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9th Circuit Panel Removes Real From Trademark Case

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The latest in a long history of challenges to a veteran Los Angeles federal judge's temperament and neutrality led Monday to his removal from an intellectual-property case.

A three-judge panel of the 9th U.S. Circuit Court of Appeals ruled that U.S. District Judge Manuel L. Real made his displeasure all too clear as he wrongly threw out a plaintiff's claims in a trademark dispute.

The panel reversed Real and ordered the case reassigned. *Rhoades v. Avon Products Inc.*, 2007 DJDAR 15783 (9th Cir. Oct. 15, 2007).

Appellate courts rarely take trial judges off cases, but it has happened repeatedly with Real, who was appointed to the bench 41 years ago.

In September, a 9th Circuit panel reversed Real in the case of a man suing a credit agency for an inaccurate report. Instead of sending the case back for a do-over, the appellate judges themselves decided in the plaintiff's favor and told an appellate commissioner to decide attorney fees. *Dennis v. BEH-1*, 2007 DJDAR 14924 (9th Cir. Sept. 25, 2007).

Circuit panels have reversed Real at least two other times this year, in one case naming him prominently in an unpublished opinion for failing to properly weigh the evidence. *Molski v. Pismo Bowl*, 05-56053 (9th Cir.).

A decade ago, a circuit panel reversed Real when he refused to dismiss a lawsuit seeking \$2 billion in damages against ex-Philippine dictator Ferdinand Marcos' estate. The panel also ordered Real to take no further part in any case involving Marcos funds in Swiss banks. *Credit Suisse v. District Court*, 130 F.3d 1342 (9th Cir. 1997).

In 1986, the 9th Circuit removed Real from a criminal case against Sears, Roebuck and Co. Three times, Real dismissed an indictment against the company despite a 9th Circuit directive that the prosecution go forward. *U.S. v. Sears, Roebuck and Co.*, 785 F.2d 777 (9th Cir. 1986).

In Monday's case, cosmetics companies DermaNew and Avon accused each other of threats and trademark infringement over the alleged similarity of DermaNew's skin treatments to Avon's ANEW product line. The case evolved into seven separate actions before the Trademark Trial and Appeal Board. In 2005, afraid Avon would sue and not settle, DermaNew sought a declarative judgment from Real that its trademark applications do not infringe on Avon's.

Real wasn't having it.

"I think that the complaint is improper, brought for an improper motive," the judge said in dismissing it.

He asserted he had no jurisdiction to hear the case because it was before the trademark board.

But Real's mistake was that he did not allow DermaNew to respond, Circuit Judge Richard A. Paez wrote for colleagues John T. Noonan and Andrew J. Kleinfeld.

There was no improper motive on DermaNew's part, Paez added. Furthermore, "the judge's invocation of the primary jurisdiction doctrine was legally erroneous," he wrote.

The matter must go back to a different judge, the panel concluded, because Real would have substantial difficulty in putting "his firmly expressed views" out of his mind.

Real, who has been on the bench since President Johnson appointed him in 1966, last year was embroiled in an ethics investigation over accusations he gave special treatment to an "attractive" woman he supervised on probation for financial fraud.

After refusing several times to discipline Real, a 9th Circuit discipline committee voted to publicly reprimand him.

DermaNew's lawyer, Steven A. Freund of Los Angeles, welcomed Monday's ruling.

"Sometimes, you hit some speed bumps, and one speed bump was Judge Real," Freund said. "Avon wanted to bleed my client, but now I get a different judge."

Avon's lawyer, Michelle M. Graham of New York's Kelley Drye & Warren, did not immediately return a call seeking comment.

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