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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE,
MARYELLEN O'DONOHUE,
LAURIE MAYERS, HEATHER
PIERCE, and KATHERINE
WILKINSON on behalf of themselves
and all others similarly situated,

PLAINTIFFS,

v.

PUBLICIS GROUPE SA and
MSLGROUP,

DEFENDANTS.

Civ No. 11-CV-1279 (ALC) (AJP)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the attached Memorandum in Support of Motion for Leave to File a Brief Amicus Curiae In Support of Plaintiffs' Motion for Recusal or Disqualification, and the proposed brief *amicus curiae* attached thereto, Richard E. Flamm, Esq. shall move this court, before the Honorable Andrew J. Peck, United States Magistrate Judge, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, 10007, for leave to file the proposed brief *amicus curiae*.

Dated: May 10, 2012

Respectfully submitted,



Richard E. Flamm, Esq.

Attorney At Law

2840 College Avenue, Suite A

Berkeley, CA 94705

Telephone: (510) 849-0123

E-mail: rflamm@comcast.net

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE,)
MARYELLEN O'DONOHUE,)
LAURIE MAYERS, HEATHER)
PIERCE, and KATHERINE)
WILKINSON on behalf of themselves)
and all others similarly situated,)

PLAINTIFFS,)

v.)

PUBLICIS GROUPE SA and)
MSLGROUP,)

DEFENDANTS.)

Civ No. 11-CV-1279 (ALC) (AJP)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION
FOR RECUSAL OR DISQUALIFICATION

Given my unique perspective on the subject of judicial recusal, the undersigned, Richard E. Flamm, respectfully requests leave to file the accompanying brief *amicus curiae* in Support of the Motion for Recusal or Disqualification ("Motion for Recusal") filed by Plaintiffs Monique da Silva Moore, et al. in the above-captioned matter.

Plaintiffs' Motion for Recusal addresses the question of whether a judge must recuse himself under 28 U.S.C. § 455(a) for the appearance of bias. As the only author of a comprehensive nationwide treatise on this subject, I believe that I am uniquely positioned to provide the Court with insight into whether its conduct and comments have created in the mind of a reasonable, objective observer a sufficient appearance so as to require its disqualification under § 455(a). Although I have been retained by Plaintiffs, and submit this brief in support of their position, I do so as a friend of the Court in

particular, and of the judiciary more broadly, as I seek to protect the perception of integrity and fairness in our judicial system.

Plaintiffs consent to the filing of this brief.

Interest of the Proposed *Amicus Curiae*

I graduated from the University of California at Santa Cruz with a Bachelor of Arts degree in 1975, and from Rutgers University with a Juris Doctorate degree in 1981. My bar admissions include the state of California, the United States District Court for the Southern District of New York, and the Supreme Court of the United States of America. From 1986 to 1995, I served as both a senior associate and senior attorney at the law firms Long & Levit and Kaufman & Logan, respectively, specializing in malpractice actions, conflict of interest claims, and disqualification motions and appeals. In 1995, I established a private practice devoted to the provision of advice and expert testimony with respect to attorney and judicial ethics matters, including attorney and judicial disqualification motions and appeals. Since then I have spoken extensively on the issue of judicial disqualification,¹ written multiple articles about this issue,² and authored the only nationwide treatise on judicial disqualification.³ I have personally read and analyzed thousands of legal decisions related to the subject of judicial recusal and/or

¹ See, e.g., *Judicial Disqualifications: Conflicts of Interest and other Bases*, Continuing Legal Education Program.

² See e.g., *Judicial Disqualification in Florida*, The Florida Bar Journal (February, 1996); *Judicial Disqualification in California*, The Daily Journal (January 3, 1996); *History of and Problems with the Federal Judicial Disqualification Framework*, 58 Drake L. Rev. 751 (Spring 2010); *Disqualification/Reassignment of Federal District Court Judges*, Practical Litigator (July, 1998).

³ See *Judicial Disqualification: Recusal and Disqualification of Judges (Second Edition)*, Banks & Jordan Law Publishing Co. (2007) (latest supplement – 2011); see also *Whitacre Inv. Co. v. State*, 113 Nev. 1101, 1115 n. 6 (Nev. 1997) (Springer, J., dissenting) (“[C]ontained in the moving papers is an opinion, in affidavit form, expressed by Richard Edward Flamm, the leading authority on judicial disqualifications, an opinion which ‘mandate[s]’ Justice Rose’s disqualification. Mr. Flamm is the author of *Judicial Disqualification: Recusal and Disqualification of Judges*, a nationwide treatise . . . [that] examines in detail the principles which have been espoused by the nation’s courts in deciding judicial disqualification motions and appeals.”; See also http://judiciary.house.gov/hearings/hear_091210_2.html (December 10, 2009 testimony before the Subcommittee on Courts and Competition Policy at the direction of Chairman, Hon. John Conyers, during a hearing on Examining the State of Judicial Recusals after *Caperton v. A.T. Massey*).

disqualification. As an individual who has devoted much of my professional career to studying and teaching attorney and judicial ethics,⁴ I possess a keen interest in Plaintiffs' Motion for Recusal.

Argument

"There is no governing standard, rule or statute 'prescrib[ing] the procedure for obtaining leave to file an amicus brief in the district court[.]'" *Onondaga Indian Nation v. State of New York*, No. 97-CV-445, 1997 U.S. Dist. LEXIS 9168, 1997 WL 369389, at *2 (N.D.N.Y. June 25, 1997) (quoting *U.S. v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991)). "The usual rationale for amicus curiae submissions is that they are of aid to the court and offer insights not available from the parties." *Auto. Club of N.Y., Inc. v. Port Auth.*, 2011 U.S. Dist. LEXIS 135391, at *6 (S.D.N.Y. Nov. 22, 2011) (citing *U.S. v. El-Gabrowni*, 844 F. Supp. 955, 957 n. 1 (S.D.N.Y. 1994)). Although they are not bound by Rule 29 of the Federal Rules of Appellate Procedure, United States District Courts sometimes look to it for guidance when reviewing a request to file an amicus brief. *Auto. Club of N.Y., Inc. v. Port Auth.*, 2011 U.S. Dist. LEXIS 135391, at *1-2 n.1 (S.D.N.Y. Nov. 22, 2011) (citing *Gotti*, 755 F. Supp. at 1158).

In accordance with Fed. R. App. P. 29:

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or **when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.**

Auto. Club of N.Y., 2011 U.S. Dist. LEXIS 135391, at *6 (citing *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007)).

My knowledge of the federal and state case law governing judicial recusal is probably unparalleled,⁵ as is my experience studying fact patterns which warrant recusal in certain instances and

⁴ Served as an Adjunct Professor, *Legal Profession*, Boalt Hall Law School (University of California at Berkeley) (1999); Adjunct Professor, *Professional Responsibility*, Golden Gate Univ. Law School (2002).

not in others. I have researched and taught extensively on the topic over the last two decades. Thus, I believe that I am uniquely positioned to provide the Court with a perspective on the issues raised by Plaintiffs' Motion for Recusal beyond what any party in the case is likely to provide.

Many courts have relied on third-party opinions in informing their recusal decisions. *See, e.g., In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 136 (2d Cir. 2007) (where the circuit court solicited the feedback of the Committee on Codes of Conduct of the Judicial Conference of the United States ("Committee") to assist it in determining whether its financial interest in the outcome of the case required panel members' recusal); *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1265 (11th Cir. 2009) (circuit court relied in part on expert testimony from a party's ethics expert); *Union Carbide Corp. v. U.S. Cutting Serv.*, 782 F.2d 710, 715 (7th Cir. 1986) (circuit court solicited the opinion of the Committee to help it determine whether the divestiture of a financial interest was sufficient to overcome the disqualification motion); *In re Cameron Int'l Corp.*, 393 Fed. Appx. 133, 136 (5th Cir. 2010) (circuit court requested the opinion of the Committee as to whether a judge's holding a debt instrument of a party required the judge's recusal). Here, I believe that my insight and unique perspective on this issue will be of assistance to the Court in reaching a reasoned, informed decision.

Pursuant to Your Honors' Individual Rules of Practice 2(C), I seek permission to file the attached brief amicus curiae, which is thirty-four pages.

⁵ *Judicial Disqualification: Recusal and Disqualification of Judges (Second Edition)*, alone cites to thousands of state judicial disqualification cases, each of which I personally reviewed.

Conclusion

For the foregoing reasons, I request that the Court grant the motion for leave to file the attached amicus brief.

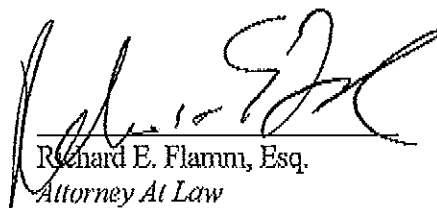
DATED: May 10, 2012

Respectfully submitted,

Richard E. Flamm, Esq.
Attorney At Law
2840 College Avenue, Suite A
Berkeley, CA 94705
Telephone: (510) 849-0123
E-mail: rflamm@comcast.net

CERTIFICATE OF SERVICE

I, Richard E. Flamm, hereby certify under penalty of perjury that on this 10th day of May 2012 true and correct copies of the foregoing amicus brief were served on all counsel of record by U.S. Mail.

A handwritten signature in black ink, appearing to read 'Richard E. Flamm', is written over a horizontal line.

Richard E. Flamm, Esq.

Attorney At Law

2840 College Avenue, Suite A

Berkeley, CA 94705

Telephone: (510) 849-0123

E-mail: rflamm@comcast.net