

No. 19-56514

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

OLEAN WHOLESALE GROCERY COOPERATIVE, INC., et al.,

Plaintiffs-Appellees,

v.

BUMBLE BEE FOODS LLC, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of
California, Case No. 3:15-md-02670-DMS-MDD

**MOTION TO VACATE ORDER GRANTING MOTIONS FOR
CLASS CERTIFICATION ON INDEPENDENT GROUNDS
BASED ON VIOLATIONS OF 28 U.S.C. § 455**

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INTRODUCTION

Defendants StarKist Co. (“StarKist”) and Dongwon Industries Co., Ltd. (together, “Defendants”) file this motion to bring to the Court’s attention violations of 28 U.S.C. § 455 by the District Court (Sammartino, J.) that independently warrant vacatur of the class certification decision in this case in order to ensure that the class certification issue is not tainted by these violations and to protect public confidence in the integrity of the judicial process. Plaintiffs have indicated that they oppose this motion.

On August 31, 2021, the Clerk of Court for the United State District Court for the Southern District of California notified the Parties that, during the pendency of this litigation, a family member of Judge Sammartino owned stock in Target Corporation (“Target”) and Sysco Corporation (“Sysco”), both Plaintiffs in the MDL proceedings. In addition to bringing their own lawsuits, both companies are members of the putative Direct Purchaser Plaintiff (“DPP”) class, and sales of packaged tuna products by Tri-Union Seafoods LLC d/b/a Chicken of the Sea International, Bumble Bee Foods, LLC, Del Monte Corporation, and StarKist (together, “MDL Defendants”) to one (Sysco) were used in all three putative classes’ economic analyses considered by Judge Sammartino in connection with certification of the DPP, End Payer Plaintiff (“EPP”), and Commercial Food Preparer (“CFP”) classes. These financial interests resulted in violations of Section 455. In fact, the

Clerk of Court’s notices stated that the conflicts would have required recusal under the Code of Conduct for United States Judges—a standard very similar to Section 455.¹ That same day, Judge Sammartino entered orders recusing herself from this case. According to an article published in the Wall Street Journal the following month,² and based on available information, Defendants have reason to believe that Judge Sammartino and/or her family member(s) had or have a financial interest in *multiple* other Plaintiffs in this case as well.

Two days after the Wall Street Journal story about these violations was published, Defendants filed a letter with the Clerk of Court requesting additional information about the extent of Judge Sammartino’s conflicts of interest in this case.

¹ Compare Guide to Judiciary Policy, Code of Conduct for United States Judges Canon 3C(1)(c) (Mar. 12, 2019), <https://www.uscourts.gov/file/25752/download> (requiring recusal when a family member “has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding”), with 28 U.S.C. § 455(a), (b)(4) (requiring recusal when judge’s “impartiality might reasonably be questioned” or a family member “has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding”).

² James V. Grimaldi, Coulter Jones, & Joe Palazzolo, *131 Federal Judges Broke the Law By Hearing Cases Where They Had a Financial Interest*, Wall St. J. (Sept. 28, 2021), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421>. The Court may take judicial notice of newspaper articles to demonstrate what was in the public realm. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010).

Defendants have yet to receive a response to this letter. However, through both press coverage and review of financial disclosure reports obtained by and recently made available to the public by the Free Law Project, Defendants learned that Judge Sammartino reported that she or her spouse or dependent children also held financial interests in CVS Health Corp. (“CVS”), the parent company of Direct Action Plaintiff CVS Pharmacy, Inc. (“CVS Pharmacy”); absent putative DPP class members Costco Wholesale Corporation (“Costco”) and Amazon.com, Inc. (“Amazon”); and Direct Action Plaintiffs Wal-Mart Stores Inc. (“Walmart”) and Kroger Co. (“Kroger”).³ MDL Defendants’ sales to their customers (which include the companies owned by Judge Sammartino or her family member) formed the basis of expert analyses performed by the putative classes. And just as Sysco’s discovery was used in connection with certification of the DPP and CFP putative classes, Walmart, Kroger, and Costco provided discovery that was used, and presumably considered by Judge Sammartino, in connection with class certification (CFPs: Walmart and Costco; EPPs: Walmart and Kroger). Defendants now file this motion to ensure that this Court is fully apprised of the substantial risk to the perception of

³ Judge Sammartino’s financial disclosure reports were obtained by Free Law Project and recently posted in a publicly accessible database on its Court Listener website. *See* <https://www.courtlistener.com/person/2830/disclosure/3336/janis-lynn-sammartino/>.

judicial integrity that Judge Sammartino's Section 455 violations pose to the decision under review.

On October 19, 2021, another district court (Bencivengo, J.), which had been reassigned a case from which Judge Sammartino recently recused herself, vacated a summary judgment order issued by Judge Sammartino because a member of Judge Sammartino's family had a financial interest in that case almost identical to the improper financial interests identified in this case (though in this case, as discussed, Judge Sammartino had multiple conflicts of interest). *See Driscoll v. Metlife*, No. 15-CV-1162-CAB-LL, 2021 WL 5323962 (S.D. Cal. Oct 19, 2021). The *Driscoll* court explained that, based on this undisclosed and disqualifying financial interest, "Judge Sammartino's involvement in this case violated § 455(a) throughout this case." *Id.* at *2. In particular, the court found that "the denial of relief here risks undermining the public's confidence in the judicial process." *Id.*

As Defendants have already argued to this Court in their supplemental brief and at oral argument, Judge Sammartino's class certification decision was erroneous as a matter of law and therefore should be set aside on the merits. Defendants nevertheless file this motion because there is an additional and independent reason why Judge Sammartino's decision simply cannot stand. For the same reasons identified in *Driscoll*, allowing Judge Sammartino's class certification decision to stand would deny Defendants a fair and impartial resolution on this important

threshold issue and create an impermissible and unacceptable risk of undermining the public's confidence in the integrity of the judicial process. Indeed, the high profile nature of this case and the fact that Judge Sammartino had *multiple* conflicts of interest in this case only magnify the concerns identified in *Driscoll*. All the Rule 60(b) factors point decisively toward vacating the decision below.

Accordingly, for this additional and independent reason, Judge Sammartino's class certification decision should be vacated.⁴

BACKGROUND

This multidistrict litigation was assigned to Judge Sammartino on December 9, 2015. Dkt. No. 1.⁵ She presided over it for six years and, in that time, issued dozens of rulings, including the class certification decision now pending before this Court. Dkt. No. 1931. That order was vacated by a three-judge panel of this Court on April 6, 2021, ECF No. 100-1, and is now on rehearing before this Court en banc.⁶

⁴ If this Court otherwise reverses or vacates the class certification decision at issue in its entirety, the Court may entertain additional briefing on whether this motion is moot in light of the Court's decision.

⁵ Dkt. No. refers to the docket in case 15-md-2670 or its member cases (as indicated), and ECF No. refers to this Ninth Circuit docket unless otherwise indicated.

⁶ Defendants are reviewing other orders issued by Judge Sammartino to determine whether to seek additional relief in the district court. This motion, however, is directed to the class certification order currently pending before this Court.

Defendants have since learned that, on August 3, 2021, while the Ninth Circuit proceedings in this case were ongoing, the Clerk of Court sent a letter to the parties in an unrelated action disclosing that a family member of Judge Sammartino had a financial interest in Target, which is also a plaintiff in this multidistrict litigation. *See The Eclipse Grp. LLP v. Target Corp.*, No. 15-cv-1411, ECF No. 270.⁷ It was not until nearly one month later, on August 31, 2021, that the Clerk of Court notified the Parties in one of the member cases in this litigation that Judge Sammartino had identified a financial conflict of interest based on a family member's ownership of stock in Direct Action Plaintiff Target. *Target Corp. v. Bumble Bee Foods LLC*, No. 3:17-cv-01348-DMS, Dkt. No. 14 ("Target Notice"). The Clerk of Court also notified the Parties that Judge Sammartino had identified a conflict of interest in another member case, based on a family member's ownership of stock in Direct Action Plaintiff, Sysco. *Sysco Corp. v. Bumble Bee Foods LLC*, No. 18-cv-00387-DMS, Dkt. No. 28 ("Sysco Notice"). In addition to bringing their own lawsuits, both of these companies (Target and Sysco) are members of the putative DPP class, and MDL Defendants' sales to these companies were used in econometric analyses at issue in certification of the CFP class (Sysco), DPP class (Sysco and Target), and EPP class (Sysco and Target). Further, Sysco provided datasets specifically relied

⁷ This Court may take judicial notice of court filings. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

upon by the Parties in econometric analyses and thus presumably considered by Judge Sammartino in connection with certification of the putative DPP and CFP classes.

According to the notices from the Clerk of Court, a member of Judge Sammartino's family owned stock in Plaintiffs Sysco and Target at the time the Judge was presiding over these member cases, and this financial interest would have required recusal under the Code of Conduct for United States Judges.⁸ *See* Target Notice at 1; Sysco Notice at 1. The same day on which Defendants received these notices, Judge Sammartino issued orders of recusal, which noted that the Judicial Panel on Multidistrict Litigation had reassigned the multidistrict litigation cases to Chief Judge Sabraw. *See, e.g.*, Dkt. No. 2619.

Not long after, on September 28, 2021, the Wall Street Journal published an article identifying more than 130 federal judges who had heard cases in which they had a financial conflict of interest. Judge Sammartino was among the judges discussed and, according to the article, had the second-most recusal violations of any

⁸ The notices do not identify the family member who owned stock in these companies. It has been reported, however, that the stocks were in "managed funds" held by Judge Sammartino's husband. *See* Kristina Davis, *Congress calls for reform after 131 judges with stock holdings fail to recuse from cases*, San Diego Union-Tribune (Nov. 29, 2021), <https://www.sandiegouniontribune.com/news/courts/story/2021-11-29/law-judicial-financial-disclosures>.

federal judge. James V. Grimaldi et al., *supra*, Wall St. J. The Wall Street Journal reported that Judge Sammartino heard 54 cases involving companies held in her family's trusts. *Id.* In addition, along with the financial interests in Plaintiffs Target and Sysco identified in the notices from the Clerk of Court, the article also stated that Judge Sammartino traded in stock of CVS, the parent company of another Direct Action Plaintiff and putative DPP class member, CVS Pharmacy, *id.*, although that separate financial interest has never been disclosed to Defendants.

On September 30, 2021, counsel for Defendants filed a letter to the Clerk of Court requesting additional information regarding any other financial interests Judge Sammartino or her family had in Plaintiffs and specifically in CVS. *See* Ex. 1. Judge Sammartino has not disclosed any additional information regarding this apparent conflict of interest to Defendants, and Defendants have yet to receive any response to their September 30, 2021 letter. Concurrently with this motion, Defendants are filing another letter with the Clerk of Court to advise it that we have filed this motion, seek information concerning additional conflicts of interest not identified in the Clerk of Court's notices, and are awaiting the information previously requested in our September 30, 2021 letter.

Since the Wall Street Journal article's publication and Defendants' letter to the Clerk of Court, Defendants have discovered in the Judge's disclosures that she or her family (either her spouse or dependent children who must be included in her

disclosures) has or had a financial interest in *multiple* other Plaintiffs during the pendency of this litigation. These include Direct Action Plaintiffs (and members of the putative DPP class) Walmart and Kroger, and absent putative DPP class members Costco and Amazon.⁹ Like Sysco, Walmart, Kroger, and Costco provided discovery that was used by the Parties' economists in connection with the class certification proceedings (CFPs: Walmart and Costco; EPPs: Walmart and Kroger). Indeed, MDL Defendants' sales to the plaintiff companies in which Judge Sammartino or her family member held stock were included in various expert analyses submitted to the Court during the class certification proceedings. Judge Sammartino never disclosed any of these other financial interests to Defendants.

ARGUMENT

Defendants have previously explained that Judge Sammartino's class certification order in this case is erroneous as a matter of law and cannot stand, as the initial three-judge panel in this case concluded. But it is now apparent that Judge

⁹ See, e.g., Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2015 at 20 (Amazon), 49 (Target), 50 (Walmart) (May 10, 2016), *available at* <https://www.courtlistener.com/person/2830/disclosure/3336/janis-lynn-sammartino/>; Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2016 at 24 (Costco) (Aug. 25, 2017), *available at* <https://www.courtlistener.com/person/2830/disclosure/14609/janis-lynn-sammartino/>; Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2018, at 19 (Amazon), 24 (Costco), 30 (Kroger) (May 13, 2019), *available at* <https://www.courtlistener.com/person/2830/disclosure/20079/janis-lynn-sammartino/>.

Sammartino’s violations of 28 U.S.C. § 455 independently require vacatur of the class certification order at issue in this appeal as well. Leaving that decision in place not only would deprive Defendants of a fair and impartial adjudication on this critical issue, but also would undermine public confidence in the impartiality of the judiciary and ultimately cast a cloud over any decision issued by this Court that does not vacate Judge Sammartino’s decision in its entirety. Especially in a case of this magnitude, that should not be allowed.

I. JUDGE SAMMARTINO VIOLATED SECTION 455 IN MULTIPLE RESPECTS AS TO THIS CASE

Even on the information now known, it is evident that Judge Sammartino’s involvement in this case violated 28 U.S.C. § 455 in numerous respects.

A. Section 455(a) Violation

Section 455(a) requires that any judge of the United States “shall disqualify h[er]self in any proceeding in which h[er] impartiality might reasonably be questioned.”¹⁰ “Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his [or her] interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the

¹⁰ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“shall” is “mandatory” and “normally creates an obligation impervious to . . . discretion”).

judge would have actual knowledge.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988) (citation omitted).

Under this standard, courts have found violations where a judge’s wife owned stock in a class member, *Arizona v. United States Dist. Ct. for the Dist. of Ariz. (In re Cement Antitrust Litig. (MDL No. 296))*, 688 F.2d 1297, 1308 (9th Cir. 1982); where a judge’s brother, sister-in-law, and nephew were employed by a party, *Shelstad v. West One Bank*, 59 F.3d 176, 1995 WL 383384, at *3 (9th Cir. 1995) (unpublished); and where a judge sat on the Board of a university that was negotiating the sale of property, and the value of the property would be impacted by a lawsuit over which the judge was presiding. *See Liljeberg*, 486 U.S. at 850-51, 859-61.

Judge Sammartino presided over this important multidistrict litigation while a family member owned stock in multiple Plaintiffs. Regardless of whether (or when) Judge Sammartino actually knew of that financial interest, that was a violation of Section 455(a). A member of the public could reasonably expect that Judge Sammartino, having signed and dated her annual financial disclosure reports, would have knowledge of her family members’ stock ownership in highly prominent plaintiffs in a case she presided over for years. *See Liljeberg*, 486 U.S. at 850, 859-61. And there is no doubt that such a member of the public could reasonably question her impartiality in these circumstances.

Judge Bencivengo reached that very conclusion about Judge Sammartino's nearly identical conflict of interest in *Driscoll*. On similar facts, the *Driscoll* court explained that, regardless of when Judge Sammartino actually became aware of the conflict of interest, "the public might reasonably believe that Judge Sammartino knew of her or her immediate family's stock holdings" and found an appearance of impropriety on that basis. *Driscoll*, 2021 WL 5323962, at *1. The court continued that the need "to promote public confidence in the integrity of the judicial process . . . does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety so long as the public might reasonably believe that he or she knew." *Id.* (quoting *Liljeberg*, 486 U.S. at 859-60).

Even based on the already known information, the same appearance of impropriety is present here. In fact, the situation is more pronounced. Here, Judge Sammartino's financial disclosures reveal that she or a family member held a financial interest in multiple Plaintiffs and made multiple trades on such stocks during the period in which she presided over this case. And, just as in *Driscoll*, Judge Sammartino's failure to recuse violated Section 455(a) regardless of whether she had actual knowledge of the improper financial interests in the case.

Whether the conflicts of interests affected or impacted Judge Sammartino's decisions in this case is of no moment. The law requires disqualification where impartiality might reasonably be questioned, 28 U.S.C. § 28. Its purpose is to

“avoid[] even the *appearance* of impropriety.” *Liljeberg*, 486 U.S. at 865 (emphasis added). And this rule applies to any case in which a conflict of interest creates the appearance of impropriety, not merely those most egregious cases when the conflict has an actual impact on the outcome. *See id.* at 864-65. Thus, there is no need for this Court to even consider whether the conflicts had an actual impact because the undisputed facts establish an appearance of impropriety sufficient to constitute a violation of Section 455.

Moreover, in light of the close similarity between Judge Sammartino’s violations of Section 455 in this case and her violation in *Driscoll*, which a district court in this Circuit already identified as a sufficient basis to vacate a major order in that case, letting Judge Sammartino’s class certification order stand would only create a further appearance of judicial impropriety. Indeed, the threat to the public confidence in the integrity of the judicial process is even greater here than in *Driscoll* given the high-profile nature of this litigation and the issues now before this Court. In addition, the class certification order in this case could expose Defendants to liability where the putative classes are pressing claims for hundreds of millions of dollars of trebled damages. Defendants’ right to the fair and impartial adjudication of this consequential issue should not be subject to such apparently inconsistent protection as would be afforded if this Court parted ways with the *Driscoll* court.

B. Section 455(b) Violation

Judge Sammartino also violated Section 455(b) while continuing to preside over this case. Under Section 455(b), a judge “shall also disqualify h[er]self” if the judge “knows that . . . h[er] spouse or minor child . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455 (b)(4). Judge Sammartino’s certified and signed disclosures suggest that she was aware of her family’s ownership in Plaintiff Target as early as 2015 and in Plaintiff Sysco as early as 2017—long before she issued the class certification order now before this Court. *See* Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2015, at 49 (Target) (May 10, 2016), *available at* <https://www.courtlistener.com/person/2830/disclosure/3336/janis-lynn-sammartino/>; Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2017 at 51 (Sysco) (May 11, 2018), *available at* <https://www.courtlistener.com/person/2830/disclosure/20079/janis-lynn-sammartino/>.¹¹ Section 455(b) required Judge Sammartino to recuse herself at that

¹¹ Likewise, Judge Sammartino’s signed and dated disclosures indicate that she was aware of her or her family member’s ownership of stock in CVS, Walmart, Kroger, Costco, and Amazon several years ago. *See, e.g.*, Financial Disclosure Report for Calendar Year 2015, *supra*, at 20 (Amazon), 24 (CVS), 50 (Walmart); Janis L. Sammartino, Financial Disclosure Report for Calendar Year 2016, *supra*, at 20 (Amazon), 24 (Costco), 51 (Walmart) (Aug. 25, 2017); Janis L. Sammartino,

time, and her failure to do at that time also was a violation of the statute. *See Liljeberg*, 486 U.S. at 858, 867 (holding that the district judge should have recused himself when he acquired actual knowledge of his conflict and that his failure to do so was an independent violation of Section 455).

C. Section 455(c) Violation

Finally, Judge Sammartino's failure to stay informed that parties appearing in her disclosures were also appearing before her in court violated 28 U.S.C. § 455(c). *See Liljeberg* 486 U.S. at 867-68; *see also Driscoll*, 2021 WL 5323962, at *1 (“[Judge Sammartino’s] failure to stay informed of [her disqualifying interest] may well constitute a separate violation of § 455” (citation omitted)). Federal law requires judges to “inform [themselves] about [their] personal and fiduciary financial interests, and make a reasonable effort to inform [themselves] about the personal financial interests of [relevant family members].” 28 U.S.C. § 455(c). In other words, if Judge Sammartino did not know about this conflict, despite signing and dating financial disclosure reports listing multiple Plaintiff companies, she “certainly should have known.” *Liljeberg*, 486 U.S. at 868.

Financial Disclosure Report for Calendar Year 2018, *supra*, at 19 (Amazon), 24 (Costco), 30 (Kroger) (May 13, 2019).

II. THESE VIOLATIONS INDEPENDENTLY REQUIRE VACATUR OF JUDGE SAMMARTINO’S CLASS CERTIFICATION ORDER

Defendants explained in detail in their supplemental brief and at oral argument in this case why Judge Sammartino’s class certification order is erroneous as a matter of law and should not stand. But the violations of Section 455 that have come to light in the past few months each independently require vacatur of that order as well.

Under Rule 60(b), federal courts have broad authority to relieve a party from a final judgment for “any” “reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). Vacatur is often justified when the issuing judge had a conflict of interest at the time they issued the judgment. *See Shelstad*, 1995 WL 383384, at *3 (vacating attorney fees order after determining that judge “abused his discretion in failing to recuse himself when the motion for recusal was filed”); *Armstrong v. Rushton (In re Armstrong)*, 294 B.R. 344, 360 (B.A.P. 10th Cir. 2003) (“[O]rders entered prior to a recusal may be voided if the injured party can show that the judge should have recused herself and failed to do so.”), *aff’d*, 97 F. App’x 285 (10th Cir. 2004); *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998) (“[W]e can vacate a remand order because of a judge’s preceding failure to recuse herself”); *see also United States v. Lindsey*, 556 F.3d 238, 246-47 (4th Cir. 2009) (holding that vacatur was appropriate even though the judge was unaware of the conflict at the time he issued the ruling). And significantly, the *Driscoll* court determined in almost identical circumstances that vacatur was appropriate where Judge Sammartino’s

family member had a financial interest in a party appearing before her. *See Driscoll*, 2021 WL 5323962, at *2-3.

In considering whether relief is justified, a court should consider: (1) “the risk of injustice to the parties in the particular case,” (2) “the risk that the denial of relief will produce injustice in other cases,” and (3) “the risk of undermining the public’s confidence in the judicial process.” *Liljeberg*, 486 U.S. at 864. As Judge Bencivengo concluded in nearly identical circumstances in *Driscoll*, all three factors support vacating Judge Sammartino’s class certification decision here.

First, the risk of injustice to Defendants from being subjected to an order issued under the cloud of such pervasive conflicts of interest is severe. By contrast, Plaintiffs could make no showing of any “special hardship by reason of their reliance on the original judgment,” particularly because a three-judge panel vacated it. *See Liljeberg*, 486 U.S. at 868-69.

Second, denial of relief will produce injustice in other cases. As the court in *Driscoll* explained, refusing relief in these circumstances “could produce injustice in other cases because it could discourage litigants from examining the grounds for disqualification of judges under the belief that courts are disinterested in enforcing § 455.” *Driscoll*, 2021 WL 5323962, at *2. To hold that there is no remedy for even such pervasive conflicts of interest as Judge Sammartino had at the time she certified the classes—where the Judge’s family member had a financial interest in at least

two, and maybe as many as *seven* different Plaintiffs based on information that has come to light—more than half of whom produced data used in the class certification proceedings—would render Section 455 toothless.

Third, and most important, refusing to address these violations of Section 455 would undermine public confidence in the judicial process. As the *Driscoll* court concluded in virtually identical circumstances, a reasonable member of the public would question Judge Sammartino’s impartiality as to the decision under review based on the conflicts discussed above, regardless of what Judge Sammartino knew and when. *Id.* Indeed, as the *Driscoll* court explained, there is a “particular risk of undermining public opinion in the judicial process” given that Judge Sammartino’s conflict of interest in this case was not an isolated incident. *Id.* at *4-5. The Wall Street Journal identified 54 recusal violations in which Judge Sammartino presided over a case in which she or a family member had a financial interest. Because Judge Sammartino’s violation in this case “was not an isolated instance,” the need for relief here is especially compelling. *Id.* at *4.

The threat to the public confidence in the integrity of the judicial process is only magnified by the high-profile nature of this case and the issues now before this en banc Court. The *Driscoll* case involved a relatively obscure dispute and a fact-bound summary judgment decision. This case, as underscored by the fact that the Court granted en banc review as well as the numerous amici who have participated

in the case and press coverage, is being closely followed by many and will have an important impact not only on the course of this litigation but also class action practice generally. That public attention greatly heightens the threat to the integrity of the judicial process if Judge Sammartino's decision were allowed to stand. Neither Defendants nor the Judiciary more generally should be subjected to a decision that would be tainted by the cloud of Judge Sammartino's Section 455 violations in this case.

CONCLUSION

Accordingly, Judge Sammartino's violations of Section 455 independently require vacatur of the class certification decision at issue in this case.

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Respectfully submitted,

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