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,	)	Civ No. 11-CV-1279 (ALC) (AJP)
PLAINTIFFS,	)	
v.	)	
PUBLICIS GROUPE SA and MSLGROUP,	)	
DEFENDANTS.	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR RECUSAL OR DISQUALIFICATION

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Plaintiffs' recusal motion is about one thing only – the appearance of bias generated by the combination of Judge Peck's statements and conduct surrounding this case.[1] 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.[2]

JUDGE PECK'S CONDUCT CREATES AN APPEARANCE OF PARTIALITY

Judge Peck seems to have adopted a personal agenda in this case and sought to steamroll it over Plaintiffs' objections.

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. (Ex. OO, Tr. at 8)
- 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.
- 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/or other e-discovery vendors) where they espoused Defendant's views on predictive coding. 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."[3]
- Chastised and intimidated Plaintiffs for disagreeing with rulings, and characterized Plaintiffs' Rule 72 objections to his orders as "whin[ing]" that did not make him "happy."
- Stripped Plaintiffs' lead counsel Janette Wipper's telephone privileges and threatened to withdraw her *pro hac vice*, after she politely requested a written ruling and refused to waive objections.
- In response to Plaintiffs' pre-motion letter asking him to recuse himself, gave various justifications for his conduct and strongly warned Plaintiffs to "rethink their 'scorched earth' approach."

Additional instances since Plaintiffs' motion have only heightened the appearance of partiality or impropriety. In response to the motion, Judge Peck chastised and yelled at Plaintiffs' counsel and

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[1] Plaintiffs have never accused Judge Peck of actual bias or sought to impugn Judge Peck's integrity. Plaintiffs' only ground for recusal is that the facts taken together create an appearance of partiality. *See*, *e.g.*, 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988); *In re Murchison*, 349 U.S. 133, 136 (1955); *U.S. v. Amico*, 486 F.3d 764, 775-76 (2d Cir. 2007); *U.S. v. Edwardo Franco*, 885 F.2d 1002, 1005, 1010 (2d Cir. 1989); *U.S. v. Singer*, 575 F. Supp. 63, 67-68 (D. Minn. 1983).

[2] *See*, *e.g.*, *Amico*, 486 F.3d at 775-76; Doc.. 170 at 12 n.33.

[3] *See* Ex. LL E-Discovery Judges in Charlotte: Post-CLE Summary, available at http://hudsonlegalblog.com/e-discovery/e-discovery-judges-charlotte-post-cle-summary.html. Recommind, MSL's e-discovery vendor, repeated the "e-Discovery blackmail" mantra in its press releases extolling Judge Peck's "game-changing" predictive coding order. *See* Doc. 171-2, Ex. Q.

repeatedly threatened sanctions. In a conference on April 25, 2012, Judge Peck:

- Indicated Plaintiffs had already "antagonized" him and it was "a little late" to go back. (Tr. at 14)
- Stated he had a personal "interest" in recusal because Plaintiffs "attacked [his] integrity." (Tr. at 15)
- Admitted that he was "yelling" at Plaintiffs' counsel (Tr. at 30), which he did multiple times.

During the April 25 conference, Judge Peck openly disclosed a motivation behind his advocacy for predictive coding and his various one-sided pro-defendant rulings in this case.[4] Judge Peck stated that liberal discovery from corporate defendants is a sham: "that's called **blackmail** to convince the defendants to settle." (Ex. GG 4/ 25 Tr. at 9) He revealed he had no intention of allowing class Plaintiffs to take the discovery needed to prove their case and to maintain the action through class certification, dispositive motions, and trial. Judge Peck further intimated **he was waiting for Plaintiffs' "funding source" to "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. (*Id.*)

At the latest conference on May 7, almost directly after Plaintiffs' lead counsel, partner Steven Wittels, was called away (with the understanding that "proportionality" was being tabled), Judge Peck tried to bait and intimidate counsels' female lawyers into waiving Plaintiffs' legal rights on the proportionality issue. Judge Peck agreed that a particular "hot" document was relevant and should be coded as responsive, but that ruling came with a quid-pro-quo: Plaintiffs must waive their right to object to his ruling setting a hard cap on the number of documents they will get in discovery. After it became clear that Judge Peck demanded an explicit waiver, Plaintiffs refused the offer:

> Plaintiffs' Counsel: Your Honor, in that case, I can't agree.
>
> M.J. Peck: **Then it's not relevant**. (Ex. HH 5/7 Tr. at 80-88).

Judge Peck then harangued counsel for lacking the "courage" to agree. This exchange raises an

[4] These rulings include but are not limited to: Judge Peck's (1) wholesale adoption of MSL's predictive coding protocols while dismissing Plaintiffs' concerns; (2) refusal to allow class discovery and other discovery specifically ordered by Judge Sullivan; (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; (4) *sua sponte* invocation of the French blocking law to prevent the discovery of critical documents in this case, even though all other courts have held that the French law is not a bar to discovery under Rule 26; and (5) *sua sponte* decision to cap Plaintiffs' garden variety compensatory damages at $25,000 despite clear binding law to the contrary.

appearance that when Plaintiffs' counsel refused to surrender their right to object, Judge Peck abandoned his role as an impartial adjudicator and assumed the mantle of an avenger. *Id.* at 88.

Judge Peck's post-letter and post-motion statements and conduct (*see* Doc. 158; Ex.GG 4/25 Tr.; Ex. HH 5/7 Tr.) tip the balance further and require his recusal under § 455(a). *See, e.g., Amico*, supra (judge's defensive response to the motion was strong factor favoring recusal); *Alexander v. Primerica Holdings*, 10 F.3d 155,164-66 (3d Cir. 1993); *Cmwlth v. White*, 589 Pa. 642, 659-60 (2006) ("The vehement reaction of the trial court to a [recusal] motion that is reasonably meritorious is the proverbial final nail in the coffin."); *Pinnacle Ins. Co. v. Freeman*, 687 So.2d 989 (Fla. App. 1997)(judge recused after he threatened lawyer who moved to disqualify, that lawyer would "pay a price").[5]

In a recent case, Judge Sand, like Judge Carter in the Mets cap case, recused himself on facts considerably more innocuous to an outside observer. In *Spicer v. Pier Sixty*, Judge Sand ultimately concluded: "I am going to recuse myself because I think that if I don't recuse myself, my resentment about the motion being made and being made at this time may be something which would impact on my ability to be a disinterested judge in this case." (Ex. JJ, Tr., Mar. 16, 2011, esp. at 10:1-5; *see also* Ex. II, Order) As in *Spicer*, Plaintiffs have made a reasonable motion shortly after gaining knowledge of facts supporting recusal. The motion has seemingly elicited an enraged and vindictive response from Judge Peck and created an appearance of bias.

Further, in *U.S. v. Offutt*, 348 U.S. 11(1954), where the trial judge engaged in a protracted wrangle with defense counsel with "increasing personal overtones," the U.S. Supreme Court ordered

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[5] *See also, e.g., Edgar v. K.L.*, 93 F.3d 256, 261 (7th Cir. 1996) (judge's indication of an "inclination to retaliate when crossed," including comment that party requesting disqualification would be in "deep doo" if motion was denied, strongly supported recusal: "The impartiality of a judge who makes such statements may reasonably be questioned, whether or not the judge planned to carry through."); *U.S. v. Ritter*, 540 F.2d 459, 462-64 (10th Cir. 1976) (recusing under appearance standard in part because judge reacted in "caustic and overbearing manner" in response to recusal motion, including stating that the motion "impugned his integrity"); *Monroe v. Blackmon*, 946 S.W.2d 533, 538 (Tex. App. 1997) ("Active participation by a challenged judge in recusal proceedings can only lead to the judge's recusal."); *Rollins v. Baker*, 683 So.2d 1138, 1140 (Fla. App. 1996). *Cf. State v. Dean*, 127 Ohio St. 3d 140 (2010) (after denial of defendant's recusal motion, "the relationship between the judge and the defense attorneys began to deteriorate" – including where judge expressed "very serious concerns about defense counsel and the manner in which they're operating in this courtroom" and made other "accusatory and threatening comments" – ultimately mandating recusal); *Inquiry Concerning a Judge (Eriksson)*, 36 So. 3d 580, 592-93 (Fla. 2010) (finding violation of Code of Judicial Conduct when judge sought to retaliate against litigant for seeking recusal); *Isaacs v. State*, 257 Ga. 126 (1987) (adversarial posture on recusal motion "may create an antipathy which persists after the motion to recuse is denied").

retrial before a different judge. The Court stated that even when a judge is legitimately provoked:

> 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. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.

Id. at 14. And: "instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with [counsel]," scuttling the appearance of fair proceedings. *Id.* at 17.

As numerous other courts have indicated, a judge's conduct towards a party's attorneys may in certain circumstances create at least an appearance of partiality.[6]

PLAINTIFFS' RESPONSE TO MSL'S ARGUMENTS

1. Judges no longer have an obligation to sit (pages 1, 6 of MSL memo)

Congress' 1974 amendments to § 455 create an objective recusal standard designed to "promote confidence in the impartiality of the judicial process…" H.R. Rep. No. 93-1453 (1974) at 6355. By clarifying § 455, Congress sought to remove the old "duty to sit" doctrine, a subjective test which required "a judge, faced with a close question on Disqualification . . .to resolve the issue in favor of a 'duty to sit.'" *Id.* Recusal now is mandatory "wherever impartiality *might reasonably be questioned*." *Likety v. U.S.*, 510 U.S. 540, 548 (1994) (emphasis added). As argued in Plaintiffs' opening memo, close questions and doubts are resolved in favor of recusal.

2. Plaintiffs' specious "agreement" to predictive coding does not control this motion (pages 1, 2-5, 6-7)

Plaintiffs' motion is not about predictive coding *per se* but about an appearance of partiality or

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[6] *See, e.g., Ritter*, 540 F.2d at 462-64; *U.S. v. Whitman*, 209 F.3d 619, 624-26 (6th Cir. 2000); *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 832-33 (1st Cir. 1987); *Walberg v. Israel*, 766 F.2d 1071, 1077 (7th Cir. 1985) (judge "went far beyond the bounds of permissible criticism of a lawyer's tactics when he accused Clark of personal ingratitude. And he implied, or could be understood to be implying, that he was angry at the lawyer because the client was unworthy of the protracted efforts that the lawyer was making on his behalf."); *Wilson v. Cmwlth*, 272 Va. 19, 28-30 (2006); *Klinck v. Dist. Ct.*, 876 P.2d 1270, 1276-77 (Colo. 1994) (recusal demanded where judge warned attorney to keep co-counsel on "short leash" or he would "have problems in this case"); *Brewster v. Dist. Ct.*, 811 P.2d 812 (Colo. 1991); *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983); *Franco v. State*, 777 So.2d 1138, 1140(Fla. App. 2001); *Town of Islamorada, Inc. v. Overby*, 592 So.2d 774, 775 (Fla. App. 1992); *James v. City of E. Orange*, 246 N.J. Super. 554, 563-64 (N.J. App. Div. 1991); *State v. Davis*, 159 Ga. App. 537, 539-40 (1981). *See generally Rafferty v. NYNEX Corp.*, 60 F.3d 844, 848 n.3 (D.C. Cir. 1995) ("a judge's impressions of counsel…can sometimes so develop that ultimately the judge determines his impartiality may be lost"); *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988) ("Because a judge's bias or prejudice against an attorney can adversely affect the party represented by the attorney, disqualification should also be required when a judge so manifests an attitude of hostility or ill will toward an attorney that the judge's impartiality in the case can reasonably be questioned.").

impropriety that could overshadow all further proceedings.

Judge Peck has continued to push predictive coding -- both leading up to and following the motion – despite concerns that MSL's protocol could undermine Plaintiffs' ability to prove their case. In his February decision, Judge Peck dismissed Plaintiffs' objections about reliability and transparency as premature. Now that coding is starting to be implemented, Plaintiffs' fears regarding MSL's procedures and their potential to hide key documents have proven all too real. (*See, e.g.*, Ex. PP Apr. 27 letter) During the process being used to train the software, MSL marked many of the same documents both as relevant and irrelevant. Moreover, under the guise of protecting Recommind's proprietary technology, MSL has refused to provide information regarding how the software program – which will select the relevant documents provided to Plaintiffs in discharge of MSL's discovery obligations – works.

But, instead of putting the brakes on the protocol, implementing proper safeguards, or holding MSL and its attorneys accountable, Judge Peck has taken Plaintiffs to task and threatened them with unfair one-sided sanctions. He has blessed MSL's "black box" protocol, stating that he only cares about the final results; yet there is no way to measure the reliability and accuracy of the system without a transparent process. Judge Peck has seemingly determined to proceed with MSL's coding regime full speed ahead and to insulate it from criticism, and has punished Plaintiffs for objecting and seeking his recusal. Given the circumstances, a reasonable observer might entertain suspicions of a personal agenda.[7]

Moreover, MSL greatly overstates Plaintiffs' acquiescence. Both in court conferences and letters to the Court, Plaintiffs indicated their genuine reluctance to agree to predictive coding. Judge Peck made absolutely clear that Plaintiffs had no choice and should drop their protests.[8] Plaintiffs then agreed to consider predictive coding in principle but raised serious objections about MSL's proposed protocol in

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[7] Accordingly, MSL's claim that this is all just a discovery issue is unsupported. It would mean that a magistrate could rarely be recused. But, § 455(a) expressly contemplates recusal by a "magistrate… in ***any*** proceeding in which his impartiality might reasonably be questioned." *See also, e.g., Brow v. U.S. Dist. Ct.*, 121 Fed. Appx. 443, 444 (3d Cir. 2005) (both district judge and magistrate had recused themselves during discovery); *Schamp v. Shepack*, 2006 U.S. Dist. LEXIS 67344, at *3 (D. Kan. Sept. 17, 2006) ("The circumstances and grounds for recusal of a federal magistrate judge are set out in 28 U.S.C. § 455.").

[8] *See, e.g.* Ex. OO at 8, "died and went to Heaven" remark; Doc. 171-1, Ex. A to recusal motion (where Judge Peck indicates that this remark may have caused Plaintiffs to agree to computer-assisted review in principle); Doc. 58 (endorsed letter in which Plaintiffs expressed reservations about predictive coding and Judge Peck firmly advised them to reread *Search Forward*).

its entirety. Judge Peck steamrolled Plaintiffs' concerns. His public comments regarding predictive coding, in which he indicated his firm adherence to MSL's position, were directly related to his decision to implement the experimental protocol advanced by MSL without Plaintiffs' requested safeguards.

3. Plaintiffs' motion is timely (pages 7-8)

MSL contends that Plaintiffs should have been aware of the facts supporting their motion no later than December 2, 2011 and that they unfairly delayed their motion until they received adverse rulings. This is inaccurate. Plaintiffs' motion is not premised on a single comment or incident but on the totality of the circumstances, which – given Judge Peck's and defense counsel's failure to make disclosures – emerged only gradually. Plaintiffs did not begin to become aware of the relevant facts – such as (i) Judge Peck's public appearances advocating predictive coding during this case, including those together with Mr. Losey, and (ii) his repetition of the "died and went to Heaven" remark in two public panels – until the period from late February through April 2012, after they filed their Rule 72 objections.[9] After investigating, Plaintiffs promptly filed their pre-motion letter on March 28 and their motion on April 13.

This is similar to the timing of the recusal motion in *Spicer*. Judge Sand found no timeliness issue where movants learned of the factual basis for their motion on February 11, informed the court of their request on March 16, and filed their recusal motion on April 13. (Ex. II, Order) Application of the factors enunciated in *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) further counsels that the motion not be denied as untimely: (1) the case remains in its early stages; (2) granting the motion would not represent a waste of judicial resources; (3) the motion was not made after entry of judgment; and (4) Plaintiffs have acted promptly upon discovering the relevant facts.[10]

Moreover, Judge Peck's post-motion conduct is an independent ground for recusal.

4. Judge Peck's extrajudicial activities are much different than other judges' participation in educational

[9] Plaintiffs touched upon these issues, of which they were still becoming aware, in their Rule 72 reply brief on March 19, 2012. They did not learn of the second repetition of the "died and went to Heaven remark," and Judge' Peck's acknowledgment that it could require his recusal, until after Plaintiffs' pre-motion letter of March 28, 2012.

[10] In the cases cited by MSL, the parties requesting recusal "hedged their bets" by delaying their motions for lengthy periods (four years after start of trial- *IBM*; nineteen months – *Grossman*; after final judgment - *Faulkner*) and/or well after the court had fully disclosed the relevant facts which formed the basis for the motion (*Faulkner*).

panels and similar events (pages 8-10)

Plaintiffs do not question the general practice of judges appearing at educational programs. Rather, as the Second Circuit and as various judicial ethics opinions make clear, recusal is dependent upon the particular circumstances. In *Aguinda*, the Second Circuit found that recusal was not required where a judge had attended – but not spoken at a presentation – when (i) the presentation did not "relate to legal issues material to the disposition of a claim or defense in an action before [the] judge", (ii) "the funding by [defendant] of the seminar's sponsor [was] too remote or minor to appear to a reasonable person to have an influence on the judge", and (iii) "the nature of [defendant's] funding of a sponsoring organization did not create an appearance of either control or impropriety." 241 F.3d at 202-204. However, the court cautioned that circumstances where these elements were not met could give rise to an appearance of partiality requiring recusal. *See id.*, esp. at 206. *See also*, *e.g.*, Committee on Codes of Conduct Advisory Opinions No. 67 (Ex. S to Plaintiff's recusal motion), No. 87 (Ex. T), and 105 (Ex. U); Missouri Committee on Retirement, Removal and Discipline Opinion 179 (2001) (Ex. N); *In re School Asbestos Litig.*, 977 F.2d 764, 781-82 (3d Cir. 1992)

Here, Judge Peck repeatedly (i) spoke directly on the subject of a key dispute between the parties (ii) on panels with Mr. Losey (iii) during the pendency of the dispute[11] (iv) in "unbalanced" forums (*see Aguinda*) (v) sponsored by Recommind among other leading e-discovery vendors.[12]

5. Predictive coding without proper safeguards will impact the merits of this case (pages 9-10)

The proposition that a judge presiding only over discovery can never be recused is unsupported and untenable. A judge's discovery rulings have the potential to gut plaintiffs' case, particularly in employment disputes where discovery is highly asymmetrical. *See* n.7, *supra*; Doc. 170 n.2.

6. Judge Peck has created at least the appearance of improper *ex parte* contacts with Mr. Losey; thus, their extrajudicial relationship compels disqualification (pages 5, 11-13)

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[11] In contrast, Judge Scheindlin – whom MSL invokes – commented on a particular case only after it had settled. (Ex. KK).

[12] LegalTech, in particular, to an impartial public, might be seen not primarily as a forum to "contribute to the improvement of the practice of law" (MSL Opp. at 8) but as a trade show designed to promote its sponsors' – such as Recommind's – products.

MSL's argument ignores the appearance or perception standard of § 455(a).[13] Judge Peck did not merely have an outside acquaintance with Mr. Losey. He repeatedly appeared with him in public on the precise controversy pending between the parties and proceeded to rule in Mr. Losey's favor, swiftly shutting down all objections and demurrals from Plaintiffs. Hence, MSL's concern that recusal could dissuade judges from ever participating on panels with attorneys is misplaced. Here, there was not merely a chance that Mr. Losey would appear before Judge Peck in the future. Judge Peck's contacts related to "an issue of critical significance to [his] ultimate ruling" on predictive coding.[14] The fact that they may not have mentioned *da Silva Moore* by name is of no moment. MSL's citations regarding contacts completely unrelated to the case (*see* Opp. at 12) are thus distinguishable.[15]

7. Judge Peck's various judicial and extrajudicial comments, especially taken collectively, create an appearance of partiality; they do not need to be "evidence of [actual] bias" (pp 13-17)

As the old adage goes: "Three times is a pattern." Here, Judge Peck made his "died and went to Heaven remark" three times – creating the inevitable appearance that he had prejudged the issue of predictive coding and that he had bludgeoned Plaintiffs into submission. Beyond this remark, Judge Peck has made numerous other comments, prior to and after the motion, indicating hostility towards Plaintiffs and their counsel and chastising them for exercising their rights. Judge Peck just revealed that he has no intention of allowing Plaintiffs to obtain necessary discovery because he views it as "blackmail" and that he hopes Plaintiffs' funding will "run out." He has mocked, threatened, and yelled

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[13] *Cf., e.g., Roberts v. State*, 840 So.2d 962, 969 (Fla. App. 2002); *KLW v. DRP*, 131 S.W.3d 400, 405-406 (Mo. App. 2004).

[14] *Goebel v. Benton*, 830 P.2d 995, 1000 (Colo. 1992). *Cf. U.S. v. Olis*, 571 F. Supp.2d 777, 786 (S.D. Tex 2008) ("[T]here are cases where the extent of intimacy, *or other circumstances*, renders recusal necessary.")

[15] Judge Peck has also said he did not know that Mr. Losey was involved in the case or that Recommind sponsored conferences at which he espoused predictive coding. Recusal is often required under § 455(a) even when the judge is unaware of the underlying facts. *E.g. Liljeberg,* 486 U.S. at 859-67 (no *scienter* requirement); *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990) (§ 455(a) mandated the after-the-fact recusal where judge later joined law firm representing one of the litigants; at the time the judge made rulings in question, he had not sought employment at the firm and did not know it was considering him); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1523 (11th Cir. 1988). A judge "must assiduously avoid those contacts which might create even the appearance of impropriety" and has a duty to take "reasonable precautions" to avoid having "a negative effect on the confidence of the thinking public in the administration of justice." Thus, a judge must take "reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot." *E.g. Inquiry Concerning a Judge*, 788 P.2d 716, 722-723 (Alaska 1990); *Lonschein v. State Comm'n on Judicial Conduct*, 408 N.E.2d 901, 902 (N.Y. 1980); 378 N.E.2d 669, 682-83 (Mass. 1978); *Washington v. Montana Mining Props.*, 243 Mont. 509, 516 (1990).

at counsel for objecting to his rulings and for seeking his recusal.

The "died and went to Heaven," "blackmail," and "funding" statements alone could lead a neutral observer to suspect Judge Peck might harbor a biased bent which would prevent him from deciding the parties' disputes disinterestedly.[16] And his flip-floppery --first agreeing with Plaintiffs that a document was relevant and then reversing course after Plaintiffs refused to give up objections on another issue --creates the specter of naked retaliation by a vengeful jurist.

8. Judge Peck's citation to outside articles was improper (pages17-18)

Plaintiffs have marshaled authority indicating that the citation to material outside of the record and unknown to Plaintiffs – writings by Mr. Losey and other predictive coding proponents – was inappropriate. More importantly, the reliance on such sources could contribute to an impression that Judge Peck has a personal interest in this matter and/or has been subject to extrajudicial influence.

9. Plaintiffs have not (and indeed cannot) retaliated against Judge Peck for his rulings and criticisms

MSL's accusations are unfounded.

Plaintiffs have no taste for reckless mudslinging, especially at a member of the federal judiciary. After hearing rumors that Judge Peck commented upon the case in a public forum, Plaintiffs carefully investigated before raising these issues. The motion is not born of personal spite. Rather, recusal under §455(a) is about public confidence in the judiciary.

Second, especially given Judge Carter's recent orders, Plaintiffs do not anticipate that recusal will instantly wipe out predictive coding in this case and substitute manual searching in its place. Rather, Plaintiffs seek fair treatment on future controversies – such as their contentions that predictive coding is being implemented in a manner which infringes upon their legal rights. Such challenges remain open, but Judge Peck has apparently signaled that he will not be receptive to anything Plaintiffs might say, or

[16] "Recusal is appropriate when a judge expresses a personal bias concerning the outcome of the case at issue." *U.S. v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992)(*citing U.S. v. Diaz*, 797 F.2d 99, 100 (2d Cir. 1986)). *See also, e.g., Johnson v. Jefferson Cty. Bd. of Health*, 674 P.2d 952(Colo. 1984) (comments on preferred outcome); *Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996) (comments that claims were frivolous and a waste of time); *In re U.S.*, 572 F.23d 301, 311 (7th Cir. 2009) (judge not only recommended plea bargain but questioned decision to prosecute in terms that might be interpreted as critical and which could lead reasonable observer to conclude that judge was "advocating for his desired result").

will consider their contentions only if in return they waive their rights.[17] This creates the appearance that the Courtroom has turned into a haggler's bazaar or, even worse, a star-chamber proceeding. Instead of maintaining an even-handed judicial temperament, by continually making *sua sponte* pro-defense rulings and by offering unsolicited arguments to Defendants and then ruling against Plaintiffs based on these arguments, Judge Peck appears to have donned the "mantle of advocate."[18]

Third, Plaintiffs' counsel has not violated the Local Rules in this case.[19] Yet Judge Peck has persistently lambasted Plaintiffs for insignificant slights and issued or threatened disproportionate sanctions – generally for politely questioning his rulings, seeking clarification, or requesting an equal chance to be heard.[20] Such one-sided conduct only enhances the appearance of bias.[21]

CONCLUSION

Plaintiffs' motion goes far beyond petty posturing to the heart of the concerns behind § 455(a). Their motion for recusal should be granted.

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[17] *See, e.g., Irwin v. Marko*, 417 So.2d 1108 (Fla. App. 1982) (judge appeared to have prejudged issue in advance of argument); *Riverside Marine Mfrs., Inc. v. Booth*, 93 Ark. App. 48, 51-52 (2005) (appearance of closed "mindset"). *See generally In re Stuard*, 113 Ohio St.3d 1236, 1238 (2006)("To be sure, if a judge's words or actions convey the impression that the judge has developed a hostile feeling or spirit of ill will, or if the judge has reached a fixed anticipatory judgment that will prevent the judge from hearing the case with an open state of mind… then the judge should not remain on the case.")

[18] *See, e.g., U.S. v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983); *In re U.S.*, 572 F.23d at 311; *U.S. v. Craig*, 875 F. Supp. 816, 818 (S.D. Fla. 1994); *Jim's Inc. v. Willman*, 247 Nev. 430 (1995) (judge "openly invited" defendant to file summary judgment motion and "for all intents and purposes indicated how he would rule"); *Evans v. Humphrey*, 281 Ky. 254, 260-62 (1940); *Chastine v. Broome*, 629 So.2d 293 (Fla. App. 1993). *See also* n. 20, infra (describing how Judge Peck personally responded to Plaintiffs' Rule 72 objections on predictive coding and fed MSL its arguments).

[19] In a single instance, Plaintiffs technically failed to comply with Judge Peck's practices by accidentally overlooking to send him a courtesy copy of a letter to Judge Carter.

[20] For example, Judge Peck has insisted that the transcripts of his oral rulings are the "written orders" triggering Plaintiffs' time to object under Rule 72. On February 8, after Plaintiffs' counsel Janette Wipper politely asked that Judge Peck issue a written opinion clarifying a particular ruling, Judge Peck chastised her, revoked her telephone privileges, and threatened further sanctions. (Ex. EE, Tr. at 21-23) There is no local rule preventing an attorney from requesting such an opinion 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). Approximately one month later, Judge Peck issued another oral ruling (on the subject of predictive coding), forced Plaintiffs to immediately file their Rule 72 objections to the ruling, and proceeded to write a lengthy opinion (virtually a brief for the defense) addressing Plaintiffs' objections – which then formed the basis for MSL's opposition. Based on these circumstances, Judge Carter granted Plaintiffs leave to file a reply brief.

[21] *Cf., e.g., Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978) (judge disqualified for "excessive," "procedurally deficient," and "wholly unjustified" discipline against U.S. attorneys, giving rise to questions about impartiality); *Brewster*, 811 P.2d at 814 (recusal required where judge held lawyers in contempt for unsupportable reasons); *James*, 246 N.J. Super. at 563-64 (case reassigned where "judge's rebukes and aspersions were out of proportion to counsel's transgressions"); *McDonald v. McDonald*, 407 Mass. 196, 203 (1990)(even where recusal not sought by parties, judge's decision to charge attorney with disbarrable fraud on the court was unsupported and thus so biased as to require judge's disqualification).

Respectfully submitted,

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SANFORD WITTELS & HEISLER, LLP
/s/ Janette Wipper
Janette Wipper Esq.
Steven L. Wittels, Esq.
Siham Nurhussein, Esq.
Deepika Bains, Esq.
Attorneys for the Plaintiffs and the Class