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November 14, 2019

BY ECF

Hon. Robert W. Lehrburger
United States Magistrate Judge
500 Pearl Street
New York, NY 10007-1312

Re: *State of New York et al. v. Deutsche Telekom et al.*, 1:19-cv-05434-VM-RWL

Dear Magistrate Judge Lehrburger:

I write on behalf of California and the other members of the Plaintiff States' leadership team (New York, Texas, Massachusetts and Wisconsin, hereafter, the States) pursuant to the Court's Individual Practices to respond to the U.S. Department of Justice Antitrust Division's (Division) letter seeking to disqualify the States' lead trial counsel, Glenn Pomerantz and his firm, Munger, Tolles & Olson LLP (Munger).[1] As the Court is aware, we are less than one month from the start of trial on December 9, 2019. The States would be extremely prejudiced by the disqualification of Mr. Pomerantz and Munger this close to trial for a complex antitrust case on a compressed timeline. Further, the Division's request should be denied because the Division failed to show how any alleged confidential government information in Mr. Pomerantz's possession poses any risk of tainting the trial. That the Division filed this letter only at the eleventh hour despite knowing of Mr. Pomerantz's involvement with this matter as early as April of this year, lends additional support to the conclusion that its request should be denied.

LEGAL STANDARD

A court's power to disqualify an attorney is derived from its "inherent power to preserve the integrity of the adversary process," *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (internal quotation marks omitted), and the decision to do so is "a matter committed to the sound discretion of the district court." *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994). Under Second Circuit precedent, it is clear that courts should be reluctant to disqualify counsel. *See, e.g.*, *Muniz v. Re Spec Corp.*, 230 F. Supp. 3d 147, 152 (S.D.N.Y. 2017) ("Disqualification is disfavored because it 'has an immediate adverse effect on the client by separating him from counsel of his choice,' and because motions to disqualify, 'even when made in the best of faith . . . inevitably cause delay.'" (quoting *Bd. of Educ. Of City*

[1] Counsel for Munger will be submitting a separate letter to the Court disputing the merits of the Division's contention that Mr. Pomerantz's and Munger's representation of the States in this case violates the New York Rules of Professional Conduct. The States concur with the substance of that letter.

of New York v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)). Second Circuit precedent stresses that: "Disqualification . . . deprives a client of counsel of its choice. Moreover, professional disciplinary bodies, including the Grievance Committee of this Court, are available to police the behavior of counsel. Accordingly, the Second Circuit has made clear that disqualification is appropriate only if a violation . . . gives rise to a significant risk of trial taint." *Universal City Studios, Inc. v. Reimerdes*, 98 F.Supp.2d 449, 455 (S.D.N.Y. 2000) (citing *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir. 1981)).

ARGUMENT

1. The Disqualification of Mr. Pomerantz and Munger Would Be Highly Prejudicial to the States.

Disqualification of Mr. Pomerantz and Munger would be highly prejudicial to the States, especially with trial less than four weeks away. This case was filed on June 11, 2019 and since then, the case has proceeded on a compressed timeline with the parties completing fact and expert discovery and preparing for trial in approximately five months. Mr. Pomerantz and his firm have taken a leading role in several critical aspects of this complex antitrust case, including serving as lead counsel at two Court hearings,[2] negotiating the case management order, taking key depositions of T-Mobile, Deutsche Telekom, and Sprint witnesses, assisting with expert reports and conducting expert depositions, and generally conducting all the tasks one would expect of lead counsel. Mr. Pomerantz will also take the lead role at trial.

It would be virtually impossible to identify and educate new counsel three weeks before trial. Particularly as to California, the decision was made in the spring of 2019, before the complaint was filed, to retain outside counsel to represent it in court, and the case was staffed accordingly. Regardless of whether California uses its own staff attorneys or outside counsel, if new counsel has to be brought in, it would take considerable time to bring those new attorneys up to speed. Moreover, while the state Attorneys General offices include experienced counsel, state-led litigation to enjoin a national merger of this magnitude is unprecedented. All of the Plaintiff States have benefited from the expertise of Mr. Pomerantz and his firm as lead counsel, and would be severely prejudiced by his and his firm's disqualification.

The prejudice that the States would suffer if Mr. Pomerantz and Munger were disqualified is reason enough for the Court to deny the Division's request. *See Universal City Studios, Inc.*, 98 F.Supp.2d at 456 ("Disqualification at this stage would prejudice defendants in that they would be forced either to find and educate new counsel for an important trial that now is less than two months away or seek an adjournment and thus perhaps prolong the duration of the preliminary injunction."); *see also Brown & Williamson Tobacco Corp. v. Pataki*, 152 F.Supp.2d 276, 290 (S.D.N.Y. 2001) (finding a two-month delay in bringing a motion to disqualify to be prejudicial where a preliminary injunction proceeding was operating under an expedited timeline and the prejudiced party had "invested substantial resources" in its counsel's "knowledge and [] preparation of the case").

[2] *See* Hearing Tr. p. 8, June 21, 2019 and Hearing Tr. p. 3, Aug. 1, 2019.

2. The Division's Delay and Failure to Identify Any Risk of Trial Taint Are Fatal.

Nowhere does the Division's November 9 letter attempt to show how Mr. Pomeranz's possession of unidentified "confidential government information" poses a risk, serious or remote, of tainting the trial in this action.[3] Instead, the Division offers up nothing more than an *ipse dixit* assertion that Mr. Pomerantz's access to such information eight years ago, by itself, is sufficient for disqualification. *See Chemical Bank v. Affiliated FM Ins. Co.*, 1994 U.S. Dist. LEXIS 5120, *66, 1994 WL 141951, at *19 (rejecting motion to disqualify and stating that "the absence of any real risk of trial taint or prejudice to Chemical compels me to find that Chemical has pressed this motion solely to obtain a tactical advantage").

On April 18, 2019, I informed the Division of California's intention to hire Mr. Pomerantz and Munger to represent California in any potential litigation to block the proposed Sprint/T-Mobile merger. At that time, no one from the Division raised any issue with Mr. Pomerantz's prior work with the Division or any other possible ethical issues. Then, on June 11, 2019, the States publicly filed their complaint in this action on which Mr. Pomerantz's signature appears on behalf of the State of California. Again, no ethical concerns were raised by the Division relating to Mr. Pomerantz's involvement in this case.

The Division was clearly aware from the outset of Mr. Pomerantz's role in the failed 2011 merger between AT&T and T-Mobile. It was aware that he, like the States, had access to confidential information in the course of litigating that failed transaction. Given the brevity of that engagement, the lapse of eight years, the difference in parties, and the clear irrelevance of the Division's internal analysis of that transaction, it is not surprising that no concerns were raised by the Division. Nothing has changed since April 2019 when I first raised Mr. Pomerantz's potential involvement in this matter with the Division in terms of the relevant facts pertinent to the ethical issue, except that the delay in raising it threatens significant prejudice to the States. The Division's belated assertion of a conflict undermines the substance of the ethical issue it purports to identify. *See Chemical Bank*, 1994 U.S. Dist. LEXIS 5120, *66, 1994 WL 141951, at *19.

For the foregoing reasons, the Division's request to disqualify Mr. Pomerantz and Munger should be denied.

Sincerely,

/s/ Paula L. Blizzard

Paula L. Blizzard
Supervising Deputy Attorney General

[3] The absence of any such showing is particularly stark given that the parties themselves have abandoned any objection to the participation of Mr. Pomerantz and Munger in this action.