

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

ANTHONY DALE, 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, T-MOBILE
US, INC., and SOFTBANK GROUP CORP.,

Defendants.

Case No. 1:22-cv-03189

Hon. Thomas M. Durkin

Hon. Jeffrey Cole

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL
DISH TO PRODUCE DISCOVERY RESPONSIVE TO PLAINTIFFS' SUBPOENA**

INTRODUCTION

Plaintiffs bring this suit to recover damages flowing from, and to obtain injunctive relief to remedy, the anticompetitive effects of the merger between Sprint and T-Mobile (the “Merger”). Plaintiffs now move to compel the production of documents, ESI, and structured data from non-party DISH Network Corporation (“DISH”—the linchpin, would-be “fourth competitor” whose viability was essential to the regulatory and judicial approval of the Merger.

On October 19, 2022, Plaintiffs subpoenaed DISH. DISH’s boilerplate written responses invoked the words “not relevant” or “irrelevant” *50 times*.¹ That assertion is not credible. Regulatory and court approval of the Merger *turned* on a generous divestiture deal that lined the pockets of DISH with subscribers and the option to buy more spectrum licenses on the premise that DISH would transform its wireless business into a competitive replacement for the market’s loss of Sprint. DISH led the Department of Justice to believe that the divested assets would be “operated by DISH as a viable, ongoing business that can compete effectively in the retail mobile wireless service market.”² And Charlie Ergen, DISH’s billionaire chairman, testified under oath that DISH would be a fierce competitor in wireless “from day one.”³ 1,779 days—and counting—have now passed, and approval of this Merger has now been criticized “as one of the worst merger-enforcement mistakes in decades.”⁴ As discussed below, five years later DISH has fewer subscribers than it inherited from T-Mobile, it cannot support the vast majority of them on its own network, and its auditors recently refused to certify it as a viable going concern. DISH

¹ See Decl. of Swathi Bojedla in Support of Pls.’ Mot. to Compel (hereinafter “Bojedla Decl.”), ¶ 5, Ex. C (DISH’s Feb. 2, 2024 Responses and Objections to Pls. Subpoena).

² See Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, *United States v. Deutsche Telekom AG*, No. CV 19-2232 (TJK), ECF. No. 42, at 1-2, 10 (D.D.C. Nov. 6, 2019).

³ *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 206, 226 (S.D.N.Y. 2020).

⁴ Melody Wang and Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint merger: A Disastrous Deal from the Start*, ProMarket (Apr. 23, 2021), <https://www.promarket.org/2021/04/23/dish-t-mobile-sprint-merger-disastrous-deal-lessons/>.

has utterly failed to replace Sprint as a “fourth pillar”⁵ of the wireless market.

In this case, Plaintiffs represent Verizon Communications, Inc. (“Verizon”) and AT&T Inc. (“AT&T”) customers who, as predicted, now pay more for less because the Merger substantially lessened competition in the retail wireless market. Plaintiffs have the right under Rules 26 and 45 to find out why T-Mobile and DISH’s pre-Merger promises proved false. Therefore, Plaintiffs seek to obtain evidence including (1) DISH’s submissions to the trustee appointed to monitor DISH and T-Mobile’s compliance with the terms of the Merger (the “Monitoring Trustee”); (2) DISH’s assessments of the retail wireless market and its ability to compete therein; (3) DISH’s spectrum and network build-out plans, and its network access agreements with AT&T and T-Mobile; (4) DISH’s pricing and product offerings, and the extent to which they are truly nationwide and competitive; and (5) DISH’s records regarding customers’ perception of the quality of DISH’s service and product offerings.

And yet, until very recently, DISH had refused to agree to *any* custodial searches for documents and ESI and has produced a mere 383 documents. Only at the tail-end of the negotiations, after Plaintiffs notified DISH of their intention to file a motion, did DISH propose a mere four custodians whose documents fail to cover the entire relevant time period, and omitting important custodians, including Mr. Ergen. And DISH continues to refuse to produce structured data on customers served via rented access to the networks of T-Mobile and AT&T. The Court should grant Plaintiffs’ motion to compel.

BACKGROUND

A. Broken Promises Fuel Approval of the Merger.

In April 2018, T-Mobile announced a Merger with Sprint. Compl. ¶ 4 (June 17, 2022),

⁵ Andrew Heinzman, *Boost Mobile’s 5G Network Buildout Will Take Longer Than Expected*, Yahoo!Tech (Sept. 25, 2024), <https://www.yahoo.com/tech/boost-mobiles-5g-network-buildout-162613752.html>.

ECF No. 1. The retail wireless market at the time consisted of four mobile network operators (“MNOs”): Verizon and AT&T, each with approximately 100 million subscribers, T-Mobile, with approximately 64 million, and Sprint, with about 41 million. *Id.* ¶ 30. For the preceding decade, both T-Mobile and Sprint had positioned themselves as price-cutting, disruptive “mavericks.” *Id.* ¶ 35. T-Mobile branded itself the “un-carrier” and, along with Sprint, disrupted the market and spurred competition by lowering prices, improving quality, and adding new perks to their service offerings to entice new subscribers. *Id.* ¶¶ 36-40. As a result, in the decade prior to the Merger, the nominal price of a nationwide wireless plan decreased every year by an average of 6.3%, including Verizon and AT&T subscribers. *Id.* ¶ 7.

The Merger changed all that. The gigantic increase in market concentration gave rise to a confident prediction (and legal presumption) that competition would be substantially reduced. *Id.* ¶ 51 & n.58. Moreover, consolidating a market from “four to three” competitors has been shown to be particularly damaging to competition. *See id.* ¶ 48. And worse yet, the Merger combined two growing mavericks into a single, much larger carrier operating on the same scale as AT&T and Verizon (*i.e.*, with less of a competitive incentive to compete on price and quality to gain share). *Id.* ¶ 20. Thus, to pass federal regulatory review, T-Mobile agreed to divest Sprint’s pre-paid phone businesses, including Boost Mobile, to DISH, to divest spectrum licenses, to decommission certain network facilities so that they could be offered to DISH, and to extend its network access agreements with DISH until 2027. *See id.* ¶¶ 4, 64, 71.

Not trusting (correctly) those remedies, a coalition of state attorneys general filed suit to enjoin the merger in the Southern District of New York. *Id.* ¶ 5. DISH’s Chairman Ergen testified at trial that “[b]ased on everything that we have at DISH already and then with the assets that we’re purchasing in this transaction, we will compete with the largest wireless

operators in the United States, and we'll compete **from day one.**" Trial Tr. Vol. 8 at 1561:24–1562:2, *Deutsche Telekom AG*, No. 19-cv-05434 (emphasis added). He elaborated, “[W]e'll be ready in probably 30 days to enter the marketplace from the time this decision is made. . . . [W]e think can we [sic] could compete right away” because DISH would be “inheriting or acquiring over nine million customers[.]” *Id.* at 1563:8-18 (emphasis added). Following a bench trial, the court ruled for T-Mobile. *See New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 249 (S.D.N.Y. 2020). The court found itself:

persuaded that DISH will likely take advantage of its opportunity to enter the [retail wireless] Markets, first building out its 5G network in dense cities and leveraging Boost’s positive brand image to cater to price-conscious customers, and shortly thereafter expanding nationwide to challenge the dominance of the incumbent MNOs more broadly.

Id. at 232.

This turned out to be wrong. T-Mobile made DISH’s task more challenging by decommissioning the legacy 3G network that served many of DISH’s acquired Boost customers. Compl. ¶ 91. DISH consequently had to strike a new deal to rent network access from AT&T. Nevertheless, between July 1, 2020 and September 2024, DISH lost over 2 million wireless subscribers, or 22.4% of the subscribers it had inherited.⁶ And while DISH’s network technically “covers” 80% of the geographic United States, it cannot even support the paltry 7.28 million subscribers it boasts today: it serves over six million of those subscribers—in total less than a

⁶ EchoStar Corporation, Quarterly Report (Form 10-Q), at 80 (Nov. 12, 2024), available at <https://ir.echostar.com/static-files/c664e4b7-3725-4cc9-8a82-788300df3dea> (“As of September 30, 2024 we had 6.984 million Wireless subscribers.”); DISH Network Corp., Press Release, DISH Network Reports Third Quarter 2020 Financial Results (Nov. 6, 2020), <https://about.dish.com/2020-11-06-DISH-Network-reports-third-quarter-2020-financial-results> (“DISH Network completed the acquisition of the Boost Mobile business on July 1, 2020, and acquired more than 9 million retail wireless subscribers as a result. DISH currently operates its wireless business as a mobile virtual network operator (MVNO).”).

fifth of Sprint's—by renting network access from AT&T and T-Mobile.⁷ DISH also recently received an extension until June 14, 2028 to deploy a 5G network,⁸ and DISH's auditors recently expressed “substantial doubt [in DISH's] ability to continue as a going concern.”⁹

As noted above, prior to the Merger the average price of a nationwide plan had been trending downward for a decade. Compl. ¶ 7. But ever since the Merger, quality-adjusted prices have *risen*, according to data compiled by the United States Department of Labor, Bureau of Labor Statistics. *Id.* ¶¶ 78-80. In other words, according to statistical models U.S. consumers are—for the first time in memory—paying *more* for the same kinds of plans than they did before. Since the Merger, all three legacy carriers have either raised prices or imposed new hidden fees and the U.S. now has one of the most expensive cell phone markets in the world.¹⁰ Compl. ¶¶ 102-08. Before the Merger, T-Mobile or Sprint might have exploited such increases to gain market share by offering a better deal. Or the very threat of a competitive response by them might have prevented the price increases in the first place. Not anymore.

B. Plaintiffs' Subpoena Is Relevant and Proportional Discovery from DISH.

On October 19, 2022, Plaintiffs subpoenaed DISH for documents responsive to thirty-six Requests regarding DISH's wireless business.¹¹ Notwithstanding Plaintiffs' efforts at compromise, spanning nearly a year of correspondence and nine telephonic meet and confers, the

⁷ Allison Johnson, *Boost Mobile Says It's a Real Wireless Carrier Now*, The Verge (Nov. 11, 2024), <https://www.theverge.com/2024/11/11/24291655/boost-mobile-5g-dish-wireless>; EchoStar Corp., Quarterly Report (Form 10-Q) (Aug. 9, 2024), available at <https://ir.echostar.com/node/31591/html>.

⁸ See Bojedla Decl., ¶ 33, Ex. P (Letter from Jeffrey H. Blum, Dish Network Corp., to Marlene H. Dortch, FCC (Sept. 18, 2024)).

⁹ EchoStar Corp., Annual Report (Form 10-K), at F-2 (Feb. 29, 2024), available at <https://ir.echostar.com/static-files/c0c6367b-a6dc-455c-87c4-5d30a5127048>.

¹⁰ See Mike Dano, *US Mobile Prices Sky High After T-Mobile's Sprint Buy – Report*, LightReading (May 14, 2024), <https://www.lightreading.com/operations/us-mobile-prices-sky-high-after-t-mobile-s-sprint-buy-report>; Eli Blumenthal, *T-Mobile Raises Rates on Select Legacy Plans, Here's the Deal*, CNET (May 26, 2024), <https://www.cnet.com/tech/mobile/t-mobile-raises-rates-on-select-legacy-plans-heres-the-deal/>.

¹¹ See Bojedla Decl., ¶ 3, Ex. A (Second Corrected Subpoena).

parties reached impasse.¹² DISH initially objected to *all* discovery of DISH as irrelevant, and refused even to discuss the subpoena during the pendency of T-Mobile’s interlocutory appeal—despite the opening of discovery.¹³ On April 25, 2024, DISH claimed that an unrelated trial would prevent DISH from discussing Plaintiffs’ discovery for four weeks. After Plaintiffs wrote to DISH again on May 9, 2024, DISH responded by proposing to talk *only after midnight* Eastern time. The parties finally met and conferred on June 13, 2024, but DISH did not address any of Plaintiffs’ questions until July 26, 2024, when DISH made its first production of just 173 documents. When the parties discussed DISH’s production at a meet and confer on August 1, 2024, DISH claimed it could not produce data for its own Boost Mobile subscribers before June 2023 and maintained that DISH’s Gen Mobile and Ting Mobile brands were *irrelevant* to the present litigation and therefore outside the scope of Plaintiffs’ subpoena. Despite repeated follow-up, DISH did not further respond until September 27, 2024—when it simply asked to schedule yet another meet-and-confer.¹⁴

Plaintiffs and DISH met and conferred in October, but no progress was made. On November 4, 2024, Plaintiffs wrote to DISH to memorialize DISH’s intransigence over 2024. DISH responded by simply rehashing its objections. Notwithstanding, Plaintiffs proposed another significant compromise on December 16, 2024, when they offered to accept even narrower productions: (1) seven categories of “go-get” documents for a time period from 2018 to 2024 and (2) custodial searches for eight custodians for a time period of January 1, 2017 forward.¹⁵ On December 30, 2024, DISH proposed for the first time (in nearly a year of

¹² Plaintiffs and DISH met and conferred on: March 14, June 13, August 1, September 6, and October 24, 2024; and January 25, January 29, February 3, and February 7, 2025. *See* Bojedla Decl., ¶¶ 6, 10, 12, 15, 17, 23-31.

¹³ *See* Bojedla Decl., ¶ 18, Ex. J (Pls.’ Nov. 4, 2024 Letter to DISH).

¹⁴ *See* Bojedla Decl., ¶ 16, Ex. I (DISH’s Sept. 27, 2024 Email to Pls.).

¹⁵ *See* Bojedla Decl., ¶ 20, Ex. L (Pls.’ Dec. 16, 2024 Letter to DISH).

negotiations) to conduct any custodial searches whatsoever.¹⁶ However, it only offered a single type of “go-get” document—quarterly reports to the Monitoring Trustee—and just four custodians—which, because of limitations on time periods of their documents, DISH admitted really amounted to “three and a half” custodians. DISH also refused to produce *any* pre-Merger documents, whether as go-gets or through custodial searches. As for customer complaints, DISH helpfully suggested that Plaintiffs read reviews *on Yelp*.¹⁷ And DISH has never substantiated its boilerplate complaints of “burden” other than by referencing its status as a non-party.¹⁸

LEGAL STANDARD

Litigants may obtain discovery of any “nonprivileged matter that is relevant to any party’s claim or defense”. Fed. R. Civ. P. 26(b)(1). Relevance “is construed broadly,” *Architectural Iron Workers’ Loc. No. 63 Welfare Fund v. Legna Installers Inc.*, No. 22 C 5757, 2023 WL 2974083, at *4 (N.D. Ill. Apr. 17, 2023) (citations omitted). The same standard “applies ‘with equal force to nonparty discovery under Rule 45.’” *Id.* (quoting *DeLeon-Reyes v. Guevara*, Nos. 1:18-cv-01028 & 1:18-cv-02312, 2020 WL 3050230, at *3 (N.D. Ill. June 8, 2020)). In determining proper scope, “the court should consider ‘the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.’” *In re Subpoena Upon Nejame Law PA*, No. 16-CV-4619, 2016 WL 3125055, at *4 (N.D. Ill. June 3, 2016) (quoting *Williams v. Blagojevich*, No. 05 C 4673, 2008 WL 68680, at *3 (N.D. Ill. Jan. 2, 2008)).

A party may not simply incant “irrelevant!” Rather, if “the discovery sought appears relevant, the party opposing the discovery bears the burden of proof to establish the discovery’s

¹⁶ See Bojedla Decl., ¶ 21, Ex. M (DISH’s Dec. 30, 2024 Letter to Pls.).

¹⁷ See *id.*

¹⁸ *Id.* ¶ 19, Ex. K, (DISH’s Nov. 14, 2024 Letter to Pls.); *id.* ¶ 20, Ex. L (Pls.’ Dec. 16, 2024 Letter to DISH).

lack of relevance by demonstrating that it is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.”

EEOC v. Heart of CarDon, LLC, 339 F.R.D. 602, 607 (S.D. Ind. 2021) (quotation omitted).

Likewise, “[u]ndue burden or expense, actual or potential, must be shown by a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.”

Papst Licensing GMBH & Co. KG v. Apple, Inc., Nos. 6:15-cv-1095 & 17 C 1853, 2017 WL 1233047, at *3 (N.D. Ill. Apr. 4, 2017) (Cole, M.J.) (quotation omitted). “Phrased differently, one claiming undue burden must do more than intone the phrase.” *Id.*

ARGUMENT

I. The Court Should Compel DISH to Conduct Custodial Searches.

A. Plaintiffs Are Entitled to Relevant Documents from Document Custodians.

Plaintiffs’ subpoena seeks relevant documents from a competitor to prove that the Merger reduced competition in the retail mobile wireless service market. DISH is not merely an important non-party in this litigation. *See Architectural Iron Workers*, 2023 WL 2974083, at *4. DISH’s failure and the reasons for it undermine the central premise for the Merger’s approval.

Plaintiffs’ narrowed Requests generally fall into five buckets:

- DISH’s communications with and submissions to the Monitoring Trustee (see Request No. 5);
- DISH’s internal discussions, assessments, and analyses of the retail wireless market and its capacity to compete in that market (see Request Nos. 7 and 10-13);
- Documents related to DISH’s spectrum assets and network including, but not limited to DISH’s network capacity, costs, and buildout plans (see Request Nos. 6, 9, and 23);
- Documents related to DISH’s pricing, service bundles, and subscriber data (see Request Nos. 15 and 20); and
- Documents related to consumer perception of DISH’s retail mobile wireless service, particularly with respect to network coverage, upload/download speeds, pricing, or 5G availability on DISH’s or a competitor’s network (see Request No. 19).

Each of these categories of documents is relevant. For example, the Monitoring Trustee

and Plaintiffs are both assessing the same question: Has DISH stepped in as a fourth MNO competitor so that competition in the retail wireless market is not substantially lessened? DISH's in-house assessments of its competitive capacity would be just as relevant, especially if they differ. Documents related to DISH's spectrum assets and purchases, as well as its network more generally, will demonstrate whether DISH has the structural capacity to compete effectively in the retail wireless market. And, as with other Requests, DISH's internal calculations as to the *need to acquire* spectrum reveal whether DISH views itself as in a position to compete with other MNOs. The same is true of documents related to DISH's pricing and subscriber data, as well as customer perception of DISH's service, pricing, and network quality.

The most reasonable way to collect and produce these categories of documents is for DISH to search the email and other records of persons most likely to possess them. Plaintiffs believe these to be the following eight custodians:

- Charlie Ergen, Chairman of DISH;
- Will Platz, Senior Finance Manager at DISH;
- Stephen Bye, Chief Commercial Officer of DISH;
- Jeff McSchooler, Executive Vice President of Wireless Engineering and Operations;
- John Swieringa, Chief Operating Officer and President of Retail Wireless;
- Stephen Stokols, CEO of Boost Mobile;
- Marc Rouanne, Chief Network Officer of DISH; and
- Rob Hussa, Senior Vice President of Boost Mobile.

DISH, however, only offered Bye, McSchooler, Stokols and, for part of the period, Swieringa.

Each of these eight custodians likely possesses documents relevant to the Merger.

Charlie Ergen founded EchoStar, which he merged with DISH in 2023, and reportedly holds

91.4% of the voting power of its equity shares.¹⁹ Ergen is not your ordinary chairman of the board. During the Merger, Charlie Ergen “exchanged text messages” with then-Assistant Attorney General Makan Delrahim, who “advised him on how to secure regulatory approval from the Federal Communications Commission, which also needed to approve the deal.”²⁰ It was widely reported that Ergen was “the linchpin in the government’s attempts to . . . approve a Merger between the nation’s third- and fourth-largest wireless providers”; he played “a starring role in what may result in the dramatic overhaul of the nation’s telecommunications market,” and “negotiate[ed] with the DOJ and T-Mobile on a deal that would save the proposed Merger . . .”²¹ Media reports attributed the Merger’s approval to Ergen, noting that the approval “may be thanks to Dish Network Chairman Charlie Ergen and his behind-the-scenes deal making”: “Ergen, the mercurial billionaire who controls Dish, appears to have played a pivotal role in convincing US judge Victor Marrero that the satellite TV giant can create a viable wireless carrier to replace sprint with a little help from his friends[.]”²² But Ergen himself has now recanted his past views: when T-Mobile prematurely shut down Sprint’s 3G CDMA network (*see* Request No. 6), Ergen “denounce[d] the unexpected shutdown as ‘anticompetitive.’”²³

Will Platz served as Senior Finance Manager at DISH from 2020 to 2024 where he led DISH’s internal Financial Analysis team.²⁴ He led “post-acquisition integration” projects and conducted “executive presentations on strategic projects.”²⁵ Additionally, Platz managed DISH’s

¹⁹ EchoStar Corp., SEC Schedule 13D/A (June 26, 2024), available at <https://ir.echostar.com/static-files/116ef85e-cbe7-45df-b865-08bd79846d60>.

²⁰ Wang and Morton, *supra* n.4.

²¹ Mike Dano, *What Does Dish’s Charlie Ergen Want?*, LightReading, (July 10, 2019), <https://www.lightreading.com/5g/what-does-dish-s-charlie-ergen-want->.

²² Josh Kosman, *Dish’s Charlie Ergen Might Have Been the Key to T-Mobile’s Sprint Acquisition*, New York Post (Feb. 11, 2020), <https://nypost.com/2020/02/11/dishs-charlie-ergen-might-have-been-the-key-to-t-mobiles-sprint-acquisition/>.

²³ Wang and Morton, *supra* n.4.

²⁴ William Platz, LinkedIn, <https://www.linkedin.com/in/williamplatz/> (last visited on Feb. 13, 2025).

²⁵ *Id.*

internal review of its expenses for its MVNO program. He analyzed customer profitability and DISH's enterprise value. Prior to his role as Senior Finance Manager, Platz served as a Finance Manager at DISH and advised DISH's leadership on DISH's mergers and acquisitions within the telecommunications industry.

Stephen Bye held the position of Chief Commercial Officer at DISH from December 2019 to January 2023. He led DISH's wireless network business, including DISH's development and commercialization of a 5G network. In the words of Charlie Ergen, “[Bye] has been an integral part of building our wireless business, helping lead efforts to maximize our wireless efforts and prepare use to monetize our investments[.]”²⁶ Bye later served on DISH's board from January 2023 to December 2023.²⁷

Jeffrey McSchooler served as Executive Vice President of Wireless Engineering and Operations, a role he has held since August 2018. He oversees DISH's build-out of its wireless systems that support DISH's nationwide narrow band-IoT and 5G networks.²⁸

John Swieringa oversaw deployment, management, and day-to-day activities of DISH's 5G broadband network and DISH's retail wireless business during his stint as President and COO of DISH's wireless business from January 2022 to January 2024.²⁹ After previously rotating between roles as President and COO of DISH's wireless business from December 2018 to January 2022, Swieringa held both titles.³⁰

Stephen Stokols served as CEO of Boost Mobile from July 2020 to August 2023.³¹

²⁶ DISH Network Corp., Press Release, Stephen Bye Joins DISH Network Board of Directors (Jan. 10, 2023), <https://about.dish.com/2023-01-10-Stephen-Bye-Joins-DISH-Network-Board-of-Directors>.

²⁷ *Id.*

²⁸ Jeff McSchooler, LinkedIn, <https://www.linkedin.com/in/jeff-mcschooler-160718103/> (last visited on Feb. 13, 2025).

²⁹ John Swieringa, About DISH, <https://about.dish.com/John-Swieringa> (last visited Feb. 13, 2025).

³⁰ John Swieringa, LinkedIn, <https://www.linkedin.com/in/johnswieringa/> (last visited on Feb. 13, 2025).

³¹ Stephen Stokols, LinkedIn, <https://www.linkedin.com/in/stokols/> (last visited on Feb. 13, 2025).

Stokols' responsibilities included management of Boost's sales, market strategy, and business operations. Stokols oversaw Boost's network deployment and long-term strategic planning.³²

As Chief Network Officer from December 2019 to March 2024, **Marc Rouanne** had responsibility for the (delayed to 2028) build-out of DISH's nationwide 5G network.³³ Rouanne's day-to-day responsibilities involved strategic planning for DISH's wireless network and the development of new 5G technologies to enable DISH's 5G capabilities.³⁴ Therefore, Rouanne likely possesses relevant documents related to DISH's network planning, testing, and deployment, a critical factor for measuring DISH's competitive capacity in the wireless market.

Finally, **Rob Hussa** held multiple executive positions at Boost from July 2019 to January 2023, including Chief Financial Officer, Senior Vice President of Retail Wireless Operations and finally Senior Vice President of Boost Mobile.³⁵ Hussa likely had input in Boost's sales and market strategy for Boost's retail wireless business.³⁶

B. The Court Should Overrule DISH's Objections.

Each of the applicable factors—the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues—weighs in favor of enforcement here. As discussed above, DISH formed the crux of the decision to permit the Merger; DISH's inability to become a robust fourth mobile wireless competitor now stands at the center of this litigation. Moreover, the amount in controversy—billions, given the size of the retail mobile wireless market—and DISH's resources (with its market capitalization of over \$8 billion) confirm that

³² Stephen Stokols, About DISH (Sept. 22, 2020), <https://about.dish.com/2020-09-22-DISH-taps-wireless-innovator-and-FreedomPop-founder-Stephen-Stokols-to-lead-Boost-Mobile>.

³³ Marc Rouanne, LinkedIn, <https://www.linkedin.com/in/marc-rouanne-133a8ba/> (last visited on Feb. 13, 2025).

³⁴ Marc Rouanne, Fierce Network, <https://www.fierce-network.com/person/marc-rouanne> (last visited Feb. 13, 2025).

³⁵ Rob Hussa, LinkedIn, <https://www.linkedin.com/in/roberthussa/> (last visited Feb. 13, 2025).

³⁶ *Id.*

Plaintiffs' narrowed requests and eight proposed custodians are an appropriate level of discovery. These factors operate with greater force given that Plaintiffs seek to enforce the antitrust laws. "Illegality under the antitrust laws concerns broad public interests transcending the private objectives of the parties." *Associated Milk Dealers, Inc. v. Milk Drivers Union*, 422 F.2d 546, 552 (7th Cir. 1970); *see Jewel Tea Co. v. Local Unions Nos. 189, 262, 320, 546, 547, 571 & 638*, 274 F.2d 217, 223 (7th Cir. 1960) ("Private suits are merely a vehicle intended to further enforce [the] antitrust laws for the benefit of the real party in interest, the public.").

Plaintiffs would offer to take on DISH's objections in advance—except that DISH asserted only boilerplate general objections in its written responses and never elaborated on its specific objections in any detail during meet and confers.³⁷ DISH has never explained how, given its centrality to the Merger remedy, it could categorically have no relevant documents. DISH has argued that *pre*-Merger documents and communications are irrelevant.³⁸ Plaintiffs agree that in general "this case is about what happened *after* the Merger."³⁹ But DISH's status as a potential competitor pre-Merger, and its failure to leverage this potential post-Merger, place DISH's plans to enter the relevant market at issue in this case. *See Sidibe v. Sutter Health*, 103 F.4th 675, 693 (9th Cir. 2024) (evidence of a party's past belief "that its conduct would have anticompetitive effects in the future is probative of whether that party's conduct had anticompetitive effects."); *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, No. 11CV0564BMCPK, 2019 WL 1515231, at *17 (E.D.N.Y. Feb. 21, 2019) (Declining to "examine the post-[bankruptcy] discharge period in a vacuum," which "must be viewed in light of the

³⁷ *See Fudali v. Napolitano*, 283 F.R.D. 400, 403 (N.D. Ill. 2012) (Cole, M.J.) (quotation omitted); *see also Loughnane v. Zukowski, Rogers, Flood & McArdle*, No. 19 CV 86, 2019 WL 13073480, at *5 (N.D. Ill. Dec. 2, 2019) (rejecting litigant's "distinction in name only" as to general objections).

³⁸ *See* Bojedla Decl., ¶ 21, Ex. M (DISH's Dec. 30, 2024 Letter to Pls.).

³⁹ Memorandum Opinion and Order at 10 (Oct. 4, 2024), ECF No. 206 (emphasis in original).

conduct that occurred *before and during* United’s period of bankruptcy” in part because it “provides color to much of the post-discharge period evidence discussed above, and certainly tends to exclude the possibility that defendants were operating independently”).

DISH will assert burden arising from its status as a non-party. But DISH is no ordinary “non-party;” DISH played an affirmative and essential role in getting the Merger approved—and reaped significant rewards. Furthermore, “[d]etermining whether a subpoena imposes an undue burden upon a witness is a case-specific inquiry requiring consideration of such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.” *Papst Licensing GMBH*, 2017 WL 1233047, at *3 (internal quotation marks omitted). DISH clearly has relevant information that can be obtained from no other source; plaintiffs have narrowed their request to searches of the documents of eight custodians, hardly a disproportionate burden for an eight-billion-dollar company. And while DISH has generically raised the possibility that some of these custodians may have duplicative documents, modern document review software solves this issue by removing any duplicative documents found within multiple custodial files automatically without any expenditure of attorney review time.

Finally, DISH has asserted certain confidentiality and data security objections. Specifically, DISH objected to producing documents and communications (or at least competitively sensitive information) without certain “firewall” protections in place, such as an attorneys’ eyes only provision or a meaningful limitation on the ability of T-Mobile’s in-house counsel to access DISH’s productions. The existing protective order (ECF No. 98) already contains strict protections; plaintiffs do not object to reasonable amendments to prevent exposure of DISH’s information to in-house T-Mobile lawyers, although T-Mobile may.

II. **Structured Data**

Plaintiffs requested structured data in four Requests (21, 22, 24, 25). DISH has agreed to produce structured data with respect to two of its brands, Boost Mobile and Boost Infinite.⁴⁰ However, DISH (without substantiating its burden) refuses to produce structured data with respect to its MVNO brands, including Gen Mobile and Ting Mobile. An MVNO or “mobile virtual network operator” does *not* have its own network. It *rents* network access for its subscribers from an MNO such as AT&T, T-Mobile, or Verizon. DISH argues that these wholly-MVNO brands are not relevant because they do not participate in the same market as MNOs.

Plaintiffs agree conceptually with DISH: because MVNOs rent network access from the main carriers, they cannot, as a matter of economics, competitively constrain those carriers. *See* Compl. ¶ 31. This difference is precisely why DISH has failed as a competitive constraint; to this day, it is principally a *virtual* network operator. T-Mobile, however, disagrees; Plaintiffs anticipate T-Mobile will argue that MVNOs qualify as an independent competitive force, and that their subscribers should not be attributed to the MNO that owns the network for purposes of calculating market share. Hence, T-Mobile has issued multiple subpoenas to MVNOs, including DISH. Whether and how MVNOs participate in the retail wireless market as competitors of MNOs strikes at issues of market definition, quantifying the Merger’s anticompetitive effects, and the data analysis each party’s economists will conduct. Accordingly, unless the court (or T-Mobile) declares that MVNOs are irrelevant to the effect of the Merger, the requested discovery directly relates to the claims and defenses of this case and should be produced.

CONCLUSION

For the foregoing reasons the Court should grant Plaintiffs’ motion to compel.

⁴⁰ This includes Republic Wireless, another MVNO, which DISH represents has since been folded into Boost Infinite (DISH’s MNO brand).

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CERTIFICATE OF SERVICE

I, Gary I. Smith, Jr. an attorney, hereby certify that the foregoing memorandum and accompanying documents were electronically filed on February 13, 2025, and will be served electronically via the Court's ECF Notice system upon the registered parties of record. Additionally, the foregoing documents were also served via email on Clifford Yin, Counsel for DISH Network, Inc. (cyin@coblentzlaw.com) and Amber Leong, Counsel for DISH Network, Inc. (aleong@coblentzlaw.com).

Respectfully submitted,

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