UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE, MARYELLEN O'DONOHUE, LAURIE MAYERS, HEATHER PIERCE, and KATHERINE WILKINSON on behalf of themselves and all others similarly situated,	)	
PLAINTIFFS,	)	**Civ No. 11-CV-1279 (ALC) (AJP)**
v.	)	
PUBLICIS GROUPE SA and MSLGROUP,	)	
DEFENDANTS.	)	

PLAINTIFFS' RULE 72(A) OBJECTION TO THE MAGISTRATE'S JUNE 15, 2012 OPINION AND ORDER

I. Introduction

Plaintiffs sought to recuse Magistrate Judge Peck from this case due to the appearance of bias created by his *combined* statements and conduct. It is well-established that all relevant facts are to be taken *together* in a 28 U.S.C. § 455(a) analysis and considered for their "*cumulative effect*" upon a reasonable outside observer. *See* Docs. 169, 170; *see also e.g., U.S. v. Amico*, 486 F.3d 764, 775-76 (2d Cir. 2007). Here, leading up to the motion, Judge Peck has – among other things:

- Announced that Defendants "must have thought they died and went to Heaven" to have him assigned to the case. *See* Declaration of Janette Wipper in Support of Plaintiffs' Rule 72(a) Objection to the Magistrate's June 15, 2012 Opinion and Order at ¶ 2, Ex. 1 (hereinafter, cross-citations reference the exhibit number only).

- Repeated this remark in public panels, where he indicated that he strong-armed Plaintiffs into considering predictive coding in principle. He also admitted that Plaintiffs' only alternative was not to raise reasoned argument about their concerns over coding procedures but to seek his recusal. Ex. 2 at 2:50-3:47.

- During the pendency of the parties' dispute over predictive coding methodology, he repeatedly appeared on trade show panels together with defense counsel Ralph Losey (and sponsored by Recommind and other e-discovery vendors) where they espoused Defendant's views on predictive coding. Exs. 3, 5, 20, & 21.[1] In some of these appearances, Judge Peck emphasized that coding technology should be implemented to ensure "that e-discovery is not used as **blackmail** to make a defendant settle." Exs. 5, 6.

- Accepted, in 2011 alone, at least $10,350 in "teaching fees" from e-discovery vendors, at least $5,500 of which were paid to him by predictive coding vendors. Ex. 7. Judge Peck accepted additional "teaching fees" from at least seven predictive coding vendors in January and February 2012, while considering the "game changing" decision for the e-discovery industry in this case. *See* Doc. 229, June 15, 2012 Opinion and Order (hereinafter, "Opinion") at n.7.[2]

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[1] In an attachment to a January 25, 2012 letter sent from Defense Counsel Jackson Lewis LLP to Judge Peck, Defense Counsel explained Mr. Losey's involvement in this case: "we had requested that Ralph Losey of our firm, a nationally recognized expert in this area, assist us. Mr. Losey prepared for and participated in the June 10th phone conference." Jackson Lewis January 25, 2012 Letter to the Court, Ex. 4.

[2] *See* Ex. 6 (describing Judge Peck's "opinion [as] nothing short of a game-changer for the e-discovery industry because it signals that e-discovery, and indeed discovery, has entered a new phase where Predictive Coding will quickly go from cutting-edge approach to mainstream technology and workflow embraced by most, and eventually all . . . The opinion, and the rapid mainstream adoption of Predictive Coding it portends, clearly point to a brighter future. *The sooner we as an industry begin to reap its benefits, the better*").

●Issued unprecedented, one-sided *sua sponte* rulings,[3] including the first judicial decision accepting a predictive coding search protocol, which defendant's vendor Recommind publicly describes as pro-defendant – *i.e.*, predictive coding means "*defendants* can avoid 'e-discovery **blackmail**.'" Ex. 6.

●Chastised and intimidated Plaintiffs for disagreeing with these unprecedented rulings, and characterized Plaintiffs' Rule 72 objections to his orders as "whin[ing]" to Judge Carter that did not make him "happy." Ex. 8 at pp. 13, 17.

●Stripped Plaintiffs' lead counsel of her telephone privileges and threatened to withdraw her *pro hac vice* admission after she politely requested a written ruling and refused to waive objections. *Id.* at 22-23.[4]

●In response to Plaintiffs' pre-motion letter requesting recusal, Judge Peck gave various justifications for his conduct and warned Plaintiffs to "rethink their 'scorched earth' approach." Doc. 158.

Since the filing of Plaintiffs' Recusal Motion, Judge Peck has added to the *combined* statements and conduct supporting recusal. Among other things, he has:

●Indicated Plaintiffs had already "antagonized" him and it was "a little late" to go back. Ex. 9 at 14.

●Stated he had a personal "interest" in recusal because Plaintiffs "attacked [his] integrity." *Id.* at 15.

●Admitted that he was "yelling" at Plaintiffs' counsel, which he did multiple times. *Id.* at 30.

● Intimidated Plaintiffs' female lawyers into waiving Plaintiffs' legal rights on the proportionality issue. When they refused, he stated: "You either get some courage or get a partner here." Ex. 10 at 80-88.

● Characterized Plaintiffs' class discovery requests as: "**blackmail** to convince the defendants to settle." Ex. 9 at 9. And stated that he thought **Plaintiffs' "funding source" had "run out."** *Id.*[5]

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[3] These rulings include but are not limited to: Judge Peck's (1) wholesale adoption of MSL's predictive coding protocols while dismissing Plaintiffs' concerns, Docs. 92-93; (2) refusal to allow class discovery and other discovery specifically ordered by Judge Sullivan, Doc. 69; (3) *sua sponte* decision to cut off all discovery as of the date of the initial complaint, despite the lack of authority for doing so, Doc. 69; (4) *sua sponte* invocation of the French blocking law to prevent the discovery of critical documents in this case, even though this Circuit has consistently held that the French law is not a bar to discovery under Rule 26, Doc. 123; and (5) *sua sponte* decision to cap Plaintiffs' garden variety compensatory damages at $25,000 despite clear binding law to the contrary, Doc. 50.

[4] There is no local rule preventing an attorney from requesting a written order and some courts have even criticized litigants for failing to do so. *See, e.g.*, *Pompano Windy City Partners, Ltd.*, 1990 U.S. Dist. LEXIS 12272, at *2-3, 7, 13 (S.D.N.Y. 1990).

[5] Class discovery in Title VII cases, pre-certification, is not only proper, it is necessary to meet the class certification standard under Rule 23. *See Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 265 (S.D.N.Y. 2007)(Lynch, J) (In Title VII class action, company-wide evidence satisfies commonality and typicality under Rule 23); *Gutierrez v.*

In his Opinion, Judge Peck ignores the "cumulative effect" of his conduct upon a reasonable outside observer. He never considers whether members of the public may view the totality of the circumstances here to suggest a cozy relationship between Judge Peck, defense counsel Losey, and the e-discovery industry (particularly Recommind) that calls into question Judge Peck's impartiality regarding discovery issues in this case. At a minimum, a reasonable observer might conclude that, given his activities, Judge Peck was predisposed to lend judicial imprimatur to predictive coding and to give short shrift to Plaintiffs' concerns and objections about the details of the e-discovery protocol to be implemented in this action. At worst, one could entertain suspicions of a *quid pro quo* in return for the financial and reputational perks Judge Peck has received and continues to receive for espousing predictive coding. Under either scenario, a reasonable observer may view Judge Peck's hostile conduct toward Plaintiffs as punishment for getting in the way of a broader predictive coding agenda or, even worse, being civil rights litigants – *i.e.*, the type of litigants predictive coding vendors and advocates accuse of using discovery to *purportedly* blackmail corporate defendants to settle.[6] Nowhere in his Opinion does Judge Peck even contemplate how a reasonable observer could view any impropriety whatsoever based upon the totality of the circumstances here.

Judge Peck instead selects only a few incidents and analyzes them in isolation. He also often substitutes himself for the reasonable outside observer or applies the wrong standard altogether – using the

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Johnson & Johnson, 2002 U.S. Dist. LEXIS 15418, at *10 (D.N.J. Aug. 12, 2002) ("[i]n employment discrimination cases, Courts generally grant wide latitude to…plaintiffs [seeking] to conduct companywide discovery."); *Bell v. Lockheed Martin Corp.*, No. 08-6292, 2010 U.S. Dist. LEXIS 96864 (D.N.J. Sept. 15, 2010) (Plaintiff was entitled to company-wide discovery, not just discovery from her business area); *Holley v. Pansophic Sys.*, No. 90 C 7505, 1993 U.S. Dist. LEXIS 15105 (N.D. Ill. Oct. 26, 1993); *Abdallah v. The Coca-Cola Co.*, 1999 WL 527835 (N.D. Ga., July 16, 1999) (shape and form of a class action evolves only through the process of discovery); *Artis v. Deere & Co.*, 2011 U.S. Dist. LEXIS 69849 at *5-6 (N.D. Cal. June 29, 2011) ("To deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion"). Indeed Judge Sullivan already compelled class discovery in this case. Doc. 40.

[6] Ex. 6; Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 RICH. J.L. & TECH. 9, available at http://law.richmond.edu/jolt/v14i3/article9.pdf.

actual bias standard under § 455(b) rather than the appearance of bias under § 455(a) – to justify his conclusion that recusal is not warranted.

Under 28 U.S.C. § 455(a), Judge Peck's legal errors include:

- Misapplying the "timeliness" standard under § 455(a), by erroneously transforming the obligation of a judge to fully disclose conduct that might appear improper into a burden on litigants to investigate the impartiality of their judges.

- Misapplying the "appearance of bias" standard under § 455(a), by erroneously requiring that Plaintiffs show that he is actually biased in order to prevail on their motion.

- Misapplying the "reasonable person" standard under § 455(a), by erroneously substituting himself for the hypothetical reasonable outside observer.

- Misapplying the "all relevant facts" standard under § 455(a), by erroneously failing to consider all relevant facts and their cumulative effect on a reasonable outside observer.

- Misapplying § 455(a), by erroneously affording himself immunity from recusal for statements made in court, contrary to the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994).

- Exceeding the limits for judges participating on privately funded panels under § 455(a) and the Canons of the Judicial Code of Conduct designed to protect public confidence in the judiciary.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, Plaintiffs respectfully request that this Court reverse Judge Peck's June 15, 2012 Opinion and Order (Doc. 229), vacate all Orders issued by Judge Peck since his referral to this case, and stay all further proceedings before Judge Peck until his recusal is finally determined.

II. Background

A. Judge Peck's Personal Interest in Predictive Coding.

On October 1, 2011, Judge Peck authored an article for *Law Technology News* titled *Search Forward*. Ex. 11. In the article, Judge Peck promoted predictive coding as a superior alternative to traditional manual review. Judge Peck also cited favorably to defense counsel Losey's blog post *Go Fish*, which spoke disparagingly of traditional review methods such as keyword searches. Ex. 12. Judge Peck

concluded his article by stating: "Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval." Mr. Losey responded in kind by posting a blog entry, entitled *Judge Peck Calls Upon Lawyers to Use Artificial Intelligence and Jason Baron Warns of a Dark Future of Information Burn-Out If We Don't*, where he embraced Judge Peck's position on predictive coding. Exs. 13, 14.

By then, Judge Peck had already built a name for himself in the pro-e-discovery community. Exs. 15, 16. In 2010, Judge Peck participated in no fewer than ten e-discovery conferences. Ex. 7. In 2011, he received "teaching fees" for six separate e-discovery events, including five by corporate sponsors. *Id.*

B. Judge Peck's Conduct During the Case Prompting Plaintiffs' Recusal Motion.

Less than two months after the publication of *Search Forward*, the parties came before Judge Peck in this case. This was Judge Peck's first case in which a party – MSL – was pushing predictive coding. During his initial status conference with the parties on December 2, 2011, in response to Defendants' statement that Plaintiffs were reluctant to adopt their predictive coding protocol, Judge Peck instructed the parties to read *Search Forward* to glean his position on the issue. Shortly thereafter, Judge Peck issued a Memo Endorsed Order, once again instructing the parties to read his *Search Forward* article. Doc. 58. During that first conference on December 2, he also remarked that Defendants "must have thought they died and went to Heaven" to have him assigned to this case.

> [Defense Counsel from Jackson Lewis LLP]: . . . I think right now there are two core disputes as it relates to discovery. The first is plaintiffs' reluctance to utilize predictive coding . . . .[15]

[15] Plaintiffs' reluctance about predictive coding is related to the asymmetrical e-discovery sources in employment discrimination cases like this one. Like every employment case, the employer here, Defendants, control nearly all the discovery Plaintiffs will need to prove their claims and to maintain the action through class certification, dispositive motions, and trial. Indeed, Plaintiffs have virtually no access to relevant evidence except through the discovery methods available under the Federal Rules of Civil Procedure.
As noted by Judge Peck on December 2, 2011: "What matter[s] is whether [Defendants] have completed production. Yes, I understand that as the defendant in an employment case, [Plaintiffs are] going to have virtually nothing, [Defendants] have everything." *See* Ex. 1 at 6 (emphasis added).

> M.J. PECK: **You must have thought you died and went to Heaven when this was referred to me.**

Ex. 1 at 8.

This remark was not confined to the courtroom. Less than six weeks later, on January 11, 2012, Judge Peck appeared on a public panel hosted by ReviewLess, a predictive coding vendor, in which he repeated this statement; admitted that it may have served to compel Plaintiffs' partial acquiescence to his and Defendants' position on the key issue before him; and openly remarked about recusal – agreeing there was "no doubt" it was Plaintiffs' only alternative to capitulation.

> M.J. PECK: I'll also tell one quick war story, which is in the first case where I know that the parties are using predictive coding. They had a conference in front of me – a general discovery status conference – and the defendant was saying that they were about to use predictive coding but they had not yet had a buy-in from the plaintiff. And I just smiled and said "**And when you got assigned to me you, the defendant, must have thought you died and went to Heaven**" in light of my *Search* article in Law Technology News. And indeed, whether because of that comment or otherwise, plaintiff said "Oh no no, we're ok with using computer-assisted review; we just had some questions about the exact process."[16] And they went out and they worked it all out.
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> MODERATOR: The alternative was to ask you to recuse yourself, I suppose, Andy?
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> M.J. PECK: **No doubt**. Ex. 2 at 22:18-23:15.

Judge Peck's second public repetition of the remark came less than three weeks later, on January 31, 2012, when Judge Peck was participating in a public panel hosted by Xerox, entitled "Judicial Perspectives on Technology-Assisted Review." Ex. 3:

> M.J. PECK: When the District Judge referred the matter to me and I saw from the letters that had been submitted to the District Judge that the Defendant was particularly pushing computer-assisted review, I couldn't resist and the first thing I said to them when they walked in my courtroom was saying to the Defendant, '**Boy, you must have thought you died and went to Heaven when this discovery matter got referred to me**,' in light of my article on the subject. Ex. 3 at 2:50-3:47.

During the second status conference held before Judge Peck on January 4, 2012, he encouraged

[16] As Judge Peck acknowledges in his public statement, Plaintiffs reluctantly assented to predictive coding in principle under compulsion from Judge Peck but never agreed to the use of Defendants' flawed method. *See* Ex. 2. Rather, Plaintiffs argued that the "devil is in the details" and consistently objected to Defendants' vendor Recommind's shifting and unreliable methods. *See* Doc. 93. Plaintiffs contend that Judge Peck swept aside their concerns in his haste to give judicial blessing to predictive coding and to implement it here without proper safeguards.

Defendants to enlist the assistance of their e-discovery counsel, Ralph Losey – whom Judge Peck claimed to know "very well." Ex. 17 at 61. Over the next four weeks, Judge Peck served on three panels with defense counsel Losey about predictive coding: on January 18, Judge Peck participated in a conference with Mr. Losey entitled *e-discovery Judges in Charlotte* (Ex. 18); on January 30, Judge Peck sat on a panel with Mr. Losey at an e-discovery LegalTech "trade show" called *Man vs. Machine: The Promise and Challenge of Predictive Coding and other Disruptive Technologies* (Exs. 19, 20); at the same event, on January 31, Judge Peck moderated a panel discussion in which Mr. Losey highlighted what he perceived to be the substantial advantages of predictive coding (Ex. 21).

At the same LegalTech trade show, on January 30, Judge Peck received the 2011 Law Technology News' "Champion of Technology" Innovation Award, for recognition of his willingness to write and speak on predictive coding. Ex. 22. In an interview with the editor-in-chief of *Law Technology News* after the awards ceremony, Judge Peck predicted that, "One of these days soon, I think we will be seeing a judicial opinion approving of, or at least talking about, use of predictive coding." Ex. 23.

One week after the trade show, on February 8, 2012, Judge Peck adopted Defendant MSL's predictive coding protocol, nearly wholesale, from the bench. For the "benefit of the Bar," as he put it, Judge Peck issued a written order on February 24 adopting Defendants' protocol and improperly cited to a number of non-peer-reviewed articles and studies outside of the record without providing Plaintiffs an opportunity to review or object to his use of the materials. Some of the materials cited were authored by Judge Peck, Mr. Losey, and Maura R. Grossman, e-discovery counsel at Wachtell, Lipton, Rosen & Katz, all of whom served together on the *Man vs. Machine* panel at LegalTech.

Magistrate Peck also opined that:

> This Opinion appears to be the first in which a Court has approved of the use of computer- assisted review . . . Counsel no longer have to worry about being the 'first' or 'guinea pig' for judicial acceptance of computer-assisted review . . . Computer assisted review now can be considered judicially-approved for use in appropriate cases.

Doc. 96: Feb. 24, 2012 Opinion at 25.

Judge Peck never properly disclosed to Plaintiffs his personal investment in predictive coding, his extrajudicial activities on the subject during this litigation, or his *ex parte* contacts with defense counsel. When Plaintiffs uncovered these facts, they sent a letter to Judge Peck on March 28 requesting that he voluntarily recuse himself. When he refused, they filed a motion for recusal or disqualification on April 13.[26] Ex. 24. Judge Peck responded to the pre-motion letter as follows:

> The Court is in receipt of plaintiffs' March 28, 2012 letter requesting my recusal… **I strongly suggest that plaintiffs rethink their 'scorched earth' approach to this litigation.**

Doc. 158: April 2, 2012 Order at 2.

After Plaintiffs filed their motion, at a hearing on April 25, Judge Peck's actions made it clear that he had taken personal offense. Despite Plaintiffs' reliance exclusively on § 455(a) and their assurances that "[w]hat we've attacked is the *appearance* of impropriety," Judge Peck demurred, "Yeah well, you call it what you call it." Ex. 9 at 15. He stated that he took a "personal interest" in recusal because Plaintiffs had "attacked [his] integrity." *Ibid.* Later, Judge Peck began yelling at Plaintiffs' counsel for noting that he appeared to be expressing a bias against the Plaintiffs. *Id.* at 30.

Judge Peck's disproportionate reaction to Plaintiffs' exercise of their right to file a motion for recusal is typical of the threats, intimidation, and mockery he has shown toward Plaintiffs throughout this action. He has reprimanded Plaintiffs for appealing his rulings, accusing three separate female attorneys for Plaintiffs of "whining" to this Court. He has declared that such appeals do not "make me happy." Ex. 8 at 20-22. He has also generally treated Plaintiffs with contempt. During one conference, he both denied Plaintiffs' lead counsel privileges to participate by telephone and threatened to revoke her *pro hac vice* admission merely because she asked for him to memorialize his ruling from the bench in a written order. *Id.*

[26] *See* Plaintiffs' March 28, 2012 Letter to the Court, Ex. 24.

at 21-23.

> WIPPER: Your Honor, plaintiffs request that you issue a written order.
> THE COURT: You're very close to getting not only your telephonic privileges removed but your *pro hac vice* removed. You have a written order. It's called the transcript. If you want to object to every single ruling I make, feel free. The rules allow you to do that. Does it make me happy? You figure that out. Would you like to have your *pro hac* withdrawn or would you like to learn the rules of the Southern District of New York?

Id. at 22-23.

III. Legal Standard

Rule 72(a) provides that "a district judge in the case must consider timely objections (to a non-dispositive order) and modify or set aside any part of the order that is clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). Similarly, "the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A), provide[s] that a district court shall reverse a magistrate judge's ruling regarding a non-dispositive matter only where the order is 'clearly erroneous or contrary to law.'" *In re Consol, RNC Cases*, [No Number in Original], 2009 U.S. LEXIS 40293, at *16 (S.D.N.Y. Jan. 8, 2009) (quoting 28 U.S.C. § 63(b)(1)(9A).

"A ruling is 'clearly erroneous' if the reviewing court is 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). "A ruling is 'contrary to law' 'when it fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Id.* (quoting *Thompson v. Keane*, No. 95 Civ. 2442 (SHS), 1996 U.S. Dist. LEXIS 6022, at *1 (S.D.N.Y. May 6, 1996) (internal quotation marks omitted)).

IV. Argument

A. PLAINTIFFS' RECUSAL MOTION WAS TIMELY.

Plaintiffs filed a timely pre-motion letter and motion requesting recusal *after* learning of the relevant facts, which *collectively* formed a *basis* for recusal. *See Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d at 333 (noting that a party should generally raise a recusal issue "at the earliest possible moment *after* obtaining knowledge of facts demonstrating the *basis* for such a claim") (emphasis added). Judge Peck erroneously

concluded that Plaintiffs' Motion was untimely filed because the Plaintiffs *purportedly* should have raised disqualifications concerns during the January 4, 2012 Status Conference or immediately thereafter upon investigation of public records. Opinion at 27-28. As demonstrated below, Judge Peck's arguments defy logic, the facts, and the law.

1. Judge Peck's Post-January 4, 2012 Conduct Formed the Basis for Plaintiffs' Recusal Motion.

As of January 4, 2012 – the date Judge Peck himself would have considered Plaintiffs' Motion timely – the following facts, which were the subject of Plaintiffs' recusal request, had ***not occurred*** **or** ***been disclosed***, including:

> (1) Judge Peck's participation in a January 11, 2012 panel regarding predictive coding, hosted by a commercial vendor, in which Judge Peck publicly repeated his "died and went to heaven" remark, then indicated that this remark may have compelled Plaintiffs to accept his pro-predictive coding agenda, and also agreed that the Plaintiffs only recourse would have his recusal;
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> (2) Judge Peck's participation on a pro-predictive coding panel on January 18, 2012 with defense counsel Losey;
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> (3) Judge Peck's and defense counsel Losey's second public appearance together at a January 30, 2012 LegalTech panel;
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> (4) Judge Peck's third public appearance with defense counsel Losey at a January 31, 2012 LegalTech panel, in which Judge Peck espoused the virtues of predictive coding and again repeated his "died and went to heaven" remark publicly;
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> (5) Defendants' predictive coding vendor was one of the sponsors of the 2012 LegalTech conference; and
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> (6) Judge Peck's remuneration for his 2010-2011 e-discovery marketing activities, which were not received by the Plaintiffs until March and May 2012, respectively. Ex. 7.
>
> As such, Plaintiffs rightfully and timely sought Judge Peck's recusal on March 28, 2012.

2. Judge Peck Violated his Duty of Disclosure.

Judge Peck's timeliness analysis runs afoul of *his* legal duty of disclosure under 28 U.S.C. § 455. Judge Peck maintains that he fulfilled any duty he had to disclose by mentioning in passing, during the

January 4, 2012 status conference, that he would be attending LegalTech, and by mentioning that he knew defense counsel Losey:

> I never tried to hide the fact that I knew Losey. I specifically advised counsel that I knew Losey 'very well' and also alluded to my engagement with LegalTech during the January 4, 2012 conference. Had plaintiffs been concerned, they could have followed up with the Court;
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> Counsel did not ask what I would be doing at LegalTech;
>
> [and]
>
> I have made no effort to hide my views, relationships or affiliations.

Opinion at pp. 6, 28.

However, several circuits have ruled that, pursuant to § 455(a), "judges have an ethical duty to disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification." *American Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. Ohio 1999) (quotation marks omitted); *see also U.S. v. Murphy*, 768 F.2d 1518, 1536-37 (7th Cir. 1985) (same); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525 (11th Cir. 1988) (same). As such, Judge Peck violated his statutory and ethical duties by vaguely stating that he knew defense counsel Losey "very well" and by merely referencing the date the LegalTech conference was to occur. Such passing references do not satisfy Judge Peck's duty of disclosure and certainly do not shield Judge Peck from recusal. Judge Peck had a duty to *fully* disclose that he has socialized with defense counsel Losey; relied on defense counsel Losey's articles in judicial opinions; has regularly read defense counsel Losey's e-discovery blog; that he and defense counsel Losey planned to jointly participate on panel discussions regarding an issue pending before him in this case; that he planned to publicly discuss the case and pending issues in the case; and that he has received fees to participate on pro-predictive coding panels, as well as funds from other commercially sponsored e-discovery events.

To expect a party to investigate and discover a judge's questionable conduct immediately after it occurs, without his or her disclosure of it, would disrupt the judicial process. Specifically, the Eleventh Circuit, in interpreting the Judicial Code of Conduct, concluded thus:

> [B]oth litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel . . . must investigate the impartiality of the judges before whom they appear. Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995). *See also United States ex rel. American Textile Mfrs. Inst. Inc. v. The Limited, Inc.*, 179 F.R.D. 541, 546 (S.D. Ohio 1997) (rejecting prior judge's finding that "litigants have a duty to investigate and inform the court of any perceived biases before the court and the parties invest time and expense in the case"); *Am. Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729, 742 (6th Cir. Ohio 1999) ("We believe . . . that litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge, rather than pore through the judge's private affairs and financial matters"). As such, Plaintiffs should have been able to rely on Judge Peck to fully disclose information that any jurist concerned about preserving the integrity of the Judiciary would.[27]

3. Plaintiffs' Recusal Motion Is Timely Under the *Apple* Factors.

Lastly, and in any event, "in considering the question of timeliness, the actual time elapsed between the events giving rise to the charge of bias or prejudice and the making of the motion is not necessarily

[27] The cases Judge Peck cites in support of Plaintiff's supposed burden of investigation are inapposite. *Universal City Studios, Inc. v. Reimerdes*, 104 F. Supp. 334, 349 (S.D.N.Y. 2000) is cited for the principle that a movant "is charged with knowledge of all facts 'known or knowable, if true, with due diligence from the public record or otherwise.'" Yet in *University City Studios*, a partner at a law firm moving for recusal had known of the information supporting recusal for *years beforehand*. *Armenian Assembly of Am., Inc. v. Cafesian*, 783 F. Supp. 2d 78 (D.D.C. 2011) involved a post-judgment denial for a new trial based on the plaintiffs' outlandish argument that the judge was partial to the defendant because both liked glass art. *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, No. 97 CIV 5499 (LAP), 2003 U.S. Dist. LEXIS 1764 (S.D.N.Y. Feb. 6, 2003) is distinguishable because in *Sony* District Judge Preska abided by her duty of disclosure in writing and disclosed to the parties that her husband's law firm may have represented companies associated with the defendants. *Katzman v. Victoria's Secret Catalogue*, 939 F. Supp. 274, 276 (S.D.N.Y. 1996) involved a post-judgment recusal motion, which is presumptively untimely. Also, *In re Martin-Trigona*, 573 F. Supp. 1237, 1240 (D. Conn. 1983) has no instructive value because the recusal motion was disposed of in part because the plaintiff was litigious and threatened to sue the judge and his family. In all, Judge Peck's untimeliness ruling rests on shaky ground.

dispositive." *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d at 334. Thus, courts should consider whether (1) the case remains in its early stages; (2) granting the motion would represent a waste of judicial resources; (3) the motion was made after the entry of judgment; and (4) the movant can demonstrate good cause for delay. *Id.* Regarding the first and second factors, this case is still in discovery, which has been stayed, and few judicial resources will be wasted by reassignment of the case. To the extent that recusal would result in some repetition of work, this is true nearly any time a case is reassigned.

With respect to the third factor, Plaintiffs' recusal motion was filed *before* entry of judgment, as Judge Peck admits. Opinion at p. 26. Judge Peck argues, however, that "[P]laintiffs waited to seek my recusal until after I adopted MSL's predictive coding protocol" and that "[i]t appears that plaintiffs are improperly using the recusal motion as 'fall-back position' to an unfavorable ruling." *Ibid.* This assertion is unfounded. Judge Peck adopted Defendants' predictive coding protocol from the bench on February 8, 2012. Because Plaintiffs did not discover Judge Peck's conduct giving rise to an appearance of impropriety – including, his presence on panels with Mr. Losey – until after February 8, 2012, there was no "waiting" to be had. Further, Judge Peck's "wait and see" arguments are also belied by the fact that Plaintiffs sought recusal *before* this Court ruled on Plaintiffs' Rule 72(a) objections regarding predictive coding. *See* Doc. 175, April 25, 2012 Order.[28]

[28] Most of the cases Judge Peck relied upon in finding Plaintiffs' Motion untimely involved so-termed "fall-back" movants who, *unlike* Plaintiffs, declined to request recusal until *after* entry of judgment. *See LoCascio v. United States*, 473 F.3d 493, 497 (2d Cir. 2007) ("LoCascio made no mention of the above remark until *after* the District Court had denied his motion to amend and *after* it had denied his § 2255 petition."); *Silver v. Kuehbeck*, 217 F. App'x 18, 23-24 (2d Cir. 2007) (movants continued to litigate for two months after the allegedly recusal conduct); *Gil Enters, Inc. v. Delvy*, 79 F.3d 241, 247 (2d Cir. 1996) (recusal not requested until *after* judgment, though the allegedly recusable statement by the judge happened midway through a bench trial); *Armenian Assembly of Am., Inc. v. Cafesjian*, 783 F. Supp. 2d 78, 88 (D.D. C. 2011) (recusal motion not filed until after judgment); *Katzman v. Victoria's Secret Catalogue*, 939 F. Supp. 274, 278 (S.D.N.Y. 1996) (recusal motion filed after judgment solely on the basis of comments made by the judge on an occasion two months beforehand); *Lamborn v. Dittmer*, 726 F. Supp. 510, 514 (S.D.N.Y. 1989) (recusal motion "two years after the date of the original trial in which the alleged prejudicial conduct occurred," and thus after judgment). The remaining three, as noted above, involve exceptional circumstances of strategic timing and/or recklessness. The recusal motions in the following cases either closely followed an order that the movant submit to a deposition, *Weisshaus v. Fagan*, 456 Fed. App'x 32, 34 (2d Cir. 2012); came after a series of threats to move for recusal and immediately before the court heard arguments on major motions, *In re Martin-Trigona*, 573 F. Supp. 1237, 1245 (D. Conn. 1983); or were filed two months after a judge

Regarding the fourth factor, Plaintiffs had good cause for any *alleged* delay. *See Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d at 334. Plaintiffs had to search the internet and verify Peck's many public statements about this case; request and receive Judge Pecks' financial disclosures; investigate Judge Peck's other public appearances at pro-predictive coding events; and enlist the advice of an ethics expert in the field. Additionally, during this timeframe, Plaintiffs had to appeal many of Judge Peck's self-serving and retaliatory discovery rulings and were also drafting a motion for collective action certification, the deadline for which Judge Peck had moved up *sua sponte* by more than thirteen months. *See* Docs. 55, 69, 93, 123; Ex. 8 at 20-22.

In sum, Plaintiffs submitted a recusal motion promptly after they learned all of the relevant facts – discovered over the course of the litigation and without the assistance of any disclosure by Judge Peck – and, accordingly, their motion is timely.

B. JUDGE PECK MISAPPLIES THE RECUSAL STANDARD UNDER § 455(A).

Under 28 U.S.C. § 455(a), "any United States justice, judge, or magistrate *shall* disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned," regardless of whether he is actually biased or not. In fact, because the purpose of § 455(a) is to enhance public confidence in the judicial system, a federal judge is expected to disqualify himself, in accordance with that statute, even if he believes that a reasonable person would probably not question the judge's ability to be impartial in presiding over a matter, as long as there is a possibility that he "*might*."[29] Moreover, where the Court considers the question of whether a reasonable person might question his ability to be impartial is a close one, the Court is obliged to err on the side of recusal.[30]

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fully disclosed facts that only tenuously could support a recusal motion, *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 97 CIV. 5499, 2003 U.S. Dist. LEXIS 1764 (S.D.N.Y. Feb. 7, 2003).

[29] Judge Peck erroneously applies the standard stating that the reasonable objective observer must rather than may view the conduct as biased. Opinion at 34 (". . . the comments would not cause a reasonable objective observer to believe I was biased in this case . . .").

[30] Insofar as Judge Peck suggests that judges have an "affirmative duty" to sit on a case even in the face of cumulative evidence suggesting partiality, he misstates the law. Opinion at 19 (citing *Nat'l Auto Brokers Corp. v.*

1. Judge Peck Erroneously Applies an "Actual Bias" Standard Rather than an "Appearance of Bias" Standard Under § 455(a).

Plaintiffs have not sought disqualification based on Judge Peck's actual bias under 29 U.S.C. § 144 or 28 U.S.C. § 455(b), but based their motion exclusively on § 455(a). Yet, Judge Peck erroneously suggests that plaintiffs have accused him of actual bias. Opinion at 1 ("The *main ground* of plaintiffs' motion is that my support for predictive coding showed *bias* favoring MSL…") and 54 ("my comments regarding plaintiffs' counsel … were [not] …so extreme to suggest *bias* against plaintiffs.") (emphasis added). *See also* Judge Peck's 4/2/12 Order ("plaintiffs now claim that my public statements approving generally of computer assisted review make me *biased*"); Ex. 9 at 32:1-4 ("what are you guys doing here? *And then you're going to say yes, I'm biased. I'm not biased.* I think you guys don't know how to practice law in the Southern District of New York"). Indeed, Judge Peck has gone even further, by accusing plaintiffs of "attacking his integrity." *Id*. at 15:24-25. Plaintiffs' counsel attempted to explain to him that this is not the case ("What we've attacked is the appearance of impropriety. That's what we've attacked"), but Judge Peck would have none of it: "Yeah well, you call it what you call it." *Id*. at 16:1-4. Judge Peck's erroneous standard is reflected in the "actual bias" cases he relies upon throughout his Opinion.[31]

Gen. Motors Corp., 572 F.2d 953, 958 (2d Cir. 1978)). Indeed, Congress's 1974 amendments to § 455 sought to remove the old "duty to sit" doctrine, a subject test which required "a judge, faced with a close question on Disqualification . . . to resolve the issue in favor of a 'duty to sit.'" H. R. Rep. No. 93-1453 (1974) at 6355. Recusal is now mandatory "wherever impartiality *might reasonably be questioned*." *Liteky v. U.S.*, 510 U.S. 540, 548 (1994) (emphasis added). Judges are to "resolve any doubt in favor of recusal." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1320 (2d Cir. 1988); *see also Republic of Panama v. American Tobacco Co.*, 217 F. 3d 343, 347 (5th Cir. 2000) ("[I]f the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal."); *In re U.S.*, 158 F.3d 26, 30 (1st Cir. 2000); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995); *U.S. v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993).

[31] *See, e.g.*, Opinion at 30, *Hu v. Am. Bar Ass'n*, 334 F. App'x 17, 19 (7th Cir. 2009) (applying actual bias standard under § 455(b)(4)); Opinion at 31 n.28., *Samuel v. Univ. Pittsburgh*, 395 F. Supp. 1275, 1278 (W.D. Pa. 1975) (applying actual bias standard under § 144 and § 455(b)(1)); Opinion at 41, *In re Judicial Misconduct*, 632 F.3d 1289, 1289 (9th Cir. 2011) (applying 28 U.S.C. § 351(a) and Judicial Conduct Rule 11(c)(1)(a)); Opinion at 45, *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966) (applying actual bias standard under § 144); Opinion at 44, 48, *United States v. English*, 629 F.3d 311, 321 (2d Cir. 2011) (applying actual bias standard in setting bail); Opinion at 48, *Gottlieb v. SEC*, 310 Fed. Appx. 424, 425 (2d Cir. 2009)(applying actual bias standard under § 144); Opinion at 54, *Matrix Essentials, Inc. v. Quality King Distribs., Inc., 324 F. App'x 22, 25* (2d Cir. 2009) (Rule 60(b) motion for abuse of discretion); Opinion at 55, *Armatullo v. Taylor*, 04 Civ. 5357, 2005 WL 2386093 at *19

Applying the wrong (and higher) actual bias standard to a § 455(a) recusal motion is contrary to law. Plaintiffs neither accused Judge Peck of actually being biased in this matter, nor were required to do so in order to show that he should be disqualified from presiding over it. Plaintiffs' only burden was to show that a reasonable person *might* question Judge Peck's ability to be completely detached and impartial in this matter. By requiring Plaintiffs to meet the higher actual bias standard, Judge Peck's decision is contrary to law.

2. Judge Peck Erroneously Substitutes Himself for § 455(a)'s "Objective, Disinterested Observer."

In determining whether a § 455(a) motion should be granted, the deciding factor – indeed the only cognizable factor – is whether *a reasonable person*, if aware of all the relevant facts and circumstances, *might* have any doubt about a judge's impartiality. *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992) (citations omitted) ("In deciding whether or not to affirm a judge's denial of a recusal motion, a court of appeals must ask the following question: Would a *reasonable* person, *knowing all the facts*, conclude that the trial judge's impartiality could reasonably be questioned? Or phrased differently, would an *objective, disinterested* observer *fully informed* of the underlying facts, entertain significant doubt that justice would be done absent recusal?")

Judge Peck erroneously substitutes himself for the requisite objective, *disinterested* observer throughout his Opinion. *See, e.g.*, Opinion at 46-47 ("While *I* have been critical of plaintiffs' counsel at times, *my* criticism and resulting frustration are *solely due* to counsels' performance, and are not a basis for recusal."); Opinion at 49 ("Plaintiffs' assertion that *I* have sought to dissuade them from objecting to my rulings is *false*."); Opinion p. 43 ("neither my comments nor the fact that Losey was on some panels with me, nor the fact that MSL's vendor Recommind sponsored different panels at LegalTech, separately or

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(S.D.N.Y. Sept. 28, 2005); Opinion at 46 n.42; *Lis v. Mammott*, 1990 WL 1648 at *1 (W.D.N.Y. Jan. 9, 1990) (applying actual bias standard).

collectively, are a basis for recusal"). Indeed, Judge Peck only references a reasonable observer three times in the Application section of his Opinion, see Opinion at 34, 35; while referencing himself over one hundred times. *See* Opinion at 23, 24, 26, 29, 31, 34-41, 43, 45-53. This is contrary to law: a § 455(a) motion cannot be decided based upon whether the challenged judge believes himself to be biased. *In re IBM Corp.*, 45 F.3d 641, 644 (2d Cir. 1995) ("based on our knowledge of the Judge's long and distinguished career, we are prepared to assume that [his] subjective disposition is one of impartiality . . . But the recusal question does not turn on his subjective state of mind").

For § 455(a) purposes, the hypothetical "reasonable person" is not a federal judge. Judges, keenly aware of the obligation to decide matters impartially, "may regard asserted conflicts to be more innocuous than an outsider would." *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (an outside observer "is less inclined to credit judges' impartiality and mental discipline than the judiciary"). Thus, "where the appearance of partiality exists, recusal is required regardless of the judge's own inner conviction that he or she can decide the case fairly despite the circumstance." *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997). Judge Peck's use of himself as the "reasonable person" was contrary to § 455(a).

3. Judge Peck Did Not Examine "All of the Relevant Facts" Supporting Recusal.

Under 28 U.S.C. § 455(a), Judge Peck should have determined whether an appearance of impropriety exists "by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding *all the relevant facts* would recuse the judge." *U.S. v. Bayless*, 201 F.3d 116, 126-27 (2d Cir.), *cert. denied*, 529 U.S. 1061 (2000) (emphasis added). Judge Peck recites this standard, but omits numerous facts that support an appearance of impropriety, artificially disaggregates other facts, and attacks each of the latter as insufficient standing alone. This is contrary to § 455(a).

i. Judge Peck Ignores How a Reasonable Person Would Perceive His Acceptance of "Teaching Fees" from Predictive Coding Vendors at the Same Time he was Deciding

Whether to Accept Predictive Coding as a Search Tool for the First Time in Federal Court.[33]

Judge Peck omits from his Opinion that throughout 2011, he accepted at least $10,350 in "teaching fees" from e-discovery events, at least $5,500 of which were paid to him by predictive coding vendors.[34] He also accepted travel reimbursements for e-discovery events in Switzerland, England and Australia. In January and February 2012 alone, Judge Peck accepted teaching fees from at least seven e-discovery vendors for speaking on the subject of predictive coding. Opinion at 7, n.7. Eight days after such an occasion, at LegalTech 2012, Judge Peck issued the "game changing" decision on predictive coding for the e-discovery industry. Without question, a reasonable observer, with knowledge and understanding of these relevant facts, could entertain significant doubt about Judge Peck's impartiality concerning predictive coding, particularly when considered with his other conduct. Indeed, a reasonable observer who is fully informed may likely be concerned about Judge Peck's conduct because the Judicial Committee has itself warned about accepting teaching fees from for-profit business-related programs like LegalTech due to the appearance of impartiality, as well as the appearance of lending a judge's prestige to advance the interests of others, or implying that others are in a position to influence the judge. Advisory Opinion 105, Business-related Programs, at 105.

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[33] Judge Peck represents that "[b]oth plaintiffs and defendants were proposing using predictive coding in this case," allowing him to paint his pro-predictive coding rulings as even-handed. Opinion at 5, 34-35; *see also* Doc. 93: Feb. 24, 2012 Opinion at 22. Yet, a plain reading of the December 2, 2011 conference transcript reveals that Plaintiffs were "reluctant" to use predictive coding, having severe doubts about its use without sufficient safeguards. *See, e.g.*, Doc. 58 (endorsed letter in which Plaintiffs expressed reservations about predictive coding and Judge Peck firmly advised them to reread *Search Forward*); Ex. 1 at 7-8 (MSL's counsel stated that an open issue was "plaintiffs' reluctance to utilize predictive coding"); Ex. 25 at 49-50 (Plaintiffs' counsel notes problems with the protocol proposed by Defendants). Judge Peck himself acknowledges this in other parts of his Opinion. *See, e.g.*, Opinion at 2 ("MSL's counsel stated that an open issue was 'plaintiff's reluctance to utilize predictive coding."). Plaintiffs' reservations regarding MSL's proposed protocol – which they never agreed to – are expressed in their motion. Doc. 169 at 1, n.2. However, Judge Peck made clear from the beginning that the parties had no choice but to use predictive coding, and thus Plaintiffs found it wise to propose a counter protocol. *See* Doc. 192 at 5-6; Ex. 1 at 20 ("But I'm not going to have them do an e-mail search because you have two or three documents that refer to various types of reorg when, in a week or two, if you all get your act together – and if you don't, you know, you may wind up with a special master or me choosing your e-Discovery plan. Just get the e-Discovery plan done."); *see also* Ex. 2 (where Judge Peck indicates that his "died and went to Heaven" remark may have caused Plaintiffs to agree to computer-assisted review in principle).

[34] *See* Judge Peck's Financial Disclosure Report for Calendar Year 2011, Ex. 7.

ii. Judge Peck Ignores How A Reasonable Person Would Perceive His Pro-Predictive Coding Speaking Engagements Sponsored by Predictive Coding vendors *with* Defense Counsel *while* Deciding a Predictive Coding Issue Pending Before Him.[35]

From January 30 to February 1, 2012, one week before deciding the predictive coding issue in this case, Judge Peck spoke on several panels sponsored by e-discovery vendors (Clearwell/Symantic, Xerox, Epiq, Autonomy, EMC, BIA and Renew Data). Opinion at 8, n.9. He was accompanied on two predictive coding panels by defense counsel in this case, Mr. Losey. Judge Peck does not acknowledge any potential impropriety from these overlapping conflicts. He instead relies on Canon 4 in part, omitting from his discussion Canon 2 and the Judicial Committee's warning "against speaking at a program on discovery issues hosted by a for-profit company offering discovery services, where the company marketed its services in part through the training program." Advisory Opinion 105, Business-related Programs, at 105-3.[36] Without question, a reasonable person, with knowledge and understanding of these relevant facts, could entertain significant doubt about Judge Peck's impartiality concerning predictive coding, particularly when considered together with his appearances on pro-predictive coding panels with defense counsel Mr. Losey at the time he was considering the "game-changing" predictive coding decision in this case.[37]

iii. Judge Peck Ignores How a Reasonable Person Would Perceive His Comments – Now Publicly Available on the Internet - About Forcing a Party to Accept Predictive Coding or Seek His Recusal While on a Panel Sponsored by a Predictive Coding Vendor.

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[35] Judge Peck defends his speaking engagements at e-discovery events because the audience may receive CLE credit. Opinion at 7, n. 7, 38 n 33. However, as plaintiffs noted in their opening brief, the Committee on the Judicial Ethics has stated: "merely because a provider offers CLE credit or is a 'non-profit' entity does not eliminate the requirement that a judge determine whether his or her participation runs afoul of Canon 2 [which] is concerned with (1) preserving the appearance of impartiality, (2) prohibiting the lending of a judge's prestige to advance the interests of others, and (3) avoiding the impression that others are in a position to influence the judge." Doc. 169 Motion at 25 (citing Advisory Opinion No. 87).

[36] ("Requests to speak at seminars sponsored by consulting firms or other business entities raise concerns under Canon 2B regarding lending the prestige of office").

[37] Judge Peck's acknowledgement that he knows defense counsel Losey "very well" disregards that he also *urged* Defendants to enlist him in their predictive coding cause. While Judge Peck's Opinion mentions that he "made the parties aware that [he] knew" Mr. Losey, he did so in the context of suggesting that Defendants "bring Mr. Losey into the mix." Opinion at 24; Jan. 4, 2012 Tr. at 61. Plaintiffs do not claim that Judge Peck's professional relationship with Mr. Losey is recusable; it is his recommendation of Mr. Losey for the benefit of the Defendants, together with his later conduct on pro-predictive coding panels with Mr. Losey, that is.

Judge Peck intimates that he told Defendants they must have "died and went to Heaven" only because he was familiar with predictive coding. Opinion at 2. Perhaps this was the message Judge Peck intended to convey, but his remarks on January 11 erased any doubt that Plaintiffs – and any reasonable observer – would construe the comment as an expression of alignment with Defendants' interests. When asked whether Plaintiffs' **only alternative to using predictive coding** was a *recusal* motion by a predictive coding vendor, ReviewLess, Judge Peck responded: "**No doubt.**" Ex. 2. Judge Peck ignores the context in which he repeated the "died and went to Heaven" comment. But a reasonable observer, with knowledge and understanding of these relevant facts, would not. Based on this comment alone, along with the other similar "died and went to Heaven" comments, one could entertain significant doubt about Judge Peck's impartiality in this case.

iv. Judge Peck Ignores How A Reasonable Person Would Perceive His Impatience for Judicial Acceptance of Predictive Coding After Receiving Teaching Fees from Predictive Coding Vendors.

Judge Peck never addresses Plaintiffs' allegation that his apparent impatience for *judicial approval* of predictive coding – in general, no matter its form or effectiveness – aligned his interests with those of Defendants, the unhesitant proponents of predictive coding in this case. His *Search Forward* article goes so far as to purportedly grant "judicial approval" to predictive coding: "Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval." Ex. 11. Judge Peck noted that certain defense counsel were "waiting for" an actual judicial ruling, hesitant to be the "guinea pig" for use of predictive coding. *Id.*

Four months later, Judge Peck's February 24 Opinion adopting Defendants' predictive coding protocol wholesale provided exactly the ruling that Defendants and Recommind were waiting for. Thus, a reasonable person – if aware of the impatient language in Judge Peck's article – might well find it odd that his Opinion linked itself to the earlier article in such explicit and extraordinary terms. Judge Peck introduces

his Opinion by quoting at length from the language in his article explaining that, at the time of the article's publication, "no reported case . . . has ruled on the use of computer-assisted coding." Doc. 96: Feb. 24, 2012 Opinion at 1. In no uncertain terms, the Opinion declares that "[t]his Opinion appears to be the first in which a Court has approved of the use of computer-assisted review . . .. Counsel no longer have to worry about being the 'first' or 'guinea pig' for judicial acceptance of computer-assisted review." *Id.* at 25.

The reasonable person might find it increasingly peculiar that Judge Peck devoted nearly nine pages to "lessons for the future," in which he only briefly mentions the facts in this case, but instead anticipates the use of predictive coding under *other* fact patterns. *Id.* at 17-25.[39] Quite unusually, he concludes by instructing "the Bar" that they should "take away from this opinion . . . that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review." *Id.* at 25.[40]

Perhaps Judge Peck intended to respond to this allegation by stating that a judge cannot be excluded from a case for his "books" or "articles" on a legal subject related to the case. *Id.* at 43. Plaintiffs argue no such thing. Their argument rests on the specific language of Judge Peck's article, viewed in conjunction with the language of his Opinion four months later. Together with his other conduct in this case, these linked writings create an appearance of alignment with Defendants' interests requiring recusal under § 455(a).

v. Judge Peck Ignores How a Reasonable Person Would Perceive His Regular, Unprovoked and One-Sided Hostility Toward Plaintiffs' Counsel.

[39] The impression that Judge Peck is responding not to the facts of this case but to the concerns of e-discovery advocates is only heightened by his Opinion's attempt to "correct the many blogs about this case." *Id.* at 2, n.1

[40] Judge Peck's Opinion also does not mention the inappropriate citations in his February 24 Opinion adopting Defendants' proposed predictive coding protocol. Doc. 169 at 9-10. The Opinion cites a number of non-peer-reviewed articles and studies outside of the record without providing Plaintiffs an opportunity to review or object to his use of the materials. Some of the materials cited were authored by Judge Peck, defense counsel Losey, and Maura R. Grossman, e-discovery counsel at Wachtell, Lipton, Rosen & Katz, all of whom served together on the aforementioned January 30 LegalTech panel. Citation to these extrajudicial sources raises similar concerns to undisclosed *ex parte* contacts and requires recusal. *Id.*

Judge Peck's Opinion lists only a select few of the antagonistic remarks mentioned in Plaintiffs' motion for recusal that Judge Peck made toward Plaintiffs' counsel. Taken together, all of these remarks demonstrate antagonism toward Plaintiffs rising to a recusable level.[41] The four specific incidents Judge Peck discusses,[42] however, fail to capture just how regular, unprovoked, and one-sided Judge Peck's hostility toward Plaintiffs was. Plaintiffs reiterate below the facts excluded from Judge Peck's Opinion.

a. Judge Peck Ignores How a Reasonable Person Would Perceive How His Numerous Hostile Comments to Plaintiffs' Counsel, Laced With Implicit or Explicit Threats of Sanctions, for Exercising Their Right to Object and Preserve the Record.

Judge Peck removed Plaintiffs' counsel Janette Wipper's telephonic privileges, despite the fact that she works in San Francisco, because Ms. Wipper objected to Judge Peck's *sua sponte* decision to move the briefing schedule for conditional class certification up more than *thirteen* months from April 1, 2013 to February 29, 2012 (which then allowed Plaintiffs only three weeks to file the motion). Ex. 8 at 21-22. At the same conference, he threatened to withdraw Ms. Wipper's *pro hac vice* admission.[43] All Ms. Wipper had done – far from a disqualifiable offense – was request that Judge Peck reduce a verbal order to a written one:[44]

> WIPPER: Your Honor, plaintiffs request that you issue a written order.
>
> THE COURT: You're very close to getting not only your telephonic privileges removed but your *pro hac vice* removed. You have a written order. It's called the transcript. **If you want to object to**

[41] *See* recusal standard for in-court comments, *supra*.
[42] *See* Opinion at 47-53.
[43] The Second Circuit treats the sanction of revoking *pro hac vice* admission similarly to that of disqualifying counsel. *Martens v. Thomann*, 273 F.3d 159, 177 (2d Cir. 2001). Because disqualification has an adverse impact on the client's right to select counsel, courts ordinarily disqualify counsel "only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint." *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir. 1981); *see also Med. Diagnostic Imaging, PLLC v. CareCore Nat., LLC*, 542 F. Supp. 2d 296, 306 (S.D.N.Y. 2008) (same); *See also Belue v. Leventhal*, 640 F.3d 567, 576 (4th Cir. 2011) ("While *pro hac vice* status was at one time . . . considered to be granted and held at the grace of the court, such an approach does not accord with the modern practice of law.") (quotation marks omitted); *Multimedia Patent Trust v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 46237, *5 (S.D. Cal. 2011) (recognizing that depriving counsel of their *pro hac vice* admission is a "drastic" sanction, "imposed only when absolutely necessary").
[44] There is no local rule preventing an attorney from requesting a written order and some courts have even criticized litigants for failing to do so. *See, e.g, Pompano Windy City Partners, Ltd.*, 1990 U.S. Dist. LEXIS 12272, at *2-3, 7, 13 (S.D.N.Y. 1990).

> **every single ruling I make, feel free.** The rules allow you to do that. **Does it make me happy? You figure that out.** Would you like to have your *pro hac* withdrawn or would you like to learn the rules of the Southern District of New York?

Ex. 8 at 22-23. This statement, which Judge Peck never mentions, demonstrates that he took personal offense when Plaintiffs objected to his rulings, as they had a right to do under the Federal Rules, and attempted to dissuade Plaintiffs from exercising those rights. Fed. R. Civ. P. 72(a). It also provides context for Judge Peck's claim that he "reminded the parties at nearly every conference . . . that they have the right to take their objections to Judge Carter." Opinion at 49.

b. Judge Peck Ignores How a Reasonable Person Would Perceive His Accusation that Plaintiffs' Counsel is "Attacking His Integrity" in Response to a Well-Supported Recusal Motion.

Judge Peck ignores most of his post-motion conduct in his Opinion. After Plaintiffs filed their recusal motion, Judge Peck stated that he had a personal "interest" in recusal because Plaintiffs had "attacked [his] integrity." Ex. 9 at 15. Later in the same hearing, when Plaintiffs' counsel Steven Wittels said he was trying not to "antagonize" him, Judge Peck replied that it was "a little late" to avoid that. *Id.* When Plaintiffs tried to explain that "[w]hat we've attacked is the appearance of impropriety," Judge Peck responded: "Yeah well, you call it what you call it." *Id.* At the same hearing, Judge Peck began yelling at Mr. Wittels when he noted for the record that Judge Peck appeared to be expressing a bias against the Plaintiffs. *Id.* at 30. This occurred several times during the hearing. *Id.* Judge Peck's Opinion briefly notes this fact but offers no explanation. Opinion at 45. A reasonable person would likely perceive screaming at Plaintiffs' counsel, together with all of Judge Peck's other expressions of hostility, as apparent bias against Plaintiffs.

c. Judge Peck Ignores How A Reasonable Person Would Perceive His Accusation that Civil Rights Litigants are Attempting to "Blackmail" a Defendant Because They Have Requested Discovery Necessary to Prove their Case.

Judge Peck defends his "blackmail" statement based upon a gross misunderstanding of the scope of discovery in Title VII class actions. Opinion at 51 (to defend his comment that Plaintiffs' request for class discovery is "called blackmail to convince the defendant to settle," Judge Peck states: "The Court was reminding plaintiffs that they are only entitled to discovery related to either the *named plaintiffs* or to *company policies* to support a motion (not filed, much less granted) for class certification.") (emphasis added). However, it is well-settled that in a Title VII class action, *class* discovery must be produced *pre-certification* in order to meet the class certification standard under Rule 23.[45] Any reasonable person fully informed of the facts and the law would likely perceive this "blackmail" comment – made in response to Plaintiffs' request for discovery they are *entitled* to receive – as apparently biased.

d. Judge Peck Ignores How a Reasonable Person Would Perceive His Comment Asking Plaintiffs "Whether their Funding Source has Run Out" Because they have Requested Discovery Necessary to Prove their Case.

After Plaintiffs filed their recusal motion, Judge Peck asked Plaintiffs whether their "funding source" had "run out," implying that he desired they drop the case and that he would put them through the ringer on discovery until they did so. Ex. 9 at 9. Judge Peck's Opinion never directly addresses this allegation.

A reasonable person, however, would not ignore this questionable comment. One may perceive this comment as suggesting that Judge Peck may have an interest in burdening Plaintiffs until their funding is depleted, while doing everything in his power to conserve Defendants' discovery costs, as biased. Judge

[45] *See Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 265 (S.D.N.Y. 2007) (Lynch, J) (In Title VII class action, company-wide evidence satisfies commonality and typicality under Rule 23); *Gutierrez v. Johnson & Johnson*, 2002 U.S. Dist. LEXIS 15418, at *10 (D.N.J. Aug. 12, 2002) ("In employment discrimination cases, Courts generally grant wide latitude to . . . plaintiffs [seeking] to conduct companywide discovery."); *Bell v. Lockheed Martin Corp.*, No. 08-6292, 2010 U.S. Dist. LEXIS 96864 (D.N.J. Sept. 15, 2010) (Plaintiff was entitled to company-wide discovery, not just discovery from her business area); *Artis v. Deere & Co.*, 2011 U.S. Dist. LEXIS 69849 at *5-6 (N.D. Cal. June 29, 2011) ("To deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion."). Indeed, even in *individual* discrimination cases, courts routinely order production of company-wide data. *See, e.g., Hollander v. Amer. Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990) (abuse of discretion to deny plaintiff company-wide data).

Peck's only explanation for this comment was: "I wondered if plaintiffs were making seemingly conflicting requests . . . Because plaintiffs might have run out of funding and were *hoping that a more expansive discovery ruling would lead defendants to settle the case*." Opinion at 51 (emphasis added). Such explanation does nothing to explain how a reasonable person might perceive this comment as anything but biased.

vi. A Reasonable Person Who is Required to Consider all the Facts and Circumstances To Determine Recusal Would Have Considered an Amicus Brief Submitted by an Ethics Expert in Support of a Recusal Motion.

Judge Peck denied a motion for leave to file an amicus brief by Richard Flamm, an expert on judicial ethics and recusal, in support of Plaintiffs' motion for recusal. In denying Mr. Flamm's motion, Judge Peck specifically stated that "[a]n alleged amicus brief that is paid for by plaintiffs is hardly necessary or appropriate" (Doc. 198), (Flamm Amicus, Ex. 25). However, in the Southern District of New York, an amicus brief is indeed an appropriate means to submit expert opinion in support of a recusal motion. *In re: Initial Public Offering Secs. Litig.*, 174 F. Supp. 2d 61, *68 (S.D.N.Y. 2001) (denying motion to submit expert opinion in support of recusal motion because "[the experts] could have submitted an amicus brief arguing how the law *should be* interpreted"). Thus, a reasonable person may perceive Judge Peck's response to the amicus brief as suspect.

4. Judge Peck Fails to Consider the "Cumulative Effect" of his Conduct on a Reasonable Observer as Required by § 455(a) and Relevant Case Law.

At no point in his Opinion does Judge Peck consider the "cumulative effect" of his conduct on the reasonable observer. *See In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1998) ("The *cumulative* effect of a judge's individual actions, comments and past associations could raise some question . . . even though none (taken alone) would require recusal."); *In re School Asbestos Litig.*, 977 F.2d 764, 782 (3d Cir. 1992) ("We need not decide whether any of these facts alone would have required disqualification, for, as we shall explain, we believe that *together* they create an appearance of partiality that mandates disqualification.");

Hathcock v. Navistar Intern'l Transp. Corp., 53 F.3d 36, 41 (4th Cir. 1995) (*ex parte* contacts with an attorney "insufficient to merit recusal in isolation" created an impression of partiality when combined with the judge's affidavit in response to a party's recusal motion and seminar comments reflecting bias toward one party); *Onishea v. Hopper*, 126 F.3d 1323, 1342 (11th Cir. 1997) (appellants' other grounds for recusal, although alone insufficient to mandate recusal, added to the totality of the circumstances and "increased the appearance of injustice").[46]

Judge Peck examines his in-court and out-of-court conduct in separate sections of the Opinion, never once mentioning the impression they *collectively* create on the *outside observer*. *Compare* Opinion at 35, Section III.A "Speaking Engagements" ("Thus, a *reasonable objective observer* would not think that my comments at these educational panels gives the appearance of bias for MSL or against plaintiffs.") *with* Opinion at 54, Section IV "In-Court Comments" ("In sum, my comments regarding plaintiffs' counsel . . . were [not] so extreme to suggest *bias* against plaintiffs."). He also oversimplifies Plaintiffs' factual claims (*e.g.*, Opinion at 23 ("Plaintiffs' [sic] seek my recusal due to my advocacy of predicative coding, relationship with Losey and speaking engagements at LegalTech.")), or ignores them altogether (*e.g.*, Reply at 3 ("Judge Peck's post-letter and post-motion statements and conduct tip the balance further and require his recusal under § 455(a)") (citations omitted)).

To further support his disaggregation strategy, Judge Peck relies upon reported cases in which parties have sought to disqualify a judge under § 455(a) based on one, or at most two, reasons.[47] In none of

[46] *See also Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530, 534 (Miss. 2003) (finding that the "totality of circumstances" inquiry was appropriate in the case and that, "under a totality of the circumstances analysis a reasonable person might have reasonable doubts as to [the judge]'s impartiality"); *Chillingworth v. State*, 846 So. 2d 674, 676 (Fla. App. 2003) ("It is not an isolated incident that warranted disqualification [but] a combination of two events."); *Com. v. Benchoff*, 700 A. 1289, 1295 (Pa. Super. 1997) (although "each of appellant's allegations do not individually amount to an appearance of impropriety . . . the cumulative effect of the uncontested claims, the public comment on the case and the comments in his letter amount to an appearance of impropriety").

[47] *See, e.g.*, *Hoatson v. N.Y. Archdiocese*, 280 F. App'x 88, 90 (2d Cir. 2008) (only issue is judge's *prior* acceptance of award and membership in the Guild of Catholic Lawyers); *Lunde v. Helms*, 29 F.3d 367, 370-71 (8th Cir. 1994) (only issue is judge's *prior* relationship with university); *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993) (only issue is judge's *prior* relationship with university); *Sierra Club v. Simkins Indus.*, 847 F.2d 1109, 1117-18 (4th Cir.

the cases cited by Judge Peck does the judge speak at a public event (1) involving an issue in *ongoing* litigation (2) *with* counsel for one party in that litigation *and* (2) comment on the case. Generally these cases involve only one of these facts: a connection to counsel or public comments about a case. Only rarely does the conduct occur *during* the litigation.

Judge Peck simply ignored that the "cumulative effect" of his statements and conduct can give rise to an appearance of partiality, even where each incident is deemed to be separately insignificant. *U.S. v. Amico*, 486 F.3d 764, 775-76 (2d Cir. 2007). [1] In *United States v. Amico*, "the appearance of partiality stem[med] from a cumulative series of events over a number of months." *Id.* at 768. It was alleged that the judge had a minor connection to the defendant, previously unknown to the judge. While this connection alone might not have constituted cause for recusal, the judge's actions surrounding the allegation did: he repeatedly raised the subject of the allegation *sua sponte*, exhibited a "defensive or perhaps even hostile" approach when addressing accusations, conducted discovery on his own initiative, and attempted to

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1988) (only issue is judge's *prior* membership with club); *U.S. v. Alabama*, 828 F.2d 1532, 1543-44 (11th Cir. 1987) (only issue is judge's *prior* civil rights work); *Shaw v. Martin*, 733 F.2d 304, 316 (4th Cir. 1984) (only issue is a single *prior* legislative act); *Armenian Assembly of Am., Inc. v. Cafesjian*, 783 F. Supp. 2d 78, 90 (D.D.C. 2011) (only issue is interest in glass art generally *prior* to litigation and judge's conduct was not challenged in any way); *Wessman v. Bos. Sch. Comm.*, 979 F. Supp. 915, 916-17 (D. Mass. 1997) (only issue is judge's prior membership with Lawyers' Committee); *U.S. v. Pitera*, 5 F.3d 624, 626-27 (2d Cir. 1993) (the single lecture supporting recusal made no reference to the case in question, and occurred seven months prior to trial); *U.S. v. Yonkers Bd. of Educ.*, 946 F.2d 180, 184-85 (2d Cir. 1991) (only issue is two comments made to the media merely restating the judicial actions taken in the case); *Wilborn v. Wells Fargo Bank* (*In re Wilborn*), 401 B.R. 848, 865 (Bankr. S.D. Tex. 2009) (only issue is remarks at one seminar, and the judge took "special care" not to mention any pending litigation); *Metro. Opera Ass'n v. Local 100, Hotel Emps. Int'l Union*, 332 F. Supp. 2d 667, 674-75 (S.D.N.Y. 2004) (only issue is comments made about a case at one seminar, *after* judgment); *Leja v. Schmidt Mfg., Inc.*, 2010 U.S. Dist. LEXIS 61876 at *2 (D.N.J. June 22, 2010) (only issue is a minor social relationship between the judge and a partner); *In re Wolverine Proctor & Schwartz, LLC*, 397 B.R. 179, 183 (Bankr. D. Mass. 2008) (only issue is judge and an attorney involved in the case serving as co-chairs of a bar association committee); *In re Healy*, 2006 Bankr. LEXIS 4649 at *4 (Bankr. E.D. Cal. Dec. 18, 2006) (only issue is judge and attorney on the case served on the same CLE panel *after* judgment in case and case was not discussed on CLE panel); *Moran v. Clarke*, 213 F. Supp. 2d 1067, 1073 (E.D. Mo. 2002) (only issue is judge in suit against the police had a social relationship with president of the board of police commissioners); *Bailey v. Broder*, 1997 U.S. Dist. LEXIS 1751 at *2 (S.D.N.Y. Feb. 20, 1997) (only issue is judge and a lawyer involved in the case participated in the same bar association activities); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656, 671 (Conn. 2009) (only issue is judge participated on a task force on public access to the courts in a case involving public access to sealed documents); *Liteky v. United States*, 510 U.S. 540, 555 (1994) (only issue is conduct that occurred during trial); *LoCascio v. U.S.*, 473 F.3d 493, 497 (2d Cir. 2007) (only issue is comments towards counsel); *U.S. v. Pearson*, 203 F.3d 1243, 1277 (10th Cir. 2000) (same); *In re Martinez-Catala*, 129 F.3d 213, 219-20 (1st Cir. 1997) (same); *Chevron Corp. v. Donziger*, 783 F. Supp. 2d 713, 722 (S.D.N.Y. 2011) (same); *Bin-Wahad v. Coughlin*, 853 F. Supp. 680, 686 (S.D.N.Y. 1994) (same).

dissuade the government from calling the witness who could speak to the allegation, instructing them to do some "soul-searching" before doing so. *Id.* at 776. The court of appeals concluded that these actions might appear "intended to protect [the judge's] own reputation." *Id.* No case cited by Judge Peck for denying recusal involves as many different kinds of facts, both in and out of court, that could create an appearance of partiality as in this case: prior advocacy of a novel legal position implicated in a case, *ex parte* contacts with counsel, public comments about the case, *and* largely one-sided, hostile comments to one party. Thus, Judge Peck's failure to consider the cumulative effect of his conduct was contrary to § 455(a).

C. JUDGE PECK ERRONEOUSLY ASSERTS THAT IN-COURT COMMENTS CANNOT BE GROUNDS FOR RECUSAL EVEN WHEN REPEATED IN PUBLIC.

Judge Peck erroneously opines that in-court comments cannot be grounds for recusal. Opinion at 31. This statement is directly contrary to the law. "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, *ordinarily* do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (emphasis added); *see also Chen v. Chen Qualified Settlement Fund*, 552 F.3d 218, 227 (2d Cir. 2009) ("Generally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, *without more*, will rarely be sufficient to provide a reasonable basis for questioning a judge's impartiality.") (emphasis added).

Judge Peck focuses on the "*ordinary*" cases, such as *Liteky*. There, the perceived bias of the judge was based wholly on his "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses." *Liteky*, 510 U.S. at 556. There were no allegations that the bias stemmed from outside the trial context. By contrast, Judge Peck's courtroom conduct supports recusal under the *Liteky* standard because, first, the appearance of bias expressed in his

antagonistic remarks toward Plaintiffs stems from extrajudicial sources; and, second, his remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id*. at 555.

1. Judge Peck's Antagonistic Remarks Toward Plaintiffs Stem from Extrajudicial Sources.

First, Judge Peck's animosity toward Plaintiffs derived from extrajudicial sources: his prior advocacy of judicial approval of predictive coding and his association with the predictive coding industry. From the first conference on December 2, 2011, when he uttered the "died and went to Heaven" comment (Dec. 2, 2011 Tr. at 8), he appeared to align his interests with those of Defendants. In case there was any doubt in reasonable minds about whether that statement reflected favoritism toward Defendants, Judge Peck later clarified, fewer than six weeks later at a public panel, that his statement may have coerced Plaintiffs to adopt computer-assisted review or request his recusal. Ex. 3.

This alignment with Defendants was consistent with Judge Peck's expression in his *Search Forward* article of eagerness for an opinion conferring judicial approval of predictive coding. A reasonable observer might conclude that Judge Peck was personally invested in approving a predictive coding protocol, whatever its details. Defendants were the unhesitant proponent of predictive coding in the case (and Judge Peck's co-panelists at pro-predictive coding events). Even if Judge Peck's activities prior to this case are not alone grounds for recusal, his alignment with the Defendants from the beginning, and his extreme hostility toward Plaintiffs during the litigation, together, warrant his recusal.

2. Judge Peck's remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."

Second, even if Judge Peck's remarks berating counsel derive from no extrajudicial source, both they and his "died and went to Heaven" remark created the appearance of "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. The "died and went to Heaven" comment, when later clarified in Judge Peck's public remarks, conveys that Judge Peck was not prepared to rule against a predictive coding protocol, regardless of its exact details. In court, Judge Peck has

mocked, intimidated, and even yelled at Plaintiffs' counsel. He has threatened them with draconian sanctions for routine requests and attempted to intimidate them into not appealing his rulings to this Court. Most recently, his inconsistency – first agreeing with Plaintiffs that a document was relevant and then reversing course after Plaintiffs refused to give up objections on another issue – also created the specter of retaliation by a vengeful jurist. Pls. Reply at 2.

This behavior rose above the level of "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display," as Judge Peck would have this Court characterize it. *Liteky*, 510 U.S. at 555-56; Opinion at 44, 48. Rather, Judge Peck's behavior reveals that he has taken a personal interest in the outcome of this litigation, and personal offense at Plaintiffs' exercise of their right to make Rule 72(a) objections. Courts have found that in-court comments and acts expressing a similar level of personal investment in a case warranted recusal. *See U.S. v. Offutt*, 348 U.S. 11 (1954) ("The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance."); *United States v. Holland*, 655 F.2d 44 (5th Cir. 1981)(appearance of partiality found where judge mentioned that the defendant had "broken faith" with him by appealing his first conviction on the basis of the judge's actions in the prior trial); *Alexander v. Primerica Holdings*, 10 F.3d 155 (3d Cir. 1993) (judge "exhibited a personal interest in the outcome" of the litigation by responding to a writ of mandamus for disqualification of the judge by writing a "lengthy letter, personally refuting petitioners' 'incomplete or inaccurate summaries' of his comments and opinions)" *Id.* at 165.[48]

[48] Judge Peck further asserts that his "died and went to Heaven" comment cannot be grounds for recusal because it was "originally made in open court." Opinion at 31. This misstates the law. He chiefly relies on the *Metropolitan Opera* case. *See* Opinion at 32-34; *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. Int'l Union*, 332 F. Supp. 2d 667 (S.D.N.Y. 2004). There, a judge gave a CLE presentation that repeated details from her recently issued opinion, and warned the audience against making one party's mistakes. But *Metropolitan Opera*, unlike the instant case, involved comments that were made *after* the entry of judgment, not during litigation, like Judge Peck's comments at

D. A JUDGE'S SPEAKING ENGAGEMENTS HAVE LIMITS UNDER § 455(A), AS WELL AS, JUDICIAL CANONS 2 AND 4, AND THOSE LIMITS, *COLLECTIVELY*, MANDATE JUDGE PECK'S RECUSAL.

Plaintiffs rightfully seek Judge Peck's recusal for engaging in several activities, including receiving "teaching fees" for commercially sponsored speaking engagements, as *cumulatively* exceeding the bounds of the Judicial Code of Conduct for United States Judges. Specifically, Canon 2(A) and 4, respectively, provide that:

> A judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2(B) states that "[a] judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge.
>
> A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. **However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality . . . .**

The Committee advisory opinion under Canon 2(B) further warns that speeches at "seminars sponsored by . . . business entities raise concerns under Canon 2B." *Guide to Judiciary Policy*, Vol. 2B, Ch. 2, 105-3. An advisory opinion of the Judicial Ethics Committee on Codes of Conduct lists five factors that may influence a judge's decision about the propriety of participating in a privately-funded program, including "the sponsor of the training program," "whether there is a commercial motivation for the program" and "the attendees, including whether members of different constituencies are invited to attend." [49] *Id.* at 105-2. Analyzing

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LegalTech and the ReviewLess panel. The apparent preference the judge showed toward one party was based on the facts of the case and not extrajudicial sources. Moreover, it appears that this case was never appealed – the decision Judge Peck cites is not from the Second Circuit, but by the very same district judge refusing to recuse herself.

[49] The advisory opinion continues: "When speaking to an audience that predominantly includes attorneys or clients on one side of litigation, a judge should be mindful of not giving advice that would favor or assist that audience at the expense of their litigation adversaries to avoid an appearance of bias that could arise contrary to Canon 2(A). A judge speaking to such an audience must be equally available to address the other litigation constituency." *Id.*

those factors in the context of programs funded by businesses, the Committee specifically *advises against* a judge "speaking at a program on discovery issues hosted by a for-profit company offering discovery services, where the company marketed its services in part through the training program." *Id.* at 105-3.

All of these considerations should have caused Judge Peck pause and to seriously consider whether speaking at LegalTech, coupled with his many other pro-defense oriented activities and statements, ran afoul of the Judicial Code of Conduct. At LegalTech, the attendees of the panels were primarily e-discovery vendors and corporate defense attorneys, both of whom shared a common commercial interest in promoting predictive coding technologies. One of the many industry sponsors of the event was Recommind, who, as Judge Peck knew, Defendants used as their e-discovery vendor and stood to benefit from the use of predictive coding in the case before him.[50] Additionally, by serving on pro-predictive coding panels sponsored by *private* corporations, including Recommind; receiving reimbursement indirectly from Recommind and other pro-predictive coding e-discovery vendors; commenting on ongoing litigation involving predictive coding; and shortly thereafter issuing a ruling that Recommind publicly described as an endorsement of its technology which will improve its commercial prospects[51] Judge Peck has created the appearance that he "lent the prestige of his judicial office to advance [ ] private interests."[52]

While Judge Peck construes LegalTech as an event "for educational purposes" because it granted CLE credit, CLE credit alone "does not eliminate the requirement that a judge determine whether his or her

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Plaintiffs have no information that Judge Peck has ever addressed plaintiff lawyers about the merits of predictive coding for their purposes.

[50] While Judge Peck claims that he never endorsed Recommind's methodology or technology, his February Opinion regarding Defendants' predictive coding protocol attaches the ESI protocol, which reveals MSL's e-Discovery vendor Recommind and mentions Recommind's patented Axcelerate software at least 15 times. Shortly following the issuance of that opinion, Recommind went on a media blitz, touting Judge Peck's decision as a game-changer for the e-Discovery industry and labeling the decision a validation of its technology.

[51] Judge Peck notes that, "I did not determine which party's predictive coding protocol was appropriate in this case until the February 8, 2012 conference, after the panels about which plaintiffs complain." Opinion at 35. This argument only exacerbates the appearance that defense counsel was in a position to influence Judge Peck during their appearances together at these conferences.

[52] Further adding to the appearance of bias, Recommind reprinted Judge Peck's *Search Forward* article on its website, with the Recommind logo appearing at the bottom below his biography.

participation runs afoul of Canon 2." *Id.* at 87-4. The perception of partiality raised by Judge Peck's participation in LegalTech and other conferences sponsored by the e-discovery industry is heightened by Judge Peck's receipt of teaching fees for many of them. In 2011, Judge Peck received $5,500 in teaching fees from four corporations for "teaching e-discovery."[53] Judge Peck also received funds in 2010 for attending a conference in Hong Kong. Ex. 7. Relatedly, at the April 25, 2012 Hearing, Judge Peck made a point of remarking on the "low pay of being a federal judge." Ex. 9 at 28:2.

With Judge Peck's fees, trips, statements at conferences, panel attendance with defense counsel, statements about his low pay, and his rulings in mind, the analysis in *People v. Lester*, 2002 WL 553844, *2 (N.Y. Just. Ct. 2002) is instructive:

> Attendance at bar meetings, CLE programs, both locally and at exotic vacation spots, are the Sodom & Gomorrah of the legal profession. Dinners and seminars are opportunities to meet, network, compare notes and determine whose plight is similar to our own. Some judges are known to "nod and wink" while others reward their loyalists with assignments and appointments. Our system, from top to bottom, tolerates ex parte communications geared to curry favor with both suspecting and unsuspecting members of the judiciary. Award from bar associations, free dinners or drinks, a round of golf, a cup of coffee or a free cigarette offered to an accepting jurist, may all be indicia of attempts to influence. Only a fool and no judge is a fool; or a deaf, dumb and blind jurist, and none are all of that, *would accept such emoluments and imagine that nothing is expected of them in return* or that an imaginary Chinese wall exists between social contacts and judicial opinion.

Lester and the Judicial Canons make clear that Judge Peck has wrongly opined that his recusal would be tantamount to precluding "any judge who speaks at a CLE conference about any e-discovery subject from handling future cases involving e-discovery." Opinion at 29, 42. This is not so. In accordance with *Lester* and the Judicial Canons, there must be *limits* on extrajudicial activities to avoid *quid pro quo* situations. Judge Peck must be recused because his activities in the aggregate exceed those limits. Nor does the case law cited by Judge Peck demonstrate otherwise. The judges in the cases relied upon by Judge Peck attended genuine educational programs funded by *professional* organizations and the *government*, a far cry

[53] Financial Disclosure Report for Calendar Year 2011, at Ex.7. The corporations were IQPC, Nova Office Strategies, Sandpiper Strategies and Xerox.

from an industry trade show like LegalTech. *See United States v. Pitera*, 5 F.3d 624, 626-27 (2d Cir. 1993) (involving a lecture to a Drug Enforcement Administration task force); *Wilborn v. Wells Fargo Bank, N.A.* (*In re Wilborn*) (involving a CLE seminar hosted by the State Bar of Texas), 401 B.R. 848, 863 (Bankr. S.D. Tex. 2009); *Metro. Opera Ass'n, Inc., v. Local 100, Hotel Emps. Int'l Union*, 332 F. Supp. 2d 667, 674-75 (S.D.N.Y. 2004) (involving a CLE presentation at a program sponsored by the Bureau of National Affairs, an independent media organization); *see also* Opinion 31-32 (citing all three).

Additionally, Judge Peck's contention that "participation on an educational panel" and the "fact that [his] interest in and knowledge about predictive coding in general overlaps with issues in this case" are not a basis for recusal, is misguided. Opinion at 29, 37. Not one of the cases he cites for these propositions involve serving on a commercial panel *during* a case with the defense counsel *from that case* on an *issue involved in that case*, wherein comments were made about the case.[54] Additionally, the case law relied upon to support his pro-defense oriented interest in predictive coding involve recusal issues with significantly different non-commercial based issues, such as a judge's involvement with the Catholic Church,[55] membership with the ABA,[56] donations to a university,[57] membership in the Sierra Club,[58]

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[54] *See Leja v. Schmidt Mfg., Inc.*, 2010 U.S. Dist. LEXIS 61876 at *2 (D.N.J. June 22, 2010) (judge had a social relationship with a partner whose firm was involved in the case); *In re Wolverine Proctor & Schwartz, LLC*, 397 B.R. 179, 183 (Bankr. D. Mass. 2008) (judge served as co-chair of a bar association committee, with no allegations that the committee work touched on the case in question); *In re Healy*, 2006 Bankr. LEXIS 4649 at *4 (Bankr. E.D. Cal. Dec. 18, 2006) (judge and attorney on the case served on the same CLE panel, but no allegation of discussion of the case or even the subject matter of the case); *Moran v. Clarke*, 213 F. Supp. 2d 1067, 1073 (E.D. Mo. 2002) (judge in suit against the police had a social relationship with president of the board of police commissioners); *Bailey v. Broder*, 1997 U.S. Dist. LEXIS 1751 at *2 (S.D.N.Y. Feb. 20, 1997) (judge and lawyer involved in the case participated in the same bar association activities, but no allegation that these activities concerned the subject matter of the case was made in the recusal motion); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 970 A.2d 656, 671 (Conn. 2009) (judge participated on a task force on public access to the courts in a case involving public access to sealed documents, but not *with* any attorney on the case).

[55] *Hoatson v. N.Y. Archdiocese*, 280 F. App'x 88, 90 (2d Cir. 2008). Cited in Opinion at 29.

[56] *Hu v. Am. Bar. Ass'n*, 334 F. App'x 17, 19 (7th Cir. 2009). Cited in Opinion at p. 29-30.

[57] *Lunde v. Helms*, 29 F.3d 367, 370-71 (8th Cir. 1994), *cert denied*, 513 U.S. 1155 (1995) and *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993). Cited in Opinion at 30.

[58] *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1117-18 (4th Cir. 1988), *cert denied*, 481 U.S. 904 (1984). Cited in Opinion at 30.

background as civil rights lawyer,[59] prior pro-death penalty legislative vote,[60] interest in glass art,[61] and association with the Lawyers Committee[62].

In all, Plaintiffs rightfully seek Judge Peck's recusal for the totality of his questionable activities, including his participation and actions at corporate sponsored speaking events. As Canon 1 notes, "[a]n independent and honorable judiciary is indispensable to justice in our society." Judge Peck has failed to "maintain and enforce high standards of conduct" and Plaintiffs rightfully seek recusal in order to preserve the integrity and the independence of the judiciary. *Id.*

V. Conclusion

Plaintiffs respectfully request that this Court reverse Judge Peck's June 15, 2012 Opinion and Order (Doc. 229), vacate all Orders issued by Judge Peck since his referral to this case, and stay all further proceedings before Judge Peck until his recusal is finally determined.

DATED: June 29, 2012

Respectfully submitted,

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[59] *U.S. v. Alabama*, 828 F.2d 1532, 1543-44 (11th Cir. 1987). Cited in Opinion at 30.
[60] *Shaw v. Martin*, 733 F.2d 304, 316 (4th Cir. 1984). Cited in Opinion at 30.
[61] *Armenian Assembly of Am., Inc. v. Cafesjian*, 783 F. Supp. 2d 78, 90 (D.D.C. 2011). Cited in Opinion at 30.
[62] *Wessman v. Bos. Sch. Comm.*, 979 F. Supp. 915, 916-17 (D. Mass. 1997). Cited in Opinion at 31. Judge Peck also cites to *Samuel v. Univ. Pittsburgh*, 395 F. Supp. 1275, 1278 (W.D. Pa. 1975) at p. 31, however, *Samuel* is an actual bias case wherein allegations were made that the judge had a personal prejudice against the law firm and class actions, and as such the case is both legally and factually inapposite to the instant dispute.

CERTIFICATE OF SERVICE

I, Hardeep Dhillon, hereby certify under penalty of perjury that on this 29th day of June 2012 true and correct copies of the foregoing "PLAINTIFFS' RULE 72(A) OBJECTION TO THE MAGISTRATE'S JUNE 15, 2012 OPINION AND ORDER" was served on all counsel of record by operation of the Court's ECF system.

/s/ Hardeep Dhillon

Hardeep Dhillon