UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL.,	:	
Plaintiffs,	:	No. 04-cv-01109 (JBA)
v.	:	
JOHN DESTEFANO, ET AL.,	:	
Defendants.	:	February 23, 2010

MOTION FOR RECUSAL

Pursuant to 28 U.S.C. § 455(a), the Plaintiffs hereby move this Court to recuse itself from this case.

I. PRELIMINARY STATEMENT

This motion is predicated on cumulative, diverse facts and circumstances, including both judicial and extrajudicial conduct of the Court.[1] Under the applicable standard and viewed objectively as they must, these facts, individually and in totality, are such that the average person, fully informed of them, might reasonably question the Court's impartiality and objectivity, and might as reasonably question whether this Court is sufficiently personally detached from and dispassionate about the social issues of race, racial disparities and affirmative action that permeate this case. Post-remand developments in particular have exacerbated the appearance of a lack of impartiality, brought these concerns to the forefront, and served to foster

[1] The term "extrajudicial" refers to those matters unrelated to a ruling. As noted in the accompanying memorandum of law, while only in rare circumstances may a court's ruling(s) alone supply the basis for recusal, appellate courts have acknowledged that rulings, when accompanied by extrajudicial actions, have meaning in the recusal assessment.

the impression and appearance of impartiality. The bases for this motion are categorized below; under each category are set forth the factual particulars.

The issue presented here is not whether this Court is in fact impartial and/or harbors bias against the plaintiffs, but whether objectively a reasonable person might question this Court's impartiality. The Court's extrajudicial public statements regarding issues of race, group disparities and discrimination, its former attorney-client relationship with the New Haven Firebirds Society, and its relationship and out-of-court communications regarding the issues and subject matter of this case with an attorney who shared the Court's attorney-client relationship with the Firebirds and who has now brought both a collateral and intervention action, have given rise to troublesome and discomforting appearances in the post-remand setting of this case.

In addition, eight other black firefighters, including the President of the Firebirds (the "Tinney Intervenors") sought both to intervene in this case and to stop promotions of the plaintiffs. They have since retreated from intervention in favor of bringing a collateral action akin to that brought by Michael Briscoe. This Court's treatment of their motions added to the appearance of a lack of impartiality respecting the efforts of newcomer litigants to impose disparate impact liability on New Haven in connection with the 2003 promotional selection procedure.

Finally, other unusual conduct of the Court in respect to this case lends to the appearance that this Court lacks the necessary personal detachment from this case and the issues it involves, a distance that is required both to maintain the confidence of litigants in the Court's impartiality and to ensure the parties' and the public's perception of the Court as a disinterested and dispassionate figure, even in a case that arouses passions on all sides.

Upon considering the following facts and circumstances, including the remand posture of this case after the United States Supreme Court's opinion and outright reversal of this Court's judgment, an objective person might reasonably question whether this Court can proceed impartially and dispassionately to preside over this case, especially given the post-remand developments, to wit: already-filed and anticipated collateral actions and interventions in this case by black firefighters and members of the Firebirds Society, including the President of the Firebirds. These actions, plaintiffs maintain, amount to nothing more than attempts at legal revanche by the beneficiaries of this Court's overturned ruling.

II. PROCEDURAL BACKGROUND

Plaintiffs commenced this action on July 8, 2004. It was initially assigned to the Hon. Janet C. Hall who promptly transferred the action. The parties were given a reason. Judge Hall "recused." Dkt. #4. The Hon. Mark R. Kravitz became the presiding judge and thereafter managed the case, issuing all rulings and orders until May, 2006 when the case became ripe for disposition on the parties' cross-motions for summary judgment. On the eve of the scheduled oral argument, however, two back-to-back court notices issued. The first advised that the argument was cancelled. The second advised that the case had been "reassigned to Judge Janet Bond Arterton…" The parties were afforded no explanation for this. Dkt. ##s 103, 104.

Oral argument on the summary judgment motions was rescheduled and took place on July 17, 2006. At the conclusion of that argument, the Court directed both counsel to advise the Court in writing whether they would be agreeable to entering settlement negotiations. In compliance, plaintiffs' counsel assented, advised the Court (as did defendants), and the Court issued an order referring the parties to a Magistrate Judge for settlement purposes. Subsequently, and based on her discussions with defense counsel, plaintiffs' counsel determined that the case

could not safely settle by customary means, that is, by settlement contract between the parties. Plaintiffs' counsel alerted the Court to this development and a teleconference with the Court took place during which the Court urged plaintiff's counsel to reconsider. The Court and plaintiffs' counsel engaged at length over this issue. Although at the Court's request, plaintiffs' counsel initially agreed to participate in a settlement conference, she changed her mind upon concluding that this case could not safely be settled by voluntary settlement contract between the parties as there would be in such event an order dismissing the action with no liability judgment, leaving the plaintiffs too vulnerable in the event the City were sued for entering into such contract, and any relief due to plaintiffs per a contract subject to potentially unending uncertainty.

Plaintiffs' counsel advised the Court of the following: 1) that the only available means of resolving the case was by consent decree and judgment, a vehicle that plaintiffs' counsel would not consider; 2) under applicable law as counsel understood it, the Court could only approve a consent decree after providing public notice, conducting a public hearing, and inviting and permitting non-parties (and their counsel) entrance into the case for the purpose of objecting and offering evidence in opposition to any such decree. As plaintiffs' counsel made clear in a post-conference follow-up letter to the Court, she would not voluntarily permit outside individuals and organizations to enter the case at its end stage, multiply the proceedings and perhaps ignite satellite litigation. Counsel added her view that such a development would invite mischief, that this was an ideologically charged case and thus "heightens the risk of transgressions of applicable principles of standing and law." Letter from Attorney Karen Lee Torre to Hon. Janet Bond Arterton, July 27, 2006. (Exh. 1)

The aforesaid conference, marked by tension between the Court and an agitated plaintiff's counsel who felt over-pressed by the Court, was not recorded. It was the only

conference in this case that was not recorded. Upon plaintiffs' counsel's refusal to consider entering into a consent decree to be supervised by this Court, the Court proceeded thereafter to consider and dispose of the cross-motions for summary judgment.

On September 29, 2006 the Court denied plaintiffs' motion for summary judgment, granted summary judgment to defendants and dismissed the case in its entirety. In so doing, the Court characterized the subject exams as presumptively "flawed" based solely on the failure of African-American applicants, as a group, to pass and achieve performance scores in parity with Whites. The Court further attributed to city officials motivations for their actions (to wit: a desire for "diversity" and minority "role models") that defendants never asserted and indeed had explicitly disavowed in their written submissions to the Court. Left undisturbed, this Court's ruling would have: 1) allowed the City to keep the vacancies open and to administer a new promotional process; 2) forced the successful candidates to endure another grueling competition; and 3) forced the plaintiffs, not the City, to bear the expense of that decision, as the City never offered to reimburse plaintiffs for the monetary losses they incurred in preparing for a competition in reliance on the City's (and the law's) promise that merit, not race, would govern who gets promoted.

In short, this Court's judgment would have permitted the City to redo the promotional competition with the admitted aim of awarding a greater number of the limited vacancies to blacks and decreasing the number of whites to be promoted. Now that this Court's ruling and judgment have been reversed, those who stood to benefit it from it are, and for the first time on remand, directly and indirectly inserting themselves into this case with collateral and intervention actions designed to recapture some or all of what they gained by this Court's 2006 ruling.

III. SUMMARY OF THE GROUNDS FOR THE MOTION

A. Extrajudicial Matter and Acts

1. This Court had a former attorney-client relationship with the New Haven Firebirds Society as its former firm, while this Court was a principle shareholder of it, represented the Firebirds in its claimed representational capacity – that is, as an entity representing the employment-related interests of all black firefighters in the New Haven Fire Department ("NHFD"). The firm commenced a years-long litigation which concerned issues very close to those in the instant case – the NHFD's promotional practices and the role that race plays in them. The Firebirds, in particular its leaders, were the principle instigators behind the City actions challenged in this case.

Upon the U.S. Supreme Court's grant of certiorari in this case, the Firebirds' organization mobilized to launch a public relations campaign in support of this Court's dismissal of this action, and later submitted an amicus brief to the U.S. Supreme Court defending the City's actions and this Court's opinion holding the City's actions lawful and appropriate. On remand of this case after the reversal of this Court's judgment, the President of the Firebirds, Gary Tinney, and seven other black firefighters moved to intervene in this case with a complaint challenging the subject exams on racially disparate impact grounds, and seeking to block the promotions of the plaintiffs. They are represented by the same IABPFF attorneys who authored the amicus brief supporting the City, and additionally by local counsel who himself was counsel to the Firebirds in the very same litigation in which this Court's former firm represented the Firebirds.

2. The Court engaged in out-of-court, off-the-record communications regarding this case, its legal issues and the outcome and consequences of the U.S. Supreme Court's reversal of this Court's judgment with an attorney (David N. Rosen) who, not long thereafter, brought a disparate impact suit challenging the subject exams and also moved to intervene in this case with a complaint that seeks to invalidate the subject 2003 promotional selection procedures, and which demands equitable relief that is akin to the very outcome desired and gained by the City and the Firebirds organization through this Court's 2006 ruling. Mr. Rosen is an attorney with whom the Court has a friendly relationship, and whom the Court has repeatedly solicited to provide pro bono services in aid of this Court's management of its pro se cases, even after the judges of this Court suspended and superseded the local rule that permitted such direct solicitations of attorneys by judges. Rosen is well known as: a) an attorney who shared this Court's former firm's attorney-client relationship with and advocacy for the interests and agenda of the New Haven Firebirds Society and its members; b) a committed and partisan advocate for the special interests of black firefighters adverse to the interests of all other NHFD firefighters of whatever race or ethnicity; c) a vocal and public supporter of this Court's since-reversed ruling and judgment against the plaintiffs.

During the period in which Attorney Rosen discussed the *Ricci* case (in whatever terms) with this Court, he was also communicating directly with plaintiffs' counsel in an effort to gain detailed information from her regarding the validity of the subject exams while both representing to her that his interest in *Ricci* was purely academic and assuring her that he was not acting as any person's attorney. In these circumstances where Rosen's collateral and intervention actions as counsel for Michael Briscoe came on the heels of whatever discussions he had with this Court, a reasonable observer would fairly question whether Attorney Rosen thus felt free, if not

encouraged or emboldened, to initiate his actions in the expectation that the Court would be protective even if his actions were patently frivolous and would subject any other attorney to sanctions.

3. This Court's responses to inquiries by plaintiffs' counsel for disclosure of any communications it had with Attorney Rosen regarding *Ricci* or its subject matter were lacking in particularity, despite plaintiffs' counsel's request that the Court provide some details. The Court's reluctance to divulge any particulars and its insistence on providing only generalized and conclusory statements regarding the content of its multiple discussions with Attorney Rosen would lead an objective person to question both this Court's impartiality and the propriety of is conduct.

4. This Court's extrajudicial remarks on the issue of race, racial disparities, race/gender discrimination, and so-called "reverse discrimination" cases, delivered to audiences largely aligned with special interest groups favoring racial and gender preferences, would lead a reasonable person to question whether the Court holds strongly held personal beliefs on matters at the core of this case that inhibit its ability to: a) apply the law to the plaintiffs' remaining claims in a neutral and even-handed manner; b) neutrally and correctly dispose of post-remand intervention and other motions brought by minority firefighters; and c) impartially and dispassionately rule on motions by the plaintiffs for court imposition of sanctions on the various attempted intervenors and their counsel for improper filings and multiplication of the proceedings and expenses of this case.

5. This Court's travel to Washington D.C. to attend the oral argument in this case before the United States Supreme Court, together with this Court's disclosure of its attendance in Chicago, the day before that argument, at a seminar held at Northwestern University Law

School, a subject matter of which was learning means by which one might "infer the winner" of a Supreme Court case based on the questions posed by Justices at oral argument. While the Court has explained that it was drawn to Chicago by a seminar on corporate criminal liability, and added that it cannot remember what else was discussed at the event, it remains that appearances, not actualities are what governs the recusal assessment, and this Court's required seminar disclosure form indicates attendance at the seminar in which the "infer the winner" topic was on the published agenda, and the date (April 21, 2009) of this Court's attendance.

6. This Court's unusual involvement in urging counsel to settle the case and its continued pressing of plaintiffs' counsel to enter into negotiations toward a consent decree judgment after plaintiffs' counsel repeatedly declined and made it clear to the Court that she wished not to go down that path.

B. Related Judicial Acts

Quite apart from the Court's controversial ruling dismissing this action entirely, the Court's pattern of judicial acts on remand is such that objective persons might reasonably question the Court's impartiality. These acts include:

1. The Court's issuance of a remedial order despite an extant motion request from plaintiffs' counsel for a status conference with the Court before it issued such an order, in which plaintiffs' counsel advised that she wished to address and discuss with the Court the fashioning of any remedial order before it issues. The Court ignored the motion and issued the subject order (thus rending the motion moot), then denied the motion for a status conference as "moot."

2. This Court's proceeding to consider and rule in substance on a "motion to stay" filed by the President of the Firebirds and others (the "Tinney Movants"). The Tinney movants sought to stay the City's compliance with the remedial order of the Court when the City had

already fully complied with that order. The Court proceeded nonetheless to take up the motion and issue a ruling on it at 10:30 at night, less than 5 waking hours before Attorney Rosen and counsel for New Haven were scheduled to appear and argue before the Hon. Charles S. Haight at a status hearing in *Briscoe v. City of New Haven*, and at which Attorney Rosen construed the Court's ruling on the Tinney motion as a basis on which the Court should permit him to proceed with discovery and expedited litigation of the *Briscoe* action.

3. This Court's act of ignoring, for an extended period of time, plaintiffs' counsel's request for a status conference with the Court for the stated purpose of making inquiry of the Court needed to ascertain and assess certain grounds for this motion for recusal.

IV. FACTUAL GROUNDS FOR THE MOTION

A. The Appearance On Remand Of The President And Members of the Firebirds.

As the record in this case demonstrates, leaders of the Firebirds organization were the principle instigators behind the City's unprecedented act of refusing to certify the promotional lists. Immediately upon receiving both exams' score results, the City's chief administrative officer - defendant Karen Dubois Walton - arranged for and had a private meeting at City Hall with Gary Tinney and certain other members of the Firebirds at which these individuals learned that they would not be promoted if the City certified the eligible lists and discussed with Dubois-Walton the City's response to those results. Dubois-Walton did not seek out or meet with non-minority firefighters. Many, including the plaintiffs, considered this to have been a cue to the Firebirds. *See, e.g.,* Aaron Rodriquez, "*Hispanic Organization Backs New Haven's White Firefighters*," HISPANIC ISSUES, June 13, 2009. (Exh. 2). What happened after that is well-known history. The Firebirds Society is the New Haven Chapter of the International Association

of Black Professional Firefighters ("IABPFF"). Gary Tinney is President of the Firebirds and sits on the IABPFF's executive board. *See* Executive Board, Int'l Ass'n of Black Prof'l Firefighters, http://www.iabpffner.org/eboard.htm (last visited Feb. 21, 2010). Together with IABPFF regional officers, Tinney lobbied city officials to scuttle the exam results, insisting the exams were flawed because blacks as a group did not pass or perform in parity with whites, a proposition this Court embraced in its unprecedented summary judgment ruling in which it characterized both promotional exams as "presumptively flawed" based solely on their demographic results.

This action proceeded from July, 2004 until late September of 2006 when it went to final judgment without any interventions by non-parties or attempts to intervene. In May of 2006, when the action was transferred to the docket of this Court, discovery had long closed, and the case was ripe for final disposition on the parties' cross-motions for summary judgment. When the U.S. Supreme Court granted certiorari, however, Tinney, his Firebirds Society, and its parent, the IABPFF, considered this development a threat to their interests and thus mobilized, organized rallies, held a media conference at the NAACP's headquarters (shared by the Firebirds) in New Haven, and engaged a professional public relations firm to launch a national media campaign against the *Ricci* plaintiffs' position. IABPFF counsel Dennis Thompson and his partner Christy Bishop, travelled from Ohio to attend the conference. Thompson and Bishop filed an amicus brief with the U.S. Supreme Court on behalf of the IABPFF in support of the defendants and this Court's summary judgment for the City, a judgment which the IABPFF considered as advancing its organizational race-based agenda. Br. of Amici Curiae Int'l Ass'n Black Prof'l Firefighters et al., *Ricci v. DeStefano*, Nos. 07-1428 & 08-328 (U.S. Mar. 25, 2009).

The NAACP also filed an amicus brief supporting the City and, in urging an affirmance of this Court's judgment, cited this Court's former firm's own successful litigation "challeng[ing] discrimination against black and Hispanic firefighters in promotions," and noted the case involved a claim that the challenged NHFD practice led to disproportionate promotions of "white individuals…". The NAACP also noted Mr. Rosen's earlier civil action on behalf of the Firebirds. *See* Br. of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc., Nos. 07-1428 & 08-328 (U.S. Mar. 25, 2009) at pp. 15-16 (citing and discussing *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs.,* 593 A. 2d 1383 (Conn. 1991); *id.* 630 A. 2d 131 (Conn. App. Ct. 1993), and *Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs,* 66 F.R.D. 457 (D. Conn. 1975). Like the IABPFF, the NAACP considered *Ricci* a threat to the gains won by black firefighters as a result of those very cases brought by the Rosen firm and this Court's former firm while this Court was a principal owner of that firm.

As plaintiffs' counsel laid out at the January 27, 2010 teleconference with this Court, in the wake of developments in this case that occurred after the Supreme Court reversed this Court's judgment, she visited New Haven Superior Court to examine the file in *New Haven Firebird Soc'y v. Bd. of Fire Comm'rs.* and noted the following. The firm of Garrison, Kahn, Silbert & Arterton (the "Arterton firm"), counsel to the New Haven Firebird Society, brought the action in 1989.[2] In apparent compliance with a court order and state court practice rules, the Arterton firm sent out notices to numerous white firefighters in the NHFD advising that their employment interests, indeed their jobs, may be adversely affected by the action. Among those so notified was the father of William Gambardella, a plaintiff in the instant case, and apparently

[2] The Arterton firm was a small one, having at the time but 5-6 lawyers. It remains today a small firm with five partners and one associate. *See* http://www.garrisonlaw.com/index.php (last visited Feb. 20,2009). This Court was at the time a partner and principle shareholder of the firm.

the plaintiff himself although the plaintiff did not lose his job as a result of the judgment gained by this Court's firm.

White firefighters in the NHFD, constituting themselves as "Firefighters for Fairness and Equality, Inc.," intervened in the Firebirds action. For reasons not apparent in the file, the action was at some point transferred from state court to this Court, in particular to the late U.S. District Judge Robert C. Zampano.[3] For equally unapparent reasons, the action was eventually transferred by Judge Zampano back to the Superior Court. The Firebirds case went up and down the appellate line, twice, and the Arterton firm succeeded in gaining a reversal of the lower court's dismissal of the action. In the end, judgment entered in favor of the Arterton firm's clients and as a result of the remedial relief gained in that case, numerous white firefighters were ousted from their offices, their promotions having been declared null and void by the Superior Court. But the litigation did not end. At a later point, (March, 1998) Attorney Martyn Philpot filed an appearance on behalf of the plaintiffs in the case and it continued for at least another five years as pleadings continued in 2003. *See* 1-27-10 Tr. at pp. 14. In the Spring of 1995, this Court commenced service as a U.S. District Judge.

After the U.S. Supreme Court's opinion and reversal of this Court's judgment was announced, Gary Tinney, the Firebirds President, called a press conference at which he criticized the Supreme Court's decision, vowed to "fight," insisted "it's not over" and that "Ricci won't stop us," and suggested he and other Firebirds might sue over the 2003 exams notwithstanding

[3] Presumably because Judge Zampano presided over the settlement agreement providing for racial quotas in the Firebirds action brought by Attorney David N. Rosen.

the rendition for judgment in plaintiffs' failure. Exh. 3; see also *"New Haven Firebirds: 'It's Not Over'"*, FIREFIGHTER NATION, July 1, 2009, reprint from *NEW HAVEN REGISTER*.[4]

Firebirds/IABPFF counsel Dennis Thompson (representing the Tinney Intervenors in this case) took to the media stating that the *Ricci* plaintiffs should understand that their win at the Supreme Court was only "round 3" of a "15-round fight," and "[y]ou don't decide who won in Round 3." John Christoffersen, "*Promotion Day Arrives for White Conn. Firefighters.*" ASSOCIATED PRESS, Dec. 3, 2009.[5]

Consistent with their attorney's promise, and as if life isn't short enough, in November 2009, Gary Tinney, who failed the Captain's exam entirely, and seven other black firefighters who also unsuccessfully competed for promotion to Lieutenant, moved to intervene in this action. Their filings were deemed defective on several counts by the Clerk and were sent over to chambers for this Court's signature on an order of rejection.[6] On November, 16, 2009, the "Tinney Intervenors" again filed a motion to intervene in this action and an accompanying complaint challenging the 2003 exams as racially discriminatory. Dkt. #158. They are represented by Attorneys Thompson and Bishop, appearing *pro hac vice*, and also by Martyn Philpot, the same attorney who represented the Firebirds in the aforesaid litigation along with the Arterton firm.

B. THE INITIAL REMEDIAL ORDER AND THE COURT'S RULING ON THE TINNEY INTERVENORS' MOTION TO STAY.

[4] Accessible at: http://www.firefighternation.com/forum/topics/new-haven-firebirds-its-not?page=1&commentId=889755%3AComment%3A4154796&x=1#889755Comment4154796

[5] Available at: http://abcnews.go.com/US/wireStory?id=9298638.

[6] Plaintiffs' counsel was advised by the Clerk's office that those initial filings remained in chambers and awaited this Court's signature on an order rejecting those filings. Despite multiple inquiries to the Clerk's office, plaintiffs' counsel has been unable to secure a copy of such order or determine the status of this Court's disposition of those filings.

Upon the remand of this case, the Court conducted a "scheduling conference"[7] at which the parties' counsel expressed agreement that promotions should be made right away and further, that there were 14 plaintiffs whose entitlement to promotion was not disputed by the City. [8] Accordingly, the parties were to submit either a joint stipulation to an order of such initial relief or separate proposals. The parties ended up submitting separate proposals as the City's included ambiguous language the plaintiffs considered potentially problematic. Given this, plaintiffs' counsel twice advised the Court that she desired a status conference for the stated purposes of: 1) addressing with the Court its plans to implement remedial relief; and 2) gaining clarification from the City regarding its intended use of the certified lists. Dkt. ##s 160, 167.

The Court ignored plaintiffs' counsel's request for a status conference, proceeded to issue an order of remedial relief without further contact with plaintiffs' counsel, and thereafter issued a brief order "finding as moot" plaintiffs' motion for a status conference. Dkt. #169. In its brief order, the Court directed the City to certify the lists and promote the 14 plaintiffs whose promotions were undisputed. Dkt. # 168. On November 30, 2009, Tinney et al. filed a motion to stay promotions. Dkt. #170. Their motion did not cite any rule of civil procedure or other authority which authorizes such a motion by a non-party. On December 1, 2009 the City promoted the plaintiffs after certifying both promotional lists, and thus fully complied with the remedial order.

In the meanwhile, counsel in *Briscoe* were in dispute over how the Court should proceed in that case. The City wished to stay discovery and proceedings while Attorney Rosen wished to proceed forthwith with discovery, gain copies of the subject exams and distribute them to his

[7] The Court issued a notice which the parties' counsel received electronically. Thereafter, chambers emailed counsel reminding them that this was to be a scheduling conference and thus status reports would not be required.

[8] At that conference, this Court had in its possession a copy of a letter from Attorney David N. Rosen directed to the City regarding his demands in the *Briscoe* action.

hired expert(s). The City contemplated filing a motion to dismiss the Briscoe action, and further urged the Court to stay proceedings in the case and any discovery by Attorney Rosen, citing *Briscoe's* conflict with the Ricci judgment and remedial proceedings. A status hearing in *Briscoe* was scheduled for the morning of December 3, 2009. *See* No. 09-01642, Dkt. #18.

Late in the evening before that hearing in *Briscoe* - at 10:16 p.m. on December 2 - this Court issued a ruling on the Tinney motion, despite the fact that it was moot. The motion was but two days old, and the parties had not yet responded to it as they are permitted 21 days to do so under this District's local rules.[9] At the time this Court did this, it had conducted no status conferences in this case, had held no evidentiary or other hearings on the issue of the nature and scope of remedial relief, and had not even called for briefing or any advisements by the parties respecting their position on the nature and scope of equitable remedial relief which the plaintiffs can and will seek, and to which they might be entitled, beyond the initial order of promotions for the 14 individuals. Indeed, as before noted, the Court denied plaintiffs' November 17, 2009 motion for a status conference to address the Court's fashioning of the remedial relief order, declaring the motion "moot." In fact, it was the Court's decision to proceed to issue a remedial relief order before hearing from plaintiffs' counsel regarding her stated concerns that rendered it moot. This Court used the non-parties moot motion as a vehicle to express its views regarding the scope of equitable relief remaining to be considered in this case.

The Court opined that the appellate mandate "required remedial promotion of eligible plaintiffs…", and that the "remaining *limited scope* of this case is unrelated to any other

[9] Had plaintiffs been afforded their procedural right to respond to that motion they would have, among other grounds for objection, asserted that the Tinney motion was not only moot but an improper filing by a non-party and thus entitled to no substantive consideration on that basis alone. While Fed. R. Civ. Pro. 24 obviously permits a non-party to file a "motion," it is for the purpose of seeking party status. The Tinney movants were not parties; at the time they had a pending motion to intervene and gain status as parties. Moreover, if the Court were to offer reasons beyond that, plaintiffs, if they had been allowed to oppose that motion, would have insisted it be denied because the U.S. Supreme Court made it clear that the City could not, on remand, be held liable for disparate impact discrimination in connection with the 2003 exams, so nothing else matters.

promotions…." Ruling, Dkt. # 175 at 1 (emphasis added). Referencing its remedial order, the Court emphasized that it "made no mention of and has no impact or effect on any other *potential* promotions," *Id.* at 2 (emphasis added), and added its view that *"[w]hether* [Tinney et al.] could demonstrate the City's liability for a disparate impact of the 2003 examination process in violation of Title VII, and hence entitlement to equitable relief, are questions beyond the ken of what remains to be addressed in this case." *Id.*

Taking things a step further, the Court stated that the claims raised by Tinney et al. are "directed to vacancies in the Lieutenant and Captain ranks of the NHFD remaining *after* the City makes the remedial promotions ordered. Any disparate-impact challenge to the City's plans for any remaining vacancies is not a matter within the remaining scope of this case." *Id.* at 3 (emphasis in original). The Court concluded its ruling by repeating and emphasizing once again that "legal challenges to any other promotions fall outside the remaining scope of this case ..." *Id.*

The plaintiffs contend with many of the Court's statements in its ruling and were immediately concerned that it would be construed by Attorney Rosen as an expression of this Court's opinion that his action could and should proceed. Plaintiffs' concern was borne out. The Court's opinion on these matters was seized upon by Attorney Rosen. When the status hearing in *Briscoe* commenced the next morning, this Court's ruling, issued at 10:16 p.m. the night before, was in hand and cited by Attorney Rosen as grounds for the *Briscoe* Court to reject the City's request for a stay of proceedings and to allow Rosen to proceed forthwith with discovery and other activity. The *Briscoe* Court also had it in hand and, upon commencing the status hearing, stated the following:

> "Well, I think it's fair to say that something has now happened in the Ricci case, to quote the late Senator McCarthy. I hold here in my hand, a collection of documents generated principally by the Ricci case, the most recent one being

> Judge Arterton's ruling and order which, according to the document before me, was issued on or about 10:00 o'clock last night…."

Briscoe v. City of New Haven, #09-01642, 12-3-09 Status Hearing Tr. at 3.

Although adding that it wished not to make any unseemly predictions of what Judge Arterton would do with Briscoe's and others' motions to intervene in *Ricci*, the *Briscoe* Court did suppose that by her ruling of the night before, "[Judge Arterton] may [] have sent a signal as to what she might do" in regard to pending motions to intervene in *Ricci*. *Id.* at 5.

C. Facts Regarding Attorney Rosen

Before the firm of Garrison, Kahn, Silbert & Arterton (the "Arterton firm") became counsel to the Firebirds, Attorney David N. Rosen, of David N. Rosen & Associates,[10] represented the Firebirds, also in litigation challenging the NHFD's promotional practices as unfair to black firefighters.[11] The following events are among those which led plaintiffs' counsel to make inquiry of this Court regarding whether it had any communications with Mr. Rosen regarding *Ricci* or the subject matter of *Ricci.*[12].

In 2004, in the midst of local media coverage of the dispute over the exams, plaintiffs' counsel telephoned Mr. Rosen. Before even disclosing the purpose of the call or before any conversation of substance took place, Mr. Rosen abruptly cut off plaintiffs' counsel. Assuming that she sought to speak with him about the *Ricci* matter, Rosen advised counsel that he had been

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[10] Attorney Rosen's firm stationary does not identify his "associates." Nor does his firm's website, which is not operational and has advised for many months that it remains "under construction."

[11] *See Firebird Society of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs,* 66 F.R.D 457 (D.Conn.). Note the Garrison firm represented the "New Haven Firebird Society." The two are one and the same. The undersigned can find no evidence of an incorporated entity. The "Firebirds" appears to be a society or association, as pleaded by the Arterton firm in its litigation on behalf of the Society. Attorney Rosen was never made to prove his client's claims for New Haven officials in that case capitulated to a consent decree and quota hiring scheme, and white firefighters who sought to challenge the agreement reached by the parties were denied intervention. Thus, there was no opposition in that case.

[12] A summary description of these events was given to the Court during the January 27, 2009 teleconference.

"contacted" by black firefighters for counsel in the matter and thus could not and would not speak to her at all about the case because he had a conflict. The call ended immediately.

In late April of 2009, after the U.S. Supreme Court granted certiorari and heard oral argument in *Ricci,* Attorney Rosen became active, expressing in one forum or another his support for this Court's 2006 summary judgment ruling. Rosen published his opinions in a forum piece in the Hartford Courant. Taking note of prior litigation against the NHFD (brought by the Firebirds), Rosen believed that *Ricci* threatened to "reverse all the progress" that he thinks he and others achieved. Rosen approved of and supported this Court's summary judgment ruling against the *Ricci* plaintiffs and hoped that judgment would be affirmed. Noting the *Ricci* plaintiffs "may well win," Rosen attributed that prospect to a Supreme Court he described as "increasingly hostile" to governmental racial preferences.[13]

Although, according to plaintiffs' counsel, Rosen was never active in the Connecticut Employment Lawyers Association ("CELA"),[14] He used the CELA list-serve to alert members about and to invite them to read his *Courant* opinion piece. Evidently considering himself to be a *Ricci* "junkie," Rosen provided CELA members a link to the transcript of the oral argument before the Supreme Court, and invited those who were "junkies" of the case to read it. Exh. 4. On June 9, 2009, as the parties awaited an imminent decision from the Supreme Court, Rosen wrote directly to plaintiffs' counsel. Rosen stated he had "been thinking about *Ricci*…" and that he was "interested, based on testing cases I've done in the past, in information that isn't in the

[13] Available at: http://www.courant.com/news/opinion/commentary/hc-commentaryrosen0426.artapr26,0,393519.story.

[14] As plaintiffs' counsel summarized for this Court on February 27, 2010, she has been active in CELA since the late 1980's, attending throughout these years countless of CELA's monthly dinner meetings at which members discuss employment law, pending cases, and otherwise aid each other. She has over the years attended regional and national conventions and seminars sponsored by CELA and its parent, the National Association of Employment Lawyers ("NELA"), and also been a presenter at several of these events. As she stated, she cannot recall Mr. Rosen being present at any of these events or dinner meetings, certainly not in recent years, although Rosen may have been a nominal member of CELA.

materials I've seen – at least, I haven't identified the information." Rosen proceeded to lay out a series of detailed interrogatory-like questions to plaintiffs' counsel about the subject exams, using the nomenclature of civil service testing professionals. Rosen sought information regarding such matters as "the form of" the questions on the exams' oral assessment phase, "score distribution" data, "essential and critical tasks," how the "link between given questions and the essential and critical tasks was established," and information about the independent reviewers used by the testing consultants to establish the job-relatedness of the exam questions, and other information about their review process. Exh. 5.

Plaintiffs' counsel responded by noting the amount of detail Rosen sought and the time it would take her to provide it all. More importantly, she pointedly asked Rosen: "what is your interest in knowing all this?" Rosen replied as follows:

> "I'm trying to figure the case out, *not because I'm anybody's lawyer – I'm not*. But as it turns out your case is a big deal in American life and deeply involves how I spent 20 years of my career. Whatever you're agreeable to doing is much appreciated."

Id. (emphasis added).

Rosen persisted, sending another e-mail to plaintiff's counsel stating, "…I wonder if you'd be willing to try to enlighten me *about those details I'm interested in*." *Id.* (emphasis added). As plaintiffs' counsel later related to this Court, given the surrounding circumstances, she did not find Mr. Rosen's assurances regarding his interest and intentions credible and thus refused to provide answers to his list of questions. And, mindful that Rosen practically hung up her in face in 2004 at the mere thought that she might speak of Ricci case with him, plaintiffs' counsel was annoyed by what she considered to be Rosen's temerity in expecting her to devote time to answering all of his pointed questions, especially given his very public opposition to the *Ricci* plaintiffs' cause. Thus angered, plaintiffs' counsel sent Rosen a strongly-worded rebuke,

in the course of which she reminded Rosen of his abrupt warning when telephoned by plaintiffs' counsel in 2004, noted this Court's own seeming fondness for Rosen, and sarcastically suggested he get the information he wanted from this Court. Exh. 6. Rosen responded with one word: "Okay". *Id.* Subsequent to this exchange, on June 30, 2009, Rosen prepared and served a written FOIA request on the City of New Haven seeking documents related to *Ricci* and the subject exams. Exh. 7. Rosen evidently also visited the Court and requisitioned from the Clerk the voluminous *Ricci* files and perused them.[15]

By October 2, 2009, Rosen had completed for filing with the federal EEOC a charge of disparate-impact discrimination against the City on behalf of one Michael Briscoe, a black firefighter in the NHFD and member of the Firebirds. Briscoe alleged that the City was about to certify the eligibility list from the 2003 Lieutenant exam, and would violate Title VII by doing so and promoting in accordance with that list because, he alleged, the promotional exam was racially discriminatory and his score and rank on the list (24) was too low to allow for his promotion into one of the subject vacancies. Exh. 8. On October 15, 2009, Mr. Rosen commenced a corresponding Title VII action in the district court on behalf of Briscoe. Briscoe seeks a rescoring of the 2003 Lieutenant exam and a judicial order promoting him to the rank of Lieutenant.[16] The action was assigned to the Hon. Charles S. Haight, Jr.

[15] The exact date(s) on which Rosen did so are unknown as the Clerk's office, while confirming that Rosen had requested the Ricci files, acknowledged that Rosen did not sign the Clerk's file-access record book as required, and the Clerk's office did not realize that he had not done so.

[16] Plaintiffs' counsel notably learned of Briscoe's complaint immediately upon its filing as it had been shopped to the media; she was called by reporters for both the *New York Times* and the *New Haven Register*, whom Mr. Rosen (or someone in his office) had apparently solicited to publicize the filing and to whom Rosen's office either e-mailed or faxed copies of the complaint. The City of New Haven had not yet been served with it, as the Clerk-prepared service copies and summons were still in production and later lay on the counter for pick-up by Rosen's office after the publicity ensued. Both newspapers, and a third - the Yale Daily News – quickly headlined the *Briscoe* filing.

Given Attorney Rosen's seeming obsession with the *Ricci* plaintiffs' success at the Supreme Court, and his above-described acts, and based further on what plaintiffs' counsel considered to be efforts by Mr. Rosen to prompt a reassignment of his case to this Court,[17] the undersigned assumed that if Mr. Rosen had had the opportunity to do so, he would have engaged this Court in discussion about the *Ricci* case, the consequences of the Supreme Court's judgment, and perhaps even his views on what might be done on remand to neutralize that. Acting on these concerns, plaintiffs' counsel undertook to learn if Mr. Rosen had such an opportunity for contact with the Court and discovered that, at the request of this Court, Mr. Rosen filed appearances in several of this Court's pro se civil cases, the most recent appearance having been filed the day after the Supreme Court issued its opinion in *Ricci*. These appointments appeared to contravene what plaintiffs' counsel understood to be the procedure the Court must use for such purpose.

D. THE COURT'S APPOINTMENTS OF ATTORNEY ROSEN

This Court not only directly solicited Mr. Rosen to provide pro bono services to pro se plaintiffs on its docket on multiple occasions, but appeared to have continued to do so after the judges of the District Court voted to suspend and did in fact suspend the local rule that allowed for judges to engage in such direct contact with attorneys for that purpose. In the summer of 2007, the judges of this district invited the Connecticut Bar Association's Federal Practice Section to assist the Court in developing a new plan for appointments of pro bono counsel. Toward that end, an ad hoc committee of the Federal Practice Section was formed to study the

[17] On October 21, 2009 Attorney Rosen delivered a letter to Judge Haight indicating the Court might be required to quickly arrange for and preside over an immediate preliminary injunction hearing, and therein twice noted Judge Arterton's role as the presider in the *Ricci* case. Exh. 9. Rosen never carried through on his request for a preliminary injunction. Later, however, he made an overt suggestion to Judge Haight that he might consider transferring *Briscoe* to Judge Arterton. *Briscoe v. City of New Haven*, No. 3:09cv1642 (CSH), Pltf.'s Memo. Opp. to Mot. Stay at 2 (Dkt. # 14) (stating "…this case could simply be transferred to Judge Arterton.").

process and to make recommendations to the bench. The "Pro Bono Committee" consisted of six members of the Section's Executive Committee.[18]

The then-existing Local Rule 83.10 governed the procedure for judicial appointments of pro bono counsel, and while it allowed for a wheel rotation system, it permitted judges to make direct requests of specific members of the bar for pro bono services to the Court. In its November 20, 2009 report, the Committee addressed various problems and perceived inadequacies of the existing rule and procedure. While acknowledging that a judge benefits from a lawyer's providing representation to a pro se litigant on the judge's docket, the Committee noted the problem of appearances that arises from a judge's directly soliciting a particular member of the bar to provide services to the Court. *See* Pro Bono Committee, CBA Federal Practice Section Executive Committee, "*Proposal to Reform the District of Connecticut's Pro Bono Program,*" (November 20, 2007) at pp. 2-3 ("In some such cases, individual judges have asked a specific member of the Bar to accept the representation. While such direct solicitations appear to have a higher acceptance rate, they have been regarded with some concern by both the Court and the Bar."). Exh. 10. The Committee thus sought to refine the "program proposed by the Court to meet its needs while addressing the concerns of the Bar." *Id.* at 7.

Accordingly, the Committee suggested procedural reforms, among them use of a new selection system (a better and larger "attorney wheel"), and a strictly random rotation method of appointments to be controlled by the Clerk of the Court, with appointments made by the Clerk in all cases in which a Court has issued an order for the Clerk to do so. *Id.*, *passim.*[19]

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[18] Among them were Attorneys Jonathan Tropp and Ethan Levin-Epstein, former co-chairs of the Federal Practice Section, and Elizabeth Stewart. Attorney Stewart and Attorney David Rosen are the current co-chairs.

[19] There were other reforms recommended by the Committee but they are not pertinent to this motion.

Subsequently, the judges of the District of Connecticut issued an order, effective March 15, 2008, temporarily suspending subparts (a) and (b) of Local Civil Rule 83.10. In its place, the judges issued a "Standing Order Regarding Pro Bono Representation" which replaced the suspended provisions with two new "subparts (a) and (b)." The new procedure provided that a judge shall, after determining a party has met the applicable criteria for pro bono counsel, shall issue an order for the appointment of counsel, but requires the order to be directed to the Clerk, who is to select and appoint the attorney who is next in sequence in the assignment wheel. Exh. 11.

After learning that plaintiffs' counsel had questions and concerns regarding this, in light of Attorney Rosen's inserting himself into this case, the Court, in remarks from the bench on February 4, stated that while plaintiff's counsel's "relationship with Mr. Rosen sounds troubled, [the Court's] relationship [with Rosen] is simple." The Court proceeded to explain its multiple requests to Attorney Rosen for services to the Court in pro se cases on its docket by stating that Rosen has a fellowship program whereby his office "matches up new lawyers, his fellows, with pro bono opportunities in federal and state court." The Court stated, "I have *twice* appointed [Rosen] and his fellows to represent pro se parties in cases ready for trial[,]" (emphasis added). The Court identified the two cases as *Wrighten v. New London*, #07-cv-257, and Arzuaga v. Choinski, #05-cv-1688. 2/4/10 Tr. at 5-6. [20]

[20] The Court added that in respect to these two cases, "[t]wo of the fellows filed appearances; a third was not yet admitted." *Id.* It appears from the docket, however, that no "fellows" of Mr. Rosen appeared as counsel in *Wrighten.* The Court specifically appointed "David N. Rosen" only to serve as counsel, an order the Court had to revoke less than 8 weeks later after the plaintiff apparently engaged other counsel of his choice. *Wrighten* Dkt. ##s 40, 43, 46. In *Arzuaga,* the Court also appointed David N. Rosen as counsel along with two associates of his office, noting its appreciation for the service. This Court's direct solicitation of Mr. Rosen and his appointments in both cases occurred after the district's judges March 15, 2008 order.

The day after the U.S. Supreme Court issued its opinion in *Ricci*, however, Attorney Rosen filed an appearance as counsel for the plaintiff in another of this Court's cases - *Rumbin v. Assoc. of Amer. Med. Colleges, et al*, #3:08-cv-983 (JBA). Dkt. # 109. He indicated he did so "at the request of the Court". Exh. 12. That case was not trial ready. Mr. Rosen appeared as counsel for "purposes of the July 7, 2009 settlement conference only," although it appeared that other counsel was later officially appointed by the Clerk to represent the plaintiff for this purpose in accordance with the new rules, although no judicial order directed to the Clerk is apparent. [21] *Id.* Dkt. ## 109, 132, 133.[22]

E. Plaintiffs' Counsel's Requests And Inquiries To The Court.

With rising concerns about appearances, and against the backdrop of both her own email communications with Attorney Rosen and this Court's late-night ruling on the Tinney et al. motion for stay, on December 4, 2009, plaintiffs' counsel hand-delivered to chambers a letter request for a status conference with the Court, a stated purpose of which was to gain the opportunity to make inquiry of the Court in order that counsel may assess the issue whether this Court should be asked to recuse itself from this case. Exh. 12. The Court neither responded to nor acknowledged the letter request, leading plaintiffs' counsel to telephone chambers staff on December 15, 2009 to inquire if the Court in fact received and read it.

On December 16, the Court's law clerk e-mailed plaintiffs' counsel and advised that "Judge Arterton is in receipt of [the] letter regarding a possible "motion by the plaintiffs pursuant

[21] The circumstances of Attorney Rosen's appointment are confusing, given that no order had then issued for the appointment of pro bono counsel, and given further that another attorney, one Andrew Alan Feinstein of Mystic, CT, was in fact appointed pro bono counsel by the Clerk pursuant to the very new procedure for appointment imposed by the District's judges after the suspension of the existing local rule provisions.

[22] Upon information and belief, Attorney Rosen did not appear at the settlement conference in connection with which his appearance was filed. The undersigned made inquiry of Attorney Feinstein regarding the matter on December 29, 2009. Ten days later, both Mr. Rosen and Mr. Feinstein filed identical requests to withdraw their appearances, with Mr. Rosen adding that he entered an appearance for purposes of the settlement conference and had completed "[his] assignment."

to 28 U.S.C § 455." As for plaintiffs' request for the opportunity to address and make inquiry of the Court, the message cited the "pre-filing conference requirement contained at paragraph (f) of Judge Arterton's Standing Order on Pretrial Deadlines," noted it does not apply to judicial recusals, and added that plaintiff may file such a motion at any time. Exh. 13.

Plaintiffs' counsel responded to this email on the same day. In sum, counsel noted her appreciation for the reminder regarding the Court's pre-filing conference requirements but noted she was well aware that those requirements did not apply to counsels' December 4 request.[23] Counsel reiterated the purpose of her request for time with the Court, and that she need to make inquiry of the Court necessary to her discharge of a perceived duty to her clients, and that she was endeavoring to do so in an efficient, expeditious and responsible manner, following the model of other attorneys in the District who felt the need to make inquiry of a court upon becoming concerned about possible appearances of impartiality. Plaintiffs' counsel further noted that she had litigated a number of cases over the years with Judge Arterton, who was previously and promptly receptive to requests from counsel. In addition, counsel noted that the Court had denied as "moot" plaintiffs' counsel November 17, 2009 request for a status conference before it fashioned any order for remedial relief.[24] Exh. 14.

With the Court again unresponsive, on December 22, 2009, plaintiffs' counsel e-mailed the Court's law clerk with the following message:

> "Dear Attorney Rajendra: I never received a response to my e-mail of December 16, 2009 in reply to your own of the same date. May I please have the favor of knowing if and when the Court intends to respond? I thank you in advance for your prompt attention to this matter."

[23] The Court's standing order makes it clear that pre-filing conferences are required before a party files a dispositive motion, defined as a motion to dismiss or a motion for summary judgment. *See* Chambers Practices, Hon. Janet Bond Arterton, available at: http://www.ctd.uscourts.gov/practiceof_jba.html .

[24] Indeed, at this point, the Court had not held a single status conference on this case, refusing even to conduct one as requested before fashioning and issuing a remedial order.

Chambers replied the same day with a message advising counsel to "[p]lease see the Scheduling order issued this date." The docket order advised that the Court would first hear oral argument on pending motions to intervene in the case on January 20, 2010, and afterward would hold a status conference with counsel. *See* Scheduling Order, Dkt. # 191.

On January 20, after the conclusion of oral arguments on Michael Briscoe's motion to intervene, the Court ordered a brief recess after which counsel would return for a status conference. [25] At the start of the conference, plaintiffs' counsel explained that she was in uncharted territory, was following the model of other attorneys who felt the need to make inquiry of a court in similar circumstances, and furthered that she had reviewed some case law suggesting counsel should alert a court at the earliest opportunity if possible grounds for recusal have arisen, and not take a "wait-and-see" attitude, or raise a recusal issue only after the Court issues substantive rulings adverse to his client. Accordingly, counsel sought to address the issue with the Court before the Court issued any substantive rulings on the numerous pending motions, and before the inevitable numerous other motions that will be filed in this case. 1-20-10 Tr. at 49-57. After all these preliminaries, plaintiffs' counsel indicated she had several requests, and then stated her belief that she had grounds to ask the Court to disclose:

> "[W]hether your Honor has at any time had direct or indirect discussion or communications with Attorney David N. Rosen regarding Ricci v. DeStefano and/or the subject matter of Ricci v. DeStefano."

The Court responded by asking, "What's your next issue?" Tr. at 57. Additional colloquy took place as counsel asked for disclosure of the reasons why this case was reassigned to this Court at

[25] Attorney Rosen, who did not represent a party but only a proposed intervenor, asked the Court whether he is "invited" to this conference. In response, the Court advised of its intent to conduct the status conference with the parties' counsel in open court, and added that while Attorney Rosen could not participate, he was "welcome to sit here." 1-20-10 Tr. at 48. Rosen responded "understood, thank you," and remained in the courtroom to witness the conference.

its end stage, noting that the parties were never told why this had occurred.[26] Counsel then returned to the issue of Attorney Rosen and expressed concern that the Court's relationship with Mr. Rosen would impede the Court's ability to rule adversely to him, (or impede its ability to rule in a manner which would undercut his strategy in *Briscoe*), and further impede the Court's ability to impose sanctions on Mr. Rosen or order him to pay the plaintiffs' attorney fees incurred in connection with responding to Mr. Rosen's filings. The Court noted no such motion for sanctions against Mr. Rosen was before her, and plaintiffs' counsel responded that there would be such a motion. With that, plaintiffs' counsel indicated she hoped that the Court would answer the above-quoted question regarding what discussions, if any, she had with Attorney Rosen. Tr. at 60. The Court responded:

> "Obviously the matter, the subject matter of Ricci being a matter before the Court is one that is, as to its substance, not subject for discussion. As to the mention of the case in connection with all of the publicity, it would be hard for me to say that I have not acknowledged the existence of the Ricci case before the Supreme Court. So when you say discuss it, I don't know what you mean. You are going to have to be much more specific." Tr. at 61.

Both the Court and counsel then spoke of an award the Court had conferred upon Attorney Rosen for his pro bono work, with the Court noting that other judges were beneficiaries of Mr. Rosen's pro bono work as well. Tr. at 62. Counsel acknowledged this but again addressed instead the issue of this Court's continued direct solicitation of Mr. Rosen despite the fact that the judges of the District apparently acted to stop such practice. With that, the Court opined that counsel's characterization of such prohibition was not "in the spirit of that rule." The Court continued:

> "I do not accept your characterization of the actions of the court, the import of an earlier local rule that you've not specified, and the import of the pro bono program.

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[26] The Court then advised counsel that the case was randomly assigned to her because Judge Kravitz determined that he could no longer remain on the case. Tr. at 58.

> I do not accept that. You are correct that I have directly asked Mr. Rosen if he will, via his fellows, take on the representation of pro se parties." Tr. at 64.

The Court then stated that if plaintiff's counsel thought that judges are "forbidden from directly requesting attorneys to represent unrepresented parties," or that the Court violated an order of the judges or an applicable rule by directly soliciting Mr. Rosen for such services, then "you may put that in the motion and I will decide it." Tr. at 65. While indicating a desire to understand what counsel's concerns were, and agreeing that such concerns were of "paramount interest [to] the Court in ensuring that there is no basis for which a judge's impartiality might reasonably be questioned," Tr. at 65, the colloquy immediately thereafter deteriorated into some tension:

> THE COURT:
>
> Do you know, the process of this interrogation is a bit odd, I will tell you, Ms. Torre. I did some research to understand what right it was that you would have to interrogate a judge.
>
> * * *
>
> MS. TORRE:
>
> To the extent that it has turned in to an interrogation, I didn't intend it. In some respects, the Court's own responses to my questions have served to transmute it into such. All I've asked to do is ask for disclosures by the Court, and instead of just making the requested disclosures, with all due respect, your Honor, you are engaging me.
>
> THE COURT:
>
> Do you know what, I think maybe you should put all of your issues in writing in the form of a motion and we will discontinue this because I'm trying to be helpful to you, only to have you turn it around saying, aha, you are transmuting it. So, I think we'll stop right now and let you put it in the form of a motion. Tr. at 66.

With this, counsel questioned how she would file a recusal motion without knowing the answer to the questions needed to assess the grounds for such motion, and the Court thereafter responded: "Okay, let's have a list of your issues and I will not be responding to them, but I will have a list of your issues." Tr. at 67.

Further discussion ensued on matters unrelated to Attorney Rosen,[27] and toward the conclusion of the conference, plaintiffs' counsel asked if it was the Court's "intention to make any further disclosure of [its] communications with Mr. Rosen other than telling me –" to which the Court responded by stating that had "not discussed the Ricci case with anybody while it's been pending other than recognizing its high profile nature, as in it's in the Supreme Court, et cetera." Counsel again asked whether the Court was in "position to disclose the actual discussions [it] had with Mr. Rosen about the subject matter of this case." The Court reminded counsel that it had just said that it "didn't discuss the case." Counsel referred the Court back to its earlier responses which indicated that Rosen was among those with whom the Court had what it described as a conversation of a non-substantive, generalized nature having to do with *Ricci's* high- profile status and pendency before the Supreme Court. Tr. at 87-88. Counsel indicated her view that the answers were not specific enough to put counsel at ease. The Court responded, "well, Ms. Torre, I'll bet little would put you at ease." Tr. at 88.

F. The Conference of January 27, 2009

Given that plaintiffs' counsel had clearly irked the Court on January 20th by asking questions regarding Attorney Rosen, at the next teleconference on January 27, plaintiffs' counsel laid out in detail for the Court her own telephone and email communications with Rosen about the *Ricci* case. Plaintiffs' counsel explained that given Rosen's seeming intense interest and preoccupation with the *Ricci* case - to the point where he sought out and tried to engage plaintiffs' counsel despite the hostility between them - it seemed inconceivable to counsel that Rosen would not, if given the opportunity, seek to discuss *Ricci* with the actual *Ricci*

[27] Among them, the issue of the Firebirds, a matter revisited in a later telephonic status conference on February 27 that was requested by plaintiffs' counsel for the purpose of clarifying the nature of her concerns about the Court's former attorney-client relationship with the Firebirds and correcting errors in counsel's January 20 recollection of what had transpired in a May, 2006 teleconference with the Court regarding the Firebirds.

judge, especially given that Rosen enjoys a unique relationship with the Court. It was this backdrop, counsel advised the Court, that led her to make those inquiries of the Court, notwithstanding the Court's obvious annoyance with it. 1-27-10 Tr. at 22-29.

Upon this, the Court then expanded upon its January 20 responses to the questions regarding Rosen as follows:

> All right, I have never, and I think I clarified that, or I attempted to clarify that, I've never spoken about the substance of the Ricci case to anyone, including Mr. Rosen. The remark I made that many have asked about Ricci, was responded to to describe to them what the issues were before the Supreme Court and then what the Supreme Court ruling said, and those are general interest questions having only to do with the public record as to the issues and the Court's disposition.
>
> I will clarify or expand to advise that at the Second Circuit Judicial Conference in June of '08 –'09, before the Supreme Court's ruling, I had occasion to be in conversation with Mr. Rosen, who was attending, and we discussed his old cases involving testing, and it was limited to his litigation and his – I don't know how old the cases are, I know they're quite old, but I know that at some point in his career he had a focus on that.
>
> And so that will complete what I have to say about your question.

1-27-10 Tr. at 29-30.

Another colloquy ensued over counsel's confusion about how the Court's discussion with Mr. Rosen about his disparate impact challenges to civil service tests was unrelated to the subject matter of *Ricci.* The Court repeated that her discussions with Rosen while they were together at the judicial conference related to Rosen's "prior litigation history in testing cases. That's it." *Id.* at 33.

The Court did not indicate, and counsel ran out of time to ask, whether Attorney Rosen was this Court's chosen invitee to the 2009 Second Circuit judicial conference, or whether Rosen was an invitee of another judge at the behest of this Court.[28]

[28] The undersigned is given to understand that once every two years, each judge is permitted to invite one, perhaps two, lawyers to be their guests at this multi-day annual conference.

This judicial conference took place days before the Supreme Court was to release its opinion(s) in *Ricci.* On June 12, Justice Ruth Bader Ginsburg, the Justice assigned to the Second Circuit, appeared at this judicial conference and addressed the attendees. She discussed *Ricci.* After noting her Court's term was about to end, and that three cases under review from the Second Circuit remained to be decided, Justice Ginsburg cited "*Ricci v. DeStefano"* as "foremost in importance" among them. The Justice devoted more words to *Ricci* than the other cases, noted that it involved an opinion by "District Judge Arterton," and concluded by stating that the "[Ricci] decision, one can safely predict, will be among the last to come out this Term." Ruth Bader Ginsburg, *Remarks for Second Circuit Judicial Conference, June 12, 2009* (available at: http://www.supremecourtus.gov/publicinfo/speeches/sp_06-12-09.html).

G. The Court's Conduct Evincing A Lack Of Judicial Detachment And Distance From The Parties And The Case.

This Court travelled to Washington, D.C. to attend the oral argument in this case before the United States Supreme Court. The Court thus sat among the firefighters and city officials who are the parties in this case, and watched arguing counsel both criticize and defend her ruling. Upon information and belief, that is highly unusual, if not unprecedented conduct for a district judge. [29] Counsel in both the state and federal appellate bar have rarely, if ever, seen the trial judge whose ruling is under challenge appear at the appellate court when the appeal is heard. The high-profile nature of this case does not change that. Many cases are high-profile and grab the public's attention. This Court's conduct evinced a lack of judicial attachment and distance

[29] The only exception that plaintiffs' counsel has been made aware of, after numerous inquiries, is an instance where a judge was actually a named party to the action because a writ of mandamus was filed, the subject matter of which was that judges' conduct. Indeed, to avoid even the appearance of judges being interested parties to an action over which they preside, rules have changed such that a judge is no longer a named party in a writ of mandamus.

from the parties and the issues in this case and fostered the appearance of the Court as overly interested and personally invested in the case.

In addition, while this Court has explained this is some respects, public records indicate that prior to the argument, this Court appeared in Chicago to attend a seminar hosted by Northwestern University School of Law, a subject of which was judicial behavior, in particular, how to "infer the winner" of a U.S. Supreme Court case based on the Justices' questions at oral argument. This seminar took place on April, 21, 2009, the day before the oral argument in this case. In evident compliance with ethical rules requiring disclosure by judges of attendance at privately sponsored seminars, this Court filed a disclosure with the Judicial Conference respecting its attendance at Northwestern. The judicial disclosure form indicates that on April 21, 2009, this Court did attend the above-referenced event. Exhs. 15,16,17.

While this Court has since advised counsel that she was drawn to travel to Chicago because Northwestern was hosting a seminar on a topic in which she was interested - corporate criminal liability - and added that she cannot remember what other subjects were on the agenda for this seminar, it was the Court's disclosure form that prompted the question from counsel regarding this matter, and it is that and related documents regarding the seminar that foster the appearance of a lack of judicial distance and detachment from this case. It is the appearance, and not what may be the case in reality, that governs the recusal assessment.

H. The Court's Extrajudicial Public Statements On Issues That Permeate This Case.

This Court presides over a docket of criminal and civil cases, the latter involving all manner of claims. The Court hears cases involving patents, antitrust, securities, police misconduct, first amendment issues, disability and social security matters, habeas claims, and even personal injury and other state claims pursuant to its diversity jurisdiction. As this Court

itself noted in one of its public speeches, employment discrimination cases, while there are numerous of them, still only comprise anywhere from 16% to slightly over 20% of the District Court docket at any given time. Yet, with no exceptions known to plaintiffs' counsel, when this Court elects to speak in public, the topic is always about gender, race, gender/race disparities, and employment litigation. This Court, for example, agreed to be the keynote speaker at a Yale Law School-sponsored conference of woman lawyers and law students, all self-described feminists. In its address, given not long after outspoken and heavily media-publicized criticism of this Court's summary judgment ruling in this case, this Court described its own personal experience with gender discrimination, suggested female judges are treated differently and less deferentially than male judges, and cast a broadside against male members of the federal bar, to whom the Court attributes a group characteristic – a tendency to treat female judges' rulings as "advisory" or subject to negotiation. The Court, citing numbers, bemoaned the statistical gender disparity in the composition of the federal bench. The Court also claimed that harsh rulings by tough-thinking female judges are more likely to be criticized or described as "cold" or "unfeeling" when a male judge's like ruling would be accepted without comment.

Exh.18 (MP 3 Recording – Manually Filed Exhibit)

In 2005, this Court addressed not defense lawyers, but plaintiffs' employment lawyers assembled at the annual convention of the National Employment Lawyers Association ("NELA"), an organization founded (and still led) by, among others, this Court's former law partner, Joseph Garrison, who has sat on NELA's national executive board. In that address, this Court made remarks which, to an objective observer, can fairly be considered to evince the Court's lack of neutrality respecting so-called "reverse discrimination victims," a term most understand to mean "white guys." The theme of that NELA conference was "Reclaiming the

Justice System," one which reflected the membership's view that they faced an increasingly hostile bench in litigating their employment discrimination cases.[30]

This Court expressed the view that white jurors come into her Court with a frame of mind that discrimination against Blacks either no longer exists or is no longer as significant a problem as it once was, an attitude this Court thought presented a challenge to the assembled lawyers, and which evinced the Court's view that anyone who believes that intentional race discrimination against racial minorities by employers is no longer prevalent is wrongheaded. The Court appeared to express dismay that 60% of white Americans thought President Clinton's "race initiative" to be an unnecessary project. Again focusing on statistics, the Court noted what it thought to be the mission of employment discrimination lawyers (and NELA members), questioned what "discrimination" will look like in the future, and rhetorically asked the attendees whether their future mission will be reclaiming the justice system for white males (as if that is not and should not be their mission at present or is not otherwise a worthwhile one).

After noting statistics on the percentage of employment discrimination plaintiffs who win their cases in the District of Connecticut (and that rate of success is low), the Court added that it discerned an uptick in what it termed "reverse discrimination cases," and then stated the following: "I will also add - *ambivalently* - that the verdicts [in reverse discrimination cases] are very large." The Court appeared to place emphasis on the word "ambivalently." Exh. 19 (MP3 Recording – Manually Filed Exhibit). These statements would lead an objective observer to reasonably question this Court's impartiality in this case.

[30] As plaintiffs' counsel is uniquely aware, NELA's membership largely comprises employment litigators uninterested in vindicating, or even recognizing, violations of the civil rights of non-minority males. Indeed, although NELA boasts of its record of submitting an amicus brief to the U.S. Supreme Court in any case presenting issues of employment law, *see* http://www.nela.org/NELA/index.cfm?event=showPage&pg=amicus, NELA would not support the *Ricci* plaintiffs. It sat out and filed no amicus brief.

Most recently, this Court agreed to be a panelist and to deliver remarks at a University of Connecticut-sponsored event, the purpose of which was to commemorate the published writings of one Professor Charles Lawrence, whose views on race discrimination against African-Americans can hardly be described as non-controversial or mainstream. Notably, this Court was the only jurist to participate – and why this Court in particular was invited to attend and speak at this event is itself a question that should be asked. This Court's address was preceded by a keynote address by Professor Lawrence, who is an outspoken and passionate critic of the U.S. Supreme Court's opinion in *Washington v. Davis*, 426 U.S. 229 (1976), a case on which the plaintiffs in this case heavily relied. Professor Lawrence believes that "unconscious discrimination" should guide disparate impact jurisprudence, apparently considers every white person to be an unconscious racist, and further suggests there is no such thing as an innocent white, and thus rejects the notion that whites themselves can be unfairly victimized by affirmative action preferences for blacks.

In what can only be described as a racially offensive and inflammatory rant against the Supreme Court, Lawrence bitterly condemned the opinion in *Parents Involved In Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007), another case on which the *Ricci* plaintiffs rely heavily. Lawrence described the moment when he learned of that decision and started to read it.

He considered Chief Justice Roberts to be "assaulting" and "hitting" him (and presumably all members of his racial group.) He likened the announcement of the ruling to the torch of the Klan riding in the night, and referred to the Court as the "scene of a crime." Lawrence continued his insults, adding that he should have expected the *Parents Involved* ruling since at the oral argument he could hear in the Justices' voices and in their questions "their commitment to white supremacy." Denouncing the Court for not following his views on the

disparate impact doctrine, Lawrence bemoaned what he described as a relentless and ruthless march of the Court's so-called conservative majority, who "raped" Ms. "Brown" (of *Brown v. Board of Education*) and without her consent.[31] Lawrence spoke of calling white people "honkies," considers the current state of disparate impact law a reflection of notions of white supremacy, and faults federal judges for largely ignoring both his scholarship and the reality of "unconscious" discrimination in fashioning the doctrine and in deciding disparate impact cases.[32]

This Court spoke after Professor Lawrence. The Court neither excused itself from the event upon hearing Lawrence's diatribe, nor even advised the attendees that the District Court disassociates itself from Lawrence's views and opinions. Quite to the contrary, this Court commenced its own remarks by opining that Professor Lawrence's work has very "clear value" for the District Court. Noting that about a fourth of the District's docket are discrimination cases,[33] the Court proceeded to speak of "unconscious discrimination" and its concerns about how such manifests itself in cases in her Court. The Court shared with the audience (verbatim) a letter purportedly written by a juror to the District Court in which the juror reported that racially

[31] Lawrence kept speaking of Chief Justice Roberts individually and said nothing in particular (thankfully) about any of the other four justices who, with the Chief Justice, formed the majority in *Parents Involved*, other than to denounce them as being guided by notions of white supremacy in their legal analyses. Nor did Lawrence account for the fact that one of those majority justices is a black man who is not considered by any sane person to embrace notions of white supremacy.

[32] And these remarks were made *before* the Supreme Court reversed the judgment of the Judge sitting next to him.

[33] Speaking at a recent CTLA seminar, again one having to do with employment discrimination, this Court was heard to put that figure at 16%, and that figure included all employment cases, not just ones involving race, but it is of no matter.

insulting remarks were made by his fellow jurors during their deliberations in a case that went to verdict in the District Court.[34]

This Court then related to the audience its own efforts to confront what it apparently considers to be prevalent unconscious racial bias.[35] The Court referred to an employment discrimination case tried in its court in which the jury rendered a verdict for the employer. Afterwards, the Court entered the jury room and confronted the jurors with her thoughts that perhaps a more racially diverse jury would have made a difference in the verdict, another way of asking the jurors if they had violated the Court's instructions and decided the case based not on the evidence but on their own "unconscious bias." It appears that the only basis on which the Court confronted the jurors was the fact that the plaintiff was black and the jurors were white. Notwithstanding the jurors' "earnest" insistence that they decided the case based on the evidence, this Court asserted that it took "little reassurance" in that.

As the audio recording reveals, the UConn event, despite its billing, was more than just a legal symposium, attendance at which is supposed to advance one's knowledge about the law. It was a blatantly political event. This Court's remarks were followed by remarks from one Eva Patterson, one of the lawyers who submitted an amicus brief to the U.S. Supreme Court in this case (on behalf of the "Equal Justice Society"), and in support of this Court's ruling. Patterson would concededly make remarks she thought might insult white people, whom she considers

[34] Despite inquiries to a number of leading litigators in the federal bar, plaintiffs' counsel has been unable to determine which case this Court was speaking of, as no one the undersigned spoke to was aware of it. At the January 20, 2009 status conference, plaintiffs' counsel inquired of the Court about it. The Court advised that it was not she, but another judge, who was the recipient of the quoted letter. What case it involved, and whether that juror communication with the Court was disclosed to counsel in the case and made a part of the record, are matters unknown to plaintiffs' counsel.

[35] On the part of whites, not anybody else, as the Court directs its thoughts and remarks only to that "bias" and those "unconscious" discriminatory attitudes that purportedly operate to injure African-Americans or other non-white racial groups.

"unenlightened" for not embracing her views, and talked about the political agenda of her organization, which includes monitoring what the "right wing" is doing, pushing back against activist Ward Connerly (a black conservative opposed to racial preferences), countering the "Federalist Society" and other groups that, she claims, have successfully outmaneuvered her organization and like groups (because, she said, they're "smart' and they have "the funding").

A principle task on Patterson's and Lawrence's agendas, was influencing federal judges outside the courtroom. For her side, Patterson claimed, it was critical to "work the judges." Aiming to influence federal judges on these issues, in particular their approach to the disparate impact doctrine, Patterson took note of Judge Arterton's presence, stating she was "so glad there's a federal judge here today."

The Court's participation in this event, and its remarks at this and the other events as above-described give rise to an appearance of impartiality respecting issues at the core of this case and the rights of the twenty plaintiffs in this case.

CONCLUSION

The plaintiffs submit that an objective person, informed of all of the foregoing facts and circumstances, might reasonably question this Court's impartiality in this case. For all the said reasons, and those set forth in the accompanying memorandum of law, the plaintiffs respectfully move this Court to recuse itself from this case.

THE PLAINTIFFS

By:/s/Karen Lee Torre
KAREN LEE TORRE
Federal Bar No. ct01707
LAW OFFICES OF NORMAN A. PATTIS, LLC
649 Amity Road
Bethany, CT 06425
(203) 393-3017
(203) 393-9745
ktorre@pattislaw.com

THEIR ATTORNEY

CERTIFICATION

I hereby certify that on February 23, 2010 a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court(s) electronic filing system. Parties may access this filing through the Court's CM/ECF system.

/s/Karen Lee Torre