

**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

FILED UNDER SEAL
ON AUGUST 28, 2024¹

**PLAINTIFFS' MOTION TO COMPEL T-MOBILE TO USE
PLAINTIFFS' PROPOSED CUSTODIAN LIST**

I. INTRODUCTION

This motion concerns whether attorneys and lobbyists may be subject to discovery. Over the course of the summer, the parties met and conferred repeatedly on the custodians whose records and ESI Defendant T-Mobile US, Inc. ("T-Mobile") would search for discoverable information. While they in large part succeeded, the parties reached an impasse on this issue. As the chart in Exhibit A illustrates, the parties' competing proposals discussed during their final meet and confer only differ with respect to Plaintiffs' request for discovery from three

¹ Plaintiffs initially filed their motion under seal because it discussed, and attached as exhibits, documents that T-Mobile designated as Protected Material under the case's Agreed Confidentiality Order (ECF No. 98). The parties conferred regarding the filing of public versions of Plaintiffs' Motion and Exhibits. Exhibit D contains confidential, personally identifiable information akin to information that is redacted under Federal Rule of Civil Procedure 5.2(a), and T-Mobile wishes to keep it under seal. T-Mobile proposed limited redactions to the identifiable information in Exhibit D. Plaintiffs agree to T-Mobile's request to redact the personally identifiable information.

custodians: Kathleen Ham, Dave Miller, and Mark Nelson. Brakefield Decl. ¶ 12, Ex. A. Miller was, and Nelson is, an in-house attorney at T-Mobile. *Id.* Ham was a lobbyist at T-Mobile. *See id.* T-Mobile rejected every proposal Plaintiffs advanced including those witnesses, and it did not offer any counter proposals that would include them. *See* Brakefield Decl. ¶¶ 5–11. Because these custodians likely possess relevant, discoverable and non-privileged information, and T-Mobile has not substantiated how searching their records would be unduly or disproportionately burdensome, this Court should order T-Mobile to use Plaintiffs’ proposed custodian list.

II. BACKGROUND

On March 18, 2024, T-Mobile proposed an initial custodian list. Brakefield Decl. ¶ 1, Ex. B. It proposed 29 custodians. *Id.* The list did not include Kathleen Ham, Dave Miller, Mark Nelson, or anyone with equivalent job titles. *See id.*

Given the complexity of this case, the need for custodians that were former Sprint employees, and the turnover that occurred within T-Mobile in the years following the merger, Plaintiffs responded on May 2, 2024, with a counterproposal of 60 custodians. Brakefield Decl. ¶ 3, Ex. C. Plaintiffs’ counterproposal included four individuals that are licensed attorneys:

- Laura Buckland (Senior Vice President, Chief Cyber Transformation Officer);
- Kathleen Ham (former Senior Vice President, Government Affairs);
- Dave Miller (former Executive Vice President and General Counsel); and
- and Mark Nelson (Executive Vice President and General Counsel). *Id.*

In addition to her responsibilities as in-house litigation counsel for T-Mobile, Laura Buckland acted “as the strategic lead for risks” involved with “significant transactions (e.g., purchase and sale of spectrum, mergers and acquisitions, and joint ventures).”² She currently works outside T-Mobile’s legal department as the head of cyber transformation.³ Ex. D.

² *Laura Buckland Biography*, The Sedona Conference, <https://thesedonaconference.org/bio/2502> (last visited Aug. 28, 2024).

³ T-Mobile has a history of cyber security failures. *See* Catherine Reed, *T-Mobile Data Breaches: Full Timeline Through 2023*, Firewall Times (Sept. 28, 2023), <https://firewalltimes.com/t-mobile-data-breaches/>. T-Mobile’s acquisition of Sprint reduced alternative options for consumers unsatisfied with T-Mobile’s security practices.

Kathleen Ham was T-Mobile’s “chief public policy advocate.”⁴ Her team lobbied “Congress, the FCC, state agencies, and other governmental bodies on a wide range of regulatory and policy issues, including spectrum, consumer, public safety, and competition matters.”⁵ Dave Miller held a seat “at the table seeing T-Mobile through some the biggest moments in [the] company’s history, including of course our merger with Sprint.”⁶ T-Mobile’s CEO Mike Sievert relied upon him as a “strategic thinker” in addition to as counsel.⁷ After stepping down from his role as general counsel, Miller stayed at T-Mobile as an “executive vice president and strategic advisor” until his retirement in April 2022.⁸ Mark Nelson was hired to fill Dave Miller’s shoes.⁹

T-Mobile considered Plaintiffs’ counterproposal for several weeks; the parties then met and conferred on June 10, 2024, regarding their opening custodian proposals. Brakefield Decl. ¶ 5. T-Mobile agreed in that meeting to add ten additional custodians from Plaintiffs’ counterproposal, but did not agree to add any of the four licensed attorneys. *Id.* The parties then discussed various objections T-Mobile had to Plaintiffs’ proposed custodians it would not adopt, including that the four licensed attorneys worked in what T-Mobile considers as legal roles. *Id.* Plaintiffs explained their belief that those individuals nevertheless had relevant information. *See id.*

After the June 10 meet and confer, T-Mobile followed up in writing with a response to Plaintiffs’ May 2 counterproposal. Brakefield Decl. ¶¶ 5–6, Ex. E. The letter confirmed that T-Mobile was willing to add the 10 custodians it named during the June 10 meet and confer as well as one additional individual. Brakefield Decl. ¶ 6, Ex. E. T-Mobile would not agree to add Laura Buckland, Kathleen Ham, Dave Miller, or Mark Nelson. *Id.* T-Mobile asserted that all

⁴ *Kathleen Ham Biography*, The Federalist Society, <https://fedsoc.org/contributors/kathleen-ham> (last visited Aug. 28, 2024).

⁵ *Id.*

⁶ *T-Mobile US Appoints Mark W. Nelson as New Executive Vice President and General Counsel*, T-Mobile US, Inc. (Sept. 16, 2021), <https://www.nasdaq.com/press-release/t-mobile-us-appoints-mark-w.-nelson-as-new-executive-vice-president-and-general>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

documents in these individuals' custodial files "are presumptively privileged" given they served T-Mobile in a "legal capacity." Ex. E at 2, 4. T-Mobile also objected to these four individuals on the grounds that they lack relevant documents or that any relevant documents would be duplicative of documents held by other "relevant custodians." *Id.*

Plaintiffs followed up in writing on July 1, 2024. Brakefield Decl. ¶ 7, Ex. F. In the interest of compromise, Plaintiffs agreed to reduce their list of proposed custodians to 53 persons. *Id.* Plaintiffs challenged T-Mobile's unsupported assertion that documents possessed by someone working in a legal capacity "are presumptively privileged." Ex. F at 1. But again, in the interest of compromise and to avoid motion practice, Plaintiffs offered to drop one of the four attorney custodians from the list. *Id.*

On July 18, 2024, the parties held another meet-and-confer. Brakefield Decl. ¶ 8. T-Mobile voiced its belief that non-privileged documents possessed by Laura Buckland, Kathleen Ham, Dave Miller, and Mark Nelson would also be in the possession of other potential custodians. *Id.*

T-Mobile then followed up with a new proposal: T-Mobile would search the records of 50 custodians if Plaintiffs would abandon seeking documents from Mark Nelson, Dave Miller, and Kathleen Ham. Brakefield Decl. ¶ 9, Ex. G. T-Mobile characterized all three individuals as "in-house attorney custodians." Ex. G at 2. It objected to their inclusion on the custodian list based on their "roles as lawyers," the possibility that these witnesses' non-privileged documents would appear in the files of other custodians, and the possible burden of reviewing and logging documents for privilege. *Id.* at 2–3.

Two days after receiving that letter, Plaintiffs' counsel responded with an email again reiterating that documents are not presumptively privileged because they are in an attorney's possession. Brakefield Decl. ¶ 10, Ex. H. Plaintiffs further explained that although one of the requested custodians had a law degree, she was primarily a lobbyist and her documents and communications associated with that function are discoverable. Ex. H at 1. While Plaintiffs made it clear that they were willing to litigate the inclusion of attorneys on the custodian list,

they offered to drop three other custodians from consideration to keep the total number at 50 custodians including Mark Nelson, Dave Miller, and Kathleen Ham. *Id.*

The parties then held a final meet and confer to discuss the parties' competing proposals. Brakefield Decl. ¶ 11. T-Mobile maintained its objections that treating Mark Nelson, Dave Miller, and Kathleen Ham as custodians would be burdensome and that non-privileged documents would likely be in other custodians' files. *Id.* Plaintiffs offered to address those concerns by discussing modified privilege logging obligations, which T-Mobile rejected. *Id.* T-Mobile also rejected Plaintiffs offer to drop one of the in-house counsels (which would have been Mark Nelson) from consideration. *Id.* Plaintiffs then declared an impasse. *Id.*

III. ARGUMENT

T-Mobile improperly seeks to shield the documents and communications of Mark Nelson, Dave Miller, and Kathleen Ham from discovery. These witnesses have unique evidence relevant to the merger between Sprint and T-Mobile and the effects that merger would have on the retail mobile wireless market, issues at the core of Plaintiffs claims in this case. Their status as licensed attorneys does not exempt them from discovery, and T-Mobile's burden objections are best addressed through means other than wholesale excluding their otherwise discoverable information from discovery. Plaintiffs' motion to compel should be granted.

The Three Disputed Witnesses Have Relevant and Discoverable Information. Under Rule 26(b)(1), parties are entitled to obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). **Dave Miller** negotiated the merger between Sprint and T-Mobile. Ex. I. As a front-line negotiator, he would be expected to have many non-privileged communications and other documents relevant to the transaction. He would also be expected to have communications and documents relevant to the transaction based on his "strategic think[ing] on everything from day-to-day issues to massive transactions," and his role as a strategic advisor after vacating the

general counsel role.¹⁰ While *some* of his documents and communications might be subject to attorney-client and work product privileges, his work as a business strategist—like many of his communications about the merger—will not enjoy such privileges. See *In re Lindsey*, 148 F.3d 1100, 1107 (D.C. Cir. 1998) (“Where one consults an attorney not as a lawyer but as a friend or as a business adviser or banker, or negotiator, the consultation is not professional nor the statement privileged.” (cleaned up)). **Mark Nelson** will also likely have relevant and non-privileged documents because he filled Dave Miller’s shoes, which included a “business strategist” component, after Mr. Miller left T-Mobile.¹¹ **Kathleen Ham**, as T-Mobile’s “Government Affairs, Technology and Engineering Policy chief,”¹² was deeply involved with the merger approval process and T-Mobile’s network and pricing plans in the post-merger world. For example, T-Mobile produced a Kathleen Ham email—which is not addressed to any of Plaintiffs’ other requested custodians, and so would not have been identified in a custodial search excluding Ms. Ham—in the DOJ investigation regarding T-Mobile’s 5G plans. Ex. K.

In-House Counsel and Lobbyists are Not Exempt from Discovery. Simply having the title of in-house counsel for T-Mobile does not automatically shield Dave Miller and Mark Nelson from discovery. See *Lamartina v. VMware, Inc.*, No. 20-cv-02182, 2024 WL 3049450, at *8 (N.D. Cal. June 17, 2024) (granting—over defendant’s burden objections—plaintiff’s motion to add as custodians three members of defendant’s in-house counsel where the in-house counsel possessed relevant information). In-house counsel, including general counsels, routinely have their records searched, including in this District. See, e.g., *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21 C 305, 2023 WL 4181198, at *10 (N.D. Ill. June 26, 2023) (granting

¹⁰ T-Mobile US Appoints Mark W. Nelson as New Executive Vice President and General Counsel, T-Mobile US, Inc. (Sept. 16, 2021), <https://www.nasdaq.com/press-release/t-mobile-us-appoints-mark-w.-nelson-as-new-executive-vice-president-and-general>. Indeed, Dave Miller was routinely part of discussions that were “primarily a business decision.” Ex. J.

¹¹ T-Mobile US Appoints Mark W. Nelson as New Executive Vice President and General Counsel, T-Mobile US, Inc. (Sept. 16, 2021), <https://www.nasdaq.com/press-release/t-mobile-us-appoints-mark-w.-nelson-as-new-executive-vice-president-and-general>.

¹² T-Mobile’s A-Team Seeking Assurances Sprint Deal Won’t Block Spectrum Bidding, Wireless Estimator (July 25, 2018), <https://wirelessestimator.com/articles/2018/t-mobiles-a-team-seeking-assurances-sprint-deal-wont-block-spectrum-bidding/>.

plaintiffs' motion to compel addition of eleven custodians, including defendant's General Counsel, where plaintiffs explained the General Counsel's custodial file was relevant to the alleged antitrust violation); *In re Restasis Antitrust Litig.*, 2018 WL 5094090, at *2–3 (E.D.N.Y. Oct. 18, 2018) (granting plaintiffs' motion to compel the addition of defendant's current and former general counsels as document custodians over defendant's objections that privilege logging would be burdensome and additional custodians' files would be duplicative of the 43 custodians already searched).

As explained above, Dave Miller, Mark Nelson, and Kathleen Ham possess information related to the merger and subsequent changes in the relevant market. Both Dave Miller and Kathleen Ham appear on documents T-Mobile has reproduced from the DOJ's premerger investigation. Ex. J; Ex. K. Plaintiffs anticipate they will receive many such more documents once T-Mobile completes its reproduction from the DOJ investigation and makes it reproductions from the States' case and other regulatory investigations. All three custodians have relevant information and are appropriate custodians.

Even if there was some shield for documents possessed by in-house attorneys (and there is not, *e.g.*, *Outpatient Med.*, 2023 WL 4181198, at *10) it would not apply to Kathleen Ham who is a lobbyist. She may have a law license, but when an attorney acts as a lobbyist, "matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice on matters that may also be the subject of the lobbying efforts." *A & R Body Specialty & Collision Works, Inc. v. Progressive Cas. Ins. Co.*, 2013 WL 6044342, *3 (D. Conn. Nov. 14, 2013); *see also Sol v. Whiting*, No. 10-CV-01061-PHX-SRB, 2014 WL 12526316, at *2 (D. Ariz. Jan. 31, 2014) ("Several courts have found that advice of the type given in lobbying efforts is not privileged."). Here, relevant documents contained within her files cannot be shielded based on her dual status as a licensed attorney and lobbyist.

Shielding Witnesses with Relevant Documents from Discovery is Not an Appropriate Manner to Address Potential Search and Privilege Logging Burdens. If some of the relevant and non-privileged documents in the possession of Mark Nelson, Dave Miller, and Kathleen Ham are indeed duplicative of documents held by other custodians, then T-Mobile can electronically de-duplicate those documents prior to review and production with no associated burden. *See Williams v. Apple, Inc.*, No. 19CV04700LHKVKD, 2020 WL 5107639, at *2 (N.D. Cal. Aug. 31, 2020) (“[W]here the key objection is unnecessarily duplicative discovery, [the defendant’s] burden can be substantially mitigated by application of appropriately narrow search terms and de-duplication of ESI across custodians.”). And if the number of privileged documents is excessive, the parties can negotiate alternate privilege logging requirements for these three custodians. An objection that adding attorneys to the custodian list will “impose an enormous burden by requiring privilege review and logging of every relevant document” is no reason to preclude Plaintiffs from obtaining otherwise relevant, non-privileged and nonduplicative discovery from these custodians’ files. *Lamartina*, 2024 WL 3049450, at *8.

V. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs’ Motion to Compel T-Mobile to use Plaintiffs’ proposed custodian list in Exhibit A.

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