

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ANTHONY DALE, BRETT JACKSON,
JOHNNA FOX, BENJAMIN
BORROWMAN, ANN LAMBERT,
ROBERT ANDERSON, and CHAD
HOHENBERY on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

DEUTSCHE TELEKOM AG et al.,

Defendants.

Case No. 22-cv-3189

Judge Thomas M. Durkin

Magistrate Judge Jeffrey Cole

**BRIEF OF *AMICUS CURIAE* CTIA – THE WIRELESS ASSOCIATION IN SUPPORT
OF DEFENDANT T-MOBILE US, INC.’S MOTION TO CERTIFY THE COURT’S
NOVEMBER 2 ORDER FOR INTERLOCUTORY APPEAL**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae CTIA – The Wireless Association (“CTIA”) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers, as well as application and content companies.

CTIA has a strong interest in this case. Plaintiffs are customers of two CTIA members: AT&T and Verizon, which are not parties to this case. Compl. ¶¶ 12–18. Plaintiffs’ antitrust claims against the T-Mobile-affiliated Defendants (“T-Mobile”) rest on a boundless theory of causation, positing a daisy chain of events that Plaintiffs seek to trace to the T-Mobile-Sprint merger. Under Plaintiffs’ theory, the merger between *T-Mobile and Sprint* somehow caused third parties *AT&T and Verizon* to charge higher prices for their nationwide wireless plans, thereby supposedly injuring Plaintiffs. Compl. ¶¶ 106–108, 122, 129. This theory raises significant concerns for CTIA, its members, and businesses generally because it weakens the guardrails that the courts have established to protect parties from expending significant time and energy to litigate speculative claims.

CTIA submits this *amicus* brief to explain the intense competitive pressures that the wireless industry has continued to face after the T-Mobile-Sprint merger, and to explain the destabilizing effects that a relaxed pleading standard and acceptance of Plaintiffs’ speculative theory of causation would have on the industry and countless other companies throughout the mobile ecosystem. Antitrust standing is a bedrock requirement that helps protect CTIA members—as well as countless other businesses—from the burdens of frivolous lawsuits seeking to extract

¹ No counsel for a party authored CTIA’s *amicus* brief in whole or in part; no party or party’s counsel contributed money to fund preparing or submitting the brief; and no person other than *amicus curiae* CTIA, its members, or its counsel contributed money to fund preparing or submitting the brief.

settlement payments for meritless claims. CTIA and its members therefore rely on the proper application of this requirement. Here, however, as T-Mobile's motion asking this Court to certify legal questions for interlocutory appellate review ably shows, Plaintiffs' theory of standing—which this Court's November 2, 2023 order (ECF No. 114) accepted—is at the very least highly “contestable.” CTIA members therefore have an interest in this Court's certification of questions for appellate review to promote legal certainty and predictability on issues of importance to CTIA members. CTIA's members also have an interest in avoiding the burden of onerous and invasive requests for third-party discovery in this case, where there is at least a substantial question whether it should proceed past the pleading stage.

ARGUMENT

This Court should certify its November 2 order, ECF No. 114, for interlocutory appeal under 28 U.S.C. § 1292 to afford the Seventh Circuit an opportunity to resolve case-dispositive legal questions concerning consumer standing in antitrust litigation that have critical importance to the wireless industry.

I. Intense Competition in the Wireless Market Following the T-Mobile-Sprint Merger Underscores the Implausible and Speculative Nature of Plaintiffs' Causation Theory.

Plaintiffs posit a speculative and implausible theory of causation whereby the 2020 merger between T-Mobile and Sprint somehow caused other wireless carriers (AT&T and Verizon) to allegedly raise their prices. This theory is all the more implausible against the backdrop of the robust competition that characterizes the market for wireless services in the wake of the merger. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (plaintiff must “state a claim to relief that is plausible on its face”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Empirical data show that competition has remained intense following the merger, and—contrary to Plaintiffs' conclusory allegations—the merger did not result in increased costs to consumers.

Following the T-Mobile-Sprint merger in 2020, competition among AT&T, Verizon, and T-Mobile has become stronger than ever—as a simple comparison between the price of wireless services and the prices of other consumer goods and services illustrates. Prices consumers pay for wireless services have *fallen* even while inflation reached historic levels in 2022.² The October 2022 Consumer Price Index report issued by the U.S. Bureau of Labor Statistics shows that the nationwide “all items index” increased 7.7% over the prior 12 months (before seasonal adjustment). Bureau of Labor Statistics, *News Release, Consumer Price Index – October 2022* at 1 (Nov. 10, 2022), available at https://www.bls.gov/news.release/archives/cpi_11102022.pdf. Yet at the same time that overall consumer prices increased, the cost to consumers of wireless phone services *fell*. *Id.* at Table 2 (showing 1.4% drop in prices, before seasonal adjustment). The October 2023 Consumer Price Index report shows that while the nationwide “all items index” increased 3.2% over 12 months (before seasonal adjustment), the cost of wireless phone services continued to fall over the same period. Bureau of Labor Statistics, *News Release, Consumer Price Index – October 2023* at 1 (Nov. 14, 2023) (showing fall in prices by 0.4%), available at <https://www.bls.gov/news.release/pdf/cpi.pdf>; *id.* at Table 2.

While consumers of wireless services are not paying more for these services (despite historic inflation), carrier expenses have risen during the same time. In particular, wireless carriers have spent billions of dollars investing in their networks—further evidence of robust competition at work. Wireless customers’ data use has surged over the last decade, from 1.5 trillion megabytes in 2014 to 73.7 trillion megabytes in 2022. *See* CTIA, *2023 Annual Survey Highlights* at 3 (2023), available at <https://www.ctia.org/news/2023-annual-survey-highlights> (“2023 CTIA Survey Highlights”). To meet this rising demand, and to retain and attract customers, carriers have made

² *See infra* at 5.

record-breaking network investments. In 2022, two years after the T-Mobile-Sprint merger closed, the industry invested a total of \$39 billion in wireless networks, up nearly 12% from a total \$35 billion investment in 2021. *See* 2023 CTIA Survey Highlights at 4. Carriers have also accelerated their network upgrades: the national rollout of 5G networks progressed at a pace twice as fast as the industry’s 4G rollout. *Communications Marketplace Report*, FCC No. 22-103, 2022 WL 18110553 (rel. Dec. 30, 2022) (“2022 *Communications Marketplace Report*”) ¶ 5; *id.* at Figure II.B.39. The industry’s investment in wireless networks has driven increases in download speeds and service quality.³ From the first half of 2020 to the first half of 2021, for example, median download speeds for mobile broadband data services have increased from 28 Mbps to 30.4 Mbps. *2022 Communications Marketplace Report* at Figure II.B.30.

Network investments also have ensured that consumers of wireless services enjoy broad, nationwide coverage. As of December 2021, more than 99 percent of the U.S. population lives in areas with 4G LTE coverage, and 94.5% of Americans’ homes were covered by at least three 4G LTE networks. *2022 Communications Marketplace Report* ¶ 147; *id.* at Figure II.B.37. And approximately 98 percent of the U.S. population now lives in areas with 5G coverage. *Id.* ¶ 149; *id.* at Figure II.B.39. The industry’s record-setting investments and rapid improvements in broadband infrastructure illustrate the intensity of competition among wireless carriers.

Against this backdrop, it is unsurprising that Plaintiffs have not identified a plausible causal link between (i) the supposed reduction in competition that they allege followed the T-Mobile-Sprint merger, and (ii) AT&T’s and Verizon’s independent pricing decisions. Rather, Plaintiffs point to price increases on a subset of wireless plans that occurred more than *two years* after the

³ As the Seventh Circuit has recognized, service quality and price are inextricably linked. *See Bastien v. AT&T Wireless Servs.*, 205 F.3d 983, 988 (7th Cir. 2000) (“[A] complaint that service quality is poor is really an attack on the rates charged”).

merger closed and while the national economy was still experiencing the aftershocks of the Covid-19 pandemic and record-high levels of inflation. Plaintiffs allege that on May 3, 2022, AT&T announced a rate increase on “older wireless plans by \$6 per month for single-line users” and “\$12 per month for customers with multiple lines.” But Plaintiffs make no attempt to draw a plausible connection between the price increases on these “older wireless plans” and the merger—as opposed to other factors impacting AT&T’s pricing decisions. Plaintiffs also point to Verizon’s announcement that, starting in June 2022, it would raise the administrative fee it charges postpaid customers by \$1.35 per voice line. Compl. ¶¶ 107–108. Plaintiffs do not plausibly allege, however, that any increase in Verizon’s administrative fees was the result of the merger. These bare allegations do not support an inference of causation traceable to the merger (as opposed to mere correlation and speculation).

Nor is Plaintiffs’ speculation plausible in light of broader, macroeconomic factors. The very sources on which Plaintiffs rely state that the carriers adopted their price adjustments to account for the sharp rates of inflation that have gripped the economy in recent years. *See* Compl. ¶¶ 107 n.168, 108 nn.169–170. In 2022, the U.S. economy endured the highest rates of inflation it had experienced in over forty years, with consumer prices up 9.1% in June 2022, and inflation rates averaging 8.0% for the year.⁴ Following the merger, carriers also were increasing expenditures on wireless network improvements. As noted above, in just 2021 and 2022, carriers’ annual investment rose from \$35 billion to \$39 billion, up from \$26 billion in 2017. 2023 CTIA Survey Highlights at 4. As is commonly understood, prices typically rise as expenses rise. Yet, the

⁴ *See* Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily, Consumer Prices Up 9.1 Percent Over the Year Ended June 2022* (July 18, 2022), available at <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm>; U.S. Inflation Calculator, *Current US Inflation Rates: 2000-2023*, available at <https://www.usinflationcalculator.com/inflation/current-inflation-rates/>.

prices consumers pay for wireless services have fallen while prices for many other consumer goods and services have increased. *See supra* at 2.

Plaintiffs also have not plausibly alleged that AT&T's and Verizon's alleged price adjustments reflect an actual increase in costs to customers for the services provided. The cost of data for wireless customers has plummeted by 98% over the last decade, from \$12.60 per gigabyte in 2012 to \$3 per gigabyte in 2022. 2023 CTIA Survey Highlights at 8. Following the T-Mobile-Sprint merger, the cost of data continued to fall from \$4 per gigabyte in 2020 to \$3 per gigabyte in 2022. Similarly, the average annual revenue that carriers have received per gigabyte has fallen steadily from 2016 to 2022.⁵ And in a recent study of the effects of telecommunications mergers, economists found “no statistically significant difference between the rates of decline of revenue per GB consumed before and after the Sprint/T-Mobile merger in 2020.” *Id.*

In sum, the empirical data confirm that the wireless services market is characterized by robust competition—and that competition has continued (and intensified) following the T-Mobile-Sprint merger. This only underscores the highly speculative and implausible nature of Plaintiffs' theory of antitrust standing here. By accepting Plaintiffs' theory, however, this Court's order permits wireless customers to pursue antitrust claims based on mere alleged correlations in timing (e.g., theories that a third party increased its prices some time after a competitor's merger), without allegations of a plausible causal link between a merger and a third party's subsequent price change. This novel approach risks exposing businesses to the burden of defending against meritless antitrust suits any time a business closes a merger, including (as now) during a period of relatively high inflation. Competitors may make independent business decisions to raise prices as inflation

⁵ Jorge Padilla et al., Compass Lexecon, *Do Four-to-Three Mobile Mergers Harm Consumers? A Review of Post-Merger Effects and Concentration Studies* at 32 (November 28, 2023), available at <https://www.compasslexecon.com/wp-content/uploads/2023/11/Do-Four-to-Three-Mobile-Mergers-Harm-Consumers.-A-Review-of-Post-Merger-Effects-and-Concentration-Studies.pdf>.

drives up costs, and prospective plaintiffs may rely on alleged timing correlations to pursue antitrust claims against the recently merged business. This risk of liability may discourage competition and pro-consumer mergers and have other destabilizing effects on the industry. This Court should certify its order for interlocutory appeal given the importance to the wireless industry (and companies throughout the mobile ecosystem) of the correct standard for pleading antitrust standing.

II. The Proximate-Causation Requirement That Applies in Any Antitrust Action Provides a Critical Guardrail Against Burdensome and Intrusive Discovery.

The Supreme Court in *Twombly* recognized the intense burden that discovery imposes on a party once a complaint survives the pleading stage. *See Twombly*, 550 U.S. at 558 (“proceeding to antitrust discovery can be expensive”). As the Court observed, even careful case management is insufficient to protect against “the problem of discovery abuse,” and the threat of discovery expense “will push cost-conscious defendants to settle even anemic cases.” *Id.* at 559.

The Supreme Court’s concerns apply with full force here. Plaintiffs will not only seek extensive discovery from Defendant T-Mobile if this case is allowed to move forward without the opportunity for interlocutory appellate review on important and case-dispositive questions of law. Plaintiffs’ unbounded theory of causation also threatens to expose other industry participants to burdensome demands for non-party discovery. Indeed, burdensome subpoenas seeking reams of data and documents have already been served on non-parties. By applying a relaxed proximate-causation standard, this Court’s order permits parties far downstream from an alleged antitrust violation to pursue litigation that would be costly and disruptive to the entire industry. An interlocutory appeal would allow the Seventh Circuit to examine and provide critical guidance concerning how directly connected a posited harm must be to an alleged violation before plaintiffs are permitted to “unlock the doors to discovery,” *Iqbal*, 556 U.S. at 678, from the industry.

A relaxed proximate-causation standard poses numerous threats. By permitting customers of competing carriers to pursue antitrust claims against T-Mobile, the standard creates opportunities for an endless cast of potential plaintiffs to come forward alleging economic harms many steps removed from any consummated merger and years after the merger has closed. It threatens to inhibit economically beneficial mergers, burden industry participants with the massive costs of defending against meritless antitrust claims when plaintiffs unlock the doors to discovery, and embroil non-party businesses in costly disputes as targets of non-party subpoenas. This Court should certify its order given the significant legal and practical ramifications it has for the industry.

CONCLUSION

For the foregoing reasons, *amicus curiae* CTIA respectfully requests that the Court grant T-Mobile's motion to certify the Court's November 2 order for interlocutory appeal.

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Respectfully submitted,

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