

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

GARTNER, INC.,

Plaintiff,

v.

HCC SPECIALTY UNDERWRITERS, INC.
AND U.S. SPECIALTY INSURANCE
COMPANY,

Defendants.

Civil Action No. 1:20-cv-04885-JGK

**MEMORANDUM OF LAW IN SUPPORT OF
GARTNER, INC.'S MOTION TO DISQUALIFY
NORTON ROSE FULBRIGHT US LLP**

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**EXHIBITS TO PLAINTIFF GARTNER, INC.'S
MOTION TO DISQUALIFY NORTON ROSE FULBRIGHT US LLP**

Exhibit	Description
A	John Riley Declaration
B	Robin Frederick Declaration
C	Ann Tracy Declaration
D	Gartner Outside Counsel and Billing Guidelines
E	May 15, 2020 N. Abrahams Email
F	June 5, 2020 J. Noakes Email
G	NRF Revisions to Gartner Guidelines
H	August 20, 2020 FitzSimons Letter
I	Gartner Germany Invoices
J	November 4, 2019 J. Kaufman Email
K	August 7, 2020 J. Hardin Letter
L	July 16, 2020 R. Frederick Email
M	May 29, 2020 N. Abrahams Email
N	May 29, 2020 A. Tracy Email
O	June 2, 2020 A. Tracy Email
P	June 4, 2020 N. Abrahams Email
Q	Collection of Frederick Correspondence
R	December 6 and December 11, 2019 Intravia and Caldwell Emails
S	August 14, 2020 Bonner Letter
T	George Walden Declaration

Plaintiff Gartner, Inc. moves to disqualify Norton Rose Fulbright US LLP (“NRF”) from representing the defendants HCC Specialty Underwriters, Inc. (“Specialty Underwriters”) and its affiliate U.S. Specialty Insurance Company (“USSIC” and, together with Specialty Underwriters, “Defendants”) in this action.¹

I. INTRODUCTION

Gartner, Inc. (together with its subsidiaries, “Gartner”) is a global, technology research and advisory firm that stages large-scale events and conferences throughout the world. Gartner serves its over 14,000 clients through its research, advisory, and consulting services, as well as by organizing events and conferences related to human resources, information technology, marketing, and sales (referred to as the “Gartner Conferences”). *See* Ex. A at ¶3. To protect itself against losses in the event a Gartner Conference is cancelled, Gartner secured insurance coverage from USSIC and its affiliates, which insurance policies were negotiated and underwritten by Specialty Underwriters. ECF 1-1. That insurance includes coverage for conferences canceled due to the “outbreak of communicable disease (whether actual or perceived).” *Id.*

Due to COVID-19 and the corresponding global pandemic, that risk became a reality, and Gartner has been forced to cancel many Gartner Conferences, resulting in significant financial loss and requiring Gartner to undertake global workforce reductions. Ex. A at ¶11. In this

¹ USSIC filed two declaratory judgment actions against Gartner in Texas: *U.S. Specialty Insurance Company v. Gartner Group, Inc.*, Civil Action No. 4:20-cv-1850 (S.D.Tx.), and *U.S. Specialty Insurance Company v. Gartner Group, Inc.*, Civil Action No. 4:20-cv-1851 (S.D.Tx.) (as consolidated, the “Texas Lawsuits”). Gartner filed a similar motion for disqualification of NRF in these related cases on September 18, 2020. In connection therewith, Gartner submitted declarations, each of which is equally applicable here and therefore submitted in support of this motion including John Riley as Exhibit A, Robin Frederick as Exhibit B, and Anne Tracy as Exhibit C

unprecedented time, Gartner has looked to its trusted counsel around the world to assist as it navigates the complexities of COVID-19 and the reduced demand and feasibility for its services. Ex. B at ¶12. In Australia, Gartner has relied on NRF² to provide that assistance. Ex. C at ¶20.

Gartner also has looked to Defendants to honor their contractual obligations and provide coverage pursuant to Gartner’s policies. Gartner notified Specialty Underwriters (a USSIC affiliate) that it would be seeking coverage for its canceled events on or about February 25, 2020, which triggered a series of communications over whether Gartner was contractually entitled to reinstate its policy limits to obtain more coverage. ECF 1-1, ¶¶16-18. USSIC retained NRF to advise on coverage and ultimately to sue Gartner in the Texas Lawsuits. Both lawsuits were filed on May 27, 2020, the very day USSIC notified Gartner of its unfavorable position on coverage. Ex. B at ¶14; *see also* Ex. T at Ex. B (stating that in no event would USSIC “accept coverage of claims in excess of the Aggregate Limit of Indemnity...”).

Gartner was surprised by the Texas Lawsuits. Ex. B at ¶14. Only two weeks earlier Specialty Underwriters characterized Gartner’s requests for policy reinstatement as “complicated” and “premature.” Ex. T at Ex. A. NRF thereafter strategically filed suit in Texas *before* USSIC conveyed its coverage position, assuring Gartner could not initiate suit first in a more appropriate jurisdiction of its choice.

² Norton Rose Fulbright US LLP is a member of the Norton Rose Fulbright Verein, a Swiss verein. Other members of the verein include Norton Rose Fulbright Australia, Norton Rose Fulbright LLP, Norton Rose Fulbright Canada LLP, and Norton Rose Fulbright South Africa Inc. *See* www.nortonrosefulbright.com (last visited September 21, 2020). These entities are referred to in this motion collectively as “NRF” and are treated as one for conflict purposes. *See, e.g., In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, in the U.S. Intl Trade Commission (May 17, 2016).

In addition to these substantive and procedural challenges, the additional injustice here is that Gartner is a current client of NRF—and has been for over a decade. Despite ethical rules precluding attorneys from acting adversely to their clients’ interests, NRF has done just that. NRF’s representation of Defendants here also violates Gartner’s Outside Counsel Billing and Staffing Guidelines (the “Guidelines”), which have been in effect since January 1, 2020 and explicitly preclude Gartner’s law firms from undertaking engagements that present a conflict of interest. Ex. D at 8.

Particularly troublesome is NRF’s conduct surrounding the representation: instead of contacting Gartner to apprise it of the conflict and seek a waiver—as required by both the ethical rules and the Gartner Guidelines—NRF remained silent, first conveying merely a “need to review” the Guidelines on May 15, 2020. Ex. E. NRF then laid in wait and attempted to circumvent its ethical and contractual obligations by delaying until one week after filing the Texas Lawsuits to propose revisions to the Guidelines. Ex. F. Recognizing its ethical quandary, through its revisions, NRF sought to limit its representation of Gartner to its wholly-owned subsidiary in Australia—evidently hoping that would absolve NRF of its duty of loyalty to Gartner Inc. *See* Ex. G. The reality is that NRF’s representation of Gartner has not been so narrow, and neither the law nor the Guidelines allow NRF to disregard its ethical obligations.

For months Gartner has attempted to resolve its conflict with NRF—to no avail. While Gartner regrets it has become necessary to bring this motion, Gartner is a current client of NRF, and NRF has sued its own client without first securing a conflict waiver. As a result of violating the most basic ethical standards, NRF should be disqualified from representing the Defendants.

BACKGROUND

Gartner is a global enterprise with a U.S. parent company (Gartner, Inc.) and foreign subsidiaries operating around the world. Ex. A at ¶3. As part of Gartner’s integrated business strategy, Gartner, Inc. collaborates with its subsidiaries to host conferences across the U.S., Asia, the Middle East, Europe, and Africa. *Id.* These conferences, which are presented under the collective Gartner brand,³ are typically staged by a global team that includes a combination of Gartner research analysts (based all over the world), operations managers and employees of various subsidiaries (depending on location and need), and local employees of the particular affiliate. *Id.*

A. Gartner’s Long-Standing Relationship with NRF Lawyers.

Gartner’s relationship with NRF lawyers dates back over 15 years. Ex. C at ¶9. Around 2004, Gartner began retaining lawyers from NRF’s predecessor firm in the Asia Pacific region. *Id.* Approximately five years later in 2010, that predecessor firm became a part of NRF (known then as Norton Rose), and its work for Gartner’s Asia Pacific (“APAC”) team continued—led then and to this day by Gartner General Counsel APAC and Managing VP, Anne Tracy. *Id.* at ¶¶10, 5. When Norton Rose became NRF in 2013, its services to Gartner continued. *Id.* at ¶11.

Ms. Tracy, who is located in Australia, reports directly to Gartner, Inc. General Counsel, Jules Kaufman, and works closely on employment and litigation matters with Robin Frederick, Gartner, Inc.’s Deputy General Counsel, GVP Global Employment Law. Ex. C at ¶6. Ms. Tracy also collaborates with other Gartner, Inc. in-house counsel, including Kevin Tang, Gartner, Inc.’s

³ Gartner stages its smaller events under the brand name “Evanta.” *See* ECF 1-2.

Managing VP and Chief Corporate Counsel (on corporate matters), and Bill Dorgan, Gartner, Inc.'s GVP for Legal Ops & Contracts (on various operational, intellectual property, and contractual matters). *Id.* Ms. Tracy keeps her colleagues at Gartner, Inc. (resident in Gartner's Connecticut headquarters) apprised of the counsel NRF provides and elevates to them certain decisions, in particular advice that could impact Gartner's global brand and strategies. *Id.* at ¶16.

B. NRF Provides Advice Across Gartner Entities and Regions.

Gartner's relationship with NRF is not limited to Australia. Ex. C at ¶¶13-15, 19. Indeed, over the years, Ms. Tracy has engaged NRF to provide legal services to Gartner's wholly-owned subsidiaries throughout the APAC region. *Id.* NRF has provided legal counsel to Gartner Australasia Pty Limited ("Gartner Australasia"); Gartner Research & Advisory Korea Co. Ltd; Gartner Advisory (Singapore) PTE Limited; and Gartner Consulting (Beijing) Co., Ltd. Ex. C at ¶13.

NRF is Gartner's primary partner firm in the APAC region, both in number of engagements and legal spend. Ex. C at ¶ 17. Over the past five years alone, Gartner has engaged NRF in over 60 matters, has been advised (in varying degrees) by over 50 NRF lawyers, and has relied on NRF's legal counsel (and assistance in implementing Gartner's global strategy) across multiple jurisdictions. *Id.* at ¶14. In addition to servicing four different Gartner subsidiaries in the APAC region, NRF's work has included: Gartner's German affiliate, who relied on NRF for employment work in 2018, 2019, and 2020; Gartner's UK entity, who retained NRF for acquisition work in 2018, and Gartner's subsidiary in Ireland, who, together with Gartner, Inc., retained NRF to give an opinion for a matter in Korea. Ex. I; Ex. C at ¶¶7, 15.

NRF's broad reach and ability to service Gartner across jurisdictions is exactly the united front NRF markets to clients.⁴ With lawyers who "collaborate on a truly global level," NRF boasts that "Norton Rose Fulbright is a global law firm," that delivers legal services to clients "across [its] global business." *See* www.nortonrosefulbright.com (last visited Sept. 21, 2020). Gartner's relationship with NRF is best described as a global company who has a long-standing relationship with its global law firm.

C. NRF Provides Advice Directly to and that Benefits Gartner, Inc.

Through these engagements, NRF lawyers provide advice directly to and for the benefit of Gartner, Inc. For example, in 2017, NRF provided commercial and employment counsel when Gartner, Inc. acquired CEB, Inc. (a global research and advisory company). Ex. C at ¶15; *see also* www.gartner.com/en/about/acquisitions/history/ceb-acquisition (last visited September 21, 2020). NRF advised on the global novation of CEB contracts from the CEB UK entity to Gartner entities, as well as assisted with transferring CEB's Australian employees to Gartner Australasia as part of the integration. *Id.* As CEB's purchaser, the work NRF performed directly benefitted Gartner, Inc. *Id.*

Ms. Tracy also retained NRF to provide broad advice to Gartner related to how Gartner should respond globally under the GDPR. Ex. C at ¶15. This work supported Gartner, Inc. attorneys Bill Dorgan and Kate Timbers in their commercial contract work. *Id.* The lawyers

⁴ With the stated goal of expanding the firm's relationship with Gartner, on September 17, 2009, Mr. Abrahams and Norton Rose UK Partner Mike Rebeiro met with Gartner's General Counsel at the time, Lew Schwartz, in Gartner, Inc.'s Connecticut headquarters. After that meeting, various Gartner entities began engaging other Norton Rose offices, and various Gartner entities have continued to engage Norton Rose and ultimately NRF since that time. Ex. C at ¶12.

advising Gartner were from NRF's UK office. *Id.* Similarly, NRF lawyers correspond with Gartner, Inc. Deputy General Counsel Ms. Frederick, as she works with them to ensure Gartner's global employment policies and practices are implemented in the respective region. See Ex. B at ¶¶5, 6.

D. Gartner Confirms the Terms of its Relationship with NRF.

On November 4, 2019, Gartner General Counsel Jules Kaufman sent NRF its guidelines for review, confirming the rules that govern their attorney-client relationship. *See* Ex. J; Ex. C at ¶ 18; Ex. B at ¶11. Mr. Kaufman advised that the Guidelines would become effective on January 1, 2020. Ex. J. The Guidelines which applied to "Gartner, Inc. and its subsidiaries" (defined as "the Company") explicitly stated that "[f]or purposes of conflicts all the Company's subsidiaries and affiliates should be considered clients" of the firm and thus subject to the restrictions on conflicts of interest. Ex. D at 8.

NRF neither rejected nor complained about the terms; nor did NRF suggest changes or attempt to negotiate the terms prior to their effective date. *See* Ex. C at ¶18. Instead, NRF proceeded with business as usual, with the Guidelines clearly indicating that "[b]y performing services for the Company, outside counsel agrees to abide by these Guidelines." Ex. D at 1.

Since the Guidelines were implemented on January 1, 2020, NRF has continued to act for Gartner Inc. and its subsidiaries in various worldwide matters, including: (i) applications to the Fair Work Commission, (ii) trademark work; (iii) a mediation; (iv) employment work; and (v) corporate secretarial support. *See* Ex. C at ¶ 19, Ex. B at ¶13. In addition, NRF has provided ongoing counsel to Gartner pertaining to the workforce reduction Gartner has undertaken in Australia in response to COVID-19 and the cancellation of its events. *See* Ex. C at ¶20, Ex. B at ¶12. Ironically, the very same global crisis that has forced Gartner to seek coverage from

Defendants required Gartner to reduce its workforce, and NRF was involved in providing legal counsel to Gartner for these layoffs. *Id.*

E. NRF Retains and Counsels USSIC Against Gartner's Interests.

As the pandemic grew so did the cancellations of Gartner's Conferences. In April 2020, Gartner notified Specialty Underwriters that Gartner intended to exercise its contractual right to reinstate its policy limits. ECF 1-1, ¶19. After repeated requests for USSIC to confirm coverage, Specialty Underwriters ultimately responded on May 13 asserting that reinstatement was "complicated" and "premature." Ex. T at Ex. A.

Meanwhile, on May 15, 2020, **for the very first time**, NRF raised the Gartner Guidelines with Ms. Tracy. Ex. E. In his email, Nick Abrahams, NRF's Relationship Partner for Gartner, conveniently conveyed: "I just wanted to flag that I will **need to review** those proposed terms with our General Counsel team and so I cannot confirm our agreement to them, but I will be in further contact as soon as possible." [sic] *Id.* (emphasis added). Now it seems obvious Mr. Abrahams was being purposefully obtuse. While NRF has refused to confirm the date on which it was retained by USSIC,⁵ undoubtedly NRF was aware of the Guidelines and advising USSIC against Gartner's interests well before filing its appearance here. Tellingly, Mr. Abrahams did not alert Ms. Tracy that NRF was in the process of drafting two lawsuits against Gartner to be filed in Texas just 12 days later. And nothing in Mr. Abrahams' email revealed NRF soon intended to propose revisions to the Guidelines that would seek to overhaul its relationship with Gartner. *Id.*

⁵ While NRF has produced certain files requested by Gartner, NRF has avoided answering questions Gartner posed in an effort to resolve this issue, including providing the date on which NRF concedes it received the Gartner Guidelines, and when the attorneys who prepared the Texas Lawsuits on behalf of USSIC first became aware of the Guidelines. *See* Exs. K and L.

That NRF chose not to be forthright with Gartner—knowing the Guidelines and ethical rules precluded its ongoing representation of USSIC—speaks volumes.

In a company as integrated as Gartner, NRF surely expected the news that suit had been filed would reach Ms. Tracy in Australia before Mr. Abrahams emailed her the day after the Texas Lawsuits were filed to “advise that Norton Rose Fulbright US is representing U.S. Specialty Services in a Texas federal court action seeking a declaration that Gartner Group Inc. cannot recover beyond its \$150 million policy limit for cancellation of events due to the coronavirus.” Ex. M. Ms. Tracy immediately responded, expressing Gartner’s confusion at being sued by its own lawyers, and requesting to speak with Mr. Abrahams the following week regarding NRF’s adverse representation “in light of NRF’s relationship with Gartner.” Exs. N and O. On June 4, NRF notified Gartner it intended to continue representing USSIC in the cases against Gartner. Ex. P. Shortly thereafter, on July 2, 2020, NRF filed its appearance on behalf of USSIC and HCC in this lawsuit. ECF 13-14.

F. NRF Seeks to Revise the Gartner Guidelines.

On June 5, 2020—6 months *after* the Guidelines became effective—NRF partner Jason Noakes emailed Gartner and for the first time proposed changes to the Guidelines. Ex. F. Inexplicably, Mr. Noakes did not include Ms. Tracy (or anyone else other than Gartner paralegal Trent Tseros) on the communication. *Id.* Just as Mr. Abrahams made no mention of the Guidelines to Ms. Tracy when he informed her of the Texas Lawsuits, Mr. Noakes made no mention of the Texas Lawsuits or NRF’s adverse representation of USSIC to Mr. Tseros.

Metadata embedded in NRF’s proposed revisions identifies changes on May 20, 2020 (a week *before* NRF filed the Texas Lawsuits and two weeks *before* NRF shared its belated revisions with Gartner), and then again on June 4, 2020 (*after* the Texas Lawsuits had been filed). Ex. G;

see also Ex. C at ¶¶23, 24. The May 20 revisions attempted to narrow the applicability of the Guidelines (and therefore NRF's representation) to Gartner Australasia. *Id.* The June 4 revisions sought to add a provision stating that NRF would not represent Gartner in any matter *adverse to insurers* in connection with conference cancellations resulting from COVID-19 (the precise subject matter of this litigation):

Conflicts of Interest

Outside counsel retained by the Company are expected to be free of any conflicts of interest under applicable laws and professional rules ("conflict of interest"), and acceptance of an assignment from the Company will be taken as confirmation that no such conflict of interest exists. The Company relies on its outside counsel to check immediately for any actual or potential conflicts of interest, which may arise from their representation of the Company ~~or any of its parent or affiliated businesses.~~

The Lead Outside Counsel must promptly bring any potential conflicts ~~of interest~~ to the Lead In-house Counsel's attention and will at all times comply with applicable laws and professional rules concerning the identification and management of conflicts of interest, including issue conflicts (i.e., asserting on another client's behalf a legal position on any issue adverse to the Company's interests) to the extent the position taken could materially affect the Company's interests. For purposes of conflicts all the Company's subsidiaries and affiliates should be considered clients. ~~If outside counsel represents other clients in similar industries as the Company, the Company should be notified. If outside counsel learns of an actual or potential representation that is or could become adverse to the Company's interests, he or she must advise immediately, in writing. Although the Company is prepared to discuss actual or potential conflicts that may arise, the Company does not, as a matter of policy, grant blanket prospective conflict waivers.~~

In this regard, it is expressly understood and agreed that Outside Counsel is representing Gartner Australasia Pty Limited alone and is not representing any other related entities or individuals, such as Gartner Australasia Pty Limited's directors and officers, employees, partners, or members, or any of Gartner Australasia Pty Limited's parent, affiliated, or subsidiary corporations or other entities, and that Outside Counsel may represent other clients in matters adverse to any such other related entities or individuals without obtaining a waiver from or informing Gartner Australasia Pty Limited.

It is further agreed and understood that in no event will Outside Counsel represent the Company or provide advice to the Company in connection with any matter relating to claims against insurers for damages or losses or expenses in connection with any event cancellation or postponement as a result of the COVID-19 Pandemic or otherwise.

There could be no clearer evidence that NRF knew its representation of Defendants in this case presents a conflict of interest. Gartner cannot accept NRF's ethical misstep by virtue of its own lawyers acting adversely to its interests.

G. Gartner’s Efforts to Resolve the Conflict.

Despite Gartner’s shock at being sued by its own lawyers, in an effort to resolve the conflict amicably and without court intervention, Ms. Frederick contacted NRF on June 23, 2020, and again on July 7, 2020 (when NRF did not respond when promised). Ex. Q; *see also* Ex. B at ¶15. When NRF wrote to Ms. Frederick on July 8 and refused to acknowledge the conflict and withdraw as counsel, Ms. Frederick responded by emphasizing her disappointment: “As our long-time partner firm we expected you to honor our relationship as well as your ethical obligations, which preclude you from representing a party adverse to Gartner.” Ex. L.

Gartner’s outside counsel in Texas also attempted to resolve the conflict before moving to disqualify NRF in the Texas Lawsuits. Ex. K. NRF did not respond and, instead, itself raised the conflict at the parties’ hearing in the Texas Lawsuits on September 10, 2020, leading to an order directing Gartner to file the motion in that case.

NRF’s representation of Defendants in a matter directly adverse to Gartner, its client for over a decade, violates prevailing Second Circuit law, ethical rules, and the Gartner Guidelines. Although the communications addressed above did not explicitly address NRF’s representation of Defendants here, there is no reason to believe that NRF would voluntarily withdraw as counsel to Defendants in this lawsuit when it rejected Gartner’s repeated attempts to resolve the conflict amicably in the Texas Lawsuits.

II. ARGUMENT & AUTHORITIES

NRF’s representation of Defendants is prohibited by Second Circuit precedent, which identifies the concurrent representation of a client as an established ground for disqualification, and ethical rules which provide valuable guidance and preclude a lawyer from suing his own client

without *prior* consent. Gartner’s Guidelines prohibit the same conduct, further underscoring that this Court should disqualify NRF from representing Defendants.

A. Second Circuit Precedent Prohibits NRF from Representing Defendants in Actions Adverse to Gartner.

Second Circuit courts have exercised their authority to disqualify attorneys to “preserve the integrity of the adversary process”. *See, e.g., Corpac v. Rubin & Rothman, LLC*, 920 F. Supp.2d 345, 352 (E.D.N.Y. 2013) (*citing Incorporated Village of Valley Stream (“Hempstead Video”)*, 409 F.3d 127, 132 (2d Cir. 2005)). A “district court has the duty and responsibility of supervising the conduct of attorneys who appear before it.” *Id.* (citations omitted). The Court must “preserve, to the greatest extent possible, both the individual’s right to be represented by counsel of his or her choice and the public’s interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice.” *Corpac*, 920 F. Supp.2d at 352 (*citing Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir. 1975)). *See also Hempstead Video*, 409 F.3 at 132. However, “any doubt [] is to be resolved in favor of disqualification.” *Canfield v. SS&C Technologies Holdings, Inc.*, 2020 WL 3960929, *2 (S.D.N.Y. July 10, 2020) (*quoting Hull*, at 571).

Where an attorney’s representation would so taint the prosecution or defense of a matter as to call into question the integrity of the adversarial process, disqualification is necessary. *See Mura v. Thomas*, 2020 WL 2086039, *4 (S.D.N.Y. April 30, 2020) (*citing Hempstead Video*, 409 F.3 at 132; *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748 (2d Cir. 1981)). Disqualification is warranted where there is the “appearance of impropriety.” *Armstrong v. McAlpin*, 625 F.2d 433, 446 (2d Cir. 1980), *vacated on other grounds and remanded*, 101 S. Ct. 911 (1981); *see also In Matter of Kelly*, 23 N.Y.2d 368, 376 (1968) (“with rare and conditional exceptions, the lawyer

may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.”).

The standard for disqualification varies depending on whether the representation is concurrent or successive. *Hempstead Video*, 409 F.3d at 133. In cases of concurrent representation, the Second Circuit has repeatedly ruled it is “**prima facie improper**” for an attorney to simultaneously represent a client and another party with adverse interests. *Id.* (citation omitted; emphasis added); *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.* (“*GSI II*”), 618 F.3d 204, 209 (2d Cir. 2010); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976); *see also Canfield*, 2020 WL 3960929 at *3 (“Second Circuit considers concurrent representation *per se* improper.”). An attorney engaging in concurrent representation must be disqualified unless he shows, “at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation. *Id.* “[T]his is **a burden so heavy that it will be rarely met.**” *GSI II*, 618 F.3d at 209 (emphasis added).

NRF has appeared on behalf of the Defendants directly against Gartner in this action. ECF 13-14. NRF did not seek, much less obtain, Gartner’s consent before appearing on behalf of Defendants in this lawsuit. Ex. B at ¶ 14. NRF’s representation of Defendants is *prima facie* improper as Gartner is a current client of NRF.

B. Gartner, Inc. is a Current Client of NRF.

Gartner raised this ethical conflict with NRF long before filing this motion hoping NRF would voluntarily withdraw from representation adverse to Gartner and avoid the acrimony disqualification motions unfortunately bring. Ex. B at ¶15. NRF refused, claiming that it

represents only Gartner’s wholly-owned subsidiary in Australia.⁶ Ex. S, Aug. 14, 2020. But, despite NRF’s attempt to circumvent its ethical obligations, its relationship with Gartner is not limited to Gartner Australasia. Ex. C at ¶¶13-15. Gartner, Inc. is a current client of NRF for conflicts’ purposes for at least two reasons: ***first***, the Gartner Guidelines, which came into effect on January 1, 2020; and ***second***, the integrated nature of Gartner, Inc. and its subsidiaries qualify as one client for conflicts’ purposes.

1. The Gartner Guidelines Confirm Gartner, Inc. is a Client of NRF.

Gartner’s Guidelines, which (through its work) NRF accepted until opting to sue Gartner in the Texas Lawsuits and appear on behalf of Defendants in this lawsuit, prohibit NRF from representing Defendants here. First, the Guidelines preclude outside counsel from undertaking conflicts of interests, requiring that even a “potential” conflict be brought to Gartner Inc.’s attention *immediately*:

Conflicts of Interest

Outside counsel retained by the Company are expected to be free of any conflicts of interest, and acceptance of an assignment from the Company will be taken as confirmation that no such conflict exists. The Company relies on its outside counsel to check immediately for any actual or potential conflicts of interest, which may arise from their representation of the Company or any of its parent or affiliated businesses.

The Lead Outside Counsel must promptly bring any potential conflicts to the Lead In-house Counsel’s attention, including issue conflicts (i.e., asserting on another client’s behalf a legal position on any issue adverse to the Company’s interests) to the extent the position taken could materially affect the Company’s interests. For purposes of conflicts all the Company’s subsidiaries and affiliates should be considered clients. If outside counsel represents other clients in similar industries as the Company, the Company should be notified. If outside counsel learns of an actual or potential representation that is or could become adverse to the Company’s interests, he or she must advise immediately, in writing. Although the Company is prepared to discuss actual or potential conflicts that may arise, the Company does not, as a matter of policy, grant blanket prospective conflict waivers.

⁶ This position not only conflicts with the Gartner Guidelines and Second Circuit precedent, but it also is inconsistent with Gartner and NRF’s past interactions. See, e.g., Ex. R (letter from Gartner counsel to NRF stating, without contradiction, that Gartner, Inc. is a client of NRF).

Ex. D at 8. NRF never apprised *any* Gartner entity of *any* actual or potential conflict. Ex. B at ¶14. Indeed, Gartner did not learn of the Texas Lawsuits until it Gartner received a media inquiry. *See* ECF 1-1, ¶23.

Second, the Guidelines, issued by “Gartner, Inc. and its subsidiaries and affiliates,” collectively defined as “the Company,” plainly state that for conflicts purposes, “all the Company’s subsidiaries and affiliates should be considered clients.” *Id.* (emphasis supplied).

Third, by performing work for the company, NRF agreed to be bound by the Guidelines, which have governed NRF’s attorney-client relationship with Gartner since January 1, 2020:

Scope and Applicability

These Guidelines govern the relationship of the Company with its outside counsel. By performing services for the Company, outside counsel agrees to abide by these Guidelines. Outside counsel may only be retained by an authorized representative of the Company Legal Department. Outside counsel performing any type of legal services for the Company may depart from these Guidelines only with the prior written approval of the lead Company attorney assigned to the matter (“Lead In-house Counsel”) and responsible for the applicable engagement. Questions concerning these Guidelines should be directed to that Lead In-house Counsel. Compliance with these Guidelines is a condition of continued representation of the Company.

These Guidelines will become effective as of January 1, 2020 and supersede any prior engagement letters or retention agreements, to the extent such letters or agreements conflict or differ from, these Guidelines. Before incurring fees and expenses, outside counsel must notify the Lead In-house Counsel if at any time outside counsel believes that adherence to a particular provision of these Guidelines will impair representation of the Company.

Ex. D at 1.

NRF demonstrated its unequivocal commitment to abide by the Guidelines by rendering legal services to Gartner after January 1, 2020—without proposing any changes to the terms until after NRF had been retained by USSIC and/or Specialty Underwriters to act against Gartner’s interests. Since January 1, 2020, NRF has represented Gartner on numerous matters including, most notably, advice related to workforce reductions due to cancellation of Gartner Conferences due to COVID-19, certain coverage for which NRF denies by way of this lawsuit. Ex. C at ¶19; *see also* Ex. I. Notably, Gartner has received invoices for work throughout 2020, as recent as

August 2020 for which NRF received or seeks compensation (including from Gartner, Inc.). Ex. I. Additionally, NRF lawyers were actively engaged in “open matters with Gartner Australasia” until being instructed to stop given NRF’s decision to sue Gartner in Texas. Ex. S.

NRF’s transparent attempt to revise the Gartner Guidelines to limit conflicts issues—a week *after* filing the Texas Lawsuits and not soon before appearing on behalf of Defendants here—is simply too little, too late. The Guidelines confirm all Gartner entities are clients of NRF, thereby precluding NRF’s representation of Defendants adverse to Gartner’s interests.

2. Gartner, Inc. and its Subsidiaries are all One Client.

Even without the Guidelines, NRF’s ethical obligations require it to treat Gartner, Inc. as a current client of the firm, which, in turn, bars NRF’s representation of Defendants in this lawsuit. According to the ABA’s Commission on Ethics and Professional Responsibility,⁷ “the particular circumstances may be such” that a corporate affiliate of an entity that technically has not engaged a lawyer also “should be considered a client.” ABA Formal Op. 95-390, at 4 (1995). This is so when, based on all the facts and circumstances, “the relationship between” the two subsidiaries “is sufficiently close as to deem them a single entity for conflict of interest purposes.” *GSI Commerce Sols., Inc. v. BabyCenter, LLC* (“*GSI I*”), 644 F. Supp. 2d 333, 337 (S.D.N.Y. 2009), *aff’d*, *GSI II*, 618 F.3d 204 (2d Cir. 2010).

In considering this question, courts have examined the management and operation of the related entities, asking whether the relationship is “close and interdependent, both financially and in terms of direction,” such that “the two share a wealth of common interests adversely impacted

⁷ As set forth in greater detail herein, the Second Circuit has recognized that ABA disciplinary codes provide valuable guidance for attorney behavior. *See, e.g., GSI II*, 618 F.3d at 209.

by the lawsuit in question.” *J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 20, 23 (S.D.N.Y. 2002). In other words, a lawyer may not be adverse to one entity and concurrently represent another when the entities do “not view each other as strangers, but more like members of the [same] family.” *Discotrade Ltd. v. Wyeth–Ayerst Int’l*, 200 F. Supp. 2d 355, 357 (S.D.N.Y. 2002).

Relevant factors considered include: (i) whether the entities share a legal department; (ii) whether the entities appear as one through shared marketing and branding; (iii) whether the entities share resources, such as benefits and technology; (iv) whether the entities conduct unified operations; and (v) whether the outcome of the litigation will impact both entities.

A company need not check off all or even the majority of these factors to qualify as a client for conflict-of-interest purposes. *See Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp. 3d 1100, 113–15 (E.D. Cal. 2015) (disqualification proper where “unified client” shared legal department, law firm advised parent on matters affecting entire corporate family, parent considered law firm to be both its and its affiliate’s top strategic firm, and firm undertook assignments involving entire corporate family); *Discotrade Ltd.*, 200 F. Supp.2d at 358–360 (disqualification proper where “single entity” wholly owned by same holding company; shared board of directors; shared resources and benefit plans; and used letterhead, business cards, and email addresses with same company logo); *Atlantic Specialty Ins. Co. v. Premera Blue Cross*, 2016 WL 1615430, *10–13 (W.D. Wash. 2016) (plaintiff and affiliate one entity because they conducted unified operations and shared same mailing address and principal place of business, plaintiff handled all claims-handling services for all of parent’s subsidiaries, and one legal unit handled all insurance coverage litigation commenced by or against parent and its subsidiaries).

Courts place particular weight on whether the entities share the same in-house legal department. *See, e.g., GSI I*, 644 F. Supp.2d at 335–37 (“of particular relevance here, BabyCenter does not maintain its own legal department, but instead relies on J&J’s Law Department for legal services (along with outside counsel retained by it or by it through J&J”)); *Honeywell Int’l Inc. v. Philips Lumileds Lighting Co.*, 2009 WL 256831, at *2 (E.D. Tex. Jan. 6, 2009) (disqualification appropriate where, among other things, corporate subsidiaries “share a common legal department”); *Certain Underwriters at Lloyd’s v. Argonaut Ins. Co.*, 264 F. Supp.2d 914, 924 (N.D. Cal. 2003) (disqualification appropriate where, among other things, “the legal affairs with respect to the claims at issue in the two cases are managed by the same group”); *Ramada Franchise Sys., Inc. v. Hotel of Gainesville Assocs.*, 988 F.Supp. 1460, 1465 (N.D. Ga. 1997) (sister corporations considered “one client”, where, among other things, they were served by same legal department); *Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 U.S. Dist. LEXIS 8363, at *12 (N.D. Cal. 1991) (“The court finds that [parent’s] control and supervision over the legal affairs of [subsidiary], and specifically its direct role in the retention and supervision of the work of . . . outside counsel, represents a significant identity of legal interest”).

Courts also have examined “whether the lawyer’s work for [one affiliate] benefits [another affiliate],” *Honeywell*, 2009 WL 256831 (citing ABA Formal Op. 95-390, at 5–6 (1995)), and whether the two subsidiaries have “overlapping functions and personnel with respect to the [dispute] at issue.” *Certain Underwriters*, 264 F. Supp. 2d at 922; *see also Lennar Mare Island*, 105 F. Supp.3d at 1113 (finding one client where law firm had advised “on strategic decisions in matters that impact the entire corporate family...”). Both of these factors ring true in NRF’s work for Gartner.

Applying these principles, Gartner, Inc. must be viewed as NRF's client for purposes of assessing whether NRF is precluded from representing Defendants in this lawsuit. As a preliminary matter, NRF concedes that Gartner Australasia is a *current* client of the firm. *See* Ex. S.⁸ Where NRF may now attempt to narrow the scope of its legal representation to Gartner Australasia, over the years, NRF has performed legal work that directly benefits Gartner, Inc. and its global strategies, including trademark work, privacy counseling, employment advice, and integration assistance. Ex. C at ¶ 15; Ex. B at ¶¶6, 9, 12. NRF also has provided services to multiple Gartner's subsidiaries.⁹ Ex. C at ¶¶13-15; Ex. B at ¶8-9, 12, 13. Gartner engages NRF to provide legal counsel seamlessly and without regard to the entity who may "own" the legal matter. *Id.*

The evidence further demonstrates that Gartner, Inc. and its subsidiaries, including Gartner Australasia, operate globally as an integrated family of companies, sharing resources, branding, intellectual property, strategy, clients, and values. Ex. A at ¶¶6-8. Most notably, Gartner, Inc. and its subsidiaries share a common legal department, led by Gartner, Inc. General Counsel, Jules Kaufman. *See id.* at ¶9, Ex. 1. Ms. Frederick directs Gartner's global employment strategy; Kevin

⁸ NRF's Mr. Bonner also concedes "a degree of ambiguity arising from the exchange about the 'Gartner Guidelines,' and that, in the circumstance, we confirm that NRFA [Norton Rose Fulbright Australia] will not further act in relation to the Texas Proceedings." Ex. S (emphasis added). These admissions are not only alarming, but confirm NRF's unethical representation.

⁹ NRF has acquired a deep understanding of Gartner's decision-making and strategy at a global level. NRF necessarily has learned confidential information that could benefit NRF's strategy on behalf of Defendants. The mere risk that NRF may use that confidential information to Gartner's detriment raises serious concerns about NRF's ability to uphold its duty of loyalty and requires disqualification.

Tang directs Gartner's commercial matters globally; and Bill Dorgan has global responsibility for the legal oversight of Gartner's IP. *Id.* Various Gartner attorneys have retained NRF over the years, and while they may work for different subsidiaries, they all ultimately report to Gartner, Inc.'s legal management. Ex. B at ¶8. In other words, there is no meaningful distinction among Gartner, Inc. and its subsidiaries in the legal department's function, nor has geographic location limited NRF's services. *Id.*

Gartner, Inc. and its subsidiaries also share the same core values, marketing materials, and terminology. *See* Ex. A at ¶7. Regardless of country, Gartner's principles are the same: for example, Gartner is governed by one Code of Conduct, one Conflict of Interest Policy, and one Human Rights Policy. *See* www.gartner.com/en/about/policies/overview (last visited September 21, 2020). The global organization is also governed by shared Antitrust, Privacy, and Corrections policies. *Id.*

Gartner also uses the same logo, letterhead, and branding across the globe, regardless of entity, and Gartner, Inc. and its subsidiaries share the same domain name and website. Ex. A at ¶8. The signature Gartner logo with the same font appears on Gartner's materials and throughout its website:



Gain the insights, advice and tools to achieve your mission-critical priorities

As disruption unfolds, you need proven guidance more than ever



Access proven management and technology research any time, 24/7



Make confident decisions using our benchmarks and playbooks



Get one-on-one advice for Gartner experts on your most critical priorities



Connect directly with peers to discuss your key issues and common initiatives

Talk to a Gartner expert today.

Contact Us

Through its website—www.gartner.com—Gartner delivers proprietary content globally under the Gartner brand. Ex. A at ¶8. Even a cursory review of Gartner’s website reveals the integration of its offering. For example, Gartner offers its services by function (e.g., Audit & Risk, Communications, Finance, Human Resources, Information Technology, Sales, Supply Chain) or by industry (e.g., Education, Energy & Utilities, Healthcare, Manufacturing, Retail)—not geographic location. See www.gartner.com (last visited September 21, 2020). This content and branding is also delivered at Gartner Conferences held around the world. *Id.* at ¶3.

Gartner and its subsidiaries share additional resources, including: information technology systems; networks and applications used to manage business activities; a human resources information system; and financial systems, including the application used to process revenue contracts. Ex. A at ¶6.

Gartner’s financial reporting is also integrated amongst Gartner, Inc. and its subsidiaries. See Ex. A at ¶6; see also <https://investor.gartner.com/financial-information/financial-results/default.aspx> (last visited September 21, 2020). This is particularly relevant here, because Gartner Inc. and all of its subsidiaries (including those in APAC) have suffered revenue losses due

to COVID-19 and the cancellation of the Gartner Conferences—the obligation to compensate Gartner for those losses is what Defendants seek to avoid honoring by defending this lawsuit in which NRF appeared on their behalf. Ex. A at ¶11.

In short, there is no meaningful daylight between the operations of Gartner and those of the entities for which courts have found are “one client” when analyzing attorney conflicts.

C. Ethical Rules Prohibit NRF from Representing Defendants in Actions Adverse to Gartner.

The Second Circuit recognizes that the ethical rules promulgated by the ABA and state disciplinary codes provide valuable guidance for courts in deciding whether to disqualify an attorney. *See e.g. GSI II*, 618 F.3d at 209. *Decora Inc. v. DW Wallcovering, Inc.*, 899 F.Supp. 132 (S.D.N.Y. 1995) (ABA ethical rules provide appropriate guidelines for attorney behavior).

“Unquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients.” *In re Dresser Indus.*, 972 F.2d 540, 544–45 (5th Cir. 1992). This principle is reflected in the plain text of ABA Rule 1.7:

(a) Except as provided in paragraph (b), ***a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.*** A concurrent conflict of interest exists if:

(1) ***the representation of one client will be directly adverse to another client;***

...

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

...

(4) ***each affected client gives informed consent, confirmed in writing.***

ABA Model Rules of Professional Conduct R. 1.7 (emphasis added). Rule 1.7 of the New York Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.7 is substantially similar, and provides:

(a) Except as provided in paragraph (b), *a lawyer shall not represent a client if a reasonable lawyer would conclude* that []:

(1) *the representation will involve the lawyer in representing differing interests;*

...

Under New York Rule 1.7, the affected client still must give informed consent. 22 N.Y.C.R.R. § 1200.7(b)(4).

The policies underscoring the prohibition of concurrent representation are as present here as they are in the Second Circuit's admonition:

Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.

Cinema 5 Ltd., 528 F.2d at 1386. *See also Burda Media, Inc. v. Blumenberg*, 97 Civ. 7167 (RWS) 1999 WL 1021104 at *5, footnote 1 (S.D.N.Y. Nov. 8, 1999) (*citing British Airways, OLC v. Port Authority*, 862 F. Supp. 889, 899 (E.D.N.Y. 1994)) (“The act of suing one’s own client is deemed a “dramatic form of disloyalty” such that disqualification is deemed appropriate.”). Because NRF has committed the profession’s cardinal sin, and has undertaken representation of Defendants adverse to its current client Gartner, it should be disqualified from representing Defendants in this lawsuit.

III. CONCLUSION & PRAYER

To both profit from and sue one’s own client is the epitome of unethical conduct prohibited by Second Circuit precedent, the ABA and New York state ethical rules, and the

Gartner Guidelines. Gartner, Inc. respectfully requests the Court disqualify NRF as Defendants counsel in this lawsuit, award Gartner, Inc. its fees and costs associated with bringing this motion, and grant it such other relief to which it is entitled.

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September 25, 2020

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CERTIFICATE OF WORD COUNT AND COMPLIANCE
WITH FORMATTING REQUIREMENTS

1. This memorandum of law contains 6917 words, excluding the parts of this document exempted from the word count under the Individual Practices of Judge John G. Koeltl.

2. This memorandum of law complies with the font, space, and type size requirements laid out in the Local rules of the United States District Courts for the Southern and Eastern Districts of New York and in the Individual Practices of Judge John G. Koeltl.

/s/ Tracy Ellis Williams
Tracy Ellis Williams

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of September, 2020 the foregoing Memorandum in Support of Motion was filed electronically via operation of the Court's CM/ECF Electronic Filing System. A Notice of Electronic Filing will be sent by e-mail to all parties appearing in this matter via operation of the Court's CM/ECF Electronic Filing System or by mail to anyone unable to accept electronic filing as indicated on the Notice. Parties may access this filing through the Court's CM/ECF System.

/s/ Tracy Ellis Williams

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