UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE, MARYELLEN O'DONOHUE, LAURI MAYERS, HEATHER PIERCE and KATHERINE WILKINSON on behalf of themselves and all others similarly situated.	11 CV 1279 (ALC) (AJP)
Plaintiffs,	
- against -	
PUBLICIS GROUPE SA and MSLGROUP,	
Defendants.	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' RULE 72(A) OBJECTION TO MAGISTRATE JUDGE PECK'S JUNE 15, 2012 OPINION AND ORDER

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Defendant MSLGroup Americas, Inc. ("MSL") respectfully submits this memorandum of law in opposition to Plaintiffs' Rule 72(a) Objection to Magistrate Judge Peck's June 15, 2012 Opinion and Order (the "Objection").

PRELIMINARY STATEMENT

A motion for recusal or disqualification of a judge is an extremely serious matter, as recognized in the Congressional record reflecting debate on Section 455(a):

> Disqualification for lack of impartiality must have a reasonable basis. Nothing in the proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to a judge of their own choice.

House Report No. 93-1453, adopting Senate Report No. 93-419, 3 U.S. Code Cong. & Admin. News, 93rd Cong., 2d Sess. 1974, pp. 6351-6363 at 6355. Ignoring the seriousness of the application, Plaintiffs' Objection sets forth a scattershot collection of allegations, consisting of baseless innuendo and gross exaggeration, recklessly impugning the reputation of Magistrate Judge Andrew Peck. Repeating the mantra that Judge Peck's actions should be viewed "collectively" to determine whether his decision not to recuse himself should be upheld, Plaintiffs fail to recognize that the accumulation of worthless allegations does not, collectively, amount to sufficient evidence to disqualify a federal judge. Despite their rhetoric and vitriol, Plaintiffs assert no valid basis on which the Court should overturn Judge Peck's well-reasoned decision not to recuse himself from these proceedings.

The "cumulative" evidence that Plaintiffs propound to seek Judge Peck's recusal or disqualification boils down to: (1) Judge Peck's advocacy of predictive coding as an alternative to traditional review methods for the processing of Electronically Stored Information ("ESI"); (2)

Judge Peck's participation in CLE conferences where Recommind, an e-Discovery vendor, was one of the sponsors; (3) Judge Peck's participation in conferences with Jackson Lewis's e-Discovery counsel, Ralph Losey; (4) Judge Peck's comments at conferences that Defendants "thought they died and went to heaven" upon discovering that Judge Peck would be addressing the proposed ESI protocol; (5) Judge Peck's decisions to endorse Defendants' predictive coding protocol and to decline to consider the *amicus brief* proffered by an expert retained by Plaintiffs; and (5) Judge Peck's in-court comments purportedly exhibiting antagonism toward Plaintiffs and their counsel. As set forth below, none of these grounds, either individually or collectively, warrant the Court's disqualification under Section 455(a). This Court should, therefore, reject Plaintiffs' objection to Judge Peck's order denying their motion for disqualification or recusal.

FACTUAL BACKGROUND

A. Plaintiffs Agreed to Use Predictive Coding

As a threshold issue, it is undisputed that MSL's intent to use the Axcelerate search software from Recommind, and Plaintiffs' agreement to the use of such software, including its predictive coding functionality, were well-known and widely-discussed between the parties well before November 29, 2011, when Judge Sullivan referred the case to Magistrate Judge Peck for pre-trial purposes.[1] In a letter dated October 7, 2011, for example, MSL advised Plaintiffs that it intended to utilize the Axcelerate software and its "concept search" features.[2] Thereafter, in letters dated October 21, 2011 and November 3, 2011, MSL further explained its proposed search methodology, including the use of predictive coding.[3]

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[1] This case was reassigned from Judge Sullivan to Judge Carter on January 9, 2012 (Dkt. 63).
[2] *See* Declaration of Brett Anders, dated April 30, 2012, Exh. 1, correspondence to Plaintiffs' counsel, dated October 7, 2011.) (DKT 178)
[3] *Id.* at Exhs. 2-3.

On December 2, 2011, the parties appeared in Court before Judge Peck for the first time. During the conference, the purpose of which was to discuss outstanding discovery issues, counsel for MSL advised the Court that the parties were discussing the protocol for reviewing the millions of potential e-mails in the case and noted that Plaintiffs were reluctant to utilize the predictive coding feature of the Axcelerate software.[4] In response, Plaintiffs' counsel stated that MSL had over-simplified their position regarding predictive coding and that Plaintiffs did *not* oppose predictive coding, but simply had concerns regarding the manner in which predictive coding would be employed. *Id.* at p. 21:5-12. This position was reconfirmed by Plaintiffs in a letter to Judge Peck dated December 19, 2011, advising, "Plaintiffs are prepared to consider the use of predictive coding as a search method in general," but they needed more time to evaluate the specific proposed methodology.[5]

The parties appeared again before Judge Peck on January 4, 2012. On January 3, 2012, before the conference, Plaintiffs had submitted to the Court their proposed version of the ESI Protocol, which *relied* on the use of predictive coding.[6] Similarly, during the January 4, 2012 conference itself, Plaintiffs, through their e-discovery vendor, DOAR, confirmed not only that Plaintiffs had agreed to the use of predictive coding, but also that Plaintiffs agreed with some of the details of the search methodology, including the "confidence levels" proposed by MSL. Specifically, Mr. Neale, Plaintiffs' consultant, represented: "We have not taken issue with the use of predictive coding or, frankly, with the confidence levels that they have proposed except

[4] *See* Anders Aff., Exh. 4, December 2, 2011 Transcript, p. 8.
[5] *See* Adders Aff., Exh. 5, letter from Plaintiffs to Judge Peck, dated December 19, 2011.
[6] *See* Anders Aff., Exh. 6, letter from Plaintiffs to Judge Peck, dated January 3, 2012, pp. 12-14.

for the fact that it proposes a limit – the ultimate result of 40,000 documents[7] before we have seen any of the results coming out of the system."[8]

Thereafter, on February 13, 2012, Plaintiffs' e-Discovery vendor, DOAR, issued a press release, touting their alleged efforts assisting in the development of the ESI Protocol, and stating, "While we most often advise producing parties on the use of alternative technologies such as predictive coding, I believe that our support of the requesting party [Plaintiffs] in this case will prove to be an important step in the wider adoption of predictive coding technologies."[9]

In light of these numerous statements, there can be no question that Plaintiffs agreed to use predictive coding. Thus, the premise of their attack on Judge Peck—that he forced the use of predictive coding over Plaintiffs' objections—is unfounded.

B. It Was Well Known that Judge Peck Was a Leader In E-Discovery Before The Case Was Assigned to Him

Well before the November 29, 2011 order referring this case to Judge Peck, it was also well known he had been recognized as leader in the field of e-Discovery, as he had written and spoken publicly about the technical process of predictive coding. His October 2011 article, *Search, Forward*, in Law Technology News, an ALM publication, for example, discussed "computer-assisted coding," and outlined factors that may be considered if "the use of predictive coding is challenged in a case before me."[10] In the concluding paragraph, Judge Peck stated: "Until there is a judicial decision approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval." *Id.* His views on the

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[7] On this point -- MSL's proposal to limit its manual review of potentially responsive e-mail message to 40,000 documents -- it is important to note that Judge Peck **agreed** with Plaintiffs and denied MSL's initial efforts to limit the number of documents to be reviewed manually. *See* Anders Dec., Exh. 7, January 4, 2012 Tr. pp. 51:20 – 52:21.
[8] *See* Anders Dec., Exh. 7, January 4, 2012 Tr., p. 51:14-18.)
[9] *See* Anders Dec. Exh. 8, DOAR Press Release, dated February 13, 2012.
[10] *See* Anders Dec. Exh. 9.

topic also were publicized in scholarly articles and in seminars and conferences in which Judge Peck and other members or the judiciary and the legal profession in general have participated. Even Plaintiffs acknowledge that Judge Peck's public statements concerning predictive coding pre-dated the commencement of this action and certainly the commencement of Judge Peck's active role in supervising discovery. *See* Objection, pp. 4-5. Thus, given the parties' agreement to use predictive coding and Judge Peck's acknowledgement in scholarly articles that predictive coding may be used in appropriate cases, his decision adopting it cannot be assailed as reflecting bias against Plaintiffs.

C. Ralph Losey Had No Ex Parte Contact with Judge Peck

Plaintiffs spend much of their brief discussing the professional panels on which Judge Peck and Mr. Losey have crossed paths. However, Mr. Losey has never discussed this case with Judge Peck.[11] Mr. Losey, who is a partner in the Orlando office of Jackson Lewis LLP and serves as the firm's National e-Discovery counsel and chair of its Electronic Discovery Group, has written extensively on cost-reduction methodologies in e-Discovery, including predictive coding, and has been invited to participate in seminars and conferences on the topic. *Id.* at ¶¶ 3, 5. His area of expertise has occasioned his acquaintance with legal experts on the subject of predictive coding, including Judge Peck. *Id.* at ¶ 8. But his mere appearance at such events does not warrant disqualification of all judges who also appear.

[11] *See* Anders Dec. Exh. 10, Declaration of Ralph Losey ("Losey Dec."), dated April 26, 2012 at ¶ 6.

ARGUMENT

I. STANDARD

Federal Rule of Civil Procedure 72 provides the standard for the district court's review of a federal magistrate judge's order. Fed. R. Civ. P. 72. When a court reviews a magistrate judge's determination of a nondispositive matter, the court may overrule the decision where it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also Macaluso v. Keyspan Energy*, No. 05 Civ. 0823, 2007 U.S. Dist. LEXIS 33464, at *10 (E.D.N.Y. May 7, 2007). A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Terry v. Incorporated Village of Patchogue*, No. 09 Civ. 2333, 2011 U.S. Dist. LEXIS 102652, at *2 (E.D.N.Y. Sept. 12, 2011). This standard is highly deferential, and "the party seeking to overturn a magistrate judge's decision thus carries a heavy burden. *Id.* (*citing Nikkal Indus. Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 189 (S.D.N.Y. 1988)).

II. THE COURT SHOULD DENY PLAINTIFFS' OBJECTION

A judge should not recuse himself under Section 455(a) unless "a reasonable person, knowing all the facts, would conclude that the court's impartiality might reasonably be questioned." *U.S. v. IBM*, 857 F. Supp. 1089, 1091 (S.D.N.Y. 1994) (quoting *U.S. v. Pitera*, 5 F.3d 624, 626 (2d Cir. 1993). "In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Recusal is not warranted for reasons that are "remote, contingent, or speculative." *Id.* at 1313. Indeed, there is "as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *Rosen v. Sugarman*, 357 F2d 794, 797 (2d

Cir. 1966) (citations omitted); *U.S. v. Helmsley*, 760 F. Supp. 338, 342 (S.D.N.Y. 1991) (citations omitted). "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *Id. at 1315*.

A. PLAINTIFF'S RECUSAL MOTION WAS UNTIMELY

A motion to disqualify must be made at the "earliest possible moment" after obtaining information regarding possible bias. *U.S. v. Yonkers Bd. of Ed.,* 946 F.2d 180, 183 (2d Cir. 1991). "The timeliness requirement is necessary to prevent waste of judicial resources and to ensure that a movant does not "hedg[e] its bets against the eventual outcome" of a proceeding. *Id.* (citing *Apple v. Jewish Hosp. & Med. Ctr.,* 829 F.2d 326, 334 (2d Cir. 1987)). Courts have deemed a motion to disqualify untimely in situations where the movant, in full possession of the facts alleging bias, "hedged its bets" until an unfavorable ruling and then moved for disqualification. *See, e.g., S.E.C. v. Grossman*, 887 F. Supp. 649, 658 (S.D.N.Y. 1995); *Faulkner v. Nat'l Geographic Soc.*, 296 F. Supp. 2d 488, 490 (S.D.N.Y. 2003).

In the Objection, Plaintiffs set forth a number of excuses for their failure to raise the issue of Judge Peck's potential recusal until after he issued numerous discovery rulings, including the ESI Protocol. As Judge Peck rightfully set forth in the Opinion, both parties had been aware of his views on predictive coding since at least December 2, 2011 and had knowledge of his appearances at seminars with Losey and engagement with LegalTech since January 4, 2012. (Opinion, p. 23.) By Plaintiffs' own admission, Judge Peck has been a frequent contributor to the e-Discovery discourse generally, and predictive coding specifically, for the past several years. (Objection, pp. 4-5.) Moreover, Plaintiffs were expressly made aware of Judge Peck's knowledge of predictive coding at the first conference on December 2, 2011 when Judge Peck instructed the parties to read his article *Search, Forward* to "glean his position on the issue."

(Opinion, p. 23.) Judge Peck reminded the parties to read his *Search, Forward* article while granting Plaintiffs' request for an adjournment of the upcoming discovery conference on December 20, 2011. (Opinion, p. 24.) Judge Peck again informed the parties of his authorship of the *Search, Forward* article on January 4, 2012 and informed the parties of his professional knowledge of Ralph Losey. (Opinion, pp. 5-6.) Despite such knowledge, Plaintiffs delayed in bringing this motion for recusal until *more than two months after* Judge Peck issued his rulings on February 8, 2012 regarding the specific implementation of predictive coding. (Objection, pp. 4-5.) In light of this unexcused delay, Judge Peck properly found that Plaintiffs' recusal motion was untimely. (Opinion, p. 29)

1. Judge Peck Had No Obligation Under 28 U.S.C. § 455(a)

Not only did Judge Peck, on the record, affirmatively advise the parties of his involvement in the discourse on predictive coding, but Plaintiffs' argument that he had an obligation to do so under 28 U.S.C. § 455(a) is entirely misplaced. Initially, Section 455(a) limits a judge's duty to disqualify himself (or, by implication, to disclose circumstances that might lead to such disqualification) to situations "where his impartiality might reasonably be questioned." Neither Judge Peck's involvement in the discourse on predictive coding nor his professional interactions with Mr. Losey satisfy this standard. The cases cited by Plaintiffs in the Objection illustrate the type of information that could reasonably require disclosure. For example, in *U.S. v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), the judge failed to disclose that the principal lawyer for the United States at trial was his best friend, with whom he had planned a vacation getaway with their respective families prior to trial. *Id.* at 1536. The judge had, in fact, advanced the date of sentencing so that he could wrap up the *Murphy* case before going on vacation with the attorney's family. *Id.*. Similarly, in *Parker v. Connors Steel Co.*, 855 F.2d

1510 (11th Cir. 1988), the judge was asked to recuse himself because his law clerk was the son of a partner in the law firm representing the defendant and because the clerk's participation in the decisional process was critical. *Id.* at 1523. The clerk also held a hearing with counsel in the absence of the judge and reported the results of the hearing to the judge. *Id.* Neither Judge Peck's involvement in predictive coding nor his professional relationship with Mr. Losey, who is not noticed as one of the Jackson Lewis attorneys representing Defendants, comes even close to requiring him to make any formal disclosure.

2. Judge Peck Properly Applied the *Apple* Factors

In his careful opinion, Judge Peck properly analyzed the request for his recusal under the factors set forth in *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326 (2d Cir. 1987). After laying out the proper standard, Judge Peck denied the recusal motion as untimely because: (1) discovery had been ongoing since October 2011 (Opinion, p. 25); (2) he had, since November 2011, expended considerable time and attention in responding to discovery issues and disputes, and because, should recusal be granted, the Court would be required to review and overturn the many decisions and orders made in this case, thereby causing a "waste of judicial resources" (Opinion. p. 26);[12] (3) Plaintiffs waited until after he adopted Defendant's predictive coding protocol, apparently using the recusal motion as a "fall-back position" from what they regarded as an adverse ruling (Opinion, pp. 26-27);[13] and (4) Plaintiffs set forth no adequate explanation for

[12] Indeed, Plaintiffs have alerted this Court that, in connection with the recusal motion, they are seeking vacatur of *all* orders entered by Judge Peck. *See* Anders Dec. Exh. 11, letter from Plaintiffs to Judge Carter, dated April 20, 2012. If granted, this request would undo months of work by this Court and by the parties.

[13] Plaintiffs demonstrated the same tactic on April 25, 2012, when they appeared before Judge Peck. First, they requested that Judge Peck enter an order staying all discovery pending the resolution of the Motion to Amend and Motion for Conditional Certification; only after Judge Peck denied that request did Plaintiffs then ask that he refrain from ruling on any matters until after resolution of the recusal motion. As Judge Peck properly noted on the record, Plaintiffs appeared to wait to see if they liked the Court's outcome on their first request, before making their second request. (*See* Anders Dec. Exh. 12, Tr. of April 25, 2012 Status Conference, p. 13.)

their decision to wait for months, until after his numerous discovery rulings, to raise the issue of disqualification (Opinion, pp. 27-29).

Plaintiffs' application of the *Apple* factors in the Objection is flawed. Initially, although the recusal motion was filed before the entry of judgment, it was filed *after* the purportedly adverse ruling on February 8, 2012 that adopted much of MSL's proposed predictive coding protocol, thus unmistakably creating the appearance that they used the recusal motion as a "fall-back position." Second, Plaintiffs' excuse for the delay – that they needed to conduct research on Judge Peck's opinion regarding predictive coding and his appearance at predictive coding events – is not persuasive. Due to Judge Peck's very public opinions and appearances relating to predictive coding, it would have taken a reasonably competent associate hours, not months, to uncover the information on which Plaintiffs based their request for disqualification.[14] Plaintiffs, therefore, raise no credible objection to Judge Peck's finding that their recusal motion was untimely.

B. JUDGE PECK CORRECTLY APPLIED THE RECUSAL STANDARD

As noted above, a judge should not recuse himself under Section 455(a) unless "a reasonable person, knowing all the facts, would conclude that the court's impartiality might reasonably be questioned." *U.S. v. IBM*, 857 F. Supp. 1089, 1091 (S.D.N.Y. 1994) (quoting *U.S. v. Pitera*, 5 F.3d 624, 626 (2d Cir. 1993)). Judge Peck correctly applied this standard in finding that his public advocacy with respect to predictive coding, his professional interactions with Mr. Losey, his appearance at seminars related to electronic discovery, and his in-court rulings and conduct, were not, singly or collectively, cause for his disqualification.

[14] The retention of an ethics expert on the field, another excuse offered by Plaintiffs to justify their delay, would not have been a necessary prerequisite to filing their motion for disqualification.

1. Judge Peck Applied the Correct Standard for Evaluating Bias

Plaintiffs' initial contention that Judge Peck erroneously applied the "actual bias" standard of Section 455(b) rather than the "appearance of bias" standard of Section 455(a) is a red herring. At the very onset of the Opinion, Judge Peck clarified: "Plaintiffs' 'Motion for Recusal or Disqualification' is based not on any claim that the Court has an actual bias, but rather on 'an appearance of partiality.'" (Opinion, p. 1.) Moreover, Judge Peck reserved four pages of his Opinion to set forth the correct "objective reasonableness" standard of Section 455(a) in evaluating Plaintiffs' motion. (Opinion, pp. 16-20.) Judge Peck's well-justified in-court statements using the term "bias" or "biased," which Plaintiffs cite out of context, have no bearing on the standard he expressly applied in the Opinion.

2. Judge Peck Correctly Evaluated the Motion Under the "Reasonable Person" Standard

Plaintiffs' sole basis for their contention that Judge Peck evaluated their recusal motion as a "federal judge" rather than as a "reasonable person" (without actually explaining why the two are mutually exclusive), appears to be the number of times the pronoun "I" is used in the Opinion. (Objection, p. 17.) As Plaintiffs' motion was based on personal attacks on Judge Peck's integrity and impartiality, it is not surprising that the first-person pronoun would have been used liberally in the Opinion to set forth adequately the events that led to Judge Peck's refusal to recuse himself.[15]

As set forth more fully below, Judge Peck at all times utilized the "reasonable person" standard in evaluating whether his conduct could give rise to an appearance of bias. Plaintiffs'

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[15] Although Plaintiffs maintain that they never impugned Judge Peck's reputation, their motion for disqualification and the Objection show otherwise. In the Objection, for example, Plaintiffs imply that Judge Peck engaged in a "*quid pro quo* in return for the financial and reputational perks [he] has received and continues to receive for espousing predictive coding" and that he was punishing "civil rights litigants." They even accused him of (continued)

cited cases hardly support Plaintiffs' position as they all *decline* to grant motions for recusal under Section 455(a) in evaluating circumstances much more questionable than those at present. (Objection, p. 17.) The court in *In re Mason*, 916 F.2d 384 (7th Cir. 1990) explains the standard of the "reasonable observer":

> A reasonable observer is unconcerned about trivial risks; there is always *some* risk, a probability exceeding 0.0001% that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons.

Id. at 385. No objective or reasonable observer would find that Judge Peck's actions, set forth more fully below, would constitute grounds for disqualification.

3. Judge Peck Examined "All the Relevant Facts" Supporting Recusal

Contrary to Plaintiffs' contention that Judge Peck ignored, or failed to consider, the relevant facts in evaluating the motion for recusal, Judge Peck, in his 56-page Opinion, carefully weighed Plaintiffs' asserted bases for disqualification and objectively weighed their validity, both singly and cumulatively.

a. Accepting "Teaching Fees"

Plaintiffs initially posit that a "reasonable person" would find an appearance of impropriety in Judge Peck's acceptance of "teaching fees" and travel reimbursements from predictive coding vendors. (Objection, p. 18.) As Judge Peck explained in the Opinion, the panels on which he sat at the LegalTech conference were not funded by Recommind, the vendor with whom Judge Peck is being accused of currying favor. (Opinion, p. 41.) Judge Peck justly noted:

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intimidating female attorneys who have appeared before him in this case. (Opinion p. 59). These baseless attacks hardly evidence an intent to raise the "appearance" of impartiality, but, rather, constitute express accusations of bias.

> [W]hile Recommind was one of thirty-nine sponsors and one of 186 exhibitors contributing to LegalTech's revenue . . . I had no part in approving the sponsors or exhibitors (i.e., funding for LegalTech and received no expense reimbursement or teaching fees from Recommind or LegalTech, as opposed to those companies that sponsored the panels on which I spoke.

(Opinion, p. 40.)

Moreover, ethical codes for judges encourage them to contribute to the improvement of the practice of law or the legal system through extrajudicial activities that offer opportunities to "speak, write, lecture and teach on both law-related and non legal subjects," and expressly allow judges to accept reimbursement of expenses to take advantage of such opportunities. Judicial Canon No. 4(H). As set forth in Judge Peck's Financial Disclosure Report for Calendar Year 2011, Exhibit 7 to the Declaration of Janette Wipper ("Plaintiffs' Exh."), the reimbursements he received were primarily for "transportation, lodging and meals," which are entirely acceptable under Judicial Canon No. 4.

b. Speaking Engagements

Plaintiffs maintain that Judge Peck's participation on several panels at the LegalTech conference, accompanied at two by Mr. Losey, at the time Judge Peck was considering the predictive coding decision in this case raises the specter of impropriety. Judge Peck properly found, however, that his "interest in and support for computer-assisted review in general" are supported by Canon 4 of the Code of Conduct that encourages judges to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." (Opinion, p. 41.) Judge Peck further properly found:

> Plaintiffs' argument that a judge's public support for computer-assisted review is a recusable offense would preclude judges who know the most about ediscovery in general (and computer-assisted review in particular) from presiding over any case where the use of predictive coding was an option, or would preclude those judges from speaking at CLE programs . . . . Taken further, it would preclude any judge who speaks at a CLE conference about any ediscovery subject from

> handling future cases involving ediscovery. Such a position defies logic and is inconsistent with the Code of Conduct for United States Judges.

(Opinion, p. 42.)

The Second Circuit has rejected arguments, such as Plaintiffs', that lead to the logical conclusion that any judge who has received special training or participated in the presentation of programs as to any given legal subject should be disqualified from sitting on any case in the future involving such issues. *See In re Aguinda*, 241 F.3d 194, 205 (2d Cir. 2001)(upholding denial of recusal where the judge was accused of bias due to his attendance at a seminar funded by the defendant and where the defendant's CEO was a speaker); s*ee also In re: Judy Wilborn*, 401 B.R. 848, 861-62 (S.D. Tex. 2009) (citing cases). Moreover, neither of the Defendants played, or is even alleged to have played, any role whatsoever in the sponsorship of the seminars in which Plaintiffs allege Judge Peck participated. Judge Peck received no compensation, including reimbursement of expenses, from Recommind. (Opinion, p. 7.) Although a Jackson Lewis attorney participated in some of the seminars, as did a number of other litigators, no employees or officers of either Defendant took part in the presentations. *See* Plaintiffs' Exhs. 19, & 21. [16]

In the Objection, Plaintiffs strategically seek to downplay their previously-asserted baseless claim that Judge Peck engaged in *ex parte* communications with Mr. Losey concerning this case during the course of their participation in e-Discovery conferences, requiring disqualification. Mr. Losey and Judge Peck have had a professional relationship since 2009 but have never spoken about this case. Losey Dec. ¶¶ 6-7. Their professional relationship does not warrant disqualification. First, an acquaintance between a judge and an attorney, even a

friendship between the two, is insufficient grounds for disqualification. *Parrish v. Bd. of Commissioners of the Ala. State Bar*, 524 F.2d 98, 102 (5th Cir. 1975) *cert. denied*, 425 U.S. 944, 96 S. Ct. 1685 (1976); *see also, U.S. v. Olis*, 571 F. Supp. 2d 777, 786 (S.D. Tex. 2008) ("Recusal is required only when the stated facts establish a personal relationship of such magnitude that the judge cannot be impartial.").

Second, even if Judge Peck and Mr. Losey had a close personal friendship (which they do not), the law does not require disqualification on the basis of *any* communications between a judge and a party or a party's counsel, but only those communications that involve the merits of the case. *See Parr Meadows Racing Assn., Inc.*, 5 B.R. 564, 566 (E.D.N.Y. 1980) ("ex-parte contacts are not grounds for recusal when they do not involve discussions of either disputed issues or trial strategy"); *In re Beard*, 811 F.2d 818, 829 (4th Cir. 1987) (denying writ of mandamus for recusal of a judge where the judge's communications with petitioners did not involve the merits of the litigation); *Bradley v. Milliken*, 426 F. Supp. 929, 941 (E.D. Mich. 1977) (recusal not warranted where conversations did not involve discussions of disputed facts or trial strategy). Plaintiffs have failed to set forth any facts indicating that Judge Peck and Mr. Losey discussed this case; indeed, both Judge Peck and Mr. Losey have categorically denied that they had any such discussions. As such, their professional contacts at educational seminars cannot form the basis for judicial disqualification.

Moreover, the mere fact that Mr. Losey and Judge Peck addressed generally issues of e-Discovery and predictive coding at these seminars does not mandate disqualification. It is routine for judges to appear at seminars and conferences to discuss a variety of litigation-related

[16] In addition to Mr. Losey and Judge Peck, a number of other litigators, in-house counsel and members of the (continued)

topics – use of experts, trial strategy, dispositive motions, and the like – and Plaintiffs offer no basis whatsoever upon which to conclude that this common practice should lead to recusal of any participating judge when a seminar topic arises in a case before them. For example, Judge Shira Scheindlin of the Southern District of New York was scheduled to appear at an ALI-ABA program on April 23, 2012 with private lawyers, concerning "Preservation & Production in ESI: What Does Cooperation Really Mean?" Applying Plaintiffs' view, Judge Scheindlin must recuse herself going forward when, in any case before her, issues of preservation, production and cooperation in ESI arise. Indeed, under Plaintiffs' view, all judges appearing on a panel with an attorney discussing any procedural issue in litigation (*e.g.*, how to effectively handle Rule 26(f) conferences) would have to recuse themselves because they have spoken on a panel with an attorney concerning an issue that will arise in the litigation.

c. "Public" Comments

Plaintiffs further maintain that Judge Peck's public comment that unnamed defendants must have "died and went to Heaven" to have him assigned to supervise the e-Discovery is cause for recusal.[17] Judge Peck's comment during a January 11, 2012 public panel discussion divulged no information regarding this case or the parties but rather related a humorous incident without identifying the case or commenting on his evaluation of the merits of the case. (Plaintiff's Exh. 2.) As Judge Peck set forth in the Opinion, courts routinely distinguish between comments reflecting a judge's personal philosophy and discussions of opinion regarding a particular case. (Opinion, pp. 42-43.) *See Samuel v. Univ. of Pittsburgh*, 395 F. Supp. 1275, 1278 (W.D. Penn.

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judiciary took part in the seminars offered at the January 2012 conferences at issue. *See* Plaintiff's Ex.19 & 21.

[17] Plaintiffs allege: (1) during a status conference on December 2, 2011, Judge Peck remarked to counsel for MSL that "you must have thought you died and went to Heaven when this was referred to me"; and (2) during a public panel discussion on January 11, 2012, Judge Peck repeated the above comment (without identifying the parties to (continued)

1975). *See also McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1481 (D.S.C. 1996) (citing cases) (holding that that a judge's remarks made outside of court do not provide a basis for recusal unless the movant shows actual bias against the particular party involved); *Metropolitan Opera Ass'n v. Local 100 Hotel Employees and Restaurant Employees Int'l*, 332 F. Supp 2d 667, 672 (S.D.N.Y. 2004) (finding judge's comments at a legal education program regarding electronic discovery and remarking that the movant's discovery failures were some of his "personal favorites" did not comment on the merits of the case); *In re Judy Wilborn*, 401 B.R. 848, 865 (S.D. Tex. 2009) (stating that a judge's expression of personal philosophy at a seminar was certainly permissible and citing another court's holding that "[u]nless it has been the intention of Congress that only ciphers be admitted to the federal bench . . . the expression of opinion on legal matters is certainly permitted").

Judge Peck's humorous comments during a panel discussion, expressing no opinion regarding the unidentified case before him, are not a ground for recusal under the well-established law in this Circuit.

d. Judge Peck's Rulings on Predictive Coding and Refusal to Consider an *Amicus Brief* Submitted by Plaintiffs' Purported Ethics Expert Are Not Grounds for Recusal

Plaintiffs intimate that Judge Peck's "impatience for judicial approval" of predictive coding cast a shadow on his decision to adopt much of MSL's proposed predictive coding protocol and his refusal to consider an *amicus brief*, drafted by a purported ethics expert retained and compensated by Plaintiffs. (Objection, pp. 20-21.) As Judge Peck aptly stated in the Opinion:

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the litigation), commented that he was "very biased" on the subject of predictive coding, and openly remarked about recusal as plaintiffs' "alternative to capitulation."

> [T]hese rulings "do not fall within the rarest circumstances in which they could evidence the requisite bias or appearance of partiality . . . . Disagreements or dissatisfaction with the Court's rulings is not enough to succeed on this [recusal] motion. An adversary system inherently has one side that wins and another that loses. If losses compromised the appearance of justice, this system would grind to a halt.

(Opinion, p. 55) (citing cases). According to Plaintiffs, Judge Peck's purported alleged bias boils down to his interest in and advocacy for computer-assisted review of electronic documents. (Objection, p. 21.) As set forth above, Judge Peck's participation in the critical dialogue forming future practices in electronic discovery could not be viewed by a reasonable observer as exhibiting bias either for either Defendant or against Plaintiffs. Moreover, Judge Peck's refusal to consider Plaintiffs' purported expert's *amicus brief* is justified by the well established principle that: "[A] Court has the inherent authority 'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases'." In re: Pub. Offering Sec. Lit., 174 F. Supp. 2d 61, 68 (S.D.N.Y. 2001). Judge Peck's decision not to entertain a purported amicus brief *paid for* by Plaintiffs squarely within his authority to manage the Court's calendar in an orderly and expeditious manner.

e. Judge Peck's Citations to Articles in his February 24, 2012 Opinion Was Proper

In Plaintiffs' most peculiar assault on Judge Peck, they make a somewhat puzzling claim (now relegated to a footnote) entirely devoid of any applicable legal support, that Judge Peck should recuse himself because he cited to materials outside of the record in his February 24, 2012 Opinion and Order. (Objection, p. 21 n. 40.) The "materials outside of the record" consist of two previously published articles on electronic discovery and a scholarly article from a professional journal. *Id.* Plaintiffs still fail to explain how citing secondary reference materials

in an Order has anything at all to do with the alleged appearance of bias. This claim should be disregarded as frivolous.

C. JUDGE PECK'S IN-COURT COMMENTS ARE NOT EVIDENCE OF BIAS

Judge Peck's in-courtroom comments to the parties also do not evidence bias requiring disqualification. Courtroom comments made by judges can be considered as evidence of bias sufficient to merit disqualification only if they display "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Armatullo v. Taylor*, No. 04 Civ. 5357, 2005 U.S. Dist. LEXIS 21383, at *57-58 (S.D.N.Y. Sept. 28, 2005). The comment that "you must have thought you died and went to Heaven" shows neither bias against Plaintiffs nor favor to MSL. It was obviously a light comment relating to Judge Peck's well-known expertise in predictive coding, about which Judge Peck had by then alerted the parties repeatedly, specifically by advising them twice in December 2011 to read his *Search, Forward* article. The statements made to counsel, including comments regarding Plaintiffs' "whining" to Judge Carter and his suggestion that Plaintiffs "rethink their 'scorched earth' approach," are judicial observations. It is a fact that Plaintiffs have filed numerous Rule 72 objections, seeking review of nearly all of Judge Peck's discovery rulings, and the cited comments by Judge Peck fall far short of demonstrating that it would be "impossible" for Judge Peck to be fair to Plaintiffs.

In any event, the parties have been before Judge Peck for lengthy conferences on several occasions since January 1, 2012, and, from the hundreds of transcript pages, Plaintiffs have plucked a few isolated comments out of context to allege a pervasive bias. At best, Judge Peck's comments could be attributable to irritation with Plaintiffs' failure to follow local procedure and

their indiscriminate and unrelenting disagreements with the Defendants' positions.[18] It is well-settled, however, that "[a]n occasional display of irritation . . . does not suffice to show personal bias or prejudice, whether the irritation was justified or not." *Rosen v. Sugarman*, 357 F.2d 794, 798 (2d Cir. 1966).

Judge Peck explains his comments as simply expressing frustration with Plaintiffs' ongoing intransigent behavior. (Opinion, pp. 46-47.) Moreover, Judge Peck expressed his frustration even-handedly to both sides in this case. Judge Peck warned: "I've seen many a big case in this court go a lot more smoothly than this. As I say, I cannot speak to what happened before I inherited the case, but I expect cooperation. Stop the whining and stop the sandbagging. This goes for both sides. Get along." (Opinion, p. 48.) In perhaps their most outrageous accusation, Plaintiffs accuse Judge Peck of trying to "bait and intimidate counsel's female lawyers into waiving Plaintiff's legal rights on the proportionality issue." (Opinion, p. 52.) In fact, the purported incident arose during a May 7, 2012 conference where Plaintiffs' lead counsel left the courtroom, professing that the two female associates remaining had the authority to continue the conference. Upon finding that the associates were refusing to give direct responses to his requests, Judge Peck warned:

> And if you can't agree because you don't have the authority, I suggest that that means Mr. Wittels will have to be here at every subsequent conference all day, all the time, just like we have three partners here from [MSL's counsel] Jackson Lewis. You either get some courage or get a partner here.

(Opinion, p. 53.) Plaintiffs' attempt to turn this exchange into a manifestation of gender bias is reprehensible.

[18] Moreover, it is important to note that, of Plaintiffs' appeals to either Judge Sullivan or Judge Carter, most have been decided in MSL's favor, thus demonstrating the propriety of Judge Peck's rulings in this matter.

Comments far more severe than Judge Peck's have been found insufficient to merit disqualification. *See Locascio v. U.S.*, 473 F3d 493 (2d Cir. 2007) (statement by judge during a scheduling hearing that he may institute disbarment proceedings against the defendant's counsel); *U.S. v. Fanta*, 2005 U.S. Dist. LEXIS 32843, at *5 (S.D.N.Y., Dec. 13, 2005) (judge's comments to petitioner that "I am going to look at your production with a jaundiced eye" and responding to a plea by petitioner that he was not trying to be smart: "If you are implying that I am trying to be smart, I assure you, sir that you are very near contempt."); *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 647 (S.D.N.Y. 2002) (trial judge referring to a party as a "prima donna" and commenting outside the hearing of the jury that the party's witness was "full of bologna"); *U.S. v. Antonelli*, 582 F. Supp. 880, 881 (N.D. Ill. 1984) (judge's comments during the course of judicial proceedings that the defendant was "the most viciously antisocial person who has ever come before me" and that "society has been too lenient with you up to this point").[19]

Notably, Plaintiffs also fail to cite the numerous instances in which Judge Peck has disagreed with MSL's ESI proposals. For example, it is important to note that Judge Peck **agreed** with Plaintiffs and denied MSL's initial efforts to limit the number of documents to be reviewed manually. *See* Anders Dec., Exh. 7, January 4, 2012 Tr. pp. 51:20 – 52:21.

[19] Plaintiffs' cited cases are easily distinguished. In *U.S. v. Holland*, 655 F2d 44, 45 (5th Cir. 1981) the trial judge commented to a defendant who had previously successfully appealed his conviction that the defendant had "broken faith" with the court at his first trial and stating for the record that he intended to increase the defendant's sentence, which he then did. In *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) a trial judge exhibited multiple episodes of "pique" after his opinion was reversed and remanded in favor of the petitioners. He variously accused petitioners' counsel of lacking candor and of recanting facts he told the judge on the record and, in an opinion on the motion for disqualification stated that the petitioners' conduct and that of their counsel "has been characterized by excessive contentiousness and , at times, bad faith." Finally, in *U.S. v. Offut*, 348 U.S. 11 (1954), where the issue was simply whether the judge who was "embroiled with the petitioner" should have overseen the charge against the same petitioner, involved "an intermittently continuous wrangle on an unedifying level between the two." *Id.* at 18. Judge Peck's justified admonition in his order, his humorous comment in the courtroom and his few justified expressions of impatience with Plaintiffs' inexcusable tactics are of an entirely different vein.

Accordingly, the few isolated examples of Judge Peck's frustrated statements to Plaintiffs' counsel cannot serve as the basis for recusal or disqualification.

Finally, Plaintiffs allege that Judge Peck "denied lead counsel privileges to participate by phone." (Objection, p. 8.) That he denied Ms. Wipper the opportunity to participate by telephone does not show any bias or create the appearance of bias, but demonstrates his belief that her telephone appearance was disrupting the progress in the case. This is particularly true when where Sanford Wittels & Heisler has a New York office and several attorneys in the New York office, including lead attorney Steven Wittels, have filed appearances in this case.

CONCLUSION

Plaintiffs have sought to avoid Judge Peck's discovery and other rulings by requesting his recusal without any basis in law or fact. For the foregoing reasons, MSL respectfully requests that the Court deny Plaintiffs' Objection to the Magistrate's June 15, 2012 Opinion and Order and award MSL's attorneys' fees and costs incurred in filing the opposition to this motion, together with such other and further relief as the Court may deem just and proper.

Dated: Melville, New York
July 13, 2012

Respectfully submitted,

JACKSON LEWIS LLP
ATTORNEYS FOR DEFENDANT "MSLGROUP"
58 S. Service Road, Suite 410
Melville, New York 11747
Tel.: (631) 247-4605

By: /s/
VICTORIA WOODIN CHAVEY, ESQ.
JEFFREY W. BRECHER, ESQ.
BRETT M. ANDERS, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2012, the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Southern District's Local Rules, and/or the Southern District's Rules on Electronic Service upon the following parties and participants:

Janette Wipper, Esq.
Sanford Wittels & Heisler LLP
Attorneys for Plaintiffs and the Class
555 Montgomery Street,
Suite 1206
San Francisco, CA 94111

George Stohner, Esq.
Paul C. Evans, Esq.
Morgan Lewis Bockius LLP
Attorneys For Defendant Publicis Group Sa
1701 Market Street
Philadelphia, PA 19103-2921

/s/
JEFFREY W. BRECHER

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