JOSEPH HAGE AARONSON LLC

485 LEXINGTON AVENUE

NEW YORK, NEW YORK 10017

(212) 407-1200

WWW.JHA.COM

GREGORY P. JOSEPH
DIRECT DIAL: (212) 407-1210
DIRECT FAX: (212) 407-1280
EMAIL: gjoseph@jha.com

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 AG, et al.*, No. 1:19-cv-05434-VM

We represent Munger, Tolles & Olson LLP (the "**Firm**") in connection with the November 8, 2019 letter (the "**Letter**") from the Antitrust Division of the Department of Justice (the "**Division**") requesting a pre-motion conference seeking leave to intervene and move to disqualify Plaintiff States' lead trial counsel, Glenn Pomerantz, and his Firm. The Letter is untimely, misapplies the relevant ethical rules, ignores the governing "trial taint" standard for disqualification in this Circuit, and disregards that the Defendants have acknowledged that they have no issue with Mr. Pomerantz and the Firm's representation of Plaintiff States (the "**Representation**"). The proposed motion is devoid of merit.

BACKGROUND

Eight years ago, the Division sued AT&T and T-Mobile to enjoin their proposed merger. On October 24, 2011, Mr. Pomerantz became a special government employee and co-lead counsel on the Division's case. Less than two months later, on December 19, 2011, AT&T and T-Mobile abandoned the transaction. Mr. Pomerantz promptly left the Division. He did not take any materials, and he recalls only the broadest generalities of the 2011 litigation.

Eight years later, Plaintiff States chose Mr. Pomerantz to have the lead trial role challenging a different proposed merger, to deliver the opening statement and to question key witnesses. Plaintiff States informed the Division of Mr. Pomerantz's planned involvement on or about April 18, 2019—7½ weeks before filing their Complaint. In April 2019, Mr. Pomerantz began discussing his potential involvement with senior Division leadership. The Division did not raise any concerns. On June 11, 2019, Plaintiff States filed their Complaint. Mr. Pomerantz appeared as counsel. Senior Division leadership raised no concerns and continued to have discussions with him.

On July 31, 2019, Defendants' counsel approached Mr. Pomerantz to discuss whether the Representation implicated Rule 1.11(c) of the New York Rules of Professional Conduct. After a thorough vetting of all pertinent ethical issues, Defendants stated that their concerns were satisfied by Mr. Pomerantz making certain representations, as reflected in Exhibit 1 (attached).

On August 28, 2019—more than four months after the Division learned of Mr. Pomerantz's involvement—the Division contacted him. In an ensuing conversation, Division counsel stated that, at the request of Defendants here, the Division was considering Mr. Pomerantz's involvement in the 2011 litigation under New York's ethical rules but had not reached any conclusion. On September 13 and 19, 2019, the Firm's General Counsel, Stuart Senator, having consulted an independent legal ethics expert, sent the Division two letters analyzing the issues and explaining why the Representation complies with the New York rules and why there is no conceivable trial taint (Exs. A and B to the Letter).

Over the next month—during which it was preparing for trial—the Firm heard nothing from the Division. It was not until October 23, 2019, that the Firm received a phone call from the Division, and not until October 28, 2019 that it received the Division's letter. That letter insisted on a response the next day. The Firm complied and requested immediate notice if the Division planned to approach the Court. The Firm heard nothing further until November 8, 2019, when the Division filed its Letter.

DISCUSSION

(1) Mr. Pomerantz and the Firm have at all times complied with the New York ethical rules. They do not "hav[e]," and have not "use[d]" or "reveal[ed]," any "confidential government information" about T-Mobile or Sprint, or any "confidential information" of the Division. The Division has identified *no* information from the 2011 litigation that any party contends is relevant to the current case that is not either publicly available or that has not been produced in discovery in this case. We refer the Court to Mr. Senator's letters (Exs. A and B to the Letter) and Mr. Pomerantz's representations (Exhibit 1 hereto (last page)) for further details.

(2) The Division's letter nowhere suggests that Mr. Pomerantz's continued service as lead counsel will taint the trial. Yet "trial taint" is the standard for the disqualification that the Division seeks. *See, e.g.*, *GSI Commerce Solutions, Inc. v. BabyCenter, LLC*, 618 F.3d 204, 209 (2d Cir. 2010) ("disqualification is warranted only if an attorney's conduct tends to taint the underlying trial"). Here, the Division's parallel complaint against T-Mobile and Sprint *agrees* that the proposed merger is anticompetitive. The Division disagrees only on whether the Division's proposed remedy solves the problem. But the Division does not purport to show how there would be any taint at trial on *that* question—let alone any other—from Mr. Pomerantz's access to some vaguely-described information about a different proposed transaction between different parties, 8 years ago, where the current proposed remedy was not at issue. As the Plaintiff States have previously confirmed, they and their experts are not in any way using or relying on any aspect of the Division's internal analyses or perspectives on that failed transaction.

(3) The Division suggests that Plaintiff States' general requests to Defendants to produce documents relating to the proposed 2011 AT&T/T-Mobile transaction somehow demonstrate that Mr. Pomerantz has used the Division's confidential information (as narrowly defined by the relevant rule) "to assist in propounding discovery requests" to Defendants in this case. Letter, at 2 and Ex. C at 9. But the Division does not identify any particular request that reflects either Mr. Pomerantz's crafting or his use of the Division's confidential information to do so. Any responsible lawyer would want to see if T-Mobile or Sprint had made statements in 2011 that are

in conflict with its position now. That is presumably why, in its pre-suit investigation here, the Division *itself* served discovery requests on T-Mobile and Sprint that sought their submissions to the Division and related documents concerning the failed 2011 transaction. Also, Plaintiff States were co-plaintiffs in the 2011 litigation and thus had the same access to material from T-Mobile and Sprint as Mr. Pomerantz, as well as other confidential materials. Plaintiff States also have the same access as Mr. Pomerantz to the discovery produced in this case and to T-Mobile and Sprint's submissions during the Division's 2018 and 2019 pre-suit investigation.

(4) The Division has known of Mr. Pomerantz's potential involvement here since April 2019 and spoke with Mr. Pomerantz without complaint during the initial months of the Representation. The Division waited more than six months—until just a month before trial—to raise disqualification with the Court. This delay alone warrants denial of relief. *See, e.g., Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 290 (S.D.N.Y. 2001) (two-month delay weighed against disqualification on the eve of preliminary injunction hearing in expedited proceeding); *Ross v. Great Atl. & Pac. Tea Co., Inc.*, 447 F.Supp. 406, 410 n. 7 (S.D.N.Y. 1978) (court may consider the "hardship which would attend our granting [a disqualification] motion at this late date").

(5) The Letter conspicuously omits that the Defendants—T-Mobile and Sprint—previously considered Mr. Pomerantz's role in this case, obtained certain representations from him relating to his prior work, and determined *not* to object to the Representation. *See* Ex. 1, attached. The Division's stated concern is the potential for material disadvantage to the Defendants. The Defendants' agreed resolution fully vindicates that concern.

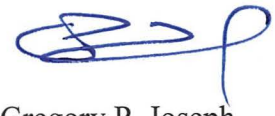
(6) The Division says that there will be "no prejudice" if the Court were now to disqualify Plaintiff States' lead trial counsel and his entire Firm, and that the Plaintiff States can easily fill that void. Letter at 3. In reality, depriving a trial team of lead counsel less than three weeks before openings in a highly complicated, tech-infused, expedited antitrust trial would pose enormous difficulties. Disqualification would result in substantial prejudice, as explained in a separate submission.

(7) The Division maintains that Mr. Pomerantz and the Firm could have avoided prejudice by resigning as soon as they became aware of the Division's interest in the ethical issue. Letter at 3. But the Division stated in September that it had *not* reached any conclusions. The Firm had both thoroughly analyzed the issue and resolved the Defendants' concerns. The Division did not communicate its conclusions until October 23 and then waited 2 weeks to pursue disqualification. There would have been enormous prejudice to the Plaintiff States were the Firm to have ended the Representation in late October. Withdrawal also would have been entirely unjustified—Mr. Pomerantz and the Firm had confirmed with an independent expert on New York ethics rules their conclusion that they have fully honored the ethical rules, there has never been a suggestion of trial taint, and the Defendants have stated that they have no issue with the Representation.

CONCLUSION

The Letter is untimely, the proposed motion is meritless, and litigating it on the eve of trial in this expedited proceeding would be an unjustified distraction from trial preparation.

Respectfully submitted,



Gregory P. Joseph

cc (by ECF): All counsel of record

Exhibit 1

From: Gorelick, Jamie <Jamie.Gorelick@wilmerhale.com>
Sent: Friday, September 13, 2019 9:05 AM
To: Senator, Stuart
Cc: Gorelick, Jamie
Subject: Re: State of New York, et al. v. Deutsche Telekom AG, et al.

Stuart -

This represents our agreement, except for the minor change that "fact" should be "facts".

Thank you -

Jamie

Sent from my iPad

On Sep 10, 2019, at 9:09 PM, Senator, Stuart <Stuart.Senator@mto.com> wrote:

EXTERNAL SENDER

Jamie,

As memorialized in prior correspondence, with Glenn Pomerantz's having executed the attached document, unless Defendants show that any of the representations therein are untrue, or barring newly-discovered information, Defendants in this litigation have agreed that they will not argue that Glenn Pomerantz or this firm's involvement in this litigation is inappropriate under NY Rule of Prof'l Conduct 1.11(c), or otherwise based on fact or circumstances now known to Defendants.

Although our prior correspondence memorializes Defendants' agreement to the above, I would appreciate your confirming that agreement in response to this email, so that we would have a single e-mail chain to reference going forward.

Thank you,

Stuart

Stuart N. Senator | Munger, Tolles & Olson LLP
350 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9528 | stuart.senator@mto.com | www.mto.com

From: Senator, Stuart <Stuart.Senator@mto.com>
Sent: Tuesday, September 10, 2019 10:07 PM
To: Gorelick, Jamie
Subject: State of New York, et al. v. Deutsche Telekom AG, et al.
Attachments: Statement.pdf

Jamie,

As memorialized in prior correspondence, with Glenn Pomerantz's having executed the attached document, unless Defendants show that any of the representations therein are untrue, or barring newly-discovered information, Defendants in this litigation have agreed that they will not argue that Glenn Pomerantz or this firm's involvement in this litigation is inappropriate under NY Rule of Prof'l Conduct 1.11(c), or otherwise based on fact or circumstances now known to Defendants.

Although our prior correspondence memorializes Defendants' agreement to the above, I would appreciate your confirming that agreement in response to this email, so that we would have a single e-mail chain to reference going forward.

Thank you,

Stuart

Stuart N. Senator | Munger, Tolles & Olson LLP
350 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9528 | stuart.senator@mto.com | www.mto.com

I, Glenn Pomerantz, hereby represent as follows:

In connection with my role as co-lead trial counsel in the DOJ's lawsuit challenging the proposed AT&T/T-Mobile merger, I acquired information about T-Mobile and Sprint that had been obtained by the DOJ under government authority. To the extent that the DOJ is today prohibited by law from disclosing such information to the public or has a legal privilege not to disclose it, and the information is not otherwise available to the public, I refer to it below as "Party Confidential Government Information."

As far as I know, I do not have Party Confidential Government Information that I could use to the material disadvantage of the defendants in the lawsuit challenging the proposed T-Mobile/Sprint merger and in any event I will not do so, except I may use information that has become or becomes available to plaintiffs through public sources or discovery in this litigation, and such information shall not be considered Party Confidential Government Information. Without limitation on the foregoing, I specifically commit that I will not use Party Confidential Government Information to suggest or formulate new discovery requests in this litigation.

I do not recall any Party Confidential Government Information that is not now available to plaintiffs through public sources or the discovery requests plaintiffs have served on the defendants in this lawsuit.

I have thought closely about my tenure as co-lead trial counsel in the AT&T/T-Mobile challenge, and I recall only the broadest generalities of that case.

I do not recall the content of any discussions with David Dinielli about any confidential information obtained from Sprint in meetings that were covered by a common interest agreement between the DOJ and Sprint, nor do I recall the content of any discussions with any other employee of DOJ about any confidential information obtained from Sprint that was covered by that common interest agreement, nor do I recall learning of any such information. If I ever did learn of any such information, I have since forgotten it.

I have not discussed or otherwise shared with any member of the current litigation team in the T-Mobile/Sprint challenge, including with any lawyer or member of any Attorney General Office that is participating in this litigation, any Party Confidential Government Information. Nor have I discussed or otherwise shared any Party Confidential Government Information with any client representative, expert or any other witness or other individual or entity who is assisting with this case.

I have not knowingly used, disclosed, or relied on any Party Confidential Government Information in formulating or planning strategy, tactics, discovery requests, witness questions, arguments, trial, or other aspects of the current litigation, nor will I do so in the future.

I will immediately inform counsel for T-Mobile and Sprint if I learn of anything that causes me to believe that one or more of the foregoing representations about Party Confidential Government Information is not accurate, or is no longer accurate in light of information that I learn or recall after providing these representations.

DATED: September 10, 2019

Glenn D. Pomerantz