JUNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL,	:	
	:	NO. 3:04CV01109 (JBA)
Plaintiffs	:	
	:	
V.	:	
	:	
	:	
JOHN DESTEFANO, ET AL	:	
	:	February 23, 2010
Defendants.		

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECUSAL

I. INTRODUCTION

The plaintiffs are back before this Court after succeeding before the United States Supreme Court in gaining an outright reversal of this Court's judgment in one of the most high-profile, widely followed and passionately debated Supreme Court cases in recent memory. These 20 firefighters have a right to feel secure in the belief that their case will proceed on remand before a judge who is absolutely neutral and impartial - and, especially in this case - dispassionate about issues as to which many are passionate: race, "diversity" v. discrimination, and the right of white males to both even-handed enforcement of our civil rights laws and fair and equal treatment in all respects by a court that presides over and manages the litigation of

their case. The plaintiffs challenged what to many has been a sacred cow – the use of Title VII so as to entitle one race to jobs and promotions at the expense of another – premised on the belief that whites, and particularly white males, cannot be - and therefore should not be considered by courts to be - "victims," and at the least that different Title VII liability and relief standards ought to apply based on what color or gender the plaintiffs are.

The plaintiffs also have the right to feel secure in the belief that this Court can withstand the temptation on remand to shape its rulings on a host of issues yet to be decided in this case so to vindicate some of the Court's own since-rejected views and enable those who provoked this dispute and were the beneficiaries of this Court's 2006 judgment to regain some of what they lost - an opportunity that has now been given to the Court by attorneys representing African-American firefighters in collateral and intervention actions. These intervenors have all but invited this Court to undermine the Supreme Court's opinion, having already made all manner of fanciful and specious distinctions between their efforts and what the Supreme Court stated should happen on the remand of this case.

Thee presiding judge in this case will determine a host of matters of importance to the plaintiffs in the remand phase of this case, including, but not limited to, whether they may proceed with their other causes of action against Mayor DeStefano and other individual defendants, the scope of their recovery, and the nature and extent of additional remedial relief due to them. In addition, the Court will have to rule on motions to be filed by the plaintiffs seeking imposition of sanctions on the intervenors and their counsel, as undoubtedly the City will argue that it should not be made to pay the fees and costs that plaintiffs incurred in connection with attempts by these intervenors to obstruct the orderly disposition of this case with multiple frivolous complaints and motions designed to interfere with and impede the grant of

remedial relief to these plaintiffs. In addition, the Court can rule - indeed it already has ruled - in a manner which influences the course of proceedings on claims and suits, filed and to be filed, by minority firefighters - leaders and members of the Firebirds Society – who have now inserted their interests into this case on remand. One collateral action has been filed and another has been promised by the President of the Firebirds, along with seven other black firefighters who seek now to impose disparate impact liability on the City of New Haven in connection with the 2003 promotional selection procedure that is the subject of this case.

Given especially the unique history of this case, marked as it was by both judicial irregularities and judicial commentary regarding those irregularities, which themselves became the story line of the case and a matter of intensive media and political discourse at the highest levels of government, the proceeding to trial and final disposition of this case must be free of any appearance of impartiality or improprieties. In sum, plaintiffs are tired of irregularities and they want no more of them. Nor do they wish to tolerate at this point even the appearance of partiality or irregularities.

This Court is not known to depart from the well-established rule that in weighing summary judgment motions, a court must construe all evidence in a light most favorable to the plaintiff, and draw all inferences in their favor as might reasonably be drawn from the evidence. A Court is not to decide disputed motivational issues. Nor is a Court to apply different Title VII standards depending on the race of the plaintiff. This Court adhered to none of those principles in its ruling granting summary judgment to the defendants. Among other things, it held that plaintiffs had no legal protectable interest in the promotions because they only had an opportunity for promotion, not a guarantee (because of the Rule of Three, among other rationales), when no disparate treatment or disparate impact suit brought by minorities over the

past decades could have survived if that were the rule of law. This Court also attributed to defendants motivations that they never asserted and indeed had explicitly disavowed in their own briefing to this court, to wit: a desire for "diversity" and concern about a lack of minority "role models." Those cited interests and goals came from this Court, not from the defendants.

This Court's ruling set in motion the events which culminated in an opinion from the United States Supreme Court which outright reversed this court's judgment, after noting that this Court "failed to adhere" to core Title VII principles – a judgment which, as Justice Alito noted, had operated to deny these firefighters their fundamental right to even-handed enforcement of this nation's civil rights laws. [1]

Ricci v. DeStefano dominated local, state and national headlines, went viral on the Web, and touched off a national debate about affirmative action, "diversity," race discrimination, and generally, the issue of race in America. It generated such intense public interest that it dominated local, state and national headlines for a sustained period of time, attracted the attention of overseas newspapers and media, and stirred American pollsters to gauge where the public stood on the case. The "New Haven 20" became poster plaintiffs in a national debate over affirmative action, the extent to which we will continue to allow race to divide us, and the extent to which

[1] Contrary to the claims of some detractors of the Supreme Court's opinion, the majority justices did not "change the law" or overrule or modify its own precedents or even those of the lower circuit courts. It was this Court's 2006 summary judgment ruling that was unprecedented, and it was based on equally unprecedented facts. Even the City of New Haven, despite multiple - indeed oversized - legal briefs to this Court and to the Second Circuit, could not cite a single case where a municipality did what New Haven did. Nor did the City or any of its numerous amici cite such a precedent in their briefs to the U.S. Supreme Court. Nor for that matter, did this Court cite a single precedent in its 2006 ruling which stands for the proposition that a municipality may, consistent with Title VII, unilaterally refuse to fill vacancies and honor the results of a civil service exam because of racially disparate scoring results. In fact the only cases this Court cited in support of its ruling not only had facts which bore no resemblance whatever to the facts of the instant case but were cases that were Congressionally overridden by the 1991 amendments to Title VII, in particular 42 U.S.C. § 2000e-2 (l), which explicitly prohibits the *post hoc* re-scoring or alteration of employment tests results for reasons of race.

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decisions like the one issued by this Court do just that.

Political commentators, analysts and academics weighed in. Chris Mathews had a knock down with a fellow liberal journalist over it. Before an audience of millions of viewers, Bill O'Reilly and Alan Colmes bet on the Supreme Court outcome – O'Reilly predicted a reversal and Colmes predicted an affirmance - the loser was to buy the other dinner at 21. Television stations and newspapers trumpeted "judgment day" – the date the Supreme Court's ruling was expected. Justice Ginsburg herself noted the importance of the case before the ruling issued. National cable networks interrupted regular programming to announce the ruling when it issued and the media descended on downtown New Haven. The plaintiffs rejoiced while a "somber" Mayor DeStefano, previously delighted by this Court's ruling in his favor, accused the nation's Supreme Court of "continual erosion of civil rights law." [2]

The public and media interest in this case took on a political dimension that reached all the way to the White House, prompting the President of the United States to speak of the *Ricci* case. The nomination of Judge Sonia Sotomayor to be the next Associate Justice only ratcheted up the attention, given Justice Sotomayor's role as a member of the appellate panel that disposed of the plaintiffs' appeal in a manner that disturbed many and which members of the U.S. Senate, one of them former federal judge himself, found shocking.

Rancorous debate over this case continues almost eight months after the Supreme Court's ruling, much of it prompted by the recent collateral actions and interventions by members and leaders of the Firebirds. In terms of public interest, *Ricci* has generated more of it than any case in recent history, save perhaps *Bush v. Gore.* The passage of time has not lessened it and one cannot possibly keep up with all the Internet commentary, academic analyses, symposia, and

[2] Apparently, the Mayor doesn't think the plaintiffs have "civil rights."

other events about "Ricci."

Of all of this pre-remand background, what is perhaps most meaningful to the recusal issue now presented to the Court, is the fact that these plaintiffs watched a national debate unfold, in legal, judicial and political circles, not just on the merits of their legal claims but on the issue of whether the lower courts treated them fairly. It is not every day that a major hot button case presenting significant statutory and constitutional issues of national import goes down a summary order black hole in one paragraph on a Friday afternoon. Just as plaintiffs would not have written an 80-page brief, had amici organizations commit their time and resources, submit an 1800 page appendix, and spend much time preparing for oral argument in New York City if they had known their case would yield a one-paragraph opinion shorter than is accorded to pro se prisoners complaining cell conditions, they do not wish to think about whether they are wasting their time arguing with this Court.

Whatever differences honest and reasonable people may have respecting the law, it is another matter entirely when the discourse concerns whether judges "buried" a case for political reasons, "swept a case under the rug" because it was a hot potato, or deliberately applied a double legal standard because of a litigant's race. And the plaintiffs saw those questions debated in connection with their case and their experience with the federal courts. Two of them spoke to it and how they felt about in nationally televised testimony before the United States Senate.

Wherever one stands on those questions, and whatever their true answers, it remains that that is what happened in this case, and that is why, now that their case is finally remanded back to this Court, the plaintiffs and their counsel wish to proceed free of concerns, suspicions, skepticism, doubts, more questions and lack of trust that the appearance of partiality breeds, even if the appearance does not match the reality. And that is why the plaintiffs now respectfully ask

this Court to recuse itself from this case.

The facts and circumstances set forth in their accompanying motion require this Court to do so because they would lead an objective person to reasonably question the impartiality of the Court and to further expect this Court to step aside at this stage of proceedings so these plaintiffs and their counsel might at last have a break from the discomforting appearances..

II. APPLICABLE PRINCIPLES AND STANDARDS

28 U.S.C. § 455 (a) provides that: "Any justice, judge or magistrate of the United States *shall* disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned." (emphases added). The standard is an objective one. Whether a judge in any given case actually harbors bias in favor of or against a party or lacks impartiality respecting the claims and legal issues presented is of no matter and is irrelevant. The statute, like the parallel provisions of the Code of Conduct for United States Judges, concerns itself with appearances, not actualities**.** 28 U.S.C. § 455(a) requires recusal when there is an appearance of bias or impartiality, whether or not impartiality exists.

This provision was added to the recusal statute in 1974 in order "to clarify and broaden the grounds for judicial disqualification," *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003) (internal quotation marks omitted), and to "promote public confidence in the integrity of the judicial process," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-860 (1988). Under § 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996); *O'Bannon v. Union Pac. R.R. Co.,* 169 F.3d 1088, 1091 (8th Cir. 1999).

As the facts and circumstances set forth in the motion demonstrate, an objective observer, aware of the facts and circumstances set forth herein, might reasonably "question" both this Court's impartiality and the propriety of its continuing as the presiding judge on remand of the case, particularly in light of the post-reversal developments discussed herein.

III. ARGUMENT

A. THIS COURT'S FORMER ATTORNEY-CLIENT RELATIONSHIP WITH THE FIREBIRDS SOCIETY IN ITS REPRESENTATIVE CAPACITY REQUIRES THIS COURT'S RECUSAL.

While the Court has already offered its views on the matter of the Firebirds, it fails to appreciate how neutral observers might view that matter, especially given the developments that have occurred on remand. Nor does the Court appear to appreciate how the plaintiffs feel about their presiding judge having been, before she joined the bench, a principle owner of a small firm that was counsel to the very organization that both instigated the events which led to this landmark case and whose President and other members now vex them on remand with not simply individual claims but "racial group" claims. It was exactly that racial group interest of that this Court's firm identified and pursued in its litigation on behalf of the Society.

1. As Counsel To The Firebirds, This Court's Former Firm Represented Interests Of All Black Firefighters In The NHFD.

The Court's observation on February 4, 2010 that none of the eight individuals who are the Tinney Intervenors were named "plaintiffs" in *New Haven Firebirds Society* ignores that her client was the Firebirds Society, an association of black firefighters in the NHFD that purports to, and does (and repeatedly in both state and federal court) represent the *interests* of all black firefighters in the NHFD, as another federal judge in this district has noted. See *The Firebird*

Society of New Haven v. New Haven Bd. of Fire Commr's, 66 F.R.D. 457, 459 (D. Conn. 1975) ("The... 'Firebirds' [is] an organization composed of *all* the black firemen in the [New Haven Fire] Department") (emphasis added).

This distinction also ignores that Gary Tinney is the President of the Firebirds Society, not just any firefighter. Tinney and at least one other of those whose motion this Court ruled on are senior enough in the NHFD so as to have been in actuality among the very individual firefighters whose interests this Court's firm was advancing at the time of its litigation. But quite aside from that, Tinney is the face and the voice of the Firebirds. He made that clear throughout the pendency of this action by his numerous press statements. The Firebirds chose to self-segregate into a racially exclusive society and to thus acialize the NHFD, much to the dismay of all other firefighters who would rather not have their department organized along such crude racial battle lines. But for the Court to say that the plaintiffs should rest easy because Gary Tinney was not named as a plaintiff in the action this Court's firm brought and prosecuted successfully is to fail to acknowledge how average people think, and how average people think is what the recusal statute directs itself to.

The Court made a distinction without a difference. Its firm could just as easily have prosecuted the "Firebirds" case in the name of one or more individuals, for all it takes to challenge a promotional practice, a perceived city charter violation, or a violation of a civil service regulation and to gain a declaratory judgment or injunction is an individual. But this Court's firm brought the action not just on behalf of individual black firemen, but on behalf of *all* black firemen in the NHFD, and represented the promotional interests and pursued the promotional aspirations of black firefighters as a group. Otherwise, why did this Court's firm represent and sue on behalf of the Firebirds Society in it *representative* capacity if not to advance

the interests of black firefighters in the NHFD as a group? That is the very mission of the Firebirds – to litigate in its representative capacity to advance the group interests of African Americans in the NHFD, which necessarily implies of course that the interests of others are presumptively contrary to those of their own members.

Indeed, the Arterton firm brought the action on behalf of the Firebirds Society - citing the association's right to do so in such representative capacity - precisely because the challenged promotional practices in that case were alleged to be race-driven, discriminatory, and contrary and injurious to the interests of black firefighters in the NHFD. Thus, the Court's reliance on, for example, *The Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982), is misplaced. In that case, the Fifth Circuit noted that the case in question involved matters that were unrelated to those the judge and his firm previously handled as counsel on behalf of one of the parties. *Id.* at 1165 ("The fact that [the judge] once represented Texaco in *unrelated matters* does not forever prevent him from sitting in a case in which Texaco is a party." (emphasis added). Here, the matters are hardly unrelated. The President and members of the Firebirds are now making the same claim that this Court's firm made on their behalf before - that the NHFD's promotional practices have a disparate impact on blacks as a racial group. The fact that the Firebirds Society itself has not appeared in the picture as a "party" is not meaningful for its President is making the same group rights claim.

In the post-remand posture of this case, the Firebirds Society, speaking usually through Tinney, has made it clear that it considers the *Ricci* judgment to undermine the gains they have made. And they have been very public about their and Tinney's role in provoking this dispute in the first place. *See, e.g.*, *Ricci v. DeStefano*, 129 S.Ct. 2658, 2686 (2009) (Alito, J., concurring) (noting Gary Tinney's involvement in the machinations to vote against list certification during

the period that the City's Civil Service Board reviewed the lists); William Kaempffer, *Racial Tension Flaring up at NHFD*, NEW HAVEN REGISTER, June 20, 2004, *available at* http://bit.ly/5hHeEi (reporting that Tinney "has held press conferences and trumpeted the views of African-American firefighters" in arguing the 2003 exams were properly discarded); Will Sullivan, *Fire Dept. Faces Charge of Bias*, YALE DAILY NEWS, Feb. 27, 2004, *available at* http://bit.ly/7FviEq (noting Tinney comments); William Kaempffer, *Judge Tosses Firefighter Bias Suit*, NEW HAVEN REGISTER, Oct. 2, 2006, *available at* http://bit.ly/79kvQ3 (noting specifically the response from the Firebirds' president); William Kaempffer, *White Firefighters File Suit Against City*, NEW HAVEN REGISTER, July 9, 2004, *available at* http://bit.ly/7XVFOv.

As the motion notes, this Court's former firm's successful litigation on behalf of the Firebirds was cited by the City's amici in briefing to the U.S. Supreme Court as an example of gains made by blacks in the NHFD that might be undermined by a reversal of this Court's judgment. Mot. at 12. Thus, the Court's reasoning that such things as the passage of time since this Court left its former firm, and the fact that her former partner did all of the work on the case for the firm does not eliminate, nor does it even mitigate, the problem of appearances. This is especially so given the current posture of the case, where the Firebirds President and Briscoe have showed up in the District Court essentially suggesting that there is a way around the Supreme Court's reversal of this Court.

2. Both the Society and Its Leaders Have A Personal Stake In The Reasoning and Outcome of This Court's Rulings on Motions To Intervene.

The post-remand efforts of leaders and members of the Firebirds to impose disparate impact liability on the city and gain remedial relief requires this court to recuse as its rulings

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might serve, indeed already have served, the interests and agenda of the Firebirds society. There can be no question that given these post-remand developments, this Court's rulings and orders, whether on motions by intervenors, or on motions and requests for remedial relief by the plaintiffs, might affect the interests of the Firebirds and the claims of its leaders and members, one way or the other. One need look no further than the transcript of proceedings in the *Briscoe* action on December 3, 2009 to understand that. *See* Motion at 17-18. Moreover, one must recognize that these intervenors are not just foreign interlopers with foreign claims but the very firefighters who personally benefitted from this Court's 2006 ruling and judgment. They are now in the District Court, on this and another docket (or will be soon according to Tinney's counsel) seeking to undermine the reversal of this Court's judgment, a reversal that did not come without criticism of this Court's handling of the summary judgment issue.

B. THE COURT'S RULING ON THE TINNEY INTERVENORS' MOTION TO STAY GAVE RISE TO AN APPEARANCE OF IMPARTIALITY AND IMPROPRIETY.

While a court's rulings rarely supply a basis for a motion for recusal, the plaintiffs' motion is based on a diverse mix of extrajudicial and judicial acts. In such case, a court's rulings are not automatically off-limits for inclusion in the analysis. "The inquiry whether a reasonable person, knowing all the relevant facts, would discern potential impropriety certainly warrants consideration of a judge's course or pattern of rulings, and also of the judge's course of conduct." *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002).

The Court's premature late-night ruling and order on the Tinney Intervenors' motion to stay, on the eve of the December 3, 2009 status hearing in *Briscoe,* by which it suggested that the judgment and the remedial rights of the *Ricci* plaintiffs and the remedial demands of Briscoe,

Tinney, could co-exist, gave rise to an appearance of impartiality.

Regardless of the bottom line "denial" by this Court of Tinney et al's motion to intervene, the Court signaled, or at least *appeared to* be signaling its view that any claims or demands for relief by such disparate impact claimants might be advanced in a separate action, do not conflict with or undermine the *Ricci* judgment, do not conflict with the remedial order issued thus far, nor would conflict with any additional remedial relief due to the *Ricci* plaintiffs. That ruling, especially given its odd timing, immediately gives rise to an appearance of impartiality and impropriety.

In plaintiffs' view, the Court's reasoning is flatly contrary to the Supreme Court's opinion and judgment, and may reasonably be viewed by objective persons as a seeming attempt to constrict the *Ricci* judgment, minimize the effect and significance of the required certification of the lists, and narrow the scope of the plaintiffs' remedial rights for the purpose of restoring in some measure the outcome of this Court's 2006 summary judgment ruling in favor of defendants and, by extension, furthering the Court's own apparent views regarding statistical disparities by giving a seeming green light to those who want a race-conscious system of promotions to close those gaps.

There was absolutely no reason for this Court to have taken up the Tinney motion on December 2. It was moot. It was but a few days old. The lists had already been certified. The plaintiffs had already been promoted. Yet, before the plaintiffs could even respond to it (and they had a right to respond to it and under the applicable rules and are afforded 21 days to do so), this Court unnecessarily ruled on that motion, and its reasoning was fashioned without this Court's conducting any proceedings whatever on the issue of what additional remedial relief is due in this case. This Court made a rather sweeping pronouncement regarding the scope of

remedial relief in this case. And on December 2, this Court had neither invited the plaintiffs to speak to the issue of remaining remedial relief, nor even held a single status conference with counsel since the date this case was remanded.

From the plaintiffs' briefing thus far, the Court at least had reason to know that plaintiffs saw their remedial needs and rights as extending beyond just promotions to remedial relief for their lost promotional opportunities. Yet this Court pronounced that any existing vacancies not filled by the *Ricci* plaintiffs are up for grabs by litigants with disparate impact claims being asserted now in respect to the 2003 selection procedure.

The timing of this Court's ruling is also problematic from the standpoint of "appearances." Most if not all neutral observers might well construe a ruling issued on that date and at that hour as one intended to influence the next morning's proceedings in *Briscoe*. Maybe it wasn't. If unintended, it still happened. Both the *Briscoe* Court and Attorney Rosen thought the order meaningful to the matter before the Court on December 3. *See* Mot. at 17-18 (recounting developments at 12-3-09 status hearing in *Briscoe* influenced by this Court's ruling); *Briscoe v. City of New Haven*, No. 09-0162, 12-3-09 Status Hearing Tr. at 3.

There may well have been another reason for this Court's issuing an order at 10:16 p.m. But, as has often been said, "context matters." *Ricci v. DeStefano*, 129 S.Ct. 2658, 2689 (2009) (Ginsburg, J., dissenting). And the context in which the Court issued that ruling is what gives rise to an appearance of impartiality.

C. THE COURT'S COMMUNICATIONS WITH ATTORNEY ROSEN NECESSITATE RECUSAL

Quite apart from Attorney Rosen's status as someone who shared this Court's attorney-client relationship with the Firebirds Society, the Court's recent disclosure of multiple

communications with Attorney Rosen regarding this case, while lacking in particulars, is enough to warrant recusal. Indeed, the plaintiffs submit that the Court's highly generalized descriptions of those communications, and its resistance to providing any particulars, only exacerbated the problem of appearances.

While the Court declined to offer particulars, it admittedly discussed with Rosen his his "litigation experience challenging the impact and validity of municipal testing," 2-4-10 Tr. at 6, having had the "occasion" to do so while together with Rosen at the Second Circuit's 2009 Judicial Conference. The Court clearly indicated that Rosen was among those with whom the Court conferred on other occasions regarding the case in terms of its status before the Supreme Court, the Court's ruling, and the consequences of the opinion.

This Court's own view of its conversations with Rosen – that they did not relate to the substance or subject matter of *Ricci* - is one that objective observers might reasonably decline to share. One of these discussions took place at a time when all were eagerly awaiting the Supreme Court's opinion in *Ricci*, and at a conference where Justice Ginsburg noted just that. It is hard to imagine how the Court's discussions with Rosen about his disparate impact challenges to civil service exams at that time can be divorced from *Ricci.*

A core subject matter of *Ricci* is municipal civil service testing and racially disparate impact - the very kind of case "involving testing" that Attorney Rosen has handled, that he himself defines as a professional mission of his, and one he desired to handle again, this time in the very context of the Ricci case on remand, and after a Supreme Court opinion that he did not like and which reversed a decision by Judge Arterton that he very much liked. Indeed, it was not very long after his conversations with this Court about *Ricci* and his own "testing" litigation experience, that Rosen managed to get a client (one he apparently denied having only a couple

months earlier), prepare and file an EEOC charge and rush into the district court with, lo and behold, a "testing case," this one notably asserting claims and demanding relief the nature of which would work to restore in key respects the very outcome this Court previously, but erroneously, thought should occur. Worse still for the all-important issue of appearances, Rosen unmistakably angled to have the *Briscoe* action transferred to this Court, first by subtle suggestion and later, by overt recommendation to the district court assigned to *Briscoe*.

It remains that both Rosen's collateral suit and his attempt to intervene in *Ricci* with a disparate impact challenge to the 2003 exams (the very subject matter of *Ricci*) were actions Rosen undertook in the wake of apparently more than one instance in which the Court spoke with Rosen regarding (what the Court described as) "the issues [that] were before the Supreme Court," "what the Supreme Court ruling said," etc. The Court's generalized characterizations of admittedly more than one conversation with Rosen about the Ricci case do not eliminate the problem of appearances, with which §455(a) concerns itself, but exacerbate it.

The Court did not claim a failure of recollection of the details. It just appeared reluctant to respond to counsel's inquires with any particulars. While it is certainly understandable that a court should find such questions "uncommon" or "irregular" as this Court put it, it remains that the Court had an opportunity to allay completely the concerns of the plaintiffs on this issue by clear, if not particularized responses, and it chose not to provide any.

D. The Court's Various Comments In Extrajudicial Speeches Would Lead One To Reasonably Question The Court's Impartiality.

Finally, this Court's speeches on the issues of race and discrimination are highly problematic**.** Particularly troubling are the Court's comments expressing ambivalence about the

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verdict successes of "reverse discrimination" plaintiffs. Mot. at 33-39. If one were to consider the flipside and envision a judge taking to a podium and expressing ambivalence over the relative success rates of African-Americans in discrimination cases, one might agree that there would be an outcry. If the Court can endeavor to understand how the plaintiffs feel about its remark, or how others might perceive it, the Court might as well understand why at this point, plaintiffs should prefer that this Court no longer preside over this case.

For all the foregoing reasons, and those set forth in the motion, the plaintiffs respectfully submit that the motion should be granted.

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C E R T I F I C A T I O N

I hereby certify that on February 23, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Karen Lee Torre