UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES, et al.

Plaintiffs,

- against -

AMERICAN EXPRESS COMPANY, et al.

Defendants.

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NOT FOR PRINT OR ELECTRONIC PUBLICATION

ORDER

10-CV-04496 (NGG) (RER)

RAMON E. REYES, JR., U.S.M.J.:

Before me is the Plaintiff States' motion for a protective order and motion to quash certain discovery requests by American Express ("Amex"). (Dkt. No. 137.) Amex requested written interrogatories and document requests from certain state government entities (the "state agencies"),[1] which are discovery devices reserved for party to party production. *See Lehman v. Kornblau,* 206 F.R.D. 345, 346 (E.D.N.Y. 2001) (interrogatories and document requests served on a non-party are a nullity). Plaintiff States object asserting: (1) the state agencies are not plaintiffs for purposes of discovery, and (2) Plaintiff States do not have possession, custody, or control over the documents sought; thus, the only means of obtaining the requested information is through Rule 45 subpoenas.[2] For the reasons herein, Plaintiff States' motion is granted in part.

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[1] The initial request was of all state government entities and government accepting entities. Throughout the course of the meet and confer and informal/formal subpoena process, the list has narrowed significantly. Reference to the state agencies herein is generally to those state agencies, unless otherwise noted.

[2] Plaintiff States also assert that State Freedom of Information Act ("FOIA") (or each States' equivalent of FOIA) requests can supply Amex with some of the requested information. However, as discussed at oral argument, the administrative procedures required under state FOIA statutes compound the burden on Amex in obtaining the discovery it seeks, and to which it is

Both Amex and Plaintiff States cite *United States v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1978), to support their respective positions. In *AT&T*, the district court found that when the United States was the named party in an antitrust enforcement action, the United States Department of Justice ("DOJ") could not alone be considered the plaintiff, and thus sole government agency subject to discovery. *Id.* at 1333-34. Accordingly, the court found that executive branch agencies were subject to party discovery. *See id.* at 1334. The court noted that DOJ likely would not have brought the suit "without consultation with government executives involved in economic policy and possibly with the White House itself." *Id.*

Contrarily, the court found that independent agencies—immune from Presidential oversight, like the Federal Communications Commission ("FCC")—were not subject to party discovery. *Id.* at 1335-36. Particularly relevant to the court's decision was that while DOJ could exercise some control over the other executive agencies via the President's authority, it had no similar manner to compel an independent agency to cooperate. *Id.* The court explained that in such case, "to hold [independent agencies] to be part of the 'plaintiff' . . . would effectively leave the conduct of [the] lawsuit, and perhaps other actions brought by the government, vulnerable to a virtual veto" by those agencies. *Id.* at 1336.

Applying the *AT&T* principles just described, a more recent decision dealt with the relationship between state agencies (namely Medicaid agencies) and State Attorneys General, and whether those agencies were parties to antitrust enforcement litigation. *See Colorado et al. v.*

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arguably entitled.

Warner Chilcott Holdings Co. III, Ltd., et al., No. 05-CV-2182, Slip Op. (D.D.C. May 8, 2007).[3] In that case, the court found that the state agencies were not plaintiffs for purposes of discovery and denied defendants' motion to compel. Of particular note and relevance here, the decision hinged on the duality of the States' executive branches—that is, the States' Governors and Attorneys General operated independently of one another. *See id.* at 8. Unlike the executive branch agencies and DOJ in *AT&T*, the State Attorneys General exercised authority independent of the State Governors. In other words, the State Attorneys General could not force the separate state entities to produce documents. Therefore, the court found the state agencies more akin to the FCC and other independent agencies in *AT&T*. *Id.* at 7. The court, relying on *New York el rel. Boardman v. National Railroad Passenger Corp. ("Amtrak")*, 233 F.R.D. 259 (N.D.N.Y. 2006), held that it would "not aggregate separate state governmental agencies without a strong showing to the contrary by Defendants." *Id.* at 8.

The same is true here, with one exception.[4] In almost every case, the State Attorneys General are independent, elected officials pursuant to the States' constitutions.[5] In all cases, the

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[3] The decision was submitted with Plaintiff States' Memorandum in Support of their Motion ("Pl. Mem.") as Exhibit G. (Dkt. No. 137-7.)

[4] One of the agencies from which discovery was sought—the Montana Motor Vehicle Division ("MT MVD")—is a subdivision of the Montana State Attorney General's Office. The point with respect to this one agency, however, appears to be moot as the Montana State Attorney General's Office has responded to the requests on behalf of that agency. For future requests, since the MT MVD is directly under the supervision and control of the Montana Attorney General's Office, party discovery as to it is proper.

[5] In New Hampshire, the Attorney General is nominated and appointed by the Governor and Executive Council; however, the Attorney General serves a term of four years to the Governor's two. *See* NH CONST. PART SECOND. ART. 42, 46; NH REV. STAT. ANN. §7:1; NH REV. STAT. ANN. §21-M:3(I). Therefore, although not an elected official, the Attorney General does not serve at the pleasure of the Governor, since the Governor has no power to remove him

dual structure of the States' executive branches was purposeful; the State Attorneys General are to operate independently of the State Governors. As in *Warner Chilcott* and *Amtrak*, these state agencies—even those that are part of the executive branch—are neither subject to common executive control nor interrelated with the State Attorneys General, and so should not be aggregated together for discovery purposes.[6] Slip. Op. at 8; 233 F.R.D. at 264.

As evidence that the State Attorneys General and agencies are not so independent as they claim, Amex cites the fact that the State Attorneys General can be compelled (in some cases) to represent state agencies in litigation. But the decision to bring this antitrust action was not an instance of compulsory representation, or done specifically on behalf or in protection of any state agencies. Rather, the decision to pursue an enforcement action against Amex was one of policy, made independently of the State Governors and state agencies. Great deference must be given "to the State and its Legislature to define how governmental entities are to be separate and distinct and how they may relate to one another as a whole." *Amtrak*, 233 F.R.D. at 264. Accordingly, I find that for purposes of this litigation and discovery, the state agencies (with one

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without cause, and may not have the opportunity to nominate anyone to the position during the Governor's term. (*See* Hearing Tr. at 86-87.) In Tennessee, the Attorney General is appointed by the Tennessee Supreme Court and serves an eight-year term. *See* TN CONST. ART. 6, § 5. Thus, the Attorney General also serves independently of the Governor.

[6] Neither party has explained under whose authority the state agencies are organized and to whose authority they are beholden—aside from the MT MVD. Plaintiff States have represented that the remaining agencies fall outside the State Attorneys General's authority. However, if any other state agencies are under the supervision and control of the State Attorneys General rather than the Governors, those agencies are properly served with party discovery as well.

exception, *see supra* note 4) are not parties.[7]

Of course as Amex correctly points out, Rule 34 is broader than merely documents in the immediate possession of a party to litigation, rather it compels production of documents under the parties' "possession, custody, or control." Amex asserts that even if the state agencies are not determined to be parties, the respective State Attorneys General have "control" over the state agencies' documents, and thus can be compelled under Rule 34 to produce them. I regrettably disagree.

Although I have no doubt that informally the State Attorneys General could probably make these requests of each agency and garner voluntary participation, the issue of control is problematic since state agencies operate outside of the State Attorneys General's authority. Legally, the State Attorneys General have no more way of compelling production than Amex does if an agency refuses to cooperate. I cannot order a party to produce that which it does not have, and that to which it does not have any right or recourse to acquire.[8]

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[7] The cases cited by Amex do not justify a different result. For example, in *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 34-35 (S.D.N.Y. 1984), the French ministries from which defendants sought discovery were the moving forces behind the contracts that formed the basis for suit. It does not follow, however, that *any* French government agency would have been subject to party discovery. Here, the state agencies were not the moving forces behind the enforcement action, and in fact no monetary damages are sought on their behalf. In *United States v. IBM*, No. 69 Civ. 200, 1975 WL 905, at *9 (S.D.N.Y. June 23, 1974), it is significant to note that ultimately the court denied the motion to compel DOJ to disclose the agency information. The decision was not based solely on the fact that the documents were not in the immediate possession of the DOJ, but neither is the decision here.

[8] Although I find a party's ability to obtain documents when it wants them as a particularly relevant, controlling factor, I agree with Plaintiff States' analysis of additional factors considered by other courts as to whether a party has control over documents for Rule 34 purposes. (*See* Pl. Mem. at 8-9.) Additionally, some courts have broadly stated that "control" requires that the party have "the right, authority, or practical ability to obtain the documents."

Assuming that any or all of these agencies act at the behest of their Governors, just as the executive agencies in *AT&T* act at the behest of the President, it is of no moment here. The State Attorneys General act outside gubernatorial control, and so relying on the Governors to compel cooperation subjects the State Attorneys General to the same unacceptable impediments as requiring the DOJ to rely on independent regulatory agencies to comply with its discovery obligations. It is not for this court to interfere with the State Attorneys General's ability to exercise their state constitutional power to bring an enforcement lawsuit absent gubernatorial approval. To find that the State Attorneys General have control over the documents in possession of state agencies that operate wholly independently of the State Attorneys General would be giving the Governors' Offices and state agencies a "virtual veto" over the policy decision to bring an enforcement action that rightfully lies with the State Attorneys General.

Amex focused its position at oral argument particularly on the fact that having served formal Rule 45 subpoenas on half of the state agencies, a majority have chosen to have the State Attorneys General's Offices represent them in answering and objecting to the subpoenas. As already alluded to and as Plaintiff States explained during oral argument, the State Attorneys General play a very unique role—that of both law firm and policymaker. In their representative capacity of the agencies, they act in many ways as retained private counsel—at their client's behest.

As this is the nature of their representation of the state agencies for purposes of the Rule

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Bank of N.Y. v. Meridian BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 146 (S.D.N.Y. 1997). Under the circumstances, I cannot find that the voluntary process I described qualifies as a "practical" ability to obtain the documents such that the State Attorneys General have control over the documents since to do so would improperly circumvent the problem described below.

45 subpoenas, the State Attorneys General must act accordingly. If the agencies have legitimate, legal objections to the requested production, it is the State Attorneys General's job to make them. In this sense, the State Attorneys General have no more power to acquire documents from the non-party agencies than any law firm representing a client. Without question, the private firms here would strenuously object if in bringing a law suit on behalf of one client (or even in their own name) their adversary sought documents belonging to another client as party discovery. They would properly insist on the use of Rule 45.

All this said, I cannot agree with Plaintiff States that Rule 45 is a more efficient, less burdensome approach for Amex. To the contrary, I recognize that party discovery would be unquestionably more efficient. My hands, however, are tied. The state agencies are not parties, and the documents sought from the state agencies are not generally in the possession, custody, or control of the State Attorneys General. I find that party discovery cannot be used to obtain documents or information directly from the state agencies (except *supra* note 4), but I will not quash the document requests and interrogatories as requested. Rather, Plaintiff States must answer those requests with whatever information and documents are in their possession, custody, and control. As for the information and documents from state agencies, I remain hopeful that the state agencies who have volunteered to produce information absent a formal subpoena will follow through on those promises, and that since it is in all parties' interest to move this process along, the State Attorneys General's Offices will take an active role in encouraging cooperation as appropriate.

CONCLUSION

For all of the foregoing, the request for a protective order from the Rule 33 and 34 requests previously served is granted as to the state agencies. I deny Plaintiff States' request to quash the Rule 33 and 34 requests.

SO ORDERED.

Dated: Brooklyn, New York
July 29, 2011

Ramon E. Reyes Jr.

Ramon E. Reyes, Jr.
United States Magistrate Judge