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, and T-MOBILE US, INC., Defendants.	Case No. 1:22-cv-03189 Hon. Thomas M. Durkin Hon. Jeffrey Cole

PLAINTIFFS' UNOPPOSED MOTION TO COMPEL DISCOVERY OF PRE-MERGER TRIAL EXHIBITS AND DEPOSITION TRANSCRIPTS FROM T-MOBILE

I. INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 34 and 37, Plaintiffs move to compel Defendant T-Mobile US, Inc. ("T-Mobile") to produce a limited number of trial exhibits and deposition transcripts and exhibits from *New York v. Deutsche Telekom AG*, No. 1:19-5434 (S.D.N.Y.) ("States' Pre-Merger Case"). T-Mobile does not oppose this motion; it has already produced the majority of trial exhibits and several deposition transcripts and exhibits from the States' Pre-Merger Case. Rather, this issue comes before the Court because the requested material includes non-party information designated confidential or highly confidential pursuant to the protective order in the States' Pre-Merger Case. These documents are both relevant and discoverable under Rule 26 because they are not privileged and contain information directly related to Plaintiffs' post-merger case. Production of this distilled set of pre-merger materials also readily clears the Federal Rules' standard for proportionality. And, the protective order

already entered by the Court in this case[1] will protect any information that remains genuinely confidential and sensitive. The affected non-parties have been put on notice of the issue and have the opportunity to be heard. The motion should be granted.

II. BACKGROUND

This case challenges the 2020 merger between T-Mobile and Sprint under the federal antitrust laws. Plaintiffs, who are customers of AT&T and Verizon, allege that the merger of T-Mobile and Sprint consolidated the market for retail mobile wireless services and resulted in higher prices for themselves and other subscribers. Compl. ¶ 1, ECF No. 1. Prior to completion of the merger, fourteen states and the District of Columbia also filed suit under the federal antitrust laws to block the merger. *Id.* ¶ 5. The States lost at trial, but also generated an extensive record on the matter, including trial transcripts, trial exhibits, and nearly seventy depositions of key witnesses. *Id.*; *see also* Chan Decl. ¶ 7, Ex. A. This record includes evidence taken from non-parties, such as non-party wireless carriers.

After this Court denied Defendants' motion to transfer venue in this case, ECF No. 63, Plaintiffs immediately sought production of materials from the States' Pre-Merger Case from T-Mobile. Chan Decl. ¶ 5. The parties reached an agreement to conduct limited discovery while T-Mobile's motion to dismiss was pending on October 20, 2022. Therein, the parties agreed to: (1) produce trial exhibits by February 28, 2022, except those with confidential third party information that were not shown to the public; and (2) meet and confer on the production of 15 depositions and exhibits from the merger. *Id.* ¶ 2; *see also* Order, ECF No. 71 (noting existence of agreement). The parties thereafter met and conferred regarding production of these pre-merger trial and deposition materials, including four video conference meetings and more than ten emails and letters exchanged. Chan Decl. ¶ 3. Through this process, the parties were able to reach an agreement to produce most of the trial exhibits pursuant to Plaintiffs' requests, but T-Mobile refused to produce responsive documents, including sealed trial exhibits and any

[1] ECF No. 98.

deposition transcripts and exhibits that implicated the confidential information of non-parties. *Id*. ¶ 4. T-Mobile maintained that it could not produce these documents under the protective order entered in the States' Pre-Merger Case, unless and until this Court ordered it to do so. That pre-merger order provides: "Nothing in this Order: (d) prevents disclosure by a Party of Confidential Information or Highly Confidential Information . . . (iv) pursuant to an order of a Court[.]"[2]

After this Court denied T-Mobile's motion to dismiss, Plaintiffs again met and conferred with T-Mobile via videoconference and served its first set of formal requests for productions, which included a request for "all trial exhibits and demonstratives" and "all transcripts and videos of depositions, including all exhibits thereto." Chan Decl. ¶¶ 4, 8, Ex. B. On November 21, 2023, T-Mobile again stated it could not produce the requested documents absent a court order compelling it to do so. *Id*. ¶ 5. The parties agreed that the best course would be for Plaintiffs to file the instant motion to compel, unopposed by T-Mobile.[3] *Id*. ¶ 5. On December 21, 2023, T-Mobile wrote to the affected non-parties to give them notice of the forthcoming motion and their opportunity to be heard. *Id*. ¶ 9, Ex. C. Plaintiffs will deliver a copy of this motion and supporting materials by the same means. As of the filing of this motion, Plaintiffs have heard from three affected non-parties, Altice USA, Inc., Comcast, and DISH Network Corporation. DISH Network Corporation and Altice USA, Inc. have permitted disclosure of the deposition transcripts and exhibits of its witnesses, and Plaintiffs continue to negotiate with Comcast to obtain consent to the requested production. *Id*. ¶ 6 (DISH); *id*. ¶ 11, Ex. E (Altice).

[2] Am. Interim Protective Order, *New York v. Deutsche Telekom AG*, No. 1:19-5434 (S.D.N.Y. Aug. 14, 2019) ("States' Pre-Merger Protective Order") (attached as Chan Decl. ¶ 10, Ex. D).

[3] The parties also agreed to the following briefing schedule for this motion: Motion: Jan. 17, 2024; Opposition: Feb. 7, 2024; Reply: Feb. 21, 2024. T-Mobile also stated that it did not oppose any page limit proposal, so Plaintiffs proposed that the motion be limited to ten pages and the opposition and reply be limited to 15 pages.

III. ARGUMENT

The documents at issue—a distilled set of materials consisting of the deposition and trial record—are relevant because they come from a pre-merger challenge to the same merger challenged here. Because there are billions of dollars in controversy and an order granting the motion would save time, costs, and court involvement in multiple non-party disputes, the request is also proportional to the needs of the case. The protective order in this case addresses confidentiality concerns because it contains robust protections for non-party information comparable to the protective order in the States' Pre-Merger Case. This Court should grant this motion because it will both efficiently advance the litigation and protect the confidentiality interests of non-parties.

A. The Requested Discovery Is Relevant.

The requested documents are relevant because they relate to an antitrust challenge of the same merger Plaintiffs challenge here.[4] Federal Rule of Civil Procedure 26(b)(1) allows "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Evidence is relevant "if it 'has any tendency' to make a fact of consequence 'more or less probable than it would be without the evidence.'" *Barnes-Staple v. Murphy*, No. 20-3627, 2021 WL 1426875, at *3 (N.D. Ill. Apr. 15, 2021) (citation omitted). While "Plaintiffs' suit is focused on the effects of the merger," premerger evidence is relevant to show each actor's motivations and expectations about the merger as well as address the "various commitments" the merging parties made to government enforcers "over the course of two years of review," including the States. *See* MTD Order, ECF No. 114 at 40.

The relevance of these materials to Plaintiffs' claims is also clear from the face of the Complaint, in which Plaintiffs cite to the pre-merger trial transcript more than thirty times. *See*

[4] *Compare New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 186 (S.D.N.Y. 2020) ("Plaintiff States claim that the effect of the Proposed Merger would be to substantially lessen competition in the market for retail mobile wireless telecommunications services . . . in violation of Section 7 of the Clayton Act . . . ."), *with* Compl. ¶ 121, ECF No. 1 ("Defendants' anticompetitive conduct set forth in this Complaint has violated Section Seven of the Clayton Act.").

Compl. at *passim*, ECF No. 1. Many of the high-level executives that were quoted in the Complaint and are likely to be deposed in this case were also deposed in the States' Pre-Merger Case as well.[5] Therefore, full deposition testimony of these witnesses and accompanying exhibits could streamline discovery in this action and will be relevant to proving Plaintiffs' claims or meeting T-Mobile's defenses. The latter is especially true where T-Mobile has made determinations in pre-merger enforcement proceedings a centerpiece of its defense.[6]

B. The Requested Production Is Unopposed and Proportional.

Under normal circumstances, this Court would have to consider proportionality on a deeper level. But this Court need not do so where T-Mobile does not contest production of the documents in question on proportionality grounds. Chan Decl. ¶ 5. Regardless, the proportionality analysis favors production of these documents. To assess proportionality, courts may consider:

> the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Human Rights Def. Ctr. v. Jeffreys, No. 18-1136, 2022 WL 4386666, at *2 (N.D. Ill. Sept. 22, 2022) (quoting Fed. R. Civ. P. 26(b)(1)).

The requested materials consist of a distilled excerpt of the pre-merger record: transcripts and exhibits from depositions and trial. This case concerns matters of national importance to millions of wireless phone subscribers who pay billions of dollars *per year* for cell phone service. Compl. ¶¶ 5, 19, ECF No. 1. Denying this motion would lead to potentially duplicative

[5] *See* Compl. ¶ 36 (former T-Mobile CEO John Legere), ¶ 44 (former Sprint Chief Marketing Officer Roger Sole-Rafols), ¶ 45 (DT Head of Mergers and Acquisitions Thorsten Langheim), ¶ 65 (Co-Founder and Chairman of DISH Network Charlie Ergen), ¶ 88 (DT CEO Timotheus Höttges); Chan Decl. ¶ 7, Ex. A (listing same names in list of deponents in States' Pre-Merger Case).

[6] *See* Memo. ISO MTD at 1 (Dec. 5, 2022), ECF No. 79 (T-Mobile claiming, "The merger of T-Mobile and Sprint has delivered to T-Mobile consumers lower prices and higher-quality, faster network services than either company could have offered alone, just as the Department of Justice's Antitrust Division, the Federal Communications Commission, two federal judges, and others found that it would.").

discovery and increase the burden and expense on parties and non-parties alike, by requiring the parties to recreate already compiled discoverable information or requiring the parties to seek the information separately from a myriad of non-parties. Furthermore, allowing T-Mobile access to this information while denying it to Plaintiffs would subject Plaintiffs to the "information asymmetry" that the Federal Rules explicitly warn against and seek to avoid. *See* Fed. R. Civ. P. 26, cmt 2015 am.

C. The Pre-Merger Protective Order Authorizes Disclosure and the Protective Order in This Case Will Protect Non-Party Confidential Information.

The protective orders in both cases permit disclosure and safeguard confidential information. Thus, "[c]onfidentiality is generally not grounds to withhold information from discovery." *Mike v. Dymon, Inc.*, No. 95-2405, 1996 WL 606362, at *3 (D. Kan. Oct. 17, 1996). The protective order in the States' Pre-Merger Case states that "[n]othing in this Order: (d) prevents disclosure by a Party of Confidential Information or Highly Confidential Information . . . (iv) pursuant to an order of a Court." *See* States' Pre-Merger Protective Order at 18, Chan Decl. ¶ 10, Ex. D. The pre-merger protective order therefore expressly contemplated and authorized disclosure of confidential information where ordered by other courts, such as this one.

Moreover, the protective order entered in this case will maintain robust protection of any non-party confidential information. *See Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 191, 195 (D. Del. 2004) ("In order to permit parties to proceed with litigation involving confidential information, protective orders, . . . must be respected by the parties and thus are presumed by courts to be effective."). Like the protective order entered in the States' Pre-Merger Case, there are two confidentiality designations that may be applied to production that are similarly defined—"Confidential" and "Highly Confidential."[7] The scope of persons to whom

[7] *Compare* ECF No. 98 at 2 (Confidential Information "means any document, or any portion thereof, . . . that contains confidential or proprietary business, commercial, research, personnel, product or financial content."), *with*, States' Pre-Merger Protective Order (Confidential Information "means (i) any trade secret or other confidential research, development, or commercial information, as such terms are used in

"Confidential" or "Highly Confidential" information may be properly disclosed is very similar as well, which will ensure that sensitive information will not be disclosed to the public or persons who have motivations that go beyond the scope of this litigation.[8] Plaintiffs would agree that any confidentiality designation made in that case should provisionally apply under the terms of the order in this case as well.

V. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion to Compel Discovery from Defendant T-Mobile.

Dated: January 17, 2024

/s/ Lin Y. Chan

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Fed. R. Civ. P. 26(c)(l)(G); or (ii) any document, transcript, or other material containing such information that has not been published or otherwise made publicly available.").

[8] *Compare* ECF No. 98 at 10-11 (listing "the Court," "Counsel," "Contractors," "Consultants and Experts," "Witnesses," "Author and Recipient") *with*, States' Pre-Merger Protective Order (listing "the Court," "Plaintiffs' attorneys," "Outside Counsel," "outside vendors or service providers," "any mediator or arbitrator," and "authors, addressees, and recipients," "testifying or consulting expert," "outside trial consultants").

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