U.S. DEPARTMENT OF JUSTICE
Antitrust Division

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

November 8, 2019

The Honorable Robert W. Lehrburger
United States Magistrate Judge
500 Pearl Street, Room 1960
United States Courthouse
New York, NY 10007

Re: *State of New York v. Deutsche Telekom AG*, 1:19-cv-5434-VM-RWL

Dear Magistrate Judge Lehrburger:

I write to request a pre-motion conference for the United States' anticipated motion to intervene in the above-referenced matter for the limited purpose of moving to disqualify Mr. Glenn D. Pomerantz and his firm, Munger, Tolles & Olson LLP, from representing the New York and California Attorneys General under New York Rules of Professional Responsibility 1.11, 1.9(c), and 1.7(a)(2). As explained below, the basis for the motion is that Mr. Pomerantz previously served as a lead trial counsel for the United States in its lawsuit to block AT&T Inc.'s proposed acquisition of T-Mobile USA, Inc. ("AT&T/T-Mobile"). In that role, he had access to confidential government information that creates a conflict. This disqualifies Mr. Pomerantz (and his law firm) under longstanding ethical limits on the activities of former government attorneys. The United States seeks to bring this motion after careful consideration and consultation with career bar ethics experts within the Department of Justice.

The essential facts underlying the United States' motion are as follows. In 2011, the United States sued to block AT&T's proposed acquisition of T-Mobile In October 2011, Mr. Pomerantz left his firm to serve as a lead trial counsel for the United States until the merging parties abandoned their transaction on December 19, 2011. In Mr. Pomerantz's role, he oversaw the day-to-day issues that arose in the pretrial litigation and had full access to the United States' files, which included confidential information provided by the parties to that action; confidential information from significant third-parties, including Sprint Corporation; and internal Department of Justice legal and economic memoranda, many of which incorporated other confidential information and contained analyses and strategies developed by Department of Justice personnel.

The proposed AT&T/T-Mobile merger in 2011 and the current T-Mobile/Sprint merger involve many of the same issues. In both, two of the four nationwide wireless carriers sought to merge. In both, the market was defined as the same four wireless carriers. T-Mobile was a party to both transactions. Sprint played significant roles in both. In AT&T/T-Mobile, Sprint was an important potential witness opposed to the transaction, and in the present transaction, Sprint is one of the merging parties. In fact, Mr. Pomerantz's firm has served document requests on T-Mobile and Sprint in this action seeking information related not only to the proposed AT&T/T-Mobile merger, but specifically requesting information about any T-Mobile and Sprint meetings or advocacy in front of the Department of Justice regarding the 2011 proposed merger.

As explained in a letter from Mr. Pomerantz's firm (Exhibit A at 3-4), Defendants' counsel contacted the Division in August to suggest that, as a result of his work at the Division in 2011, Mr. Pomerantz's representation of California and New York implicated Rule 1.11(c) of the New York Rules of Professional Conduct. This raised serious concerns for the Division, which has an independent interest in ensuring that its current and former employees, and any others with access to confidential government information, fulfill their ethical obligations. We therefore consulted with career bar ethics experts within the Department of Justice, and then promptly raised our concern with Mr. Pomerantz later that month. At Mr. Pomerantz's request, we exchanged correspondence on these questions. After full and careful consideration, including reviewing two letters from Mr. Pomerantz's firm (Exhibits A & B, sent September 13 and 19), the career bar ethics officials within the Department concluded that Mr. Pomerantz and his firm have a serious conflict of interest and should withdraw from this representation. The Department explained its reasoning in a fourteen-page letter on October 28 (Exhibit C). Mr. Pomerantz's firm declined to withdraw (Exhibit D). As a former client of Mr. Pomerantz's, the United States has standing to move for his disqualification. *See Evans v. Artek Sys. Corp.*, 715 F.2d 788, 791 (2d Cir. 1983).

New York Rule 1.11(c) protects the United States' "confidential government information" from disclosure, and prohibits a former government lawyer from representing a client in a matter in which the lawyer could use that confidential information to a person's material disadvantage. In the present situation, Mr. Pomerantz obtained confidential government information in the AT&T/T-Mobile merger litigation about T-Mobile and Sprint, including internal Department of Justice memoranda and analyses that are not subject to discovery in this case. Mr. Pomerantz could use that information to the material disadvantage of T-Mobile and Sprint in the ongoing litigation. Moreover, consent cannot cure a Rule 1.11(c) conflict.

Additionally, New York Rule 1.9(c) prohibits Mr. Pomerantz from using the United States' confidential information to the United States' disadvantage or revealing it to any other entity. Here, given the similarities between the present litigation pending in this Court and the AT&T/T-Mobile merger litigation, Mr. Pomerantz owes a duty to the United States under Rule 1.9 with respect to the confidential information that he obtained as a lead trial counsel for the government. Under these circumstances, Mr. Pomerantz's

continuing duty to his former client, the United States, creates a conflict in representing his current clients, the New York and California Attorneys General. New York Rule 1.7(a)(2) generally prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property, or other personal interest." "In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9." N.Y.R. Prof'l Conduct 1.7, NYSBA cmt. [9].

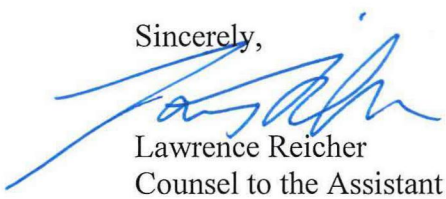
Although Mr. Pomerantz has claimed that he does not remember any confidential information from AT&T/T-Mobile merger litigation, that is insufficient to resolve the conflict. Unless Mr. Pomerantz's firm established a timely screen — and there is no reason to believe it has — then it too has a conflict for the same reasons that Mr. Pomerantz does. The appropriate remedy for these conflicts is disqualification.

Mr. Pomerantz's clients, the Attorneys General of New York and California, have retained Fiona Scott Morton as an expert in the matter pending before this Court. Prof. Scott Morton served as the Deputy Assistant Attorney General for Economics during the AT&T/T-Mobile litigation and, in that capacity, supervised the economic team as it assembled the evidence to support the Division's case, managed interactions with expert witnesses, and helped set the strategy and direction of economic litigation support. Prof. Scott Morton's involvement raises concerns that Mr. Pomerantz could use this expert's knowledge of the government's confidential information. While Prof. Scott Morton is not bound by the rules of professional responsibility, Mr. Pomerantz and other lawyers in his firm are ethically obligated to ensure that the conduct of non-lawyers with whom they work (*e.g.*, expert witnesses) act in a manner that is compatible with their own professional obligations. *See* New York Rule of Professional Responsibility 4.4; *see also* D.C. Legal Ethics Comm., Op. 285 (Nov. 1998).

Since disqualification is a matter of public interest, there is no particular time limit for filing a motion to disqualify and, in the absence of prejudice, laches is generally not a defense to a motion to disqualify. *Pastor v. Trans World Airlines, Inc.*, 951 F. Supp. 27, 33 (E.D.N.Y. 1996). There is no prejudice here. Mr. Pomerantz and his firm are representing the offices of state attorneys general, which are themselves composed of litigators, many of whom have made appearances in this matter and are playing active roles in the litigation. Additionally, Mr. Pomerantz and his firm have been aware of the United States' concern for several months, and chose to continue the representation.

The United States requests a pre-motion conference.

Sincerely,



Lawrence Reicher
Counsel to the Assistant Attorney General

Exhibit A

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September 13, 2019

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Re: *State of New York, et al. v. Deutsche Telekom AG, et al.*,
U.S.D.C., Case No. 1:19-cv-05434-VM (S.D.N.Y.)

Dear Mr. Shaw:

Last week, you raised the question whether Glenn Pomerantz's representation of the Attorneys General of the State of California and the State of New York in the above-referenced case is consistent with Rules 1.9 and 1.11 of the New York Rules of Professional Conduct, in light of Mr. Pomerantz's prior employment by the Department of Justice ("DOJ"). For the reasons set forth below we have concluded that Mr. Pomerantz's representation in this case clearly complies with the New York Rules.

You also confirmed in our conversation last week that you are not raising any question regarding Mr. Pomerantz's compliance with federal law or DOJ policies, and we understand that there are no issues in this regard.

BACKGROUND

On August 31, 2011, DOJ sued AT&T and T-Mobile to enjoin their proposed merger. On October 24, 2011, according to firm records, Mr. Pomerantz left this firm to become a special government employee and work on the lawsuit. Mr. Pomerantz was not involved in the investigation that preceded the lawsuit. Less than two months later, on December 19, 2011, the parties to the merger agreement abandoned the proposed transaction. Mr. Pomerantz promptly left DOJ. I have confirmed with Mr. Pomerantz that he did not take any materials with him when he left the government. Mr. Pomerantz has also made clear to me that he recalls only the broadest generalities of that case from nearly eight years ago.

The Attorneys General of California and New York, along with the Attorneys General of several other states, were co-plaintiffs with DOJ in the 2011 lawsuit. It is our understanding that leading up to and during the 2011 lawsuit, investigative information was regularly shared between DOJ and the involved States. For example, we understand that attorneys for the involved States had access to DOJ's evidentiary database, participated in depositions, received deposition transcripts and exhibits, received economic and other models, and had regular discussions with DOJ lawyers.

Today, nearly eight years later, the Attorneys General of several states, including New York and California ("Plaintiff States") are challenging a different proposed merger between T-Mobile and Sprint. As you know, several of Plaintiff States, including New York and California, played an active role in DOJ's Hart-Scott-Rodino investigation of that proposed merger. Mr. Pomerantz was retained by the Attorneys General of New York and California for purposes of this litigation. We understand that these States informed DOJ of Mr. Pomerantz's involvement in this matter on or about April 18, 2019. Shortly thereafter, Mr. Pomerantz began having discussions about this matter with DOJ's Antitrust Division.

On June 11, 2019, Plaintiff States filed their Complaint alleging that the proposed merger between Sprint and T-Mobile violates Section 7 of the Clayton Act, 15 U.S.C. § 18. Mr. Pomerantz was listed as counsel on the Complaint. Plaintiff States were initially hopeful that the DOJ would join them in this lawsuit, and Mr. Pomerantz and DOJ personnel continued to have discussions about this matter into July 2019.

On July 26, 2019, the DOJ announced that it had "filed a civil antitrust lawsuit today in the U.S. District Court for the District of Columbia to block the proposed transaction." *See* https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package. DOJ's complaint alleges a highly-concentrated relevant market, alleges that "the merger of T-Mobile and Sprint likely would substantially lessen competition for retail mobile wireless service," and alleges that "[a]ny efficiencies generated by this merger are unlikely to be sufficient to offset the likely anticompetitive effects on American consumers in the retail mobile wireless service market, particularly in the short term, unless additional relief is

granted." *See* Complaint ¶¶ 6, 14–15, 24, https://www.justice.gov/opa/press-release/file/1187721/download. DOJ alleged that the proposed merger would violate Section 7 of the Clayton Act. *Id.*

At the time it filed suit, DOJ also announced that it had filed a proposed settlement that would resolve its concerns. *See* Competitive Impact Statement, https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package. The proposed settlement would require T-Mobile to divest to DISH Network Corporation ("DISH") certain retail wireless business and network assets. It would also require that T-Mobile provide to DISH certain transition services and other services necessary to facilitate DISH's operating as a Full Mobile Virtual Network Operator, and that DISH build and operate a mobile wireless services network. https://www.justice.gov/opa/press-release/file/1189336/download.

As DOJ recognized, its proposed settlement and the approval of that settlement "has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants." *Id.* at 17. Plaintiff States' lawsuit is considered a private lawsuit for this particular purpose. *New York v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030, 1033 (S.D.N.Y.), *aff'd*, 14 F.3d 590 (2d Cir. 1993).

On July 31, 2019, more than one and one-half months after Plaintiff States filed their Complaint, Defendants' counsel approached Mr. Pomerantz and suggested that his representation of California and New York implicated Rule 1.11(c) of the New York Rules of Professional Conduct in light of his work with the DOJ in 2011. In a prompt exchange of correspondence thereafter, I explained our view that Mr. Pomerantz's representation complies with the New York Rules. Defendants' counsel thereupon proposed that their concerns could be resolved by Mr. Pomerantz's making certain written representations and commitments regarding his prior work at DOJ. Mr. Pomerantz has now done so, and Defendants have confirmed that their concerns with Mr. Pomerantz's participation in this litigation have been resolved. (We attach hereto a copy of Mr. Pomerantz's representations and commitments, as well as the memorialization of the agreement with Defendants' counsel.)

We also recently learned in conversations with DOJ that Defendants' counsel approached DOJ representatives and prompted the Antitrust Division's current inquiry. On August 28, 2019—more than four months after DOJ became aware of Mr. Pomerantz's involvement in this matter and more than two months after Plaintiff States filed their Complaint listing Mr. Pomerantz as counsel—the Assistant Attorney General scheduled an August 29, 2019 call with Mr. Pomerantz to discuss this issue. That conversation led to your follow-up communications with Mr. Pomerantz and me.

During our communications you informed me that the Antitrust Division is evaluating whether Mr. Pomerantz's involvement in the current litigation complies with Rules 1.9 and 1.11(a) of the New York Rules of Professional Conduct. You have stated that the Division has not reached any conclusion in this regard, and would like our views on the relevant facts and law.

ANALYSIS

We are firmly of the view that the facts as set forth herein, as well as the applicable law, show that there is no violation of Rules 1.9 and 1.11 of the New York Rules of Professional Conduct. Indeed and as noted, DOJ has known of Mr. Pomerantz's representation of the Attorneys General of New York and California since April 2019. Mr. Pomerantz has had multiple discussions about this litigation with the Front Office of the Antitrust Division during the succeeding months. Never was there any objection to Mr. Pomerantz's role or suggestion of a violation of the rules of professional conduct.

I. Rule 1.11(a)

Rule 1.11(a) provides:

> (a) a lawyer who has formerly served as a public officer or employee of the government:
>
> > (1) … shall comply with Rule 1.9(c); and
> >
> > (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Mr. Pomerantz's representation of Plaintiff States in the current case does not violate this Rule.

A. Rule 1.11(a)(1)

Rule 1.11(a)(1) requires no more than compliance with Rule 1.9(c), which in turn states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

New York Rules of Professional Conduct, Rule 1.9(c). I have confirmed with Mr. Pomerantz that he has complied with Rule 1.9(c).

As I noted at the outset of this letter, and as he has confirmed in the representations and commitments that he has provided (*see* attachment), Mr. Pomerantz has not retained any materials from his time at DOJ, and he recalls only the broadest generalities of the AT&T/T-Mobile case from his brief stint at DOJ nearly eight years ago. Moreover, substantial information about the 2011 proposed merger is now available, either publicly or through discovery in this case, and Plaintiff States had access to DOJ information during the 2011 investigation and litigation. Accordingly, Mr. Pomerantz could not feasibly "use" or "reveal" DOJ's "confidential information" in connection with Plaintiff States' challenge to the T-Mobile/Sprint merger. Mr. Pomerantz has also represented and committed to Defendants that he has not used or revealed, and will not use or reveal, confidential information from the AT&T/T-Mobile case, and Defendants have stated that Mr. Pomerantz's representations and commitments have resolved their concerns.

Nor could Mr. Pomerantz use information from the AT&T/T-Mobile case to the "disadvantage of" DOJ, as would be necessary for a violation of Rule 1.9(c)(1). DOJ is not a defendant in this litigation. Its interest in the merger is to ensure that the transaction does not threaten to "substantially . . . lessen competition." 15 U.S.C. § 18. This interest is not unique to DOJ. *See* 15 U.S.C. § 26 (empowering "[a]ny person, firm, corporation, or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws"). Indeed, it is the same interest that motivates Plaintiff States' suit. Second Amended Complaint ¶ 11, *New York v. Deutsche Telekom AG*, No. 1:19-cv-05434-VM (S.D.N.Y. Aug. 15, 2019) (invoking 15 U.S.C. § 18); Complaint ¶ 25, *United States v. Deutsche Telekom*, No. 1:19-cv-02232-TJK (D.D.C. July 26, 2019) (same). Both DOJ and Plaintiff States seek to enforce the antitrust laws and to protect consumers by preserving open and free competition. *Cf. California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) ("Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."); 54 Am. Jur. 2d Monopolies and Restraints of Trade § 309 ("Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured, but also to vindicate the important public interest in free competition.").

To be sure, DOJ has concluded that the anticompetitive threat posed by the proposed merger can be mitigated by certain remedies, including T-Mobile's divestiture to DISH. *See* Competitive Impact Statement, https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package. But that conclusion does not

convert the DOJ from an impartial guardian against anti-competitive mergers into an advocate of the transaction itself. The Plaintiff States' lawsuit thus does not "disadvantage" DOJ, as Rule 1.9(c)(1) requires.

B. Rule 1.11(a)(2)

Rule 1.11(a)(2) provides that a former government employee may not "represent a client in connection with a matter in which the lawyer participated personally and substantially as a [government employee]."

This Rule is inapplicable here by its very terms. In 2011, Mr. Pomerantz worked for two months on DOJ's challenge of the proposed AT&T/T-Mobile merger—a merger the parties subsequently abandoned. Nearly eight years later, Mr. Pomerantz has been retained to represent Plaintiff States in a challenge to a proposed merger between Sprint and T-Mobile. This case, which involves a new and temporally-distant merger between different parties, cannot possibly be considered to be the "matter in which [Mr. Pomerantz] participated" while employed by DOJ. The Rule's reference to a "matter" means the "same specific matter" in which the lawyer participated while employed by the government. New York State Bar Association Committee on Professional Responsibility, Opinion 1148 ¶ 9 (Apr. 2, 2018) ("Rule 1.11(a) bars representation . . . only in the *same specific matter*" (emphasis added)); *accord* Cmt. 4 to Rule 1.11 (Rule 1.11(a) applies only to the "*particular matters* in which the lawyer participated" as a government employee (emphasis added)).[1]

The case law confirms this conclusion. For example, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig*., No. MDL 05-1720(JG) (JO), 2006 WL 6846702 (E.D.N.Y. Aug. 7, 2006) addressed a precursor to Rule 1.11(a)(2), which similarly provided that "lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer." *See* 2006 WL 6846702, at *9. The court explained that a "matter" is a "discrete and isolatable transaction or set of transactions between identifiable parties." *Id*. at *11.

The court held that a DOJ investigation into "whether the overlapping membership of Visa and MasterCard inhibited competition in cards and services" (*id*. at *3) and a private lawsuit alleging that "Visa, MasterCard and their respective member banks take advantage of the networks' alleged market power to fix uniform interchange fees at supra-competitive levels" were not the same "matter" for purposes of the rule. *Id*. at *2. The court noted that the fact that

[1] Rule 1.0(l) provides: "'Matter' includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties."

"background information about the credit card industry and the relevant market" was relevant to both cases was insufficient to transform two distinct matters into the same matter. *Id*. at *14.

In re Payment Card contrasted the situation presented there with *General Motors Corp. v. City of New York,* in which the Second Circuit found that a case that a lawyer brought after leaving DOJ constituted the same "matter" as a case he had worked on at DOJ. The Second Circuit based its determination on the fact that "virtually every overt act of attempted monopolization alleged in the City's complaint is lifted in haec verba from the Justice Department complaint." 501 F.2d 639, 650 (2d Cir. 1974). Subsequent cases have cautioned that "the level of similarity between the two complaints at issue in *General Motors* compels caution in applying it as a precedent" to find that a subsequent case qualifies as the same "matter." *In re Payment Card*, 2006 WL 6846702, at *15; *see McBean v. City of New York*, No. 02 CIV. 5426 (GEL), 2003 WL 21277115, at *4 (S.D.N.Y. June 3, 2003). The commonsense conclusion that the AT&T/T-Mobile merger challenge is a distinct "matter" from the T-Mobile/Sprint merger challenge accords with the caution in the commentary to Rule 1.11 that "the rules governing [government lawyers] should not be so restrictive as to inhibit transfer of employment to and from the government." Cmt. 4, Rule 1.11. *See also In re Payment Card*, 2006 WL 6846702, at *16 (defendant's proposed application of Rule would "impose a needless and intolerable cost on government service"). Consistent with that principle, former lawyers for the DOJ Antitrust Division routinely represent private parties directly adverse to government regulators in defending mergers in the same industries in which they previously were involved in merger enforcement. To interpret Rule 1.11(a)(2) as barring Mr. Pomerantz's involvement in the current case would preclude this common and accepted practice, which has never been viewed as implicating Rule 1.11(a)(2). And of course here Mr. Pomerantz is not defending a merger that DOJ is challenging—he is playing a role analogous to that of a DOJ lawyer in a Clayton Act Section 7 enforcement proceeding.

C. Other Subdivisions of Rule 1.11

The other subdivisions of Rule 1.11 do not require extended discussion. Subdivision (b) deals with imputation of conflicts that are found to exist under Subdivision (a). Imputation is not an issue here and, as just demonstrated above, there is no conflict under Subdivision (a). Subdivision (c) addresses the potential use of certain information previously provided to the government by private persons, to the material disadvantage of such persons. As noted, while Defendants in the current case did raise Subdivision (c) in previous conversations with our firm, they have subsequently agreed that their concerns have been resolved. Finally, Subdivisions (d) and (f) apply only to current public officials, and Subdivision (e) is merely a definitional limitation that is not implicated here.

II. Rule 1.9

Rules 1.9(a) and 1.9(b) do not govern a former government lawyer's obligations to the agency or government that employed that lawyer. Indeed, Rule 1.11, which *does* govern such obligations, expressly incorporates Rule 1.9(c), but it does not mention Subdivisions (a) or (b) of Rule 1.9. That is because Subdivisions (a) and (b) are simply inapplicable.

As stated in the ABA Formal Ethics Opinion 97-409: "Rule 1.11 alone determines the conflict of interest obligations of a former government lawyer . . . the provisions of Rule 1.9(a) and (b) do not apply." ABA Formal Opinion 97-409 (Aug. 2, 1997). Similarly, New York State Bar Association Ethics Opinion 1148 explains that "Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers." New York State Bar Association Ethics Op. 1148, ¶ 10 (Apr. 2, 2018).

Because, as discussed above, Mr. Pomerantz has complied with Rule 1.9(c), and because Rule 1.9(a) and Rule 1.9(b) are inapplicable here, no further analysis is necessary to conclude that Mr. Pomerantz's representation of the Attorneys General of New York and California does not violate Rule 1.9. But even if Subdivisions (a) and (b) did apply, Mr. Pomerantz would be in full compliance.

A. Rule 1.9(a)

Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

As noted above, Rule 1.9(a) does not apply to Mr. Pomerantz's work for DOJ as a government employee. In addition, this rule does not apply to Mr. Pomerantz because (1) the AT&T/T-Mobile merger challenge from 2011 is not "substantially related" to the present T-Mobile/Sprint merger challenge and (2) DOJ's interests are not "materially adverse" to those of Plaintiff States.

1. Substantially Related Matter

Two matters are "substantially related" only if they "involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Cmt. 3 to Rule 1.9. There exists a substantial relationship between two matters "only upon a

showing that the relationship between issues in the prior and present cases is 'patently clear' [and] only when the issues involved have been 'identical' or 'essentially the same.'" *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739–40 (2d Cir. 1978). As explained in the discussion of Rule 1.11(a) above, the issues involved in the AT&T/T-Mobile and T-Mobile/Sprint mergers are far from "identical" or "essentially the same."

Further, Rule 1.9's commentary is explicit that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying" for purposes of Rule 1.9. Cmt. 3 to Rule 1.9. The Plaintiff States here were co-plaintiffs with DOJ in the 2011 litigation. Their lawyers had access to DOJ information, and they regularly strategized with DOJ lawyers. This is not a situation where Mr. Pomerantz has confidential information that, in the prior case, was not available to his current clients. *Cf. Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) ("[B]efore the substantial relationship test is even implicated, it must be shown that the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client.").

Giambrone v. Meritplan Insurance Company, 117 F. Supp. 3d 259 (E.D.N.Y. 2015) is instructive. In *Giambrone*, the defendant insurer objected that the plaintiff's counsel had previously represented one of the defendant's affiliated insurers, QBE. The defendant argued that the attorney's "work for QBE relating to first-party property damage insurance claims, arising out of [Hurricane] Sandy" was substantially related to *Giambrone*, which was a breach of contract action "over whether an insurance policy issued by Defendant covers alleged damage to Plaintiffs' property arising from Hurricane Sandy." *Id.* at 261, 272. The court acknowledged that the "fact that Sandy caused rain, wind and flooding is a common issue in this action and other first-party insurance claims on which Mr. Pedro advised QBE affiliates." *Id*. at 274. However, this did not make the matters "substantially related." The "material facts at issue" in *Giambrone* were "the cause of damage to the Property" and "the terms of [Plaintiff's] Insurance Policy." *Id*.

In *Giambrone,* it did not change the result that in the prior matter the attorney "had access to other insurance policies that were similar in kind, participated in discussions with QBE affiliates and participated in internal firm meetings regarding insurance matters." *Id.* at 274. As the court noted, the "logical conclusion of Defendant's argument would preclude Mr. Pedro from ever appearing in an insurance-related action against any QBE affiliate, regardless of whether Mr. Pedro had acquired relevant confidential information." So too here. While the prior proposed merger and the current proposed merger involve the same industry, there are dispositive differences between the two matters. *See* Cmt. 3 to Rule 1.9 ("Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.").

2. Material Adversity

What is more, the interests of Plaintiff States are not "materially adverse" to the interests of DOJ in the current case. As explained in the discussion of Rule 1.11(a) above, DOJ is not a party to the current case. *See Satina v. N.Y.C. Human Resources Admin.*, No. 14 Civ. 3152(PAC), 2015 WL 6681203, at *2 (S.D.N.Y. Nov. 2, 2015) (suggesting that "material adversity" requires that the former client be "tantamount to . . . a defendant" in the subsequent case (alteration in original)). Nor does DOJ have any interest in the merger's consummation. Rule 1.9(a)'s requirement of "material adversity" thus is not satisfied.

* * *

For all of the above reasons, Rule 1.9(a) is not implicated here.

B. Rule 1.9(b)

Subsection (b) of Rule 1.9 provides that a "lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of [Rule 1.9] that is material to the matter." This rule concerns imputation from a former firm to a particular lawyer, a scenario that is not at issue here. And like Subdivision (a) of Rule 1.9, Subdivision (b) requires as a threshold matter that there be a substantial relationship between the first and the second matter, as well as material adversity between the interests of the clients in the first and the second matters. Therefore, for the same reasons that Subdivision (a) is inapplicable, Subdivision (b) is inapplicable.

C. Rule 1.9(c)

Rule 1.9(c) has been addressed above in the discussion of Rule 1.11(a)(1), which expressly incorporates Rule 1.9(c).

III. Disqualification Remedy

When Defendants raised their now-resolved concerns about Mr. Pomerantz's participation in the current litigation, they suggested that disqualification might be appropriate. In response, we showed both that Mr. Pomerantz had fully complied with the ethical rules and that, in any event, Defendants' concerns did not come close to meeting the standard for disqualification. Defendants have now agreed that their concerns have been resolved.

The Second Circuit has held that "disqualification is warranted only if an attorney's conduct tends to taint the underlying trial." *GSI Commerce Solutions, Inc. v. BabyCenter,*

LLC, 618 F.3d 204, 209 (2d Cir. 2010) (internal quotation marks omitted); *see also United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 166 (2d Cir. 2013) ("courts must ... limit[] remedies for ethical violations to those necessary to avoid 'tainting the underlying trial'"); *Hempstead Video, Inc. v. Incorporated Villaged of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("disqualification is only warranted where an attorney's conduct tends to taint the underlying trial") (internal quotation marks and citation omitted); *Wai Hoe Liew v. Cohen & Slamowitz, LLP*, No. 14-CV-4868 KAM MDG, 2015 WL 5579876, at *7 (E.D.N.Y. Sept. 22, 2015) ("[v]iolation of New York's conduct rules, . . . does not necessarily require disqualification of the offending counsel."); *Leo v. Selip & Stylianou LLP*, No. 16 CV 36, 2019 WL 2314616, at *2 (W.D.N.Y. May 31, 2019) ("disqualification is only warranted where 'an attorney's conduct tends to taint the underlying trial'"); *Maiden Lane Hospitality Grp. LLC v. Beck, By David Companies, Inc.*, No. 18 Civ. 7476 (PAE), 2019 WL 2417253, at *3–4 (S.D.N.Y. June 10, 2019) (disqualification motion denied where no risk of trial taint).

We are aware of no facts here that would meet the "high standard of proof" that is required to impose the "drastic measure" of disqualifying counsel and "imping[ing] on a party's right to select counsel of its choosing." *Capponi v. Murphy*, 772 F. Supp. 2d 457, 471 (S.D.N.Y. 2009). As shown above, the current case is substantially different from the 2011 litigation challenging the proposed merger of AT&T and T-Mobile. Further, the issue on which the DOJ and Plaintiff States currently diverge is not whether the proposed T-Mobile/Sprint merger violates Section 7 of the Clayton Act, but rather whether a particular remedy is sufficiently rehabilitative. The 2011 litigation sought to block the proposed AT&T/T-Mobile merger; it did not raise the issue whether the anticompetitive harms of the proposed merger could be remedied by the divestiture of certain assets to DISH and the theoretical emergence of DISH as a fourth nationwide mobile network operator.

As noted, California and New York were co-plaintiffs with DOJ in the challenge to the 2011 proposed merger and, in that capacity, routinely shared information. Even if Mr. Pomerantz remembered confidential DOJ information from the 2011 litigation (which he does not), and even if such hypothetical information were relevant to the remedy issue (which it could not be), there could be no taint because California and New York would likewise have had access to that information in the 2011 litigation, and any lawyer handing the current case will have access to the voluminous public information and information produced in discovery in this case regarding the 2011 proposed merger. *See In re Payment Card Interchange Fee*, 2006 WL 6846702, at *24 (finding "no danger of trial taint that would justify disqualification" in private case involving same industry as was involved in lawyer's prior matter while employed at the Antitrust Division of DOJ); *Med. Diagnostic Imaging, PLLC v. CareCore Nat'l, LLC*, 542 F. Supp. 2d 296, 315–16 (S.D.N.Y. 2008) ("Movants have not pointed to any information, allegedly in Weiss's possession, which might lead to a request or question that would not have otherwise been advanced, but-for reliance on their confidences.").

Moreover, the Antitrust Division did not raise any question with respect to Mr. Pomerantz's involvement in this matter in the months after it became aware of that involvement—including the month following DOJ's announcement of its settlement with T-Mobile and Sprint. We have pointed out to Defendants' counsel that courts have repeatedly warned against the use of disqualification motions "for tactical reasons." *Fierro v. Gallucci*, No. 06-CV-5189 (JFB) (WDW), 2007 WL 4287707, at *3 (E.D.N.Y. Dec. 4, 2007). The Division's questions concerning Mr. Pomerantz's involvement arose only when prompted by Defendants' counsel, and only after we had shown Defendants that the purported concerns they had expressed to us were unjustified under the New York Rules of Professional Conduct and in any event did not warrant disqualification. And the parties have now resolved Defendants' concerns regarding Mr. Pomerantz's participation in this trial.

The passage of time before the Division raised any question concerning Mr. Pomerantz's involvement is extremely prejudicial to Plaintiff States, given the importance of the role of Mr. Pomerantz in Plaintiff States' preparations for trial on an expedited schedule. *See Skyy Spirits, LLC v. Rubyy, LLC*, No. C 09–00646 WHA, 2009 WL 3762418, at *3–4 (N.D. Cal. Nov. 9, 2009) (defendant waived any right to object to attorney's representing opposing party given delay in raising the issue and the fact that "the case schedule has been moving ahead and the fact-discovery cutoff is seven weeks away"). The current litigation is now just three months from trial, and is not at a point where the parties can afford to be diverted from their trial preparations or where a change of counsel could be made without requiring modification of the case schedule.

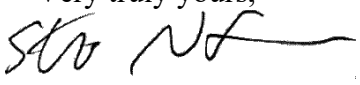
CONCLUSION

For all these reasons, Mr. Pomerantz's involvement in this case complies with the New York Rules of Professional Conduct that you have raised. There is no harm to DOJ or the United States—much less a risk of trial taint—in Mr. Pomerantz's representation of Plaintiff States in challenging the proposed T-Mobile/Sprint merger, which DOJ agrees violates Section 7 of the Clayton Act.

* * *

I would gladly discuss these issues further with you or others at the Division if that would be helpful.

Very truly yours,



Stuart N. Senator
General Counsel

cc: Glenn D. Pomerantz

Attachment

From: Gorelick, Jamie <Jamie.Gorelick@wilmerhale.com>
Sent: Friday, September 13, 2019 6:05 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

<Statement.pdf>

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.

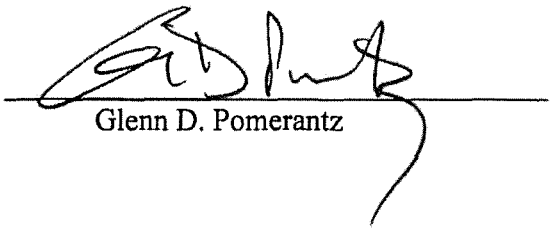
I do not recall the content of any discussions with David Dinielli about any confidential information obtained from Sprint in meetings that were covered by a common interest agreement between the DOJ and Sprint, nor do I recall the content of any discussions with any other employee of DOJ about any confidential 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

Exhibit B

MUNGER, TOLLES & OLSON LLP

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MICHAEL R. DOYEN
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MADELINE D. SWAN
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(1922-2008)

*ADMITTED IN DC.
ALL OTHERS ADMITTED IN CA

September 19, 2019

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BY EMAIL TO david.shaw@usdoj.gov

Mr. David J. Shaw
Counsel to the Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Ave., N.W., Room 3116
Washington, DC 20530

Re: *State of New York, et al. v. Deutsche Telekom AG, et al.*,
U.S.D.C., Case No. 1:19-cv-05434-VM (S.D.N.Y.)

Dear Mr. Shaw:

As you requested, I am writing to supplement my letter of September 13, 2019 to address New York Rule of Professional Conduct 1.11(c). I appreciate the opportunity to provide this supplementation based on your clarification that the Antitrust Division would also like us substantively to address this provision.

For the reasons set forth below, Mr. Pomerantz's representation here complies with Rule 1.11(c).

ANALYSIS

Rule 1.11(c) provides in part that:

> a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

As noted in my prior correspondence, the entities "whose interests are adverse" to those of Plaintiff States in the current litigation are the Defendants in that litigation, not the Department of Justice ("DOJ") or the United States. Those Defendants, but not DOJ, are the "person[s]" whom the Rule addresses. Yet those Defendants do not now contend that Mr. Pomerantz's or this firm's involvement in the litigation is inappropriate under New York Rule of Professional Conduct 1.11(c), or otherwise. *See* Attachment to Letter of September 13, 2019. While Defendants did initially raise some concerns, Plaintiff States responded with a showing that the concerns were unwarranted. As stated in the materials already provided to the Antitrust Division, Defendants have now agreed in writing that their concerns have been resolved.

In any event, no violation of Rule 1.11(c) is present.

First, Rule 1.11(c) applies only where a former public officer or employee has "confidential government information," as narrowly defined in that Rule, that "could be used to the material disadvantage" of a private party in the later representation. For reasons including the following, that is not the situation here:

- The material related to the 2011 AT&T/T-Mobile merger that is potentially relevant to the current litigation is currently available to the Plaintiff States through discovery or from public sources. For example, testimony that was provided by employees of T-Mobile in the 2011 litigation and related material has already been produced by T-Mobile in the current litigation. T-Mobile has agreed in the current litigation to produce "All transcripts of any meeting with, or interview conducted by, DOJ, Including investigatory interviews, depositions, and any other transcribed proceeding, and any exhibits used, referenced or relied on in such meetings, interviews or other proceedings." T-Mobile has also agreed to produce, and has produced, FCC material relating to the 2011 merger in discovery in the current litigation. Moreover, Defendant Sprint objected to Plaintiff States' request for production of 2011 FCC material from it precisely because it is readily available—in Sprint's words, "it requires Defendant to search for and provide information that is *publicly available or is equally obtainable from another party, third parties, or from some other source*." (Emphasis added.) Neither the Plaintiff States nor Defendants contend that any material from the 2011 litigation other than that sought in

the Plaintiffs' States discovery requests is relevant here, and by definition, information that is not relevant could not be used to Defendants' disadvantage, material or otherwise.

The case law supports the common-sense proposition that Rule 1.11(c) is not implicated where, as here, any information at issue is available to the client from a source other than the former government lawyer. *See In re Payment Card Interchange Fee*, No. 05–1720(JG)(JO), 2006 WL 6846702, at *25 (E.D.N.Y. Aug. 7, 2006) (no violation of prior provision where "virtually all of the information potentially relevant to this litigation to which [the prior government attorney] may once have had unique access is now available to any private attorney who might replace him").

- As noted above, aside from the fact that all of the information from the 2011 litigation that either side contends is relevant in the current litigation is being produced in discovery and/or publicly available, Plaintiff States were co-plaintiffs in the 2011 litigation and thus had access to that same material, as well as other confidential materials, during the 2011 litigation. Thus, even if Mr. Pomerantz had a substantive recollection of confidential government information from the 2011 litigation—and he does not[1]—that would merely duplicate the information obtained by Plaintiff States by virtue of their own involvement in the 2011 case. As such "the purpose and effect of the prohibitions contained in Rule 1.11(c)"—"to prevent [a] private client … from obtaining an unfair advantage by using … confidential government information about the private client's adversary"—are not implicated here. Comment 4A to Rule 1.11 of the New York Rules of Professional Conduct.

Second, Rule 1.11(c) by its terms applies only to the potential representation of "a private client." Plaintiff States are not private clients; they are public entities. *See* Simon's New York Rules of Prof. Conduct Ann. § 1.11.28 (Rule 1.11(c) "does not restrict government agencies that

[1] *See In re Payment Card Interchange Fee*, 2006 WL 6846702, at *21 (Predecessor to Rule 1.11(c) likewise "uses the present tense to refer to an attorney 'having' information that she knows 'is' confidential. There is nothing about the fact that the attorney at issue may once have had access to information that supports a presumption that she actually has such information now ….")*; Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 827 F. Supp. 2d 341, 346 (S.D.N.Y. 2011) ("Given that over three years have passed, … it is credible that his recollection of any confidential information has naturally diminished") (internal quotation marks omitted); *Arista Records LLC v. Lime Grp. LLC*, No. 06 CV 5936 (KMW), 2011 WL 672254, at *7 (S.D.N.Y. Feb. 22, 2011) (passage of 32 months since prior representation weighed against disqualification); *Intelli-Check, Inc. v. Tricom Card Techs., Inc.*, No. 03 CV 3706 (DLI) (ETB), 2008 WL 4682433, at *5 (E.D.N.Y. Oct. 21, 2008) (passage of two years since prior representation made it "unlikely that ... [the attorney's] knowledge was central to the ongoing strategies of the [former client]").

have hired lawyers that acquired confidential government information while working at other government agencies"); *cf. State of N.Y. by Vacco v. Reebok Int'l Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (contrasting the "motivating factor in the ordinary multi-member class action [which] is quite often simply the quest for attorney fees" with a case in which "the motivating factor is the enforcement of antitrust laws by the States acting as *parens patriae* for their citizens").[2]

As discussed more fully in my September 13, 2019 letter, there is no threat to the fairness of the upcoming trial from Mr. Pomerantz's involvement in this litigation. To put this in terms of the Second Circuit's test for disqualification of counsel, no risk of "trial taint" exists by virtue of Mr. Pomerantz's involvement in the current litigation. *See In re Payment Card Interchange Fee*, 2006 WL 6846702, at *25 (disqualification inappropriate under predecessor to Rule 1.11(c) where attorney's "former government service does not give his current clients an unfair advantage in this litigation" and there was a "mere threat that [the former government attorney] might use confidential information produced to and by DOJ"); *United States v. Quest Diagnostics*, 734 F.3d 154, 166 (2d Cir. 2013) ("courts must ... limit[] remedies for ethical violations to those necessary to avoid 'tainting the underlying trial'"); *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("disqualification is only warranted where an attorney's conduct tends to taint the underlying trial") (internal quotation marks omitted).[3] This is not just our view; Defendants in the current litigation have apparently concluded this as well. The Antitrust Division did not raise any question with us until more than four months after it was informed of Mr. Pomerantz's role, and only after prompting from the Defendants in that litigation whose concerns have now been resolved. And to our knowledge no other person or entity has raised any concerns with Mr. Pomerantz's involvement in the current litigation.

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[2] Although the Clayton Act statute potentially treats the states as private parties for certain specific purposes—such as the presumption of irreparable harm enjoyed by the FTC or the DOJ—they remain governmental actors, even when bringing claims under the Clayton Act, and are subject to unique treatment as a result. For example, the Clayton Act allows a State to sue on behalf of its citizens, whereas a private party obviously cannot do so. And of course, the question here is not whether the Clayton Act considers a State to be a private party for a particular purpose, but rather whether the New York State Rules of Professional Conduct characterize the State of California or the State of New York as a "private client" for purposes of Rule 1.11(c). Nothing in those Rules says that the meaning of "private client" in Rule 1.11(c) hinges on the statutory claims at issue in the subsequent litigation.

[3] *See also, e.g., Leo v. Selip & Stylianou LLP*, No. 16 CV 36, 2019 WL 2314616, at *2 (W.D.N.Y. May 31, 2019) ("disqualification is only warranted where 'an attorney's conduct tends to taint the underlying trial'"); *Maiden Lane Hospitality Grp. LLC v. Beck, By David Companies, Inc.*, No. 18 Civ. 7476 (PAE), 2019 WL 2417253, at *3–4 (S.D.N.Y June 10, 2019) (disqualification motion denied where no risk of trial taint).

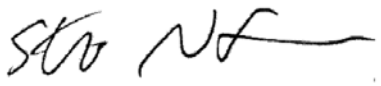
CONCLUSION

For the reasons set forth, Mr. Pomerantz's involvement in the current litigation complies with Rule 1.11(c) of the New York Rules of Professional Conduct—as well as the other provisions of the Rules that we addressed in my letter to you of September 13, 2019.

* * *

I would gladly discuss these issues with you further if that would be helpful. Please let me also reiterate my appreciation that the Antitrust Division has raised these issues with us and given us the opportunity to share our views.

Very truly yours,



Stuart N. Senator
General Counsel

cc: Glenn D. Pomerantz

Exhibit C

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

October 28, 2019

Stuart N. Senator
General Counsel
Munger Tolles & Olson LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071

Stuart.Senator@mto.com

Re: T-Mobile/Sprint

Dear Mr. Senator:

It gives me no pleasure to write this letter. After full and extensive consideration, the Department of Justice has concluded that your partner, Mr. Pomerantz, would be breaching ethical duties to the United States in continuing to represent the New York and California Attorneys General in *State of New York v. Deutsche Telekom AG*. The only appropriate remedy is for Mr. Pomerantz to withdraw from the matter. Failure to do so, may require us to seek to have him disqualified.

The Department does not take this question lightly. As you are aware, after being informed of the potential issue, we consulted with career bar ethics experts within the Department and then promptly raised it with your firm in August. In response, you sent us two letters—one on September 13 and one on September 19—to which the Department gave full consideration.

We have great respect for Mr. Pomerantz and your firm, but my duty as the Professional Responsibility Officer of the Antitrust Division is to protect the interests of the United States. Those interests include ensuring that former government lawyers adhere to their ethical obligations to the United States. For the reasons outlined below, on the advice of career bar ethics officials, the Department has determined that Mr. Pomerantz's current representation violates New York Rules of Professional Conduct 1.11, 1.7(a)(2), and 1.9(c).

I. Factual Background

In 2011, the United States sued to block AT&T Inc.'s acquisition of T-Mobile USA, Inc. (henceforth, "AT&T/T-Mobile merger litigation"). *United States v. AT&T Inc.*, 1:11-cv-01560 (D.D.C. Aug. 31, 2011). In October 2011, Mr. Pomerantz became a special government employee and served as the United States' lead trial counsel until the merging parties abandoned their transaction on December 19, 2011. In Mr. Pomerantz's role as lead trial counsel, he had full access to substantial confidential information, ranging from information provided by the parties to that action, information from significant third-parties, including Sprint Corporation (henceforth, "Sprint"), and internal Department of Justice legal and economic memoranda and analyses, many of which incorporated other confidential information.

On June 11, 2019, several state attorneys general sued to block the proposed merger of T-Mobile and Sprint. *State of New York v. Deutsche Telekom AG*, 19-cv-5434 (S.D.N.Y. June 11, 2019). Mr. Pomerantz now represents the Attorneys General of New York and California in that lawsuit. In that litigation, your firm has promulgated discovery requests to defendants for information related to the AT&T/T-Mobile merger, and members of the firm have characterized the cases as "closely, closely related." Letter from Jamie S. Gorelick, WilmerHale, to Glenn Pomerantz, Munger Tolles (Aug. 3, 2019) (memorializing statements from Munger Tolles).

The AT&T/T-Mobile merger in 2011 and the current T-Mobile/Sprint merger involve many of the same issues. In both, two of the four nationwide wireless carriers sought to merge. In both, the market was defined as the same four wireless carriers. T-Mobile was a party to both transactions. Sprint played significant roles in both. In AT&T/T-Mobile, Sprint was an important potential witness opposed to the transaction, and in the present transaction, Sprint is one of the merging parties.

II. Choice of Law

The New York and California lawsuit is pending in the U.S. District Court for the Southern District of New York, which has adopted the New York State Rules of Professional Conduct ("the New York Rules"), *see* S.D.N.Y. L. Civ. R. 1.5(b)(5), so the New York Rules apply.

III. New York Rule 1.11: Conflicts of Interest for Former Government Officers and Employees

Mr. Pomerantz's role in the New York and California lawsuit implicates both New York Rule 1.11(c) and 1.11(a). The underlying purpose of Rule 1.11 "is a protection of the former client's confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty." *See* N.Y. Bar Ass'n Comm. on Prof'l Ethics, Op. 1148 (April 2, 2018).

Rule 1.11, in pertinent part, states:

> (a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:
>
> > (1) shall comply with Rule 1.9(c); and
> >
> > (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).
>
> . . .
>
> (c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

N.Y. R. Prof'l Conduct 1.11.

A. Rule 1.11(c)

New York Rule 1.11(c) protects the United States' "confidential government information" from disclosure and prohibits a lawyer having confidential government information from representing a client in certain circumstances. The application of this rule is straightforward. In the present situation, if Mr. Pomerantz obtained confidential government information in the AT&T/T-Mobile merger litigation about a person whose interests are adverse to those of the Attorneys General of New York and California—for example, if Mr. Pomerantz obtained confidential government information about T-Mobile or Sprint, whose interests are adverse to Mr. Pomerantz's clients in having the merger completed pursuant to the settlement—then Mr. Pomerantz would be prohibited from representing the Attorneys General in the present litigation, if the information could be used to the material disadvantage of T-Mobile or Sprint.

"Confidential government information" includes, by its definition, privileged information and information that is not otherwise available to the public. *See* N.Y. R. Prof'l Conduct 1.11(c) ("[T]he term 'confidential government information' means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public."); *see also U.S. v. Villaspring Health Care Center, Inc.*, No. 3:11-43-DCR, 2011 WL 5330790, at *6 (E.D. Ky. Nov. 7, 2011) (concluding that confidential government information includes information possessed by an attorney "in the form of strategic insights, such as knowledge of the strengths and weaknesses" of the government's case); *U.S. v. Philip Morris, Inc.*, 312 F.Supp.2d 27, 43 (D.D.C. 2004) (noting that the attorney's insights into the strengths and weaknesses of the Government's evidence regarding alleged tobacco fraud is exactly the kind of information [received during the first representation] . . . that might be useful to the second [representation]"). In addition to raw information obtained directly from defendants and third-parties to the AT&T/T-Mobile merger litigation, this would also include internal Department of Justice legal and economic analyses that incorporated such information, including information obtained from T-Mobile and Sprint.

You do not dispute that Mr. Pomerantz was privy to the confidential information of AT&T, T-Mobile, and/or Sprint during the AT&T/T-Mobile merger litigation; rather, you now argue that because "all of this information is available from a source other than from Pomerantz," the information has effectively lost its confidential status and, as a result, Mr. Pomerantz's representation does not create a conflict of interest that requires disqualification. This argument, however, ignores the fact that Mr. Pomerantz was also privy to highly confidential internal Department of Justice analyses, including both legal and economic analyses, that are relevant to the present lawsuit. These internal analyses

were not shared with any party or third party involved in the AT&T/T-Mobile merger litigation, are not discoverable in the present litigation, and are not otherwise publicly-available. This information about T-Mobile and Sprint, if used by Mr. Pomerantz in the present litigation, would be to the material disadvantage of T-Mobile and Sprint, whose interest in the completion of their merger is adverse to the Attorneys General of New York and California's interest in blocking it. As a result, Mr. Pomerantz has "confidential government information" about T-Mobile and Sprint, which creates a conflict of interest under New York Rule 1.11(c). The fact that T-Mobile and Sprint may have acquiesced to the use of their information is irrelevant, because there is no consent provision in Rule 1.11(c). Thus, New York Rule 1.11(c) prohibits Mr. Pomerantz's continued representation of the New York and California Attorneys General.

You have made several arguments against the application of Rule 1.11(c) in this instance. After careful consideration, for the reasons discussed below, we do not find these persuasive. First, you argue that the United States is not a person protected by Rule 1.11. Consistent with the analysis above, we agree that T-Mobile and Sprint are the persons protected by Rule 1.11(c). That, however, does not change the analysis. The United States has an interest in ensuring that former government employees do not use confidential government information in violation of their ethical duties. That T-Mobile and Sprint may have acquiesced to Mr. Pomerantz's representation is irrelevant to the analysis, since consent cannot cure a Rule 1.11(c) conflict.

Second, you argue that the Attorneys General for New York and California do not constitute "private clients" for purposes of Rule 1.11(c). The term "private client" is not defined in New York Rule 1.11(c) or its accompanying commentary, and Department ethics experts are not aware of any ethics opinion in which the term has been defined. To the extent it may be useful for purposes of analogy, the American Bar Association's Committee on Ethics and Professional Responsibility analyzed the disciplinary rules that preceded Model Rule 1.11. Former government lawyers who had moved to private practice were concerned by the ethical implications of these disciplinary rules, which—like Model Rule 1.11(c)—were designed to "safeguard confidential governmental information from future use against the government." *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (Nov. 24, 1975). In Formal Op. 342, the Committee explained that "'private employment' refers to employment as a private practitioner." *Id.* at n. 18 (noting that "this position is not in conflict with *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). In that case it appears that the lawyer for the municipality was privately retained, and the appellate court held that this employment constituted 'private employment' within the meaning of DR 9-101(B)."). Pursuant to this jurisprudence, the Department's view is that because the Attorneys General for New York and California privately retained Mr. Pomerantz and your firm, then Mr. Pomerantz is engaged in "private employment" for your firm, and the

Attorneys General are effectively "private clients" for purposes of Rule 1.11(c). *See also* N.Y. R. Prof'l Conduct, Scope [6], ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.").

Third, you argue that Mr. Pomerantz has no specific memory of any confidential information from the AT&T/T-Mobile merger litigation. Rule 1.11(c) applies "when the lawyer in question has actual knowledge of the information. It does not operate with respect to information that merely could be imputed to the lawyer." *See* N.Y. R. Prof'l Conduct 1.11, New York State Bar Association ("NYSBA") cmt. [8]; *see also* N.Y. R. Prof'l Conduct 1.0(k) ("'knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). You seem to acknowledge that Mr. Pomerantz has actual knowledge of (or, at a minimum, that actual knowledge could be inferred from the circumstances of his serving as lead trial counsel) and/or had access to all of the United States' information regarding the AT&T/T-Mobile merger litigation—including confidential internal memoranda and analyses. The fact that T-Mobile and Sprint have accepted your firm's assertion that Mr. Pomerantz has no memory of any confidential information about T-Mobile or Sprint and that Mr. Pomerantz "has not retained any materials from his time at DOJ . . . and recalls only the broadest generalities of the AT&T/T-Mobile case from his brief stint at DOJ nearly eight years ago" is not dispositive of the issue.

Mr. Pomerantz's asserted lack of memory about the confidential government information that Mr. Pomerantz would have acquired while representing the United States in the AT&T/T-Mobile merger litigation does not insulate him from Rule 1.11(c). *See Kronberg v. LaRouche*, No. 1:09-cv-947, 2010 WL 1443934, at *3 (E.D. Va. April 9, 2010) (concluding that because former government attorney "concede[d] that he possessed and had access to 'confidential government information,' his lack of memory concerning that information does not insulate him from the reach of Rule 1.11(c)" and that "the passage of twenty years does not 'undo' [the attorney's] actual knowledge even if [the attorney] cannot today remember the confidential government information."). Indeed, a lawyer's lack of memory about exposure to confidential information generally is not a defense to later disclosure or use of the information. *See, e.g., Arifi v. de Transport du Cocher, Inc.*, 290 F. Supp. 2d 344, 350 (E.D.N.Y.2003) (finding attorney's sincere assertion that he did not recall confidential information irrelevant to issue of whether he had access to such information); *Schwed v. General Electric Co.*, 990 F. Supp. 113, 117 n.2 (N.D.N.Y.1998) (same); *Paul v. Judicial Watch, Inc.*, 571 F. Supp. 2d 17, 26 (D.D.C. 2008) (stating that a presumption for disqualification is created when the moving party shows that an attorney-client relationship existed and that the current litigation is substantially related and that the attorney to be disqualified cannot defeat this presumption by saying that he or she does not recall confidential

information); *Tucker v. George*, 2008 U.S. Dist. LEXIS 66783, *4-5 (W.D. Wis. Aug. 29, 2008) (disqualifying former government attorneys despite their failure to recollect confidential information because the appearance of impropriety still remained); *Smith & Nephew, Inc. v. Ethicon, Inc.*, 98 F. Supp. 2d 106 (D. Mass. 2000) (disqualifying, under the Massachusetts Rules of Professional Conduct, an attorney who had been involved in a substantially similar matter fifteen years earlier, noting that the attorney's argument that the fifteen year passage of time "cloak[s] confidences as effectively as a sip from the waters of Lethe" was contradicted by attorney's own concession that he was familiar with the earlier matter and recalled pieces of that matter).

In sum, Mr. Pomerantz has a non-consentable, disqualifying conflict of interest under Rule 1.11(c).

B. Rule 1.11(a) & Rule 1.9(c)

New York Rule 1.11(a) requires that Mr. Pomerantz comply with Rule 1.9(c), which protects a former client's confidential information.

Rule 1.9(c) states:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> >
> > (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

N.Y. R. Prof'l Conduct 1.9.

Rule 1.11(a) supplants Rule 1.9(a) and (b). *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-409 (August 2, 1997) (hereinafter "ABA Formal Op. 97-409") ("The conflict of interest obligations of a former government lawyer under the Model Rules of Professional Conduct are determined by Rule 1.11 and not by Rule 1.9(a) and (b)."). Although New York has not adopted any comments to its Rules of Professional Conduct, the NYSBA publishes Comments to provide guidance for attorneys in complying with the New York Rules. NYSBA Comment [4A] explains that

the purpose of Rule 1.11(a)(1) is to "protect information obtained while working for the government to the same extent as information learned while representing a private client." *See* N.Y. R. Prof'l Conduct 1.11, NYSBA cmt. [4A].

Accordingly, New York Rules 1.11(a), 1.9(c), and 1.6(a) protect the United States' confidential information from the AT&T/T-Mobile merger litigation. The definition of "confidential information" is broad and applies "to all information gained during and relating to the representation, whatever its source," to "disclosures by a lawyer that do not in themselves reveal confidential information but could reasonably lead to the discovery of such information by a third person" and includes "all factual information 'gained during or relating to the representation of a client,'" which includes information that "has any possible relevance to the representation or is received because of the representation." *See* N.Y. R. Prof'l Conduct 1.6, NYSBA cmts. [3], [4], & [4A].

Rule 1.9(c) generally prohibits Mr. Pomerantz from using and/or revealing the United States' confidential information in the present litigation. In particular, Rule 1.9(c)(1) prohibits Mr. Pomerantz from using "information relating to the representation" to the disadvantage of a former client, the United States, except as permitted or required by Rule 1.6, unless the information "has become generally known." Rule 1.9(c)(2) prohibits Mr. Pomerantz from revealing such information unless permitted or required by Rule 1.6. The prohibition in Rule 1.9(c)(2) is broader than the prohibition in Rule 1.9(c)(1), because Rule 1.9(c)(2) does not require that the revelation be made to the disadvantage of the United States—it prohibits *all* revelations unless permitted or required by Rule 1.6.[1]

Based on the information to which Mr. Pomerantz would have been privy to in the AT&T/T-Mobile merger litigation, Mr. Pomerantz has the United States' confidential information and, as a result, is ethically obligated to safeguard it. Here, you argue that there is no unique or undiscoverable confidential information involved in the present

[1] Note that NYSBA Comment [4A] to New York Rule 1.11, which purports to further explain the purpose of Rule 1.11(a)(1), is inconsistent with the express language of Rule 1.9(c). *See* N.Y. R. Prof'l Conduct 1.11, NYSBA cmt. [4A] ("By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is 'generally known' or these Rules would otherwise permit or require its use or disclosure, the information may not be used or revealed to the government's disadvantage."). Comment [4A] adds a "generally known" exception to revealing confidential information and adds that revealing information is impermissible if it is to the government's disadvantage. These additions are contrary to the text of New York Rule 1.9(c)(2); the text of the rule—not the comments—are controlling. *See* N.Y. R. Prof'l Conduct, NYSBA Comments, Scope [13] ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. *The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.")* (emphasis added).

lawsuit and, even if there was, the information is generally known. This argument is without merit because, even if the information is discoverable from T-Mobile or Sprint, it does not lose its confidential status, or permit Mr. Pomerantz to use it to the United States' disadvantage, unless it has, in fact, become "generally known." *See* N.Y. R. Prof'l Conduct 1.9(c)(1). At a minimum, Mr. Pomerantz appears to have used the United States' confidential information to assist in propounding discovery requests on T-Mobile and Sprint—and such use is, effectively, to the disadvantage of the United States because of the United States' interest in the merger's completion pursuant to the settlement versus challenging the propriety of the merger.

Moreover, the fact that information is available from a prior lawsuit does not make it "generally known." *Compare* NYSBA Comm. on Prof'l Ethics, Op. 991 (Nov. 12, 2013) ("[I]nformation is generally known only if it is known to a sizeable percentage of people 'in the local community or in the trade, field or profession to which the information relates.'") *with* N.Y. R. Prof'l Conduct 1.6, NYSBA cmt. [4A] ("[i]nformation is not 'generally known' simply because it is in the public domain or available in a public file."); *see also NCK Org., Ltd. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) ("[T]he client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.'") (quoting H. Drinker, Legal Ethics 135 (1953)); ABA Comm. on Ethics & Prof'l Conduct, Formal Op. 17-479 (Dec. 15, 2017) ("Information is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.").

Moreover, even if the information has become "generally known" and Mr. Pomerantz could use it pursuant to Rule 1.9(c)(1), Mr. Pomerantz is still prohibited from revealing the United States' confidential information under Rule 1.9(c)(2), unless the United States provides its informed consent for Mr. Pomerantz to do so. The United States has not done so.

At bottom, unless the United States' provides its informed consent to Mr. Pomerantz using or revealing the United States' confidential information from the AT&T/T-Mobile merger litigation, the Department believes that Mr. Pomerantz is putting himself in the position of running afoul of—or having already run afoul of—his professional responsibility obligations under Rule 1.9(c).

If Mr. Pomerantz cannot ethically use or reveal the United States' confidential information from the AT&T/T-Mobile merger litigation, a potential material conflict of

interest in his representation of the Attorneys General for New York and California arises under Rule 1.7(a)(2), which is discussed, *infra.*

IV. New York Rules 1.6 & 1.7: Confidentiality of Information and Conflict of Interest—Current Clients

Even if Mr. Pomerantz were ethically permitted to represent the Attorneys General of New York and California under New York Rule 1.11, this situation also implicates New York Rule 1.7(a)(2), which generally prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." *See also* N.Y. R. Prof'l Conduct 1.7, NYSBA cmt. [9] ("In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be adversely affected by responsibilities to former clients under Rule 1.9, or by the lawyer's responsibilities to other persons . . . ."). In essence, Mr. Pomerantz's continuing duty of confidentiality to his former client, the United States, creates a conflict of interest under New York Rule 1.7(a)(2).

As discussed, *supra*, Mr. Pomerantz owes his former client, the United States, a broad duty of confidentiality under Rule 1.9(c). Additionally, New York Rule 1.8(b) prohibits a lawyer from "us[ing] information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules." New York Rule 1.6(a) generally prohibits a lawyer from revealing information relating to the representation of a client without informed consent or pursuant to enumerated exceptions that likely would not apply under the circumstances.

As discussed, *supra*, by serving as the United States' lead trial counsel in the AT&T/T-Mobile merger litigation, Mr. Pomerantz undoubtedly obtained the United States' confidential information, which is material and relevant to the present lawsuit. As another member of your firm noted, the two mergers are "closely, closely related" and both transactions involve a nationwide "four-to-three" merger; the market is composed of the same four wireless carriers; both mergers involved T-Mobile; both mergers involved Sprint playing an important role; and there has not been a significant change in merger law, so the confidential internal Department memoranda and analyses from the AT&T/T-Mobile merger litigation remain highly relevant.

Under these circumstances, none of the exceptions to New York Rule 1.6(b) would permit Mr. Pomerantz to use or reveal the United States' confidential client information in connection with his representation of the Attorneys General for New York

or California. Nor would such use or revelation be impliedly authorized, because Mr. Pomerantz no longer represents the United States such that disclosure would be needed "to advance the best interests of the client." Accordingly, unless the Assistant Attorney General for the Antitrust Division or his designee (who stands in the shoes of the United States for purposes of providing consent) consents to Mr. Pomerantz using or revealing the United States' confidential information, his representation of the Attorneys General of New York and California would likely be materially limited by the duty of confidentiality he owes to his former client, the United States, which would create a conflict of interest under New York Rule 1.7(a)(2) in his representation of his current clients, the Attorneys General for New York and California.

If the Assistant Attorney General will not or cannot consent to Mr. Pomerantz using or revealing the United States' confidential information, *e.g.*, because it is prohibited or protected from disclosure under substantive law, Mr. Pomerantz would be permitted to represent the Attorneys General of New York and California notwithstanding a conflict of interest under New York Rule 1.7(a)(2) only if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

See N.Y. R. Prof'l Conduct 1.7(b). Unless the AAG consents to full disclosure and use of the United States' confidential information, Mr. Pomerantz may not be able to satisfy the first requirement of New York Rule 1.7(b). As explained in ABA Formal Op. 97-409:

> Where the Rule 1.7(b) conflict arises from the lawyer's duty of confidentiality to a former client under Rule 1.9(c), the Committee believes it unlikely that the lawyer could form the "reasonable belief" of no adverse affect [sic] since, in addition to the constraints on zealous representation implied by her obligation to keep her former government client's confidences, she would also be vulnerable to a disqualification motion by the government. Thus, while some clients might wish to retain the lawyer even after being fully informed of the high risk of her being subjected to a disqualification motion, no reasonable lawyer could conclude that the very existence of this risk—much less the eventuality of disqualification—would not adversely affect the representation. Accordingly, the

> lawyer could not undertake the new representation unless the former government client consented to waive the confidentiality barrier posed by Rule 1.9(c).

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-409 (Aug. 2, 1997). As a practical matter, it may be difficult or impossible for Mr. Pomerantz to separate the United States' confidential information from the information that he learned in connection with his representation of the Attorneys General for New York and California in the present lawsuit. Under such circumstances, and the threat not only of disqualification, but also potential disciplinary action for violating his duty of confidentiality to the United States, it would be unlikely that he could reasonably believe that he could competently and diligently represent the Attorneys General for New York and California in connection with the present lawsuit. Thus, the Department believes that Mr. Pomerantz has a non-consentable conflict under New York Rule 1.7(a)(2).

V. Disqualification of your firm

If Mr. Pomerantz has discussed the AT&T/T-Mobile merger litigation with others in your firm—and/or has used the United States' confidential client information or revealed it to anyone at the firm—then it will be difficult to impose an effective screen at this point. Generally, in order for screens to be effective, they need to be erected as soon as possible. *See* N.Y. R. Prof'l Conduct 1.0(t) ("'[s]creened' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer . . . is obligated to protect under these Rules or other law."); *see also Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 741 F.Supp.2d 970 (W.D. Wis. 2010) (identifying "various factors that a court may consider in assessing the adequacy of a firm's screening procedures: (1) whether the disqualified lawyer is denied access to relevant files; (2) whether the lawyer is excluded from profits or fees derived from the representation in question; (3) whether discussion of the suit is prohibited in the lawyer's presence; (4) whether members of the firm are prohibited from showing the lawyer any documents relating to the case; (5) whether the disqualified lawyer and others in his firm have affirmed under oath that they have not discussed the case with each other and will not do so in the future; (6) whether the screening arrangement was set up at the time the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem"); *Analytica, Inc. v. NPD Research Inc.*, 708 F.2d 1263, 1267-68 (7th Cir. 1983) ("[I]t was not enough that the lawyer 'did not disclose to any person associated with the firm any information . . . on any matter relevant to this litigation,' for 'no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently,' until the disqualification motion was filed – months after the lawyer had joined the firm."); *United States v. Goot*, 894 F.2d 231, 235 (7th Cir. 1990) ("The predominant theme running

through this court's prior decisions is that disqualification is required when screening devices were not employed *or were not timely employed.*") (emphasis added); *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 831 (Fed. Cir. 1988) (noting that presumption of shared confidences was not clearly overcome because oral screening measures were not timely employed or adequately communicated); *Cobb Publ'g, Inc. v. Hearst Corp.*, 907 F. Supp. 1038, 1047 (E.D. Mich. 1995) (opining that delay of 11 or 18 days in setting up ethical wall is too long); *In re Essex Equity Holdings USA v. Lehman Bros., Inc.,* 909 N.Y.S.2d 285, 391,393 (Sup. Ct. 2010) (disqualifying law firm for failure to comply with screening requirements when former AUSA who participated in a criminal investigation was subsequently employed by law firm representing persons in a related arbitration; notification to law firm employees of the screening was "vague, untimely and ineffective" and there was "interaction rather than isolation between the conflicted attorney and others involved in the matter"). We doubt that your firm can meet this standard.

Thus, the Department believes that, in addition to Mr. Pomerantz withdrawing, it is likely that your firm must withdraw as well.

VI. Significance of the retention of Fiona Scott-Morton as an expert

Finally, we note that New York and California have retained Fiona Scott-Morton as an expert in the New York and California litigation. Prof. Scott-Morton served as the Deputy Assistant Attorney General for Economics during the AT&T/T-Mobile litigation and, in that capacity, "supervised the economic team as it assembled the evidence to support the Division's case, managed interactions with expert witnesses and help[ed] set the strategy and direction of economic litigation support." Antitrust Division, Division Update Spring 2012, https://www.justice.gov/atr/fiona-scott-morton. While Prof. Scott-Morton is not bound by the rules of professional responsibility, Mr. Pomerantz and other lawyers in your firm are ethically obligated to ensure that the conduct of non-lawyers with whom they work (*e.g.,* expert witnesses) act in a manner that is compatible with their own professional obligations, and they are prohibited from violating or attempting to violate the Rules through the acts of another. *See* N.Y. R. Prof'l Conduct 4.4(a) ("In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person."); N.Y. R. Prof'l Conduct 4.4 cmt. [1] ("It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."); N.Y. R. Prof'l Conduct 5.3(a) ("A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate."); 8.4(a) ("A lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induct another to do so, or do so through the acts of another."). For example, if Mr. Pomerantz

is ethically prohibited from using or revealing the United States' confidential or privileged information that he obtained during his representation of the United States in the AT&T/T-Mobile merger litigation in the present lawsuit, then he cannot have his expert do that which he ethically cannot do. *See, e.g.*, D.C. Legal Ethics Comm., Op. 285 (Nov. 1998).

The Department believes that this further counsels for Mr. Pomerantz's and your entire firm's withdrawal.

* * *

Please confirm by close of business Tuesday, October 29, 2019, that Mr. Pomerantz will withdraw consistent with his ethical obligations and that your firm will comply with all of its ethical obligations.

Sincerely,

Marvin Price
Professional Responsibility Officer

Exhibit D

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October 29, 2019

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BY EMAIL TO MARVIN.PRICE@USDOJ.GOV

Marvin Price
Professional Responsibility Officer
U.S. Department of Justice Antitrust Division
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Re: *State of New York, et al. v. Deutsche Telekom AG, et al.*,
U.S.D.C., Case No. 1:19-cv-05434-VM (S.D.N.Y.)

Dear Mr. Price:

I have reviewed the Antitrust Division's letter of October 28. It is 14 pages and calls for a response in one business day. My prior letters to the Division contain a substantive analysis of the ethical rules that the Division previously identified. Given the deadline, I am not in a position to address the issues point-by-point here. I will simply note our view that the Division's discussion of both the facts and the law is materially inaccurate and incomplete. The Division's letter never mentions, much less engages on, important facts and legal authorities that were identified in my prior letters.

I am also compelled to note the timing of the Antitrust Division's letter, which I believe is relevant both to the merits of the ethics issue as well as to the prejudice to our clients that would result from the withdrawal of counsel that the letter seeks. The Division's letter came only 42 days before the trial date in the above litigation and six months after the Division first learned of Mr. Pomerantz's involvement. It was also well over a month after I provided my

firm's analysis of the ethical rules that the Division identified in September. The Division sought our analysis after having known for more than four months of Mr. Pomerantz's involvement. Over the course of those months, the Division repeatedly engaged with Mr. Pomerantz with respect to the litigation. The Division never suggested any impropriety in Mr. Pomerantz's involvement.

We have evaluated Mr. Pomerantz's and this firm's ethical obligations in depth—internally, with outside counsel in New York and with an independent expert on the New York ethical rules. We have concluded that Mr. Pomerantz and this firm are ethically representing their clients in this litigation. We are in full compliance with both the New York ethical rules that the Antitrust Division previously identified and the additional New York ethical rules that the Division identified only yesterday. This letter will confirm that we will not withdraw as counsel in this litigation and that we will continue to comply with all of our ethical obligations.

The Antitrust Division suggests in its letter that the Division may pursue disqualification. We appreciate your statement that the Division would not take this step lightly, and believe that it would be wholly inappropriate for the Division to go down that path. If the Antitrust Division does plan to pursue disqualification, please immediately provide the schedule for the Division's filing its pre-motion conference letter as required under the judge's rules, so that we can plan for filing our response.

Very truly yours,

Stuart N. Senator
General Counsel

cc: Glenn D. Pomerantz