UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FRANK RICCI, ET AL.,	:	
		Nos. 3:04-cv-1109 (JBA)
V.	:	3:10-mc-00037 (PCD)
JOHN DESTEFANO, ET AL.,	:	March 30, 2010

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTION TO MOTION FOR RECUSAL

Recognizing that the uncontested facts set forth in plaintiffs' motion give rise to a "hint or appearance" of partiality,[1] defendants object to recusal principally on procedural rather than substantive grounds, rely largely on invocations of waiver and untimeliness, and devote less than three pages of their brief to the pertinent issue at hand: whether these facts would lead a reasonable observer to question the court's impartiality. Defs.' Br. at 13-15. Tellingly, defendants forego any discussion of, or even reference to, Attorney Rosen's conduct, and his relationship, interactions, and ex-parte communications with the presiding judge.[2] Defendants' waiver and delay arguments lack merit as they rest on a distorted account of the record and relevant time-line of events, and further ignore the post-remand developments that prompted the motion for recusal.

As an initial matter, defendants' desire to retain the presiding judge is irrelevant to the

[1] "... [T]the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *U.S. v. Columbia Broadcasting Sys.*, 497 F.2d 107, 109 (5th Cir.1974).

[2] Defendants also notably chose not to address the court's expressed "ambivalence" toward "reverse discrimination" plaintiffs and other speechmaking evincing a discomfiting, one-sided preoccupation with perceived discrimination against African-Americans and women, including the court's most recent presence at an event at which the court lent the prestige of its office to racist, extremely offensive, and incendiary rants against whites and the very justices that overturned her judgment in this case, and which featured equally offensive and blatantly political lobbying and remarks by counsel for amici supporting the City in this case. Mot. at 36-39. The event even commenced with an introductory reference to the very type of exams involved in *Ricci* - one that employed a derision used by plaintiffs' opponents and other partisans in this case, and considered by plaintiffs to be an elitist insult to their profession ("pencil and paper tests" – a derogation used by the dissenting Justice Ginsburg and others who notably never use it to refer to the written exams required and jealously guarded by their own professions). The court's willing appearance and remarks at this event, while aware that the *Ricci* case might be remanded to her, displayed little regard for the impact it would have on the plaintiffs' and the public's perception of her neutrality, dispassion, and judicial detachment from the issues in this case.

objective recusal standard.[i] They were both beneficiaries and appellate defenders of Judge Arterton's ruling; indeed Mayor DeStefano publicly denounced the Supreme Court for reversing the judgment and rejecting Judge Arterton's views.[3] Thus, defendants are not impartial observers. See *In Re: U.S.A.*, 572 F. 3d 301, 310 n.12 (7th Cir. 2009) (in ordering recusal of judge who tried to press counsel into a plea deal, court notes that defendant's desire to retain the judge had no bearing on the statutory standard since he was not an impartial observer, and "[t]he judge's view of the future course of [the case] clearly was favorable to the defendant."). As the motion demonstrates, among other bases for recusal, Judge Arterton similarly - and quite prematurely and gratuitously – signaled her outlook regarding both the impact of the *Ricci* judgment and the scope of remedial relief - at a time and in circumstances that undermined the semblance of impartiality. For the court to even intimate the view - coming out of the gate on remand no less and before any evidence or hearings on equitable relief - that the relief Rosen demands in *Briscoe* (also sought by the Tinney Intervenors) might co-exist with the *Ricci* judgment and the Supreme Court's opinion, would lead an observer not only to reasonably question the court's impartiality but infer that she is disposed toward subtle oppositional behavior and maneuvers around the Supreme Court opinion that reversed her judgment.[4]

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[3] At a media conference the Mayor opined that the *Ricci* opinion was part of the U.S. Supreme Court's "continual erosion of civil rights law." http://www.nhregister.com/articles/2009/06/30/news/new_haven/a1-riccimain.txt.

[4] In contrast, in *Bridgeport Guardians v. Delmonte*, No. 78-cv- 175, Judge Arterton continues to this day, *30 years* after a judgment entered in favor of several black police officers alleging disparate treatment, to hold hearings and fashion remedial relief of the most far-reaching nature. In the instant case involving 20 white firefighters, the court was quick to view the judgment narrowly, constrict the scope of relief, and shut the door on remedies before the ink was dry on the remand order. The court's premature expression on that issue, which goes to the heart of this case and its proper disposition, is disturbing.

I. PLAINTIFFS DID NOT IN 2006 "WAIVE" ALL FUTURE BASES FOR RECUSAL.

In arguing that plaintiffs "waived their recusal argument" respecting the Arterton firm's representation of the Firebirds,[5] defendants rely entirely on plaintiffs' counsel's May 2006 statements to the court regarding the firm's role in the previous Firebirds litigation. Br. at 12. But they ignore the procedural posture of *Ricci* in 2006, and omit reference to a key qualifying remark by plaintiffs' counsel. In May 2006, *Ricci* had been fully litigated and was ripe for disposition. Neither the Firebirds Society nor its President or members had intervened in the case with competing claims. (Nor could one timely intervene at that late stage). Plaintiffs' counsel made it clear that it "would matter" if that were the case. Defs.' Exh. A, 5/24/06 Tr. at 8.

Moreover, any alleged waiver of recusal on that basis in 2006 is immaterial to the issue whether recusal is required now in a dramatically changed context in which the Firebirds' president and other members have, after over 5 years, inserted themselves into this case on remand and put their organizational interests in play before Judge Arterton, both directly and indirectly. Worse yet, they have done so through the Firebirds organization's counsel who, as amicus counsel supporting the city, defended Judge Arterton's ruling before the Supreme Court, and through Attorney Rosen who: 1) also shares the court's previous attorney-client relationship with the Firebirds; 2) is a lawyer the judge repeatedly solicits to provide free services to her docket; 3) engaged in deceptive conduct toward plaintiffs' counsel; and 4) had multiple extrajudicial communications with the presiding judge regarding matters undeniably related to

[5] Defendants mistakenly suggest the Firebirds litigation ended nearly two decades ago. The case continued as late as 2003 with Attorney Martyn Philpot taking it over at its end stage after the Arterton firm succeeded in prevailing for the Firebirds. Attorney Philpot appeared as counsel for the Tinney Intervenors in *Ricci*. Mot. at 13.

this case.[6] "The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge." *U.S. v. Kelly*, 888 F. 2d 732, 744 (11th Cir. 1989) (emphasis added).

II. THE MOTION WAS NEITHER UNTIMELY NOR UNREASONABLY DELAYED.

The timeliness argument is equally meritless as it ignores both that the parties were not even back before the district court until mid-October 2009, and the fact that plaintiffs raised the recusal issue on December 4, 2009, promptly after it became obvious that the issue should be raised, and before the court issued substantive rulings on contested matters. Plaintiffs thus cannot be accused of unnecessary delay. To the contrary, they properly sought recusal before the court proceeded to dispose of the numerous substantive issues presented to it on remand. *Compare United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) (party waived disqualification based on judge's known relationship with prosecutor by allowing contested sentencing to go forward and then only raising the issue afterwards).

Defendants wrongly assert that plaintiffs were long ago aware of the relevant facts

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[6] After causing the plaintiffs substantial expense in connection with intervention proceedings, the Tinney Intervenors, on the eve of oral argument, moved to "withdraw" their motion to intervene (without prejudice no less), in favor of bringing a collateral action akin to Briscoe's. Before plaintiffs could even respond to that motion, Judge Arterton quickly granted it. Dkt. # 206. The city will undoubtedly insist it should not be liable for those fees and costs. Thus, plaintiffs are left to move Judge Arterton to order the Tinney Intervenors and their counsel to compensate for these losses. This is another among numerous reasons why recusal is now required; plaintiffs should be free of the concern that their presiding judge is sympathetic to and loath to impose sanctions on Tinney et al and the Firebirds' counsel, who was himself co-counsel with the Arterton firm in advancing the promotional interests of the New Haven Firebirds. Moreover, for recusal purposes, it does not matter that the Tinney Intervenors strategically removed themselves from the *Ricci* docket. As we have already seen in the case of *Briscoe*, Judge Arterton's rulings influence proceedings in these collateral actions and the problem of appearances thus persists. *See, e.g., In re Aetna Casualty & Surety C.*, 919 F.2d 1136 (6th Cir. 1990) (en banc) (it was not enough for judge, presiding over multiple consolidated cases, to sever the one being handled by the firm employing his daughter, for his rulings on the cases he retained could constitute the law of the cases or at least serve as highly persuasive precedent in the case from which he recused himself.)

surrounding Attorney Rosen but misleadingly confine those facts to Rosen's 2004 and June 2006 conduct, which is but the relevant backdrop that served to further becloud subsequent developments on remand with the appearance of judicial impropriety and partiality. Plaintiffs' counsel undertook inquiries into Judge Arterton's relationship and communications with Attorney Rosen upon being prompted to do so by Judge Arterton's December 2 late-night ruling on the eve of the December 3 hearing in *Briscoe,* together with the events that transpired at that hearing. They led first to private inquires and then counsel's December 4 letter requesting an immediate status conference for the purpose of making inquiry of the court regarding this particular basis for recusal.[7] Colloquies between court and counsel eventually took place but not until January 20 and 27. [8] On February 4, after an agreed-upon delay during which the court considered (on the basis of the Firebirds issue only) transferring *Ricci* in lieu of requiring a formal motion, the court announced it would not do so.[9] The motion was then prepared, and filed little more than two weeks later. In the interim, and before these colloquies took place, Attorney Rosen moved to intervene in *Ricci* with a disparate impact lawsuit challenging the subject

[7] As the motion and record demonstrate, the unnecessary bedtime ruling on a blatantly frivolous, improper, moot motion by a non-party, a ruling which contained gratuitous and prematurely formed opinions on the scope of equitable remedial relief in *Ricci,* and which unmistakably suggested that the relief Rosen seeks in *Briscoe* could lawfully co-exist with the *Ricci* judgment, might reasonably and readily be construed by any objective observer as a calculated attempt to influence the next morning's proceedings in *Briscoe* and advance Mr. Rosen's interests and, by extension, the organizational interests of the Firebirds in invalidating the city charter's requirements for race-blind selection.

[8] Any delay in filing the motion was occasioned by the district court's own near two-month-long resistance to granting plaintiffs the opportunity to make inquiry of the court regarding the recusal issue as the series of e-mails well demonstrate. Mot. at 25-27; Exhs. 12-14. When the court eventually scheduled a status conference, it was set to coincide with Mr. Rosen's appearance before the court to argue his motion to intervene. Dkt. # 191. Mr. Rosen stuck around for the conference as the court was asked about her communications with him. 1-20-10 Tr. at 48.

[9] Defendants wrongly assert that Judge Arterton already "ruled' on the substance of this motion and plaintiffs ignore her "thorough examination of the facts." Br.at 9. There was no such "ruling" as no oral motion to recuse was made, much less one that presented to Judge Arterton the numerous facts laid out in the formal motion.

exams. Piling on to the already-existing heap of appearance problems, Rosen did so only after having twice attempted to nudge his case over to Judge Arterton. Mot. at n. 17.

III. JUDGE ARTERTON'S SHORT-TERM ROLE MILITATES IN FAVOR OF RECUSAL.

Defendants wrongly suggest recusal is inappropriate because Judge Arterton has presided over this case "for several years." Br. at 7. That is grossly inaccurate. To the contrary, although *Ricci* is now in its sixth year, Judge Arterton's role actually lasted a mere *four months*, and chiefly consisted of issuing the controversial ruling that dismissed the case outright on summary judgment, despite disputed motivational issues the court itself acknowledged. *See Ricci v. DeStefano*, 129 S. Ct. 2658, 2689 (2009)(Alito, J. concurring) ("The District Court threw out their case on summary judgment, even though that court all but conceded that a jury could find that the City's asserted justification was pretextual.").

It was Judge Kravitz who was the long-presiding judge in *Ricci* from its inception in July 2004 all the way to May 2006. Judge Kravitz issued all pre-disposition rulings and orders, and managed *Ricci* through contentious discovery and summary judgment proceedings; he relinquished the case on the eve of oral argument and final disposition. Judge Arterton actively took over in June 2006, nearly two years *after* the action commenced and at its end stage. She rescheduled and heard oral argument on July 17, and 72 days later dismissed the action entirely on September 29, 2006. Plaintiffs appealed and Judge Arterton lost jurisdiction over *Ricci* for the years that it pended in the appellate courts.[10] *Ricci* was not remanded to the district court until October 27, 2009. Judge Arterton held a "scheduling" conference on November 5, 2009.

[10] This renders all the more frivolous defendants' claim that the motion is untimely because plaintiffs' counsel became aware, in March-June of 2009, of both the Firebirds' Supreme Court amici role in *Ricci* and Attorney Rosen's conflicting interest. Br. at 10-11. Judge Arterton had no jurisdiction over *Ricci* during that period.

Less than 30 days later plaintiffs delivered a letter to Judge Arterton requesting a conference to address the issue of recusal. Exh. 12.

Post remand, Judge Arterton has issued no substantive rulings.[11] All rulings of significance to the parties and the public, that is, those rulings which will not only determine *Ricci's* outcome but whether it will finally end here or require a repeat of appellate proceedings, have yet to be made. No jury trial has been scheduled. No evidentiary hearings have taken place or even been scheduled. A new judge will not have to duplicate any labors of Judge Arterton. Thus, this is not a situation where "a change of umpire mid-contest may require a great deal of work to be re-done …". *In Re: USA,* 572 F. 3d 301, 308 (7th Cir. 2009). Thus, Judge Arterton's short-term role in *Ricci,* especially when balanced against the troublesome appearances that have arisen upon its remand, argues in favor of granting, not denying, the motion for recusal.

IV. THE SUGGESTION OF "JUDGE SHOPPING" IS UNJUSTIFIED.

A recusal motion inevitably prompts allegations of "judge shopping," and this case is no exception. Defendants proffer the clichéd charge in lieu of a substantive response to the most troubling facts and the pertinent issue at hand. Additionally, the assertion that plaintiffs seek a jurist who is "unabashedly partial to them," Br. at 1, rings hollow for it both ignores that the identity of a successor judge is unknown (as s/he would be randomly assigned by the Clerk), and

[11] Contrary to defendants' intimation that plaintiffs' promotions were a product of judicial benevolence, the order requiring the promotions of 14 plaintiffs was *jointly* requested by the parties immediately upon the remand and was required by the appellate judgment, as the district court itself acknowledged. Defendants further strain to paint the court's ruling on the Tinney Intervenors' motion as an effort by Judge Arterton to "protect" the plaintiffs' promotions from collateral attack. Br. at 5. The plaintiffs hardly construed it that way. For the reasons explained, the court's bedtime ruling on December 2, together with its content, was among the multiple events which triggered the motion for recusal. The subsequent motion to intervene in *Ricci* filed by Attorney Rosen was obviously another.

insults the other judges in this district. [12]

Plaintiffs do not seek a judge that is "partial" to them. They seek only a judge free of the appearance that s/he is biased, overly personally invested in the case, or pursuing an ulterior agenda. In expanding §455 (a) to cover even the hint and appearance of impartiality and in imposing a strictly objective standard which asks what the "average person on the street" might think, Congress aimed to protect the institutional interest of the federal judiciary and to promote public confidence in and respect for it. It is respectfully submitted that this paramount interest is not served here where a court, in the wake of an outright reversal of her judgment in a controversial and high-profile case of national import, insists on continuing to preside on remand despite circumstances – some of her own making – that give rise to a significant problem of appearances that unquestionably have weakened the confidence in her neutrality and judicial detachment.

It also bears mention that the charge of judge-shopping is further belied by the record of plaintiffs' counsel. As noted for the Court on January 20, she has been a member of this bar for

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[12] Defendants, and Judge Arterton herself, both off the bench and in her order transferring the motion to this court -- see 2-4-10 Tr. at p. 14; and Order, Dkt. # 234) suggest plaintiffs seek merely to avoid anticipated adverse rulings from Judge Arterton. Had plaintiffs waited until after such rulings to file the motion, they undoubtedly would stand accused of having lain in wait. One cannot have it both ways with plaintiffs in a Catch-22. As plaintiffs' counsel advised the Court, in raising the recusal issue as early as December 4 - *before* the Court proceeded on remand to dispose of numerous substantive issues - plaintiffs were heeding the direction of appellate courts for the prompt raising of a recusal issue when circumstances arise which warrant it. See, e.g., *In Re: IBM Corp.*, 45 F. 3d 64, 643 (2d Cir. 1995) ("[A] prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters.").

The December 4 letter to Judge Arterton was delivered promptly upon the court's bedtime ruling of December 2 that would lead an objective observer to question whether Judge Arterton sought improperly to influence proceedings in *Briscoe* in a manner calculated to benefit Attorney Rosen and other counsel representing the interests of the President and members of the Firebirds who now seek to recapture some or all of the benefits of Judge Arterton since-reversed opinion by collateral lawsuits and intervention complaints. Once again, the recusal standard does not require any finding that this in fact occurred; it directs itself instead to whether the average person would question whether this was an impartial act. "[The] focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter." *U.S. v. Antar*, 53 F.3d 568, 573 (3d Cir. 1995).

over 20 years, litigated many cases, and has never before moved to recuse a judge of this Court. And Judge Arterton is hardly the first one whose judgment was overturned as a result of an appellate challenge by the undersigned counsel. *Ricci* was the sixth such occasion.[13] In none of those previous cases did the undersigned discern a basis for recusal of the reversed judge.[14] The same simply cannot be said of the instant case.

On January 20, Judge Arterton took umbrage at even being requested to disclose the particulars of her communications with Attorney Rosen, questioning counsel's right to "interrogate a judge," and offering nothing beyond the most generalized and conclusory statements regarding those discussions. Even on January 27, when Judge Arterton amended her earlier disclosure to "add" that she had "occasion to be in conversation with Mr. Rosen" about his "testing cases" while the two were together at the June 2009 Second Circuit judicial conference (at which Justice Ginsburg herself spoke of *Ricci*), the court would only generalize the account as such and made it clear this would "complete" what she had to say about it. When

[13] *See Dillon v. Morano*, 497 F.3d 247 (2d Cir. 2007); *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000); *Miller v. Lovett*, 879 F.2d 1066 (2d Cir. 1989); *Lounsbury v. Jeffries*, 25 F.3d 131 (2d Cir. 1994); *Dobosz v. Walsh*, 892 F.2d 1135 (2d Cir. 1989).

[14] Both Judge Arterton's out-of-court discussions with Attorney Rosen, and her presence at the oral argument in Washington were dismissed by the court as understandable given *Ricci's* status as a high-profile, highly publicized case. 1/20/10 Tr. at pp. 61, 81-82. But it is *precisely* that status which made it all the more important for the court to maintain distance and detachment from the case, and why the court's public speeches on race, men and reverse discrimination, and accusations of white bias against blacks, undermined the appearance of neutrality in this case. See *United States v. Cooley*, 1 F.3d 985, 992 (10th Cir.1993) (ordering recusal in high-profile, publicized case where the judge's public statements "conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant … rather than remaining as a detached adjudicator."); *Hathcock v. Navistar Intern. Transp. Corp.* 53 F.3d 36 (4th Cir. 1995) (ex parte contact with lawyer, together with judge's blunt remarks at seminar while presiding over case involving same issues, requires recusal); *Edgar v. K.L.* 93 F.3d 256 (7th Cir. 1996) (judge's undue remarks and pressuring of counsel during settlement conference the problem of judicial conduct that leaves no trace in the record).

counsel asked how such discussions could possibly *not* relate to *Ricci*, the court was unresponsive.[15] Mot. at 31. This hardly served to quell the appearance problem and indeed strengthens the case for recusal for it only fuels the notion that the plaintiffs would not be vexed on remand by Mr. Rosen's actions if Judge Arterton were not the presiding judge in *Ricci.*

There is no question that a reasonable person aware of all of these facts "might harbor doubts about the [judge's] impartiality." *In Re: Chevron,* 121 F.3d 163, 165 (5th Cir. 1997). Indeed these facts While few could deny that these facts "…would likely cause the average person in the street to pause," *Moran* at 649, even "if the question … whether § 455 (a) requires disqualification is a close one, the balance tips in favor of recusal." *Chevron* at 165.

Accordingly, plaintiffs respectfully submit that the motion should be granted.

RESPECTFULLY SUBMITTED:
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[15] Since Judge Arterton has known Mr. Rosen for many years, *query* why she decided to discuss with him in June of 2009 his civil service testing cases, two of which involved efforts on behalf of the Firebirds, while the two were together at a judicial conference listening to Justice Ginsburg speak of the imminence of her court's ruling in *Ricci*. To suggest this did not constitute an out-of-court discussion about the *Ricci* case and its subject matter is astonishing. And Judge Arterton did not see fit to voluntarily disclose to counsel that she had such discussions with Rosen even though she was sitting on his motion to intervene in this case. The disclosures, such as they were, came only upon the urgings of plaintiffs' counsel. These facts present precisely the kind of appearance that §455 aims to prevent.

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

I hereby certify that on March 30, 2010, 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

[i] In amending § 455 Congress expressly aimed to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety. *See* H.R.Rep. No. 1453, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 6355. The standard is thus an objective one and does not concern itself with whether the district court is in fact impartial or biased.