JUDICIAL COUNCIL

OF THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

| IN RE COMPLAINT OF<br><br>JUDICIAL MISCONDUCT | Nos. 07-89000 and 07-89020<br>**ORDER AND MEMORANDUM** |
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Before: **THOMPSON**, **THOMAS**, **GRABER, McKEOWN**, and **RAWLINSON**, Circuit Judges, **GONZALEZ, LASNIK**, and **WHALEY**, Chief District Judges, and **HATTER**, District Judge*

On January 14, 2008, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States ("Conduct Committee") issued a Memorandum and Order pertaining to Complaint No. 07-89020, rejecting a prior order of this Judicial Council, dated March 21, 2007, and remanding the matter for further proceedings ("Remand Order"). On January 16, 2008, Chief Judge Kozinski referred Complaint No. 07-89020 to the previously established special committee for further investigation consistent with the Remand Order. On February 5, 2008, Chief Judge Kozinski assigned Complaint No. 07-89000 to the Committee for inclusion in the investigation.

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* Hon. Alicemarie H. Stotler did not participate in the consideration of this matter.

On June 15, 2008, Chief Judge Alex Kozinski, formerly a member of the special committee *ex officio*, removed himself from the investigation and has not participated since that date.

Complaint Nos. 07-89020 and 07-89000 now come before the Council upon the filing of the special committee's report. After due consideration of the special committee's report, the Council adopts the findings and recommendations of the special committee and attaches as its memorandum the special committee's report modified to remove the names of the district judge and the complainant, and to remove the appendices.

For the reasons explained in the special committee's careful and complete report, the Council cannot find clear and convincing evidence of misconduct as defined by the Remand Order because of its stringent requirements for findings as to the District Judge's state of mind. The Remand Order requires "clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or wilful indifference to, that law." The Remand Order further provides that a finding of willfulness cannot rest on a large number of cases alone unless the conduct is "virtually habitual." Even as to a failure to give reasons after an appellate remand directing that reasons be given, there must be a "substantial

number" of similar cases or other clear and convincing evidence of intentional departure from prevailing law based on the judge's disagreement with the remand.

Nevertheless, the Council is troubled by the District Judge's failure in many cases to give reasons for his rulings when the law requires that reasons be given, and by the District Judge's obduracy in implementing many directives from the appellate court. In many cases, appellate remand could have been avoided by a few additional statements from the District Judge and by a fuller acceptance of the appellate court's instructions. The District Judge's acts and omissions have resulted in needless appeals and unnecessary cost to litigants in both money and time, and have tended to undermine the public's confidence in the judiciary. The occurrences here are more than anecdotal or occasional. That such conduct was not found to be "virtually habitual" or be found in a "substantial number" of similar cases in no way lessens the importance of and the need to give reasons for a decision when required by law.

Accordingly, Complaint Nos. 07-89020 and 07-89000 are hereby ordered dismissed due to a determination that the facts on which the complaints were based do not demonstrate judicial misconduct. *See* 28 U.S.C. §§ 354 (a)(1)(B). This dismissal should not be misunderstood as approval of the District Judge's conduct that has been the subject of these complaints. Following this order, the District

Judge should be especially vigilant concerning the subject matter of these Complaints.

This order shall be made public, and provided that the District Judge consents, the name of the judge shall be disclosed and substituted for "District Judge" in this Order and Memorandum when the order is no longer subject to review, or within 30 days of this order if no petition for review has been filed with the Judicial Conference of the United States. Misconduct Rule 17 (a)(1).

The complainant's name shall also be disclosed. Misconduct Rule 17(a)(4).