UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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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.

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECUSAL OR DISQUALIFICATION

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Defendant MSLGroup Americas, Inc. ("MSL") respectfully submits this memorandum of law in opposition to Plaintiffs' motion for recusal or disqualification pursuant to 28 U.S.C. § 455(a) ("Section 455(a)").

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' motion sets forth a scattershot collection of allegations, consisting of baseless innuendo and gross exaggeration, recklessly impugning the reputation of Magistrate Judge Andrew Peck.

Plaintiffs appear to have taken this imprudent course primarily because of Judge Peck's public writings on the practice of predictive coding, which uses technology to cull electronic documents for review in litigation. Not only were Judge Peck's views on e-Discovery generally, and predictive coding in particular, well-known far in advance of the rulings in question, but also Plaintiffs try to ignore the indisputable fact that they *agreed* to the use of predictive coding in this case. In any event, despite their rhetoric and vitriol, Plaintiffs assert no valid basis for the recusal or disqualification of Judge Peck.

Plaintiffs seek Judge Peck's recusal or disqualification on the following grounds: (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 sponsored by an e-Discovery vendor, Recommind; (3) Judge Peck's participation in conferences with Jackson Lewis's e-Discovery counsel, Ralph Losey; (4) Judge Peck's comment at conferences that Defendants "thought they died and went to heaven" upon discovering that Judge Peck would be ruling on their e-Discovery issues; and (5) Judge Peck's in-court comments and his Order of April 2, 2012, 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).

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 they 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]

[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.)
[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, 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 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, 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 topic also were publicized in

[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.)

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* Plfs.' Brief, p. 6, n.16. 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.

[9] *See* Anders Dec. Exh. 8, DOAR Press Release, dated February 13, 2012.
[10] *See* Anders Dec. Exh. 9.
[11] *See* Anders Dec. Exh. 10, Declaration of Ralph Losey ("Losey Dec."), dated April 26, 2012 at ¶ 6.

ARGUMENT

THE COURT SHOULD DENY PLAINTIFFS' MOTION FOR RECUSAL OR DISQUALIFICATION

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 which 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. Judge Peck's Well-Known Expertise in and Ongoing Discourse on the Topic of Predictive Coding Are Not Grounds for His Disqualification

A large portion of Plaintiffs' brief is devoted to a detailed accounting of Judge Peck's publications and activities relating to the field of predictive coding. Plaintiffs point to Judge Peck's on-going scholarship relating to the topic in a number of publications, including his 2011 article titled *Search Forward* in Law Technology News, his participation in a number of e-Discovery conferences dating back to 2010, and his receipt of Law Technology News' "Champion of Technology" award in recognition of his contributions to the e-Discovery discourse. Plfs' Br., pp. 5-6. Although Plaintiffs decry Judge Peck's advocacy for predictive

coding, his contributions to the ongoing dialogue regarding e-Discovery cannot be a basis for disqualification.

As a preliminary matter, Plaintiffs' motion is untimely. 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. (Plfs. Br., p. 6, n.16.) At the very least, Plaintiffs were or should have been on notice of Judge Peck's public statements before the November 29, 2011 Referral Order and certainly no later than December 2, 2011, when Judge Peck purportedly instructed the parties to read his article *Search Forward* to "glean his position on the issue." Plfs. Br. p. 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.

Accordingly, the motion is untimely because 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).[12] 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). The timing of Plaintiffs' motion suggests just such a scenario: Plaintiffs, aware

of Judge Peck's very public statements about predictive coding, waited for months, until after his numerous discovery rulings, to raise the issue of disqualification.[13] As such, their motion should be denied on the ground that it is untimely.

In addition to the delay in filing their motion, Plaintiffs also have failed to advance even one cogent argument as to why Judge Peck's contribution to the e-Discovery discourse should merit disqualification. 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." Judicial Code, Canon 4. 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). *See also In re: Judy Wilborn*, 401 B.R. 848, 861-62 (S.D. Tex. 2009) (citing cases).

In re Aguinda is particularly instructive. Petitioners in *Aguinda*, citizens of Ecuador and Peru who alleged that respondent, Texaco, Inc., had polluted rain forests and rivers in their countries, petitioned to have the presiding judge recuse himself in light of his attendance at an expense-paid seminar on environmental issues. The seminar was sponsored by an organization that received minor funding from Texaco, and its panel included a former Texaco CEO. 241 F.3d

[12] Indeed, Plaintiffs have now alerted Judge Carter to the fact 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 un-do 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 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.)

at 197. Petitioners in *Aguinda*, like Plaintiffs here, argued that the judge's attendance at the seminar created an appearance of partiality mandating his disqualification. *Id*. at 199. The Court rejected the petitioners' argument, holding that the judge's attendance at a seminar, on a topic that was not material to the disposition of a claim or defense in the underlying litigation, was simply too remote to create a plausible suspicion of improper influence. *Id*. at 202-03. The Court concluded:

> No reasonable person would believe that expense-paid attendance at such events could cause a judge to be partial, or to appear so, in litigation involving a minor donor – whether a party or counsel to a party – to a bar association, law school or program administering a particular seminar.

Id. at 203.

The connection between Judge Peck's attendance at e-Discovery seminars and the issues in this litigation is even more attenuated than the one existing in *Aguinda*. Most importantly, the issue of predictive coding is does not involve a substantive claim. As evidenced by Plaintiffs' Rule 72 Objection to Judge Peck's order concerning the ESI protocol, Judge Peck's e-Discovery rulings concern non-dispositive matters only. 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.[14] Judge Peck received no compensation, including reimbursement of expenses, from Reccommind.[15] Although a Jackson Lewis attorney

[14] Plaintiffs' contention is that Judge Peck should be disqualified because MSL's e-Discovery vendor is Recommind, one of the many industry sponsors of e-Discovery seminars. But there is no evidence of a relationship between Recommind and Judge Peck, nor that Judge Peck was ever paid by Recommind.

[15] Although Plaintiffs repeatedly accuse Judge Peck of receiving compensation for his participation in these seminars, they have produced no evidence of such payment. The 2010 Financial Disclosure Report for Judge Peck, attached as Plaintiffs' Exhibit CC, shows no record of compensation or reimbursement from Recommind or Defendants. Thus, although the Code of Conduct permits judges to accept reimbursement for transportation, lodging and meals, Judge Peck accepted no such reimbursements from Recommind for his attendance at the seminars in question. Judicial Code, Canon 4 (H); Order dated April 2, 2012.

participated in some of the seminars, as did a number of other litigators, none of Defendants' employees or officers took part in the presentations. *See* Plaintiffs' Exhs. C, E & F.[16] In short, Plaintiffs fail to set forth any reasonable basis for their request that Judge Peck recuse himself because of his expertise and ongoing interest in e-Discovery or his participation in professional conferences on the topic.

The case that Plaintiffs use to support their argument, *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), is readily distinguished. In that case, the district judge attended a scientific conference on a key *merits* issue in the litigation over which he was presiding – the hazards of asbestos. *Id*. at 770. The conference was partially funded by the *plaintiffs* in the ongoing litigation before the judge and the cost of the seminar was paid with proceeds from the settlement fund established for the plaintiffs, as approved by the judge in an *ex parte* conference with the plaintiffs. *Id*. at 779. The views expressed at the conference were overwhelmingly consistent with the plaintiffs' position and effectively "previewed" the plaintiffs' case for the judge. *Id*. at 781-82. *See also United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (judge disqualified for appearing on national television to make statements directly about the merits of the case currently before him). There is simply no relation between the conduct of the judges in Plaintiffs' supporting cases and Judge Peck's participation in the e-Discovery conferences where there was no discussion regarding the merits of this case. As noted above, the case has been referred to Judge Peck only for non-dispositive pre-trial issues; all dispositive motions will be decided by Judge Carter.

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

B. Judge Peck's Professional Relationship with Ralph Losey Does Not Mandate Disqualification

Plaintiffs engage in rank and irresponsible speculation to assert 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 here.

Mr. Losey and Judge Peck have had a professional relationship since 2009 and 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.").

Instead, the level of personal relationship required to call into question a judge's partiality is exemplified in the cases Plaintiffs cite in support of their motion. In *U.S. v. Murphy*, 768 F.2d 1518 (7th Cir. 1985), for example, the judge and the government's lead attorney representing one of the parties were "the best of friends," in a relationship that spanned almost fifteen years. *Id. at 1536*. Moreover, immediately after the sentencing of the defendant, the judge and lead attorney, along with their families, visited a resort in Georgia for a family vacation. *Id*. The trip had been planned before the trial and the judge had advanced the date of sentencing so he could wrap up the defendant's case before going on the vacation. *Id.*; *see also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988) (asking judge to consider recusal in situation where the senior

judiciary took part in the seminars offered at the January 2012 conferences at issue. *See* Plfs' Exhibits C, E & F.

partner in one of the law firms representing one of the litigants was the father of the judge's law clerk and where the judge gave credit to his law clerk in the opinion written on the case); *Liljeberg v. Health Servs, Acquisition Corp.*, 486 U.S. 847, 861 (1988) (motion to recuse a judge who "forgot" to inform the litigants that he was on the board of directors of a company that would financially benefit from a finding for the plaintiff); *In re Continental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990) (granting recusal of judge who accepted an offer of partnership with the law firm representing Continental approximately one month after granting Continental's motion for summary judgment and who praised Continental's president in Business Week and Wall Street Journal articles during the pendency of the action). Here, by contrast, Plaintiffs have failed to set forth any fact to establish that the relationship between Judge Peck and Mr. Losey requires disqualification. If it did, no attorney could ever appear on any panel with a judge for fear that such participation would require recusal on any case assigned to the judge.

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 fact indicating Judge Peck and Mr. Losey

discussed this case. 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 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. Judge Peck's Comments, Both In and Out of the Courtroom, Do Not Warrant Recusal

As additional muck to demonstrate purported bias, Plaintiffs cite a number of comments made by Judge Peck both at training seminars and in the courtroom. 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"; (2) during a public panel discussion on January 11, 2012, Judge Peck repeated the above comment (without

identifying the parties to the litigation), commented that he was "very biased" on the subject of predictive coding, and openly remarked about recusal as plaintiff's "alternative to capitulation;" (3) on January 31, 2012, during a video-recorded public panel, Judge Peck again related the "died and went to Heaven" comment, again without identifying the parties to the litigation; (4) in another status conference, on January 4, 2012, Judge Peck pressed MSL to prepare a revised ESI protocol quickly, but, when Attorney Brett Anders indicated that he would be away on vacation for a week beginning the next day, Judge Peck suggested that MSL enlist the assistance of Jackson Lewis's e-Discovery counsel, Ralph Losey, whom Judge Peck claimed to know "very well"; (5) in his Order dated April 2, 2012, Judge Peck suggested that Plaintiffs "rethink their 'scorched earth' approach to this litigation;" and (6) Judge Peck accused Plaintiffs of "whining" to District Judge Carter and suggested that such appeals did not "make [him] happy." (Main Brief, pp. 1-5.)[17] None of these comments evidence bias by Judge Peck on the central issues of this case and cannot serve as a basis for disqualification or recusal.

1. Judge Peck's Public Comments Cannot Rationally Be Considered Evidence of Bias

Courts in this and other circuits have consistently held 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. *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1481 (D.S.C. 1996) (citing cases). Humorous references at public seminars to unidentified cases that make no direct or indirect comment on the merits of a case, like Judge Peck's alleged seminar comments, do not require recusal or disqualification. *Metropolitan Opera Ass'n v. Local 100*

[17] Plaintiffs also make reference to a number of public comments made by Recommind in press releases and by Mr. Losey on his legal blog relating to the decision on predictive coding. (Plfs. Brief, p. 10.) Plaintiffs do not claim that Judge Peck had any involvement in or influence on these public comments. As such, they cannot possibly serve as evidence of bias on the part of Judge Peck.

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") (quoting *Samuel v. Univ. of Pittsburgh*, 395 F. Supp. 1275, 1278 (W.D. Penn. 1975)); *McBeth*, 921 F. Supp. at 1480-81 (finding judge's humorous comments regarding defense trial lawyers did not evidence a general attitude on the part of the court toward defendants and their attorneys).

2. Judge Peck's In-Court Comments Are Not Evidence of Bias

Judge Peck's in-courtroom comments to Plaintiffs 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 Defendants. It was obviously a humorous comment relating to Judge Peck's well-known expertise in predictive coding. The statements made to counsel, 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 most 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.

The parties have been before Judge Peck on several occasions since January 1, 2012 for extended conferences, and Plaintiffs have taken a few isolated comments out of context to suggest a pervasive bias. At best, Judge Peck's comments might be attributable to irritation with Plaintiffs' failure to follow local procedure and their seemingly indiscriminate and unrelenting disagreements with the Defendants' positions and with the Court's rulings.[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).

Comments for more severe than Judge Peck's have been found to be 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 (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

[18] Moreover, it is important to note that, of Plaintiff's 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.

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 the defendant's ESI proposals. *See, e.g.*, fn. 7 above. Accordingly, the few isolated examples of Judge Peck's statements to Plaintiffs' counsel cannot serve as the basis for recusal or disqualification.

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

In Plaintiffs' final assault on Judge Peck, they make a somewhat puzzling claim, 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. (Plfs.' Brief, p. 9.) The "materials outside of the record" consist of two previously published articles on electronic discovery and a scholarly article from a professional journal. (Plfs' Brief, p. 10 n. 26.) Canon 3(A)(4)(c) speaks to a judge's obtaining "the written advice of a disinterested expert on the law" only after "giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received . . ." Judicial Code, Canon 3(a)(4)(c).[20] But Plaintiffs do not

[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." Judge Peck's justified admonition in his order and his humorous comment in the courtroom are of an entirely different vein.

[20] *Edgar v. K.L.*, 93 F.3d 256 (7th Cir. 1996), cited by Plaintiffs as analogous, is hardly so. The case deals with the disqualification of a judge for holding private, ex parte meetings with a panel investigating Illinois's mental health institutions and programs and obtaining from the panel a private briefing on the merits of the case. Judge Peck is not even alleged to have had any such meetings with any experts in the instant case.

explain how citing secondary reference materials in an order has anything at all to do with obtaining the written advice of an expert. This claim should be disregarded as the "red herring" that it clearly is.

CONCLUSION

Plaintiffs have sought to soil the reputation of Judge Peck without any basis in law or fact. At best, the motion is careless; at worst, it is made for the purposes of avoiding prior decisions made by Judge Peck that Plaintiffs view as unfavorable and in retaliation for criticisms lodged at Plaintiffs' counsel for not complying with local rules. For the foregoing reasons, MSL respectfully requests that the Court deny Plaintiffs' Motion for Recusal or Disqualification 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
April 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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:

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