion affirming Judge Marks's summary judgment order. Doc. 472. Thereafter, Plaintiffs filed petitions for a writ of certiorari with the United States Supreme Court. While petitions were pending, the Plaintiffs filed a motion requesting leave to conduct discovery regarding Judge Marks's ownership of Allstate stock. Doc. 497.

On April 27, 2022, Plaintiffs filed a motion to transfer and reassign this case back to Judge Watkins, who initially presided over the case. Doc. 484. That motion was denied. Doc. 496.

On June 30, 2022, Plaintiffs filed a motion for leave to conduct discovery on the issue of Judge Marks' Ownership of Allstate Stock. Doc. 497.

With the return of the mandate from the Eleventh Circuit, Judge Huffaker ordered Defendant to respond to Plaintiffs' motion to vacate. Doc. 495. Briefing on this issue by both Plaintiffs and Defendant concluded on August 3, 2022.

On October 3, 2022, the United States Supreme Court denied Plaintiffs' petitions. Docs. 503, 504.

On November 9, 2022, Judge Huffaker held oral arguments on the motion to vacate. Doc. 465. After the hearing, Plaintiffs again filed a motion to transfer and reassign the case back to Judge Watkins. Doc. 510.

On December 13, 2022, Judge Huffaker denied Plaintiffs' motion to vacate final judgment due to Judge Marks' violation of 28 U.S.C. § 455 (Doc. 465) and their motion for leave to conduct discovery on the issue of Judge Marks' ownership of Allstate stock (Doc. 497). Doc. 517.

On January 12, 2023, Plaintiffs filed their notice of appeal. Doc. 518.

II. STATEMENT OF FACTS

The Allstate Corporation is a publicly traded company. Doc. 9 at 2. It was incorporated on November 5, 1992, "to serve as the holding company for Allstate Insurance Company." https://www.allstate.com/resources/allstate/attachments/annualreport/allstateprosperity-report-2019-combo.pdf at 96 (accessed 8/11/2021). Allstate Insurance Company is the Defendant (Allstate). It is the primary

subsidiary of the Allstate Corporation, and the financial accounts of the two companies are consolidated in one financial statement. *See* id. at 202.

The Plaintiffs are elderly former employees of Allstate who had their retiree life insurance terminated on December 31, 2015. The Plaintiffs were told by Allstate, before and at retirement, that they would receive a "paid up" life insurance benefit. Doc. 44 at ¶¶ 25-63.

As a cost-cutting move, the cancellation of the benefit, which took effect on December 31, 2015, has been a boon for Allstate, adding tens of millions of dollars to the company's bottom line since 2015. *See e.g.*, Doc. 88 at 2, ¶ 4 (the "total premium cost to Allstate for both plans [i.e., for former claims employees and non-claims employees] was $13,035,813 for 2013").

During the 2015 hearing on Plaintiffs' motion for preliminary injunction, Judge Watkins heard testimony from former employees of Allstate which included representations by Allstate to them about the retiree life insurance benefit. These witnesses repeated what was alleged in the *Turner* amended complaint, to-wit: the benefit was a "permanent benefit," that the insurance was "paid up," that "no further premiums would be due," and similar statements that the benefit was for life at no further cost to the retiree. *E.g.*, Doc. 91 (transcript) at 74-78. At the hearing, Allstate admitted that it made the representations of permanency not only to the Plaintiffs who testified but to others who were aggrieved

by Allstate's decision to terminate the benefit. The District Court explained: "Allstate does not dispute that these representations were made, or that Plaintiffs relied on those representations. In fact, at the hearing on the motion for preliminary injunction and the motion to dismiss, Allstate *admitted* that it did make the representations." Doc. 122 at 10-11.

In 2018, one month before oral arguments on Plaintiffs' motion for class certification and Defendants' motion for summary judgment, the case was reassigned to Chief Judge Emily Marks.

In 2019, Judge Marks owned fewer than ten (10) shares of the Allstate Corporation. Doc. 460. This information was not disclosed to the Plaintiffs until July 28, 2021 (ten months after Judge Marks granted Allstate's motion for summary judgment). *Id*. Middle District Clerk Debra Hackett notified certain counsel of record by letter that Judge Marks "…during 2019, while she presided over this case, in a managed account, she owned fewer than ten (10) shares in The Allstate Corporation…." and "…she has since divested herself of any Allstate Corporation stock." Ms. Hackett correctly noted that "…her stock ownership would have required recusal under the Code of Conduct for United States Judges." (Doc. 460).

Ms. Hackett invited the undersigned to respond to her letter by August 4, 2021, and we did so. (Doc. 462). In our August 3, 2021, letter, we requested

certain information about Judge Marks' Allstate stock ownership. *Id*. We received a response on August 10 stating we must complete a form to obtain information from the Financial Disclosure Office, Administrative Office of the United States Courts. (Doc. 464). We requested the reports as the Clerk of Court advised us to do. We did so promptly and diligently, even before receipt of the Clerk's instructions. (Doc. 465-1). On November 10, 2021, we received Judge Marks' 2018 and 2019 disclosures and later received her 2020 disclosures. Doc. 497-1. While those disclosures reference certain accounts, they do not include what is or was within those accounts. Hence, they are insufficient to chronicle the information we requested in the August 3 letter. For example, the letter from Ms. Hackett fails to describe with certainty the time period during which Judge Marks owned Allstate stock. Her letter fails to describe when Judge Marks disposed, and the manner in which she disposed, of the Allstate stock. (Doc. 460).

This case is not the only one where Judge Marks ran afoul of the ethical rules and issued rulings instead of recusing herself from the proceedings. At one time, Judge Marks held Wells Fargo stock, and she ruled in favor of Wells Fargo. *Springer v. Wells Fargo Bank, N.A., et. al.,* 2022 U.S. Dist. LEXIS 70542, at *1 (M.D. Ala. Apr. 18, 2022). Judge Marks affirmed a Magistrate Judge's ruling on a Rule 12(b)6 dismissal. Thereafter, the Plaintiffs appealed to the Eleventh Circuit, and this Court affirmed. *Id*. at *2. On July 7, 2021, the Middle District of Alabama

clerk, Debra Hackett, authored a letter to the parties in the *Springer* action, which was similar to the letter written July 28, 2021, in the instant case. The *pro se* Plaintiffs filed a pleading in the District Court which the court construed to be a Rule 60 motion, and the matter was assigned to Honorable Keith Watkins. *Id*. at *2-3. Judge Watkins entered an order vacating the judgment entered by Judge Marks, and conducted an independent review of the record. *Id*. Following an independent review of the record, Judge Watkins entered an order upholding the dismissal of the case. *Springer v. Wells Fargo Bank, N.A.*, 2022 U.S. Dist. LEXIS 71441, at *1-2 (M.D. Ala. Apr. 19, 2022).

III. STANDARD OF REVIEW

Decisions on relief under Fed.R.Civ.P. 60 are generally reviewed for abuse of discretion. *Rismed Oncology Sys., Inc. v. Baron*, 638 F. App'x 800, 804-05 (11th Cir. 2015). An error of law is an abuse of discretion, as is application of "the law in an unreasonable or incorrect manner" or "improper procedures in making a determination." *See id.* The test for deciding if 28 § U.S.C. 455(a) is violated is whether a jurist's conduct creates an appearance of impropriety. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-65 (1988); *accord Exxonmobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163, 172-73 (2d Cir. 2022) (explaining *Liljeberg* and the Fifth Circuit decision affirmed by it, and stating "§ 455(a) deals exclusively with appearances" (internal quotation marks and citation omitted)).

SUMMARY OF THE ARGUMENT

District Judge Emily Marks violated numerous provisions of the Judicial Canons codified at 28 U.S.C. § 455 by owning stock in the Allstate Corporation when it was a defendant in her court. Judge Marks owned the stock "during 2019", but Plaintiffs do not know exactly when she acquired the stock, even though Plaintiffs have made efforts to get more information regarding the stock ownership. Judge Marks instructed the circuit clerk in the Middle District to inform the parties of her ownership, but such did not occur until July, 2021—about one month before oral argument was set in this Court, and perhaps more than **two years after she became disqualified.** Judge Marks was disqualified from sitting on the case when she acquired the stock, whenever in 2019 that was. Pursuant to the Judicial Canons, she was required to be informed about her financial affairs, so, at a minimum, she "should have known" in 2019 that she held Allstate stock. Although disqualified, she remained on the case, and in late 2020 entered summary judgment in favor of Allstate. This order from a disqualified judge was affirmed on appeal by this court, but this order should not be allowed to stand. It should be vacated, and the facts and principles set forth in *Liljeberg* support vacatur. The District Court refused to provide any remedy, in effect sweeping these serious violations under the rug.

The cases cited by Allstate and relied upon by the District Court to reach its conclusion are easily distinguishable and inapposite. In particular, this Court's decision in *Parker* is factually at odds with the instant case and should not offer any support that Judge Marks' order entered while she was disqualified was harmless error. It was clearly an error, but it was far from harmless. Judge Marks took away the hearing date that was set by Judge Watkins and never gave Plaintiffs an opportunity to have a hearing on the dispositive motions.

The District Court should have reassigned the case to Honorable Keith Watkins, from whom it was taken and reassigned to Judge Marks **five years into the litigation with looming dates set for oral argument, and an upcoming trial date.** Had Judge Marks let it be known that she was disqualified, then the case should have reverted back to Judge Watkins. If this Court vacates the tainted order, then the case should be remanded back to Judge Watkins for further proceedings.

ARGUMENT

I. Vacatur Is the Only Remedy for the Numerous Statutory Violations Committed by District Judge Marks.

The District Court found that Judge Marks' numerous violations of the Judicial Code should be free of consequences and that her summary judgment order should stand. Doc. 517. Judge Marks became disqualified in 2019 when she acquired Allstate stock. She granted summary judgment in favor of Allstate in late

2020. Doc. 432. *A judge who was disqualified, and who had been disqualified for a year or longer, entered an order granting summary judgment.* This Court should not give credence to orders from disqualified judges. This order should not even exist. *De novo* review of an order from a disqualified judge which should not even exist should not wash away the numerous Judicial Code violations committed by Judge Marks. Yet, this stained order remains, haunting the Plaintiffs. The order is a ghost. It is time for this ghost to disappear.

A. The Rules and Their Import

> A judge "…shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a).
>
> A judge "…shall also disqualify himself [when] he knows that he…has a financial interest in the subject matter in controversy or in a party to the proceeding…." 28 U.S.C. §455(b)(4).
> A judge "…should inform himself about his personal and fiduciary financial interests…." 28 U.S.C. §455 (c).
>
> District Judge Emily Marks violated each of the provisions above.

Judge Marks was assigned the case on August 8, 2018. Doc. 387. At that point, she was obligated to do at least two things: (1) review her personal finances and investments to determine whether she had any interest in the Allstate Corporation; **and** (2) advise her investment managers that she was prohibited from owning any interest in the Allstate Corporation until, at the earliest, the completion of the case which had been assigned to her. This is not a difficult task to execute.

Nor is it difficult to implement procedures to ensure that a judge would not acquire a financial interest in a party that is currently a litigant in his or her court. Section §455(c) requires judges to know about their personal finances. There are no exceptions and there are no excuses for failing to abide by this rule. As the Supreme Court stated in *Liljeberg v. HealthServs. Acquisition Corp.*, "We must continuously bear in mind that to perform its high function in the best way 'justice must satisfy the appearance of justice.'" 486 U.S. 847, 864 (1988) (citation omitted).

"Justice does not satisfy the appearance of justice" in this case. What we know about Judge Marks' ownership of Allstate stock is scant—only what she told the Middle District of Alabama clerk to report to us. *See* Doc. 460. The clerk's letter said that Judge Marks owned Allstate stock "during 2019." *Id*. Rather than adhering to the rules for judges, Judge Marks ignored them. She failed to inform herself of her financial interests. She was obligated to recuse herself in 2019, when she knew or "should have known" that she was disqualified. If she had done what she was required to do then, this case would most likely have reverted back to the judge from whom it came—Honorable Keith Watkins. The record would not be the same as it is now. Instead, Judge Marks retained control of a case she should have relinquished and in late 2020 entered a ruling in favor of Allstate, leaving Plaintiffs stuck with the consequences of an order that never should have existed.

It is hard to fathom anything more at odds with "the appearance of justice" than the scenario we have here. How is it that a judge can ignore a rule that requires him or her to ascertain whether a financial interest exists in a litigant in his or her court? A judge **cannot** ignore this mandate. Perhaps it is inconvenient to constantly check one's finances to determine whether an interest in a litigant exists, and perhaps it is also cumbersome to do so if a judge has extensive investments. When a judge receives a new case, there should be a procedure in place to satisfy the requirements of §455(c). Learning about the violation almost two years after the fact, some ten months after judgment has been entered, is the antithesis of the "appearance of justice."

It turns out that Judge Marks was a repeat offender of the rules. In *Springer v. Wells Fargo Bank, N.A., et al*, Plaintiffs filed a *pro se* action against Wells Fargo arising out of foreclosure proceedings. 2022 U.S. Dist. LEXIS 70542, at *1 (M.D. Ala. Apr. 18, 2022). Judge Marks affirmed a Magistrate Judge's ruling on a Rule 12(b)6 dismissal. Thereafter, the Plaintiffs appealed to the Eleventh Circuit, and this Court affirmed. *Id*. at *2. On July 7, 2021, the Middle District of Alabama clerk, Debra Hackett, authored a letter to the parties in the *Springer* action, which was similar to the letter written July 28, 2021, in the instant case. *Id*. Apparently, it had "been brought to her attention" that Judge Marks owned Wells Fargo stock while she presided over the *Springer* case. *Id*. The *pro se* Plaintiffs filed a pleading

in the District Court which the court construed to be a Rule 60 motion, and the matter was assigned to Honorable Keith Watkins. *Id*. at *2-3. Judge Watkins entered an order vacating the judgment entered by Judge Marks, and conducted an independent review of the record. *Id*. Following an independent review of the record, Judge Watkins entered an order upholding the dismissal of the case. *Springer v. Wells Fargo Bank, N.A.*, 2022 U.S. Dist. LEXIS 71441, at *1-2 (M.D. Ala. Apr. 19, 2022).

Judge Watkins in *Springer* did what should be done in this case. He vacated the judgment and conducted his own independent review of the record. The similarity between *Springer* and the instant case ends there, because *Springer* pertained to the frailties of a pleading prepared by *pro se* plaintiffs whereas this case has a robust and voluminous record consistent with **seven years of intense litigation, scores of depositions, briefs, and discovery disputes attempting to unravel the Rubik's cube of ERISA.**

B. The Violation by Judge Marks was Not Harm*less*—It Was Harm*ful*.

The District Court summed it up this way: "Plaintiffs' Rule 60 motion is due to be denied because Judge Marks's failure to recuse was harmless . . . and the challenged orders were affirmed on appeal." Doc. 517 at 10. In other words, *de novo* review operates as a cleansing of the violations Judge Marks committed, which is an incomplete and flawed analysis of what happened in this case.

We do not know when in 2019, whether it was in January or December, but sometime that year Judge Marks was the owner of Allstate Corporation stock. Doc. 460. Judge Marks violated §455(a) because any "reasonable person, knowing the relevant facts" would have known that they had Allstate stock, and that Allstate Corporation was a litigant in their court. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988). Judge Marks also violated §455(b)(4) because she had a financial interest in a party appearing before her. And she violated §455(c) because she failed to inform herself about her financial interests. That conduct creates "the appearance of impropriety" and *is harm* for that reason, because it breaches the "very purpose" of the statute. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg*, 486 U.S. at 865. *Accord Exxonmobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163, 173 (2d Cir. 2022) ("[V]iolations of § 455(a) are harmful because 'the integrity of the judicial process is paramount and the potential damage from impairment of the public confidence in the judicial process is a serious concern.'" (citation omitted)). *De novo* review of the summary judgment Judge Marks entered did not wipe away that harm. There are more harms which the prior appeal in the case did not remedy.

Recusal should have occurred sometime in 2019, but regrettably it did not. Had Judge Marks recused herself when she was required to do so, and had she

discharged her duties as she was required to do, then the case would most likely have been reassigned back to Judge Watkins from whom it originated.

We know that Judge Watkins was assigned the case at inception, and presided over it for **five years until it was mysteriously reassigned to Judge Marks. Doc. 387.** When Judge Watkins had the case, he granted Preliminary Injunction in favor of the Plaintiffs, finding that there was a "substantial likelihood" they would prevail on the merits. Doc. 92 at 2. Judge Marks took the same evidence that was considered by Judge Watkins and flipped it. Two judges looking at the same evidence coming to different conclusions.

Had Judge Marks recused in 2019, the record in this case would most assuredly look much different, and if the case had been transferred back to Judge Watkins, Allstate may have been the appellant.

The current record, tainted though it may be with the summary judgment ruling entered by a disqualified judge, nevertheless is replete with evidence that would justify a reversal of the summary judgment if such were vacated and an independent review was conducted by the trial court. The fact that this Court conducted a *de novo* review of the Marks summary judgment order does not render Judge Marks' conduct harmless.

First, following five years of intense litigation, the Plaintiffs had fully briefed their motion for class certification, and Allstate had fully briefed its Motion

for Summary Judgment, and all pending motions were set for a hearing before Judge Watkins on **September 5, 2018.** Doc. 386. Less than one month before the hearing date, on **August 8, 2018,** the case was reassigned to Judge Marks. Doc. 387. Rather than resetting the hearing date on the pending motions, Judge Marks took them off the calendar, and instead quickly scheduled a status conference on September 12, 2018. Doc. 388. The District Court order states that the "status of all pending motions was discussed", but this was in the most general of terms. At that time, Judge Marks was a brand new judge and had been assigned a mature case with a thick record. Over the ensuing two years before Judge Marks ruled, the record reflects efforts by Plaintiffs to get back before Judge Marks to no avail. *See* Docs. 405, 409, 412, 417, and 430. When the case was with Judge Watkins, a firm hearing date on all pending motions had been set. Judge Marks took that away. Judge Marks took away Plaintiffs' opportunity to present evidence and arguments at an oral hearing on Allstate's summary judgment motion.

Stripping away a hearing date on a pivotal motion is significant, because statements and admissions can occur at oral argument which may impact rulings by the court, as the record in this case reflects. At summary judgment hearings, judges frequently ask for or accept more briefings on issues that are significant to the outcome of the motion. This record demonstrates the value of a hearing; the *Plaintiffs' Motion for Preliminary Injunction in December, 2015.* At the hearing,

Judge Watkins pointedly asked Allstate counsel various questions about the contentions in the case, and whether Allstate agreed with Plaintiffs' allegations that officials at Allstate repeatedly represented to the putative class of Allstate retirees that the life insurance policies at issue were "paid up." Allstate counsel acknowledged that the allegations were true, and these admissions by counsel were prominently referenced by Judge Watkins in his Preliminary Injunction order. Doc. 122 at 10-11.

Judge Watkins knew the value of a hearing on important motions, especially dispositive motions, and set a hearing date accordingly. Doc. 386. Judge Marks took the hearing date away (Doc. 388) and never gave it back, and such was detrimental to the Plaintiffs.

De novo review by this Court of the issues raised on appeal is not dispositive. We have already seen how Judge Watkins and Judge Marks came to different conclusions after reviewing the same evidence in the case.

Here, there are an abundance of issues that render summary judgment in favor of Allstate improper, including but not limited to the following: failing to apply the correct legal standard set forth in *Cigna Corp. v. Amara*, 563 U.S. 421 (2011) for Plaintiffs' equitable fraud claims, and failing to correctly interpret the limitation of actions provisions in 29 U.S.C §1113. An independent review of the record would result in a denial of Allstate's motion for summary judgment.

C. The Supreme Court's *Liljeberg* Decision Found That Vacatur Was Appropriate Under the Facts Not as Compelling as Those of Judge Marks.

The *Liljeberg* court considered the actions of a federal judge while serving on the board of Loyola University while a litigant before him was involved in a transaction which would have provided a financial benefit to Loyola if consummated. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850, 108 S. Ct. 2194, 2197-98 (1988). At issue were several board meetings where the judge denied that he had any actual knowledge of the transaction, as well as the date the judge stated he had "actual knowledge" of the transaction. *Id*. at 852-858. The judge presided over a bench trial, which was later appealed to the Fifth Circuit and affirmed. *Id*. at 850. Ten months after the Fifth Circuit decision, Liljeberg discovered that the judge was on the Loyola board, and filed a Rule 60 motion to vacate the underlying judgment. *Id*.

The Fifth Circuit determined that the underlying judgment was due to be vacated and the Supreme Court affirmed. *Liljeberg*, 486 U.S. at 850. The facts that justified vacatur in *Liljeberg* are no worse that those pertaining to Judge Marks. The judge in *Liljeberg* took a voluntary position on a university board and was deemed to know the board's activities surrounding Mr. Liljeberg, even though he denied having actual knowledge until a later date. *Id*. at 852-858. We contrast that with the failure of Judge Marks to implement safeguards that would *prevent her*

acquisition of a financial interest in a party litigating in her court. The abysmal failure committed by Judge Marks strikes at the very heart of §455(a), which is "…to avoid even the appearance of partiality." *Liljeberg*, 486 U.S. at 860 (internal quotation and citation omitted). Owning stock in a party evokes a visceral reaction of favoritism of one party over the other, which is precisely why the *Liljeberg* court held that "…the administration of justice should reasonably appear to be disinterested as well as be so in fact." 486 U.S. at 869-870 (internal quotation and citation omitted).

With respect to the judge in *Liljeberg*, the court stated that the violation of §455(a) was "neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest may well constitute a separate violation of § 455. *See* § 455(c)." 486 U.S. at 867-868.

Neither were the violations committed by Judge Marks "insubstantial nor excusable." Nor were they harmless.

The *Liljeberg* court said it would be "appropriate" to consider the "risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that to

perform its high function in the best way 'justice must satisfy the appearance of justice.'" 486 U.S. at 868 (citation omitted).

The "appearance of justice" cries out for a vacatur of the summary judgment ruling entered by Judge Marks. She was duty bound to recuse in 2019. She violated numerous provisions under § 455. She owned a financial interest in a party litigating in her court. Turning a blind eye to this conduct under the guise of "no harm no foul" turns § 455 on its head, and at least in this case, renders it an optional rule without consequences for violations.

As *Liljeberg* held, "providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." 486 U.S. at 868. The same is true here.

In denying Plaintiffs' motion to vacate, the District Court stated that "granting the Plaintiffs the relief that they seek would tend to undermine the public's confidence in the judicial process." Doc. 517 at 11. It is hard to imagine a more bizarre or incongruent comment coming from the court. Judge Marks took over the case in 2018. Doc. 387. She acquired Allstate stock in 2019. Doc. 460. She ruled in favor of Allstate in 2020. Doc. 432. We have never argued that her

ownership of Allstate stock "caused" her to rule in favor of Allstate even though the District Court latched on to that belief for some reason, stating "[Plaintiffs'] theory therefore rests on the foundation that Judge Watkins was right, Judge Marks was wrong, and Judge Marks could only be wrong because she held a financial interest in Allstate." Doc. 517 at 7. Respectfully, the District Court misunderstands. Section 455 is the dagger to the rulings made by Judge Marks. Her ownership of Allstate stock while Allstate was a litigant in her court created the appearance of impropriety. These are the very things that create distrust in the legal system. As *Liljeberg* teaches, "justice must satisfy the appearance of justice." This summary judgment order, entered by a disqualified judge and stained to its core, must not escape unscathed. The Judicial Canons are not mere "advisory rules" a judge can violate without any ramifications. This order should be vacated and discarded.

II. The Decision Rests on Inapposite Cases and Is Marred by Mistake.

The denial of Rule 60 relief rests on *Parker v. Connors Steel Co.*, 855 F. 2d 1510 (11th Cir. 1988), and *U.S. v. Cerceda*, 172 F.3d 806 (11th Cir. 1999), but *Parker* and *Cerceda* are inapposite. The recent decision *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1035-36 (U.S. Fed. Cir. 2022), proves that with respect to *Cerceda*:

> The third circumstance where courts have declined vacatur is where substantial time has passed since the rulings in question . . . In this respect,

> Centripetal relies on the Eleventh Circuit's en banc decision in [*Cerceda*]. But in that case, which dealt with the possible re-trial of multiple criminal defendants, it had been six years since one of the trials, and one of the key witnesses—who had been 84 years old and in poor health at the time of the first trial—would have been over 90 years old at the time of a new trial. *Centripetal has made no comparable showing in this case*.

(emphasis added). Allstate made no comparable showing below. It could not. The merits judgment here was not even final when the violation of § 455 became known and the Plaintiffs moved for relief. *Cerceda* does not support denial of vacatur.

Parker is thoroughly distinguished as well. Completely different from the law clerk relationship in *Parker*, Judge Marks' share ownership in Allstate immediately disqualified her and required her to recuse. The recusal was mandatory; there was no discretion or waiver. The *Centripetal* decision, addressing stock ownership by a judge's wife, proves that. The *Centripetal* court overruled the district court's refusal to recuse, finding a violation of § 455(a) that warranted vacatur of "all orders and opinions of the court after [date specified] including the final judgment." 38 F.4th at 1027. It remanded for further proceedings before a different district court judge. *Id.*

The *Parker* court, in contrast, was not presented with the question of violation of 28 U.S.C. §§ 455(b) and 455(d), which the Plaintiffs assert. *Parker* found harmless error in the law clerk relationship at issue, and Allstate attempted

to make that same argument based on *Parker*. The trial court evidently accepted the argument, a mistake for several reasons, as follow.

A. *Parker* Does Not Establish That a Violation of 28 U.S.C. § 455(b) Is Harmless.

In *Parker*, after the district court granted defendant's motion for summary judgment, plaintiffs requested the judge recuse himself for violation of § 455(a) because the judge's law clerk (who did substantial work on the case) was the son of a partner in the law firm representing defendant. 855 F.2d at 1523.

Parker focuses on the appearance of a law clerk's impartiality, not a judge's disqualifying financial interest under § 455(b)(4). Although *Parker* analyzed 28 U.S.C. § 455, it did so without effect on the facts here, or on the conclusions to be drawn from them, because § 455(b) applies exclusively to judges. *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 409, 411-12 (P.R. 1989).

Parker does not establish that a judge's violation of 28 U.S.C. § 455(b) is harmless. There are compelling reasons for that conclusion. 28 U.S.C. § 455(b)(4) establishes strict disqualification for a financial interest "however small" (*id.* at § 455(d)(4)). *See In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. at 412. A disqualifying interest or conflict under § 455(a) may be waived, provided the parties are fully informed at the time (not true here), but a disqualifying financial interest within the meaning of § 455(b)(4) cannot be waived. 28 U.S.C. at § 455(e); *see Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir.

2003). **Thus, a financial interest is a disqualifying event in every instance, strictly requiring recusal and creating an appearance of impropriety *by the judge* when she does not recuse.** Without doubt, that is a different and lesser matter than what *Parker* addresses. *See Parker*, 855 F.2d at 1524-25 ("We express no opinion on whether any of the above facts standing alone would rise to the level of a § 455(a) violation.").

B. The Decision Turns *Liljeberg* On Its Head.

The trial court denied vacatur because granting it would sow public mistrust of courts. Doc. 517 at 11. That reasoning and result turn *Liljeberg* on its head. They are an error of law, or an unreasonable application of law, and reversible for that reason.

Liljeberg's third factor for granting vacatur is to diminish "the risk of undermining the public's confidence in the judicial process." *Centripetal*, 38 F.4th at 1034, 1038 (Fed. Cir. 2022). It is the most significant factor, according to *Centripetal*. The *Centripetal* court held that "failure to vacate here would strike at the heart of what the statute was designed to protect," and that "vacatur here would signal to judges in other cases the importance of complying strictly with the procedures spelled out in § 455." 38 F.4th at 1039. It explained further that:

> It is seriously inimical to the credibility of the judiciary for a judge to preside over a case in which he has a known financial interest in

> one of the parties and for courts to allow those rulings to stand.
>
> This assessment is confirmed by responses to the recent reports of many federal judges presiding over cases in which they or relevant family members owned stock in a party. *See* James V. Grimaldi et al., *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, Wall St. J. (Sept. 28, 2021). Congress responded by recently enacting the Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat 1205 (2022), which requires judges to make more timely and accessible disclosures of their financial holdings and potential conflicts of interest. *See also* 168 Cong. Rec. H4522 (daily ed. Apr. 27, 2022) (statement of Rep. Hakeem Jeffries) ("Failure to recuse can cause real harm to parties seeking fair and impartial justice and leave a cloud of doubt over any decision that is made once the conflicts are subsequently uncovered."). Chief Justice Roberts similarly responded by devoting a substantial portion of his 2021 Year-End Report on the Federal Judiciary to discussing the importance of judges complying with their ethical obligations. Chief Justice John G. Roberts, Jr., 2021 Year-End Report on the Federal Judiciary, 3.
>
> It simply cannot plausibly be argued that public confidence in the judiciary will be degraded by a decision that vacates a judge's rulings rendered while she had a financial interest in one of the parties. Rather, in the circumstances here, vacatur is essential to preserve public confidence.

Id.

Obedience to the statute is the goal. Vacatur serves the goal -- *Centripetal* and *Liljeberg* say so. *Id*.; 486 U.S. at 868 (“Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when

discovered.").

Section 455 promotes and secures public trust in the fairness, impartiality, and propriety of courts, *but only if it is obeyed*. The trial court concluded instead that trust is maintained by excusing breaches of the statute. The decision upholds the undisputed appearance of impropriety. It must be reversed for that reason. Section 455 demands it.

C. There Is No Burden to Prove Harm.

There is no burden to prove harm from a violation of §§ 455(b) and 455(d). This is not a hunt for evidence of partiality. Actual partiality is a non-issue according to *Liljeberg*, 486 U.S. at 860, and the Plaintiffs make no such accusation. The relief of vacatur does not require it. *Id.*; *accord Chase*, 343 F.3d at 127-132. The district court commits error, misapplying the law, in this critical respect.

In denying vacatur, it appears impressed that the Plaintiffs did not show prejudice against them by Judge Marks, but that is not the test under *Liljeberg* and progeny. On its own, the appearance of impropriety is harm under *Liljeberg*. There is other harm as well, and the trial court did not weigh it for vacatur, another mistake.

Following Allstate's lead, the trial court simply but wrongly assumed no harm based on *de novo* review and affirmance of the final judgment by the

Eleventh Circuit. The factual record for and the fact findings in the final judgment were extensive, in contrast to the instance cited in *Centripetal* where "the ruling involves a pure question of law that is subject to plenary review on appeal, a posture that some courts in some circumstances have found relevant." 38 F.4th 1025, 1034-35. The relevance *Centripetal* refers to means relevant to whether vacatur is warranted, versus "finding harmless error for violations of § 455." *Id.*

Parker is one such court where *de novo* review weighed against vacatur, but *Parker* is distinguished. The final judgment here did not turn on "a pure question of law" (*Centripetal*, *supra*), so the decisions *Centripetal* refers to which apply that factor to deny vacatur are inapposite. One such decision, *Exxonmobil Oil Corp.*, is addressed below.

Most relevant here, *Centripetal* recognizes decisions of other courts where *de novo* review did not (and would not on its own) weigh against vacatur. 38 F.4th at 1034 n.11. Accordingly, there is no rule or controlling authority that *de novo* review of a final judgment extinguishes a 28 U.S.C. § 455(b) violation. The most that can be mustered for that proposition is "some courts in some circumstances" (the *Centripetal* explanation) find plenary review of pure questions of law to be relevant. The decision below adopts a much broader and far stronger proposition, namely that *de novo* review erases a § 455 violation, but there is no authority for it. *De novo* review does not mean vacatur is unwarranted.

D. The Trial Court Mis-Relies on *Exxonmobil Oil Corp*.

The decision below mis-relies on *Exxonmobil Oil Corp. v. TIG Ins. Co.*, 44 F.4th 163 (2d Cir. 2022). *Exxonmobil Oil Corp.* indicates correctly that a violation of § 455(a) is harm, 44 F. 4th at 173, but the trial court did not recognize that important part of the decision, much less apply it.

The part it did recognize and apply, a denial of vacatur, is distinguishable for three reasons: in *Exxonmobil Oil Corp.*, after the § 445(a) violation, another district judge stepped in and independently considered "the merits of" the matter (an arbitration dispute), 44 F.4th at 166, which is the very relief denied these Plaintiffs (namely their request for transfer back to Judge Watkins); second, the case presented "only questions of law," *id.* at 167, in contrast to the extensive material facts the Plaintiffs submitted to Judge Marks – most of which, *but not all of which*, were undisputed; and third, the party who asserted the § 445(a) in *Exxonmobil Oil Corp.* was not denied a hearing on facts, specifically on summary judgment, in contrast to here.

Exxonmobil Oil Corp. is a Second Circuit decision. The decision the district court should have considered and applied from the Second Circuit is *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120 (2d Cir. 2003). It is the apposite Second Circuit case, *Exxonmobil Oil Corp.*is not.

E. *Chase* supports the Plaintiffs, Warranting Reversal and Remand.

Disqualifying stock ownership, even if not actually known by the judge, can give rise to a substantial question of impartiality after the fact, specifically under 28 U.S.C. § 455(a). That occurs if, "in the eyes of a reasonable person, the disqualifying financial interest" could have been easily ascertained by the judge. *See Chase*, 343 F.3d at 129. In that event, if the judge presided over final disposition of the case after the disqualification, that disposition is due to be vacated. *See id.* at 129-33. The test and basis for that relief is whether a "reasonable person would believe that the district judge knew that [s]he had a financial interest in a party to the litigation at some point before the decision on the merits." *Id.* at 132.

The disclosure here (Doc. 460) did not say when Judge Marks first knew of her share ownership in Allstate, only that she owned the shares in 2019 and that fact had been brought to her attention. 28 U.S.C. § 455(c) provides that judges should be knowledgeable of such ownership. 2019 is before the final judgment here, satisfying the temporal requirement of "a financial interest . . . at some point before the decision on the merits." *Chase*, 343 F.3d at 132.

The Plaintiffs submit that the financial interest could have been ascertained easily and a reasonable person would believe that, satisfying the other requirement *Chase* sets for vacatur. Objective facts warrant that conclusion.

i. <u>The Objective Facts that Support Relief</u>

The Judge Marks was commissioned in 2018 and was re-assigned this case in that year. She owned shares in 2019, and Allstate Corporation had been disclosed and identified by that time. Doc. 9; *see also* Middle District of Alabama General Order No. 3047 (disclosure enables "judges to avoid conflicts of interest with unnamed corporations . . ." and requires all parties to "file a statement identifying all parent companies . . . or similar entities that could potentially pose a financial or professional conflict for a judge").

Federal judges annually file financial disclosure reports which the public can obtain. *See* Docs. 464, 464-1. The final judgment occurred in 2020, by which time the Judge Marks should have filed two such reports (for years 2018-2019) containing the specific details of stock ownership. The Plaintiffs requested these. *See* Doc. 462, 464 (request for details of Allstate share ownership and reply that "you must complete the attached form to obtain a copy of *this information*," respectively (emphasis added)); *accord Chase*, 343 F.3d at 131 ("[T]he forms are filed by May 1 and report holdings and transactions for the previous calendar year.").

On receipt and review of Judge Marks' report for 2019, the Plaintiffs determined that (1) Allstate stock is not listed in that disclosure, and (2) the report was filed by her in August, 2020, one month *before* she granted summary judgment to Allstate. When she learned of the ownership and amended the report

to show it, if amended at all, remains unanswered, which is why the Plaintiffs sought discovery. Her knowledge should not be difficult to determine, however, provided the record is complete.

Allstate Corporation is a well-known, very widely held stock,[1] an objective fact for relief given (a) the identification of it before the final judgment (specifically, in the corporate disclosure form, Doc. 9 at 2), (b) the diligence required by 28 U.S.C. § 455(c), and (c) the annual disclosures filed by the Judge. This objective factor was not fully present in *Chase*, because there, unlike here, the corporate disclosure form of the party did not identify the disqualifying stock by name. *See* 343 F.3d at 124, 131 & n.2 (stating, *inter alia*, that "after discovery was concluded and with various motions pending, the case was reassigned to Judge Pollack for purposes of the bench trial. Notably, the caption and Chemical's corporate disclosure form had not been altered to reflect Chase's presence as a party."). That difference strengthens the conclusion that, under the objective test *Chase* applies, "a reasonable person would believe that" the Judge Marks knew she had a disqualifying financial interest "at some point before the decision on the merits." *See id.* at 132. That conclusion does not change because her original 2019 report fails to list Allstate. Her mistake in not getting that report right is hers

[1] *See* https://www.allstateinvestors.com/shareholder-services/investor-faqs ("The Allstate Corporation's common stock is listed on the New York Stock Exchange under the trading symbol 'ALL.' . . . Allstate became a publicly traded company in 1993 – which at that time was *the largest initial public offering in the nation's history*." (emphasis added)).

alone and does not mitigate the violations of § 455. If anything, it proves a failure to inform herself of the disqualifying stock ownership.

Also, long before the re-assignment, this case had been publicized in the judicial district, a factor which was present in *Chase*. *See* 343 F.3d at 123-25. The publicity was due in part because the lead Plaintiff, Garnet Turner, is a Montgomery resident. *See* https://www.wsfa.com/story/23588947/allstate-insurance-company-sued-by-company-retirees/ (accessed 8/12/2021). This publicity fact is more reason why Allstate stock ownership should have produced immediate recusal, versus a conflict and disqualification that occurred long before the dispositive decision and was disclosed *only long after it*.

The foregoing objective facts, together with the duty 28 U.S.C. § 455(c) imposes on judges to ascertain financial interests which disqualify them, establish that a reasonable person would conclude that the Judge knew of her disqualification before the final judgment. This is not speculation of actual knowledge, or scienter, because that is not the issue the Plaintiffs asserted. Scienter is unneeded under the objective test asserted.

ii. The Other Non-Issues

The magnitude of share ownership (or lack thereof) and any risk to share price are not issues either. Subsection 455(b)(4) is strict disqualification for a financial interest "however small." *See id*. at § 455(d)(4); *In re San Juan Dupont*

Plaza Hotel Fire Litig., 129 F.R.D. 409, 412 (D.P.R. 1989); *accord Chase*, 343 F.3d at 128 ("Section 455(a) applies when a reasonable person would conclude that a judge was violating Section 455(b)(4)," despite little risk that judgment would affect share price and *de minimus* value of shares to the judge). That conclusion is further secured by the fact that a disqualifying interest or conflict under § 455(a) may be waived, provided the parties are fully informed at the time (not true here), but a disqualifying financial interest within the meaning of subsection (d)(4) cannot be waived. *Id.* at 455(e); *see* 343 F.3d at 127.

F. There Is No Cure Apart from Vacatur.

Likewise, 28 U.S.C. § 455(f), which permits divestiture of the financial interest, "cannot cure circumstances in which recusal was required years before and important decisions have been rendered in the interim." *Chase*, 343 F.3d at 131. The final judgment is more than an "important decision" rendered after "recusal was required:" the Judge decided all claims of the Plaintiffs and dismissed them with prejudice. Docs. 431, 432. Indeed, the Court treated the Allstate motions for summary judgment *as a bench trial*, *see* Doc. 431 at 6, so it cannot be said that Judge Marks did not make findings of fact to dismiss the Plaintiffs' claims. That is undoubtedly true of their claim for equitable relief under ERISA Section 502(a)(3).

G. Decisions After *Chase* Support Relief.

The relief warranted by *Chase* -- vacatur of the final judgment -- is due for the reasons above. Decisions in the court below after *Chase* support the relief. One such case has been addressed, *Springer*. One other, *King v. CVS Health Corp.*, 198 F. Supp. 3d 1277 (N.D. Ala. 2016), is relevant.

In *King*, unlike here, there was no disqualification before or when the judge presided over a two-week trial resulting in judgment against the party which later moved for relief under 28 U.S.C. § 455. The subsequent disqualifying stock ownership was in the party moving for that relief, *not in the party which won the judgment* – the opposite of *Chase* and here (and a patent difference of appearance). The only substantial decision entered after the disqualification was in part uncontroversial, a remittitur which the party prevailing on the judgment, the plaintiff, accepted (*see* 198 F. Supp. 3d at 1285), again different from *Chase* and the final judgment against the *Turner* and *Klaas* Plaintiffs. Motions for other post-trial relief under Fed.R.Civ.P. 50 and 59 were denied in that same decision. *See id*. Those additional rulings were consistent with the district court's decisions on the same subjects *before* disqualification, *see id.* at 1286, an important difference with this case.

Also, the corporate disclosure form on file in *King* when the disqualifying stock purchase occurred did not correctly identify the disqualifying stock by name.

The correct identification occurred only later, after the district judge who acquired the stock notified the parties of the purchase. The judge then promptly divested. *See* 198 F. Supp. at 1280 & n.1.

Relief of vacatur was denied in *King* on the forgoing facts because "no reasonable person knowing all the facts would question the impartiality of Judge Hopkins' decisions in the one substantive ruling she made while holding [the disqualifying] stock." *See* 198 F. Supp. at 1286.

III. The Share Ownership Affected the Case.

The paramount concern of *Chase* and of 28 U.S.C. § 455(a) is the appearance problem of a judge owning shares in a party to one of the cases pending before her, then continuing in the case and deciding the case in favor of that party without ever taking cognizance of and disclosing the conflict to the parties. *Accord United States v. Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001) ("The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (quoting *Liljeberg*). Allstate dwelt on another argument. It suggested that the failure to recuse did not affect the case. *See* Doc. 461 at 3 ("Judge Marks' 'stock ownership would have required recusal under the Code of Conduct for United States Judges' but there is no evidence, and indeed a statement to the exact opposite, that the small financial interest affected anything.") (quoting Doc. 460)). Allstate was

wrong about that, and the denial of vacatur is wrong for that reason. The objective record proves that.

One of the reasons relief was denied in the *King* decision addressed above is that the rulings before disqualification and after disqualification were consistent. The consistency found in *King* was based on rulings of only one judge. Two judges presided here on the merits -- Judge Watkins until the re-assignment to Judge Marks. The point is these Plaintiffs experienced a key ruling after disqualification (the final judgment) that differed profoundly from the rulings before disqualification, a circumstance not present in *King*.

Specifically, the district court here first ruled very clearly for the Plaintiffs on the merits, so much so that they won a preliminary injunction against Allstate on the strength of their claims. Docs. 92, 121. More than four years later, after re-assignment to Judge Marks and her disqualification, final judgment on the claims was entered for Allstate. The rulings are polar opposites and were reached on the same law, the same arguments, and no different evidence from Allstate. The contrast with *King* is stark.

There was no recusal before the final judgment. Judge Marks presided and entered the final merits decision for Allstate. She denied the Plaintiffs the hearing on summary judgment that had been set. But for those facts, the final judgment would be different, *because it would have been issued by another judge in the first*

instance (immediate recusal as required), *and on a different record in the second* (holding the hearing which had been set instead of denying it). The result might have been the same, victory for the Defendant, but the Plaintiffs do not have a crystal ball that tells them that. Allstate evidently does have such magic powers because it confidently suggested that the disqualification and failure to recuse did not affect the case. *See* Doc. 461 at 3. In truth, the Defendant speculated, while the Plaintiffs do not. The cold record they rely on proves that the stock ownership affected the case. Recusal should have occurred because of it, but did not. A different decision on summary judgment would have issued (the result unknown), *but did not*. Allstate is wrong. The appearance of impropriety is in no way abated. There's nothing harmless about it.

IV. Discovery Is a Proper Procedure Denied the Plaintiffs.

The trial court held that scienter is relevant to remedy but denied as moot the Plaintiffs' request for discovery of Judge Marks' knowledge of her stock ownership. *See* Doc. 517 at 5-6, 13. The trial court met itself coming and going, improperly denying this request for a reasonable search for actual knowledge of disqualification, *i.e.*, when and in what circumstances. That is the same issue it said would bear on remedy. The contradiction is an abuse of discretion warranting reversal, because it constitutes "improper procedures in making a

determination." *See Rismed Oncology Sys., Inc. v. Baron*, 638 F. App'x 800, 804-05 (11th Cir. 2015).

V. The District Court Erred by Not Reassigning the Case to Honorable Keith Watkins.

This 10-year-old case has a tortured history.

Originally assigned to Judge Keith Watkins, the case was vigorously litigated from the beginning. Plaintiffs' complaint sought to represent a class of Allstate retirees who had their company-provided retirement benefit of life insurance terminated by the board of Allstate. Plaintiffs alleged various violations of ERISA, and sought, among other remedies, the reinstatement of the life insurance benefit to thousands of Allstate retirees.

The record in the case is voluminous and reflects the commitment to the litigation from all the law firms involved in the case. All of the *Turner* Plaintiffs (fifteen class representatives) were deposed in the states in which they lived, and a number of depositions of Allstate representatives were taken in Chicago, Allstate's home offices. A mediation was held in Chicago but failed. Discovery disputes were common and numerous hearings took place before Magistrate Judge Charles Coody for resolution.

Allstate filed a Motion to Dismiss on various grounds, including the plan language, statute of limitations, and others. Docs. 63-64. On September 27, 2016, Judge Watkins entered an opinion denying Allstate's motion to dismiss finding that

"Plaintiffs have stated a claim (1) that the plan did not include (or was ambiguous as to whether it included) a provision under which Allstate reserved the right to cancel the retiree life insurance policies; and, alternatively, (2) that Allstate's representations that the retiree life insurance was "permanent" and "paid-up" upon retirement constituted an informal interpretation of the ambiguity as to whether the retiree life insurance policies could be cancelled at Allstate's discretion." Doc. 122 at 19. Judge Watkins also stated "…a statement that an employer could, at some point in the future, modify or terminate the plan or plan benefits would not necessarily place a retiree on notice that he or she could lose (or one day be required to pay for) a permanent retiree life insurance policy that had already been purchased and 'fully paid up' … [u]nder the circumstances, the reservation of rights could reasonably be understood to apply to other benefits under the plan…." Doc. 122 at 19. Judge Watkins also found that Plaintiffs' breach of fiduciary duty claim under ERISA §502(a)(3) was not time-barred. Doc. 122 at 22-23 (citing his Memorandum Opinion and Order on the motion for preliminary injunction, Doc. 121 at 14-22).

In December, 2015, a hearing was held before Judge Watkins on Plaintiffs Motion for Preliminary Injunction (Doc. 74), which sought to compel Allstate to maintain the insurance in force before it terminated in 2016. Judge Watkins

granted the Preliminary Injunction in favor of all the named Plaintiffs, and Allstate was required to keep their life insurance benefits in force. Doc. 92.

Judge Watkins did not extend that relief to the putative class. Witnesses were called during the hearing and Judge Watkins was actively engaged and asked numerous questions of Allstate counsel as verified by the transcript and the order granting the Preliminary Injunction. Docs. 91 (transcript): 92, 122.

Discovery continued after the granting of the Preliminary Injunction but the core issues and Allstate's defenses remained the same as presented to the court in the Motion to Dismiss and the opposition to the Preliminary Injunction.

Finally, the Court set a trial date and a hearing date on Plaintiffs' Motion for Class Certification, as well as Allstate's Motion for Summary Judgment. The hearing date to argue the motions was set for September 5, 2018, **five years after the filing of the case.** Doc. 386.

Then, out of the blue, less than a month before the hearing date on the motions, this 5-year-old case, deep into the fourth quarter with a voluminous record, nearing its long-awaited conclusion either at trial or on summary judgment, was reassigned to the recently appointed Judge Marks. Doc. 387. Allstate breathed a sigh of relief that was palpable from Chicago to Montgomery.

The Court knows the rest of the story. Judge Marks held one status conference with the parties, on September 12, 2018, asking if the case could be

settled, and the parties reported that it could not. Thereafter, sometime in 2019, perhaps as early as January, 2019, Judge Marks became disqualified to hear the case. *See* Doc. 460. The case should have been transferred back to Judge Watkins at that point, but Judge Marks apparently did not know that she was disqualified. But without question, she should have known.

At the hearing before the District Court on Plaintiffs' Motion to Vacate, the District Court asked whether we believed the transfer to Judge Marks in August, 2018 was "improper." November 9, 2022, Hearing Transcript, 10:6-8. How could we answer such a question? We do not know the inner workings of the court or how a case is chosen to be reassigned. The notice of reassignment was not accompanied with an explanation of why it was done. But the unfairness of how a five-year-old case with looming dispositive motion hearings and an upcoming trial could mysteriously escape to a newly appointed judge caused us great angst, disappointment, and concern. Little did we know that all our efforts to get back before Judge Marks were being requested from a judge who was no longer qualified to hear the case.

Perhaps it is just bad luck that this five-year-old case in which Allstate's backs were to the wall was reassigned on the cusp of the hearing date. Perhaps it is more bad luck that we were transferred to a judge who failed to follow the Judicial

Canons and who was disqualified without our knowledge, and who entered a dispositive ruling which never should have been entered.

Seeking some good luck, or fairness, Plaintiffs requested that the District Court reassign the case to Judge Watkins. Doc. 484. The motion was denied. Doc. 496. We renewed the motion when we discovered Judge Watkins had the *Springer* case and vacated a ruling entered by Judge Marks because she owned stock in Wells Fargo, a party in the case. Doc. 510.

If this Court sees fit to vacate the Marks summary judgment order, it should remand the case to Judge Watkins for several reasons: (1) The case should never have been transferred to Judge Marks; (2) when Judge Marks became disqualified, the assignment should have been void and the case should have gone back to Judge Watkins; and (3) Judge Watkins is familiar with the case, and judicial economy would not be served by requiring a third judge to become familiar with all the complex aspects of this case.

CONCLUSION

The denial of Plaintiffs' motion to vacate final judgment is due to be reversed, with the case remanded.

Plaintiff John E. Klaas, through his undersigned counsel, joins this appeal and agrees the decision below should be reversed.

Respectfully submitted this 5th day of May, 2023, by:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel for Appellants hereby certifies that the foregoing brief complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure (FRAP) and Eleventh Circuit Rule 32-4. This brief complies with the type volume limitation of FRAP (32)(a)(7)(B) because the countable part of it contains 11,087 words according to the Word processing system used to prepare the brief. The brief also complies with the type face and type style requirements of FRAP 32(a)(5) and 32(a)(6) because it has been prepared with Time Roman 14 point font or larger for headings in larger size.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the above and foregoing to be served on all counsel of record via the Court's ECF filing system this 5th day of May, 2023, to include these attorneys for the Appellee:

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