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

ANTHONY DALE, BRETT JACKSON, JONNA FOX, BENJAMIN BORROW-MAN, 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 Hon. Thomas M. Durkin Magistrate Judge Jeffrey Cole

NON-PARTY DISH NETWORK CORPORATION'S
MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
AND T-MOBILE'S SEPARATE MOTIONS TO COMPEL

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INTRODUCTION

Non-party DISH Network Corporation ("DISH") respectfully requests that this Court deny the simultaneous Motions to Compel Plaintiffs and T-Mobile (together, "the Parties") have filed seeking irrelevant, unduly burdensome, and cumulative information that is disproportionate to the needs of this case. While the Parties do not agree on much, they align in their utter disregard of DISH's status as a non-party. *Papst Licensing GmbH & Co. KG v. Apple, Inc.*, No. 6:15-cv-1095, 2017 WL 1233047, at *3 (N.D. Ill. Apr. 4, 2017) ("Non-parties have a different set of expectations."). They not only failed to take reasonable steps to avoid imposing undue burden or expense on DISH when they issued their subpoenas, but also failed to show a substantial need for the requested information that cannot be met otherwise. The Parties urge the Court to view DISH as the "linchpin" to the underlying Merger and as "not an ordinary nonparty" as justification for their failure to comply with Rule 45, but no such exceptions exist. Pls.' Mot. at 1; T-Mobile's Mem. at 2. *See Grund & Mobil Verwaltungs AG v. Amazon.com, Inc.*, No. MC23-56RSL, 2023 WL 5533575, at *6 (W.D. Wash. Aug. 28, 2023) (rejecting contention that subpoenaed non-party's purported significance to the litigation negates non-party status since "plaintiffs are responsible for naming those whom they wish to hold responsible for their alleged injuries as defendants in their complaint"). The Court should deny both Motions and grant any further relief as the Court deems appropriate.

BACKGROUND

The Merger between T-Mobile and Sprint closed on April 1, 2020.[1] To complete the Merger, T-Mobile agreed to divest Sprint's Mobile Virtual Network Operator ("MVNO") Boost Mobile ("Boost") to DISH. Declaration of Jeffrey H. Blum ("Blum Decl.") ¶ 4 Ex. A, Amended

[1] *T-Mobile Completes Merger with Sprint to Create the New T-Mobile* (Apr. 1, 2020), https://www.t-mobile.com/news/un-carrier/t-mobile-sprint-one-company.

Final Judgment at 7-12, Section IV, Divestitures, *U.S. v. Deutsche Telekom AG*, No. 19-cv-02232-TJK (D.D.C. Oct. 23, 2023), ECF No. 139 (the "Final Judgment"). The "primary purpose" of the Final Judgment is to enable DISH "to offer competitive services and grow to replace Sprint as an independent and vigorous competitor in the retail mobile wireless service market." Blum Decl. ¶ 6 Ex. B, Competitive Impact Statement at 2-3 (July 30, 2019), ECF No. 20. To assist DISH in its efforts to compete in the retail wireless market, the Final Judgment required T-Mobile to allow DISH access to T-Mobile's wireless networks for at least seven years. *Id.* Ex. A at 20-22, Section VI, Full Mobile Virtual Network Operator. Recognizing that after the Merger DISH would become both a customer of and competitor to T-Mobile, the Final Judgment included a section titled "Firewall," ordering that DISH and T-Mobile "shall implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed…to components or individuals within the respective companies involved in the marketing, distribution, or sale of competing products." *Id.* Ex. A at 29-30, Section XIII, Firewall.

The District Court appointed a Monitoring Trustee to ensure T-Mobile's and DISH's compliance with the Final Judgment (the "Monitoring Trustee"), including DISH's obligation to use assets acquired as part of the Final Judgment to operate a retail wireless network as a competitive Mobile Network Operator ("MNO"). *Id.* Ex. A at 27-29, Section XII, Appointment of Monitoring Trustee. DISH provides quarterly confidential submissions to the Monitoring Trustee regarding its mobile wireless operations and compliance with the Final Judgment. *Id.* ¶ 8. In addition to these confidential submissions, DISH also makes confidential submissions to the Federal Communications Commission ("FCC") regarding the commitment DISH made to deploy a facilities-based 5G network. *Id.* ¶¶ 13-14.

A. <u>Plaintiffs' Overbroad Subpoena Was Not Tailored to Reduce DISH's Burden</u>.

On October 19, 2022, Plaintiffs served DISH with a subpoena containing thirty-six

sweeping document requests reaching back to January 2010—nearly a decade before the Merger was even approved. Declaration of Clifford E. Yin. ("Yin Decl.") ¶ 3 Ex. A, Instruction No. 13.[2] Many of the Plaintiffs' document requests have numerous subparts, and all but ten requests broadly seek "all documents."

In its timely responses and objections, DISH objected that Plaintiffs' subpoena is not narrowly tailored to reflect DISH's status as a non-party, is overbroad, and seeks confidential and proprietary as well as irrelevant information—including information that predates the Merger and information about DISH's wireless assets that are wholly unrelated to the Merger. *Id.* ¶ 8; Declaration of Swathi Bojedla in Support of Pls.' Mot. To Compel ("Bojedla Decl.") Ex. C. Despite its well-founded objections, DISH engaged in good faith negotiations with Plaintiffs while T-Mobile sought certification of its interlocutory appeal of the Court's denial of its Motion to Dismiss. Yin Decl. ¶¶ 7-11. During these negotiations, Plaintiffs acknowledged the overbreadth of their requests. *Id.* ¶ 10. When T-Mobile appealed the ruling to Seventh Circuit, DISH paused negotiations to avoid a potentially needless waste of resources in the event of dismissal. *Id.* ¶ 11. After T-Mobile's appeal was denied in May 2024, DISH re-engaged in good faith negotiations with Plaintiffs regarding the scope of their requests. *Id.* ¶ 12.

Without waiving its valid objections to Plaintiffs' subpoena, DISH made two document productions in good faith. These productions included some of DISH's quarterly submissions to the Monitoring Trustee. *Id.* ¶¶ 16, 18. In October 2024, DISH provided Plaintiffs with the structured data fields they requested and agreed to provide a sample of structured data once they

[2] Defining the "Relevant Time Period" as beginning January 1, 2010, "unless specifically otherwise stated in the request." Plaintiffs point to their December 16, 2024 letter as evidence that they "narrowed" their requests by moving the beginning of the date range for their demanded custodial discovery to January 1, 2017. Pls.' Mot. at 7. Plaintiffs' Second Corrected Subpoena, which was issued after their letter and serves as the basis for their Motion to Compel, continues to define the "Relevant Date Range" as beginning on January 1, 2010. Bojedla Decl. Ex. A.

executed a data security agreement protecting DISH's highly sensitive structured data. *Id.* ¶¶ 21, 24-26. Plaintiffs never executed the data security agreement. *Id.* at ¶ 26.

It was not until December 16, 2024, more than two years after issuing their subpoena, and after nine months of negotiations, that Plaintiffs provided DISH with a list of proposed custodians and threatened to move to compel if DISH did not agree to custodial searches. *Id.* ¶ 27. In response, DISH detailed the many ways this misguided request for custodial discovery was unduly burdensome and sought information that was cumulative of information already produced or otherwise publicly available.[3] *Id.* ¶ 28. DISH made clear that it was prepared to produce the remainder of DISH's quarterly submissions to the Monitoring Trustee upon modification of the Agreed Confidentiality Order (ECF No. 98), which was necessary to adequately protect DISH's highly sensitive confidential information from disclosure to competitor T-Mobile.[4] *Id.*

On February 10, 2025, Plaintiffs, for the first time, proposed search terms for DISH to run against custodial data for the list of custodians from December. *Id.* ¶ 32. Plaintiffs' proposed search terms are extremely broad and not narrowly tailored to reduce DISH's burden. *Id.* That same day, Plaintiffs served DISH with their Second Corrected Subpoena, which contained a material alteration to the definition of "Affiliate MVNOs," functionally rendering it a new subpoena. *Id.* ¶ 31. Plaintiffs' new subpoena gave DISH until February 14—just four days—to respond. *Id.* ¶ 31. Before this truncated deadline expired, and presumably spurred by this Court's February 12 Order (ECF No. 231) denying the Parties' Stipulated Motion Regarding Deadlines for Non-Party Discovery and to Amend Schedule (ECF No. 230), Plaintiffs rashly filed the first

[3] In a good faith effort to resolve its objections to Plaintiffs' demand for overly broad custodial discovery, DISH proposed undertaking targeted discovery limited to three custodians for a limited, post-Merger time period. Yin Decl. ¶ 28. Plaintiffs implicitly rejected this offer when they filed their Motion.

[4] *See* Order re Protocol for the Production of Electronically Stored Information (ESI) ¶ 19 (Apr. 3, 2024), ECF No. 181 (requiring a party receiving non-party productions to provide copies of such productions to other parties).

version of their Motion to Compel on February 13, 2025. *Id.* ¶ 34.

Plaintiffs filed in such haste that they mistakenly used the wrong docket event and had to re-file the next day. Plaintiffs' Corrected Motion to Compel DISH to Produce Discovery Responsive to Plaintiffs' Subpoena (Feb. 14, 2025), ECF No. 234. After the Court's Order denying Plaintiffs' February 14, 2025, motion without prejudice as to refiling (ECF No. 241), Plaintiffs made no further attempts to confer. Yin Decl. ¶ 35. DISH's only substantive contact with Plaintiffs on matters other than the briefing schedule involved answering an emailed question regarding the content of DISH's structured data. *Id.*

B. T-Mobile's Overbroad Subpoena Was Not Tailored to Reduce DISH's Burden.

On November 18, 2024, T-Mobile served DISH with a subpoena containing thirty-four document requests for a period spanning seven years, from January 2017 to June 2024. Yin Decl. ¶ 37. Like Plaintiffs' subpoena, several of T-Mobile's requests have several subparts. Many of T-Mobile's requests also seek the same information that Plaintiffs sought in their subpoena, and all requests seek pre-Merger information.[5] Declaration of Minae Yu in Support of T-Mobile's Mot. To Compel ("Yu Decl.") Ex. 1, Instruction No. 2.[6]

In its timely responses and objections, DISH objected that T-Mobile's subpoena is not narrowly tailored to reflect DISH's status as a non-party, is overbroad, and seeks irrelevant information, including information about DISH's wireless assets that are wholly unrelated to the Merger. Yin Decl. ¶ 37; Yu Decl. Ex. 2. DISH additionally objected that T-Mobile's subpoena seeks to force DISH to disclose its highly confidential and competitively sensitive information to a competitor in contravention of the anticompetition provisions of the Final Judgment. Yu Decl.

[5] T-Mobile Request Nos. 1-21, 23-25, 26-30, 31, and 34 wholly or partially overlap with Plaintiffs' requests.
[6] Defining the "relevant time period" as beginning January 1, 2017, "[u]nless specified otherwise in a particular Request."

Ex. 2 at 5-6. DISH offered to produce Boost structured data and the remaining submissions to the Monitoring Trustee if T-Mobile agreed to appropriate modification of the Agreed Confidentiality Order to align with the firewall procedures of the Final Judgment. *Id.* Ex. 2.

DISH promptly engaged in good faith negotiations with T-Mobile and emphasized that modification of the Agreed Confidentiality Order was a prerequisite to further productions. Yin Decl. ¶ 39. T-Mobile dismissed DISH's concerns and offered modifications that would not adequately protect DISH's commercially sensitive confidential information, in conflict with the firewall procedures of the Final Judgment. *Id.* ¶¶ 39-40.

DISH tried to negotiate a scope of discovery appropriate for a non-party, but T-Mobile was immovable. For example, during the February 19, 2025, conferral, T-Mobile's counsel indicated that DISH should be prepared to search the same custodians Plaintiffs identified, and also new custodians T-Mobile would propose. *Id.* ¶ 40. T-Mobile proposed its own set of overbroad search terms on March 4. *Id.* ¶ 42. While T-Mobile was clear that it intended to file its Motion to Compel, DISH continued to confer in good faith, including answering a dozen emailed questions about Boost structured data just eight days before T-Mobile filed its Motion. Yu Decl. Ex. 6.

LEGAL STANDARD

"It is one thing to subject *parties* to the trials and tribulations of discovery—rightly regarded as the 'the bane of modern litigation'—but a non-party doesn't usually have a horse in the race." *Papst*, 2017 WL 1233047, at *3 (internal citation omitted) (italics in original). Rule 45 states that parties issuing a subpoena "must take reasonable steps to avoid imposing undue burden or expense" on the non-party who receives the subpoena, and courts "must quash or modify a subpoena that…subjects a [non-party] to undue burden." Fed. R. Civ. P. 45(d)(1); 45(d)(3)(A)(iv).

Relevance is a threshold question when determining whether the burden imposed on a non-party is undue. "Obviously, if the sought-after documents are not relevant…then *any burden*

whatsoever imposed upon [the subpoenaed non-party] would be by definition 'undue.'" *Builders Ass'n of Greater Chicago v. City of Chicago*, No. 96 C 1122, 2001 WL 664453, at *8 (N.D. Ill. June 12, 2001) (quoting *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335-336 (N.D. Cal. 1995)) (italics in original). "[N]on-parties are entitled to greater protection in the discovery process than parties." *Ameritox Ltd. v. Millennium Lab'ys, Inc.*, No. 12-CV-7493, 2012 WL 6568226, at *3 (N.D. Ill. Dec. 14, 2012) (citing *Thayer v. Chiczewski*, 257 F.R.D. 466, 469 (N.D. Ill. 2009)) (internal punctuation omitted) (quashing non-party subpoenas where the discovery sought was cumulative, duplicative, and readily available through party discovery). "[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to *special weight* in evaluating the balance of competing needs." *Uppal v. Rosalind Franklin Univ. of Med. and Sci.*, 124 F. Supp. 3d 811, 813 (N.D. Ill. 2015) (Cole M.J.) (finding that compliance with a non-party subpoena seeking irrelevant information would itself be an undue burden) (italics in original); *see also Rossman v. EN Engineering, LLC*, 467 F. Supp. 3d 586, 590-592 (N.D. Ill. 2020) (Cole, M.J.) (denying motion to compel a non-party's subpoena compliance because the serving party's failure to exhaust other avenues to obtain the information was an unnecessary burden).

"If confidential information is being sought, 'the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.'" *Suture Express, Inc. v. Cardinal Health 200, LLC*, No. 14-cv-04737, 2014 WL 6478077, at *4 (N.D. Ill. Nov. 18, 2014) (quoting *Concord Boat Corp. v. Brunswick Corp.*, No. 96 C 6026, 1996 WL 705260, at *3 (N.D. Ill. Dec. 4, 1996)). Courts determining whether a subpoena imposes an undue burden on a non-party "consider whether: (1) the information requested is relevant; (2) the party

requesting the information has a substantial need for the documents; (3) the document request is overly broad; (4) the time period the request covers is reasonable; (5) the request is sufficiently particular; and (6) whether compliance with the request would, in fact, impose a burden on the subpoenaed party." *Little v. JB Pritzker for Governor*, No. 18 C 6954, 2020 WL 1939358, at *2 (N.D. Ill. Apr. 22, 2020) (quashing subpoena as subjecting non-party to undue burden due to overly broad requests seeking irrelevant information).

A court granting a motion to compel compliance from a non-party "must protect" the non-party "from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(i)-(ii). A court is permitted to quash or modify a subpoena if it would require disclosure of trade secrets or other confidential commercial information. Fed. R. Civ. P. 45(d)(3)(B)(i). A court may order production of such sensitive information from a non-party only if the serving party shows "substantial need" for the requested information that cannot be met without undue hardship through other means, and only so long as the serving party ensures that the subpoena recipient will be reasonably compensated. *Id.* 45(d)(3)(C)(i)-(ii). To demonstrate substantial need, "the serving party must demonstrate that the disclosure…is both relevant *and* necessary to the underlying litigation." *Luiken v. Runzheimer Intern., Ltd.*, No. 11–MC–34, 2011 WL 3423335, at *1-2 (E.D. Wisc. Aug. 3, 2011) (quashing non-party subpoena seeking trade secrets because the serving party did not demonstrate substantial need) (italics in original). In addition to relevance and necessity, determining whether the serving party has shown substantial need for a non-party's confidential commercial information "requires taking into account…the availability of facts from other sources." *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (TSH), No. 19-cv-03074-YGR (TSH), 2020 WL 5993223, at *3 (N.D. Cal. Oct. 9, 2020).

A "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including…(A) forbidding the disclosure or discovery." Fed. R. Civ. P. 26(c)(1)(A). "The limits and breadth of discovery expressed in Rule 26 are applicable to non-party discovery under Rule 45." *Noble Roman's, Inc. v. Hattenhauer Distributing Co.*, 314 F.R.D. 304, 307 (S.D. Ind. 2016) (quashing a non-party subpoena seeking irrelevant and disproportionate information as "discovery run amok"). It is the "power—and *duty*—of the district courts actively to manage discovery and to limit discovery that exceeds its proportional and proper bounds." *Id.* at 306 (italics in original).

ARGUMENT

The Court should deny both Motions to Compel. Plaintiffs and T-Mobile have failed to take reasonable steps to avoid undue burden to DISH or to demonstrate a substantial need for the sensitive information subject to DISH's well-founded objections.[7] The combined 70 requests issued by the Parties largely seek irrelevant and overly broad information, including documents that pre-date the Merger,[8] documents that are publicly available,[9] and documents that can be obtained from sources more convenient than DISH.[10]

The Parties urge the Court to compel DISH to undertake burdensome fishing expeditions of its custodial data in hopes that they might catch *something* that will either prove that "the Merger reduced competition in the retail mobile wireless service market" or "rebut Plaintiffs' DISH-focused allegations." Pls.' Mot. at 8; T-Mobile's Mem. at 2. The Parties are represented by

[7] Bojedla Decl. Ex. C; Yu Decl. Ex. 2.
[8] The "relevant time period[s]" for both the Parties' subpoenas pre-date the April 1, 2020 approval of the Merger.
[9] In their Motions and exhibits, the Parties cite publicly available information from DISH's securities filings, press releases, and websites that contain detailed information about the exact topics mentioned in their Motions. Pls.' Mot. at 4 n.6, 5 nn.7 and 9; Yu Decl. Ex. 7, 20, 21, 27, 28, 29, 41.
[10] Such as communications between DISH and Deutsche Telekom AG or T-Mobile (Pls.' Request Nos. 3, 17, 25(b)); or between DISH and Plaintiffs (T-Mobile's Request No. 4).

sophisticated counsel who are well-versed in modern discovery, yet they blithely dismiss the significant burdens associated with: (i) running overbroad search terms against the custodial data associated with high-level employees over a time period of seven years; (ii) exporting the resulting data set to a discovery vendor to process the data[11] into a review platform, for which DISH pays a hosting fee; (iii) retaining a team of contract attorneys to conduct a responsiveness and privilege review; and ultimately (iv) producing or logging any responsive information resulting from that review.

The Parties also show little regard for the fact that their separate subpoenas seek highly confidential commercially sensitive information from a non-party. DISH advised both Parties repeatedly during conferral that it would produce certain responsive materials subject to modification of the Agreed Confidentiality Order, yet the issue remains pending.[12] Yin Decl. ¶¶ 28, 39, 44.

Neither Plaintiffs nor T-Mobile have complied with their obligations under Rule 45. Despite the Parties' collective failure, DISH has produced and is willing to produce additional responsive documents subject to proper safeguards. Nonetheless, the Parties make similar but separate demands for even more discovery that will impose an undue burden on DISH and is disproportionate to the needs of this case.

For these reasons, the Court should deny both Motions to Compel. If the Court considers modifying the subpoenas or is otherwise inclined to compel DISH to respond, even in part, DISH reserves its rights to seek any protections that may be available under the Rules.

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[11] Which includes removing system files and duplicate files, dismissed by Plaintiffs as an inconsequential process that can be done "automatically without any expenditure of attorney review time." Pls.' Mot. at 14.

[12] Indeed, this issue remains pending for multiple non-parties. Stipulated Sched. for a Joint Filing Regarding the Confidentiality Order, ECF No. 250.

A. Custodial Discovery Is Not Proportional to the Needs of This Case and Should Be Denied.

The Parties' insistence on broad custodial discovery from DISH demonstrates a mutual failure to take reasonable steps to avoid imposing undue burden on a non-party as required by Rule 45(d)(1). Further, the Court has recognized the well-established principle that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies for … producing their own electronically stored information." Memorandum Op. and Order at 5 (Oct. 4, 2024), ECF No. 206 (quoting The Sedona Conference, The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 118 (2018)) (denying Plaintiffs request for three additional custodians because the fifty custodians already agreed to give Plaintiffs "pretty much everything they want[ed]"). In accordance with Sedona Principle 6, DISH has produced or is ready to produce materials that respond to the Parties' requests but avoid the undue burden of the custodial discovery they demand. Yet Plaintiffs claim they also need confidential, competitively sensitive information from DISH custodians—including its Chairman—to determine whether "DISH has stepped in as a fourth MNO competitor so that competition in the retail wireless market is not substantially lessened." Pls.' Mot. at 9. T-Mobile maintains that it, too, requires similar custodial searches to refute Plaintiffs' claims regarding DISH's status as a competitor. T-Mobile's Mem. at 11. Their separate demands for custodial discovery seek similar confidential commercial information relating to DISH's (i) internal assessments of the retail mobile wireless market and its own competitive status; (ii) wireless pricing and marketing strategies and decision-making; and (iii) spectrum assets, including usage, deployment, and buildout plans. Pls.' Mot. at 8-9; T-Mobile's Mem. at 10-11.

1. The Parties Fail to Establish a Substantial Need for More Information Than DISH Is Required to Share with the Regulators.

DISH objects to the burden of undertaking broad custodial discovery here in part because

it has already produced relevant, non-privileged information that will allow the Parties to assess DISH's status as a competitor in the wireless market. DISH's productions to date include a portion of the quarterly submissions it makes to the Monitoring Trustee. Yin Decl. ¶ 18. These submissions contain information relating to DISH's retail mobile wireless strategy, 5G network buildout and deployment, pricing, subscriber acquisition and retention, and spectrum acquisition and usage. *Id.*

DISH has advised the Parties that it is prepared to produce the remaining quarterly submissions through the Q2 2024 submission upon appropriate modification of the Agreed Confidentiality Order. *Id.* ¶ 28; Yu Decl. Ex. 6. DISH further advised T-Mobile that it is prepared to produce its confidential submissions to the FCC in WT Docket 22-212,[13] which include additional information relating to DISH's facilities-based 5G deployment, upon modification of the Agreed Confidentiality Order. Yu Decl. Ex. 6. These pending productions will allow the Parties to determine DISH's status as a competitor and whether it is complying with the Final Judgment.[14] After all, the Monitoring Trustee is tasked with assessing the very same question and is able to do so without access to DISH's custodial information. Blum Decl. ¶ 12. Likewise, the FCC can assess whether DISH is complying with the buildout requirements of the Final Judgment without access to DISH's custodial data. *Id.* ¶ 17. The regulators charged with overseeing DISH's compliance with the Final Judgment, and who "stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices" are entitled to have

[13] The FCC created WT Docket 22-212 to monitor DISH's compliance with the 5G network buildout requirements of the Final Judgment. *DISH Build-out Monitoring, WT Docket 22-212*, FCC, https://www.fcc.gov/transaction/dish-build-out-monitoring.

[14] Plaintiffs further claim they need custodial discovery regarding DISH's "in-house assessments of its competitive capacity" to learn whether they "differ" from what DISH submits to the Monitoring Trustee. Pls.' Mot. at 9. DISH objects to Plaintiffs' baseless insinuation that DISH is making misrepresentations or otherwise misleading the Monitoring Trustee in violation of its obligations under the Final Judgment.

their views accorded deference. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 224 (S.D.N.Y. 2020).

2. The Parties Fail to Establish a Substantial Need for DISH's Internal Assessments and Plans.

The Parties have also failed to demonstrate a "substantial need" for the proprietary custodial information they have requested as required by Rule 45, particularly given the additional information DISH has agreed to provide subject to modification of Agreed Confidentiality Order. Fed. R. Civ. P. 45(d)(3)(C)(i)-(ii). Indeed, the Parties could ***already*** have received DISH's additional submissions to the Monitoring Trustee but for their failure to take any meaningful steps to address DISH's confidentiality concerns. The Parties cannot logically contend they have a substantial need for additional discovery that would inflict further undue burden on DISH ***before*** reviewing the information DISH has agreed to produce. But that is exactly what the Parties do, insisting that materials they have not yet seen are not enough and demanding broad discovery that delves into DISH's internal assessments of its own competitive position and its strategic spectrum plans. Moreover, by insisting that they need this discovery because DISH was the "linchpin" to the Merger, Plaintiffs want the Court to ignore the salient fact that they have made no claims against DISH and are not wireless customers of DISH. Pls.' Mot. at 1; T-Mobile's Mem. at 2. "'[P]laintiffs are the master of their complaint' and they may generally plead any claims they wish." *Davis v. City of Chicago*, No. 19 CV 3691, 2024 WL 579976, at *6 (N.D. Ill. Feb. 13, 2024) (quoting *Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 557 (7th Cir. 2021)).

Compelling custodial discovery would require DISH to provide its "most confidential and commercially sensitive information to its direct competitor[]…. This fact alone counsels against allowing" such discovery. *Suture Express*, 2014 WL 6478077, at *6. The *Suture Express* court noted the harmful effects that disclosure of competitively sensitive information to a direct

competitor could cause the disclosing party, including the competitor adjusting its own pricing or services to obtain a competitive advantage. *Id*. Further, as the *Concord Boat Corp.* court observed, disclosure of confidential competitively sensitive information between competitors "raises antitrust issues of a different sort" and "weigh[s] against [the court's] compelling the production of the requested documents." *Concord Boat Corp.*, 1996 WL 705260, at *3 (in an antitrust action, denying a motion to compel compliance with a non-party subpoena on grounds of irrelevance, burden, and lack of substantial need); *see also In re Delta Dental Antitrust Litig*., No. 19 CV 6734, 2023 WL 8043400, at *4-5 (N.D. Ill. July 18, 2023) (denying motion to compel confidential internal market analyses because the court was not convinced the parties "need or are entitled to their non-party competitors' confidential market analyses" or "undisputedly sensitive, high-level internal strategy documents . . . ."). While there may be a public interest in illegalities under the antitrust laws, "[a]n antitrust action does not come with an automatic entitlement to force non-parties to reveal their competitive thinking." *In re eBay Seller Antitrust Litig.*, No. C09-0735RAJ, 2009 WL 10677051, at *5 (W.D. Wash. Aug. 17, 2009) (denying motion to compel production of non-party's competitively sensitive documents where the serving party had not shown substantial need).

3. The Parties' Demand for Custodial Discovery Unduly Burdens DISH.

The Parties have identified ten custodians (six of whom overlap) and submitted competing sets of overbroad, yet complex, search terms[15] that are not reasonably tailored to target unique, relevant information but represent classic, and improper, fishing expeditions. *See Delgado v. Donald J. Trump for President, Inc.*, No. 19-CV-11764 (AT)(KHP), 2024 WL 3730499, at *3 (S.D.N.Y. May 13, 2024). The *Delgado* court detailed the burden associated with custodial

[15] Bojedla Decl. Ex. O; Yu Decl. Ex. 3.

discovery before denying a subpoena seeking the same:

> Parties responding to subpoenas must collect relevant ESI in a forensically sound manner, while incurring costs to host the ESI, process the ESI into forms suitable for application of search terms, review and analyze the ESI, apply search terms to the ESI, conduct a legal review of the ESI for privilege, and prepare any applicable privilege log, among other things. Although ESI software has improved over the years it has existed, costs associated with ESI production continue to increase…. And, attorney review time is expensive as well.

Id. Despite T-Mobile's skepticism,[16] quantifying the burden associated with custodial discovery[17] is, itself, burdensome, but the Parties have left DISH no choice but to do so.

Like many organizations, DISH's internal discovery team uses Google Vault ("Vault") for discovery. Declaration of Michael L. Hastings ("Hastings Decl.") ¶ 4. Vault returns hit counts for simple search terms run across email messages stored in Gmail, which is DISH's email platform. *Id.* ¶ 6. If DISH is required to evaluate search terms that are too complex for Vault, the discovery team has to export data to its discovery vendor, which means incurring hosting and processing costs. *Id.* ¶ 15.

Here, the Parties proposed dueling sets of broad search terms that are too complex for Vault's limited search functionality. *Id.* ¶ 12. To evaluate the search terms without incurring vendor costs, DISH's discovery team spent approximately 15 hours simplifying and re-formulating the terms so they could be run across email messages stored in Gmail to obtain hit counts. *Id.* Vault returned more than 2.6 million emails that hit on the simplified version of Plaintiffs' search terms for January 1, 2017 through June 30, 2024. *Id.* ¶ 13. Vault returned more than 372,000 emails that hit on the simplified version of T-Mobile's search terms for April 1, 2020[18] through

[16] T-Mobile's Mem. at 11 ("DISH refused to even ascertain its burden, claiming that determining the burden is itself too burdensome.").
[17] Neither party defines "custodial discovery." For purposes of quantifying its burden here, DISH defines "custodial discovery" as discovery of email and attachments stored in Gmail and associated with a specific DISH employee.
[18] Yu Decl. Ex. 3.

June 30, 2024. *Id.* These volumes reflect hits in email messages only and are expected to expand by 50% to account for email attachments, resulting in approximately 3.9 million emails and attachments with hits on Plaintiffs' simplified search terms and approximately 558,000 emails and attachments with hits on T-Mobile's simplified search terms. *Id.* ¶ 14.

If DISH were compelled to proceed with custodial discovery here, the discovery team would export the defined scope of data to its discovery vendor, which would use discovery software to process the data and make it fully searchable, while also removing system files and de-duplicating the data set to defensibly reduce the overall volume of data subject to further discovery. *Id.* ¶ 8. The vendor would then run search terms against the resulting data set to create a review set, which would be reviewed by a team of contract attorneys. *Id.* ¶ 9.

Estimated Hosting and Review Costs for Plaintiffs' Custodial Discovery

To further quantify the undue burden imposed by the Parties' demand for custodial discovery, DISH obtained cost estimates from its discovery vendor for hosting and review. *Id.* ¶ 16. The vendor estimated that DISH would incur [redacted] in hosting fees based on the assumptions that (i) DISH would export 264 GB of data, which represents the Gmail data for Plaintiffs' custodians for January 1, 2017, to June 30, 2024; (ii) 20% of this volume would be removed during processing as duplicative; and (iii) the data would need to be available for six months. *Id.* ¶ 17.

The vendor estimated that DISH would incur [redacted] in managed review fees. *Id.* This estimate is based on the assumptions that (i) 3.9 million emails with attachments collected from Gmail for Plaintiffs' custodians for January 1, 2017 to June 30, 2024, include hits on Plaintiffs' search terms; (ii) 1.5 million emails with attachments would remain for review assuming a 60% de-duplication rate; and (iii) DISH would conduct a traditional linear review. *Id.* The vendor estimated that DISH's managed review fees would reduce to [redacted] if DISH instead uses a

continuous active learning ("CAL") model for review. *Id.*

Estimated Hosting and Review Costs for T-Mobile's Custodial Discovery

DISH's vendor estimated that DISH would incur [redacted] in hosting fees based on the assumptions that (i) DISH would export 238 GB of data, which represents the Gmail data for T-Mobile's custodians for April 1, 2020 to June 30, 2024; (ii) 20% of this volume would be removed in processing as duplicative; and (iii) the data would need to be available for six months. *Id.* ¶ 18.

The vendor estimated that DISH would incur [redacted] in managed review fees based on the assumptions that (i) 557,816 emails with attachments collected from Gmail for T-Mobile's custodians for April 1, 2020 to June 30, 2024 include hits on T-Mobile's search terms; (ii) 223,126 emails with attachments will make up the review set assuming a 60% de-duplication rate; and (iii) DISH would conduct a traditional linear review. *Id.* The vendor estimated that DISH's managed review fees would be reduced to [redacted] if DISH instead uses a CAL model for review. *Id.*

If DISH were compelled to proceed with the Parties' proposed custodial discovery, DISH's discovery vendor estimated it will take up to six months, will cost DISH approximately [redacted] in hosting fees, and approximately [redacted] in review fees. *Id.* ¶¶ 17-18. These estimates do not include costs for privilege review and logging, nor do they include costs for production. *Id.* ¶ 19. Compelling a non-party to incur such significant costs to conduct overly broad, marginally relevant, and cumulative custodial discovery is an undue burden that far outweighs any benefit the Parties may receive from wading through DISH's documents based on the hope they might catch *something*. DISH should not be compelled to facilitate these fishing expeditions.

B. <u>The Parties' Demands Do Not Overcome DISH's Well-Founded Objections and Should Be Denied</u>.

1. Pre-Merger Documents Are Not Relevant.

As a threshold issue, the Parties improperly use their subpoenas to seek pre-Merger discovery that the Court has already determined is irrelevant to their claims. Memorandum Op. and Order at 5 (Nov. 2, 2023), ECF No. 114. Specifically, the Parties seek discovery beginning in 2017[19] (Bojedla Decl. Ex. A; Yu Decl. Ex. 1), three years before the Merger was completed[20] and in direct contravention of the fact that the Court has ***twice*** weighed in on the relevant time period for this litigation, in separate opinions directed at each Party.

When denying T-Mobile's Motion to Dismiss, Judge Durkin stated that "this case does not focus on the wisdom of the merger, but rather its consequences." Memorandum Op. and Order at 5, ECF No. 114. The Court specifically defined the temporal scope of this litigation: "Plaintiffs' suit is focused on the effects of the merger…after it was effectuated in April 2020." *Id.* at 40. When denying a prior attempt by Plaintiffs to compel pre-Merger discovery, Judge Cole reiterated Judge Durkin's guidance, stressing that "[i]t is imperative not to forget that this case is about what happened *after* the merger—as the plaintiffs, themselves, have emphasized in the past." Memorandum Op. and Order at 10, ECF No. 206 (italics in original).

Yet each Party is moving to compel a non-party to produce irrelevant pre-Merger discovery. Notably, Plaintiffs ***admit*** their suit is about the "effects" of the Merger, not what happened before. Pls.' Mot. at 2. They begrudgingly agree "in general" with the Court's past statements about the irrelevance of pre-Merger discovery but boldly assert that, despite the Court's clear statements to the contrary, pre-Merger discovery is nevertheless relevant here. Pls.' Mot. at 13. But the cases Plaintiffs cite to support their pre-Merger discovery relevance arguments, in which courts found the past beliefs and conduct of a ***party*** accused of anticompetitive conduct to

[19] T-Mobile applied the April 1, 2020 start date only to those requests where it seeks custodial discovery. Yu Decl. Ex. 3.

[20] *See Concord Boat Corp.,* 1996 WL 705260, at *3 (finding that a subpoena seeking six years of information from a non-party was unduly burdensome).

be relevant, are entirely inapposite. Pls.' Mot. at 13 n.29. Here, unlike those cases, DISH is not a party to this litigation, and Plaintiffs bring no claims of anticompetitive conduct against DISH. T-Mobile's pre-Merger relevance arguments, on the other hand, must also fail because—in repeatedly contending throughout its Motion that it needs DISH's information to refute Plaintiffs' claims and assert its own defenses[21]—it directly and blatantly contradicts the Court's statements that pre-Merger information is irrelevant to the claims and defenses of this case. Moreover, neither Plaintiffs nor T-Mobile explains why the Court's determinations regarding the irrelevance of pre-Merger information would not apply to the information sought from DISH.

The Court should once again disabuse the Parties of their notion that pre-Merger discovery is relevant. If the Court determines that any further discovery is needed from DISH beyond what it has already stated it will produce upon appropriate modification of the Agreed Confidentiality Order, DISH respectfully requests that the Court limit such discovery to the post-Merger period beginning April 1, 2020.

2. T-Mobile's "Go-Gets" Are Not Proportional to the Needs of This Case.

In addition to custodial data, T-Mobile asks the Court to compel DISH to produce a variety of so-called "discrete 'go get'" documents, asserting they are "readily identifiable and likely can be produced with minimal burden to DISH." T-Mobile's Mem. at 8-9. T-Mobile makes this assertion as if it is an obvious fact and not an unsupported statement requiring evidence of its veracity. *Silversun Indus., Inc. v. PPG Indus., Inc.*, 296 F. Supp. 3d. 936, 939 (N.D. Ill. 2017) ("[l]awyers' talk is no substitute for data") (quoting *Phillips v. Allen*, 668 F.3d 912, 916 (7th Cir. 2012)). But T-Mobile provides no such evidence. DISH has explained to T-Mobile that the information requested is either not maintained by DISH or is available from other sources. Yu

[21] T-Mobile's Mem. at 1-2, 4-5, 7-8, 9-11, 13-15.

Decl. Ex. 6; Yin Decl. Ex. M. T-Mobile's insistence that DISH produce these "go gets" is yet another attempt to litigate this case by burdening DISH.

One "go get" category T-Mobile seeks is a granular breakdown of DISH's wireless profits and costs of providing wireless services, including the amount AT&T charged and DISH paid for access to AT&T's wireless network. T-Mobile's Mem. at 9. T-Mobile argues it needs this information to refute Plaintiffs' allegations regarding DISH's operating costs and to assess DISH's competitiveness. *Id.* at 9-10. DISH's wireless profits and costs of providing wireless services are publicly available in its Form 10-K. T-Mobile does not demonstrate a substantial need for more than the publicly available information in DISH's SEC filings combined with the information provided to the Monitoring Trustee and FCC, who are charged with assessing DISH's competitiveness under the Final Judgment. The only explanation T-Mobile provides is that DISH's publicly available SEC filings "do not disclose the breakdown that T-Mobile requested." T-Mobile "is perfectly capable of hiring experts and consultants who can do sophisticated studies" on DISH's publicly available financial information beyond just "what its outside counsel can find" out. *In re Apple iPhone Antitrust Litig.*, 2020 WL 5993223, at *5. T-Mobile has failed to show a substantial need for this information or that this information cannot be obtained from other sources.

In another "go get" request, T-Mobile demands that DISH search for documents sufficient to show the historical prices, plans, and features of DISH's mobile wireless plans to allow T-Mobile to "evaluate the plan's comparative value." T-Mobile's Mem. at 10. While T-Mobile says the plan information in DISH's structured data is not good enough, DISH has offered to produce responsive information in the form in which it is ordinarily maintained. Fed. R. Civ. P. 45(e)(1)(B); *see also* Memorandum Op. and Order at 5, ECF No. 206 (quoting The Sedona Principles, Principle 6). DISH should not be compelled to produce more than it has offered.

Finally, T-Mobile states it needs DISH's data and computation methodology for Customer Lifetime Value ("CLV"). T-Mobile's Mem. at 9; T-Mobile's Request No. 33. DISH has pointed T-Mobile to publicly available information and DISH's prior productions, and has informed T-Mobile that it does not calculate CLV on the requested subscriber-by-subscriber basis. Yin Decl. Ex. M. DISH also advised T-Mobile in conferral that it viewed its concerns regarding the insufficient protections in the Agreed Confidentiality Order as a threshold issue to additional production. Yin Decl. ¶ 39. As discussed below, T-Mobile largely dismissed those concerns and filed its Motion. DISH should not be compelled to produce the requested information, at least not without meaningful conferral once it is assured its confidential information will be properly protected.

3. MVNO Structured Data Is Not Proportional to the Needs of This Case and Should Be Denied.

Upon appropriate modification of the Agreed Confidentiality Order, DISH also is prepared to produce structured data for MNO Boost. The Parties are not satisfied with this offer and seek production of structured data regarding DISH's MVNO brands: Gen Mobile ("Gen"), Ting Mobile ("Ting"), and Republic Wireless.[22] Pls.' Mot. at 14 n.31; T-Mobile's Mem. at 7. Compelling DISH to produce MVNO structured data would be disproportionate to the needs of this case. Boost subscribers account for approximately [redacted] of DISH's wireless customers.[23] Blum Decl. ¶ 10. Consequently, Gen and Ting subscribers represent not only a small portion of DISH's wireless subscribers but of the overall MVNO market. Each party insists it needs DISH's MVNO structured

[22] DISH has informed the Parties that as of August 2023, all Republic Wireless customers were transitioned to Boost Mobile and Republic Wireless was deprecated as a brand. Bojedla Decl. Ex. M at 5; Yu Decl. Ex. 6 at 6. DISH no longer maintains separate data for former Republic Wireless customers outside of the data it maintains for Boost Mobile. *Id.*

[23] As of December 31, 2024, DISH had 6.995 million wireless subscribers. EchoStar Corp. Form 10-K for the Fiscal Year Ended Dec. 31, 2024, at 79 (Feb. 27, 2025), https://ir.echostar.com/static-files/533bc2b3-7658-4dba-9680-3068232bca69.

data to help settle their dispute regarding the definition of the retail wireless market and the place of MVNO subscribers within it. Pls.' Mot at 14-15; T-Mobile's Mem. at 5. But the small segment of the retail wireless and MVNO markets represented by Gen and Ting subscribers will not materially affect the Parties' experts' abilities to effectively assess market definition. It would be disproportionate to compel DISH to undertake the burden of retrieving structured data that will have no impact on the resolution of this case.

Compelling DISH to produce Gen and Ting structured data also would be unduly burdensome. Gen and Ting structured data exist separate from Boost structured data, in systems maintained by third-party vendors who provide operational, billing, and other back-end support for Gen and Ting. Declaration of Jose Andrade ("Andrade Decl.") ¶¶ 6-7. DISH would need to coordinate with and receive support from those vendors to collect Gen and Ting structured data for production. *Id.* ¶ 7. The level of vendor support necessary to retrieve Gen and Ting structured data for this purpose may not be within the scope of DISH's current agreements with those vendors. *Id.* ¶ 7.

DISH has minimal experience with collecting Ting structured data and would need to develop a process if compelled to produce. *Id.* ¶ 24. If compelled to produce historical Gen structured data, the specifics of how the data is stored and maintained require a complex manual process of identifying the various wireless plan offerings during the responsive time period and when they were offered, mapping those plan offerings and the periods in which they were offered to create a timeline of plan offerings, and retrieving the structured data in separate tranches corresponding to changes in plan offerings. *Id.* ¶ 12. To retrieve the data, Gen personnel would likely have to create custom Structured Query Language ("SQL") queries that would need to be tested first. *Id.* ¶ 18. After Gen data is extracted, DISH personnel would then need to validate the

data to ensure that the extracted data is correct and useful. *Id.* ¶ 20. Once a process is developed for extracting Ting data, that data would likewise have to be validated. *Id.* ¶ 8.

Preparing Gen and Ting structured data for production is not a task that falls within the purview of DISH's internal discovery team. Hastings Decl. ¶ 20. The DISH personnel who would be responsible for preparing Gen and Ting structured data for production have job responsibilities unrelated to supporting litigation and discovery. Andrade Decl. ¶ 5. Production of this data would require a significant and sustained time commitment, disrupting DISH's business by diverting personnel from carrying out the needs of their day-to-day job responsibilities. *Id.* ¶ 8. If DISH were compelled to produce Gen and Ting structured data, it may require up to six months to prepare responsive structured data for production in a manner that minimizes this business disruption. *Id.* ¶ 9.

Finally, it is unclear why the Parties are demanding this information. T-Mobile argues that it needs DISH's MVNO data to respond to Plaintiffs' allegations (T-Mobile's Mem. at 5), but Plaintiffs' claims relate solely to competition in the MNO market, not the MVNO market. Compl. ¶¶ 30-31; *see Davis*, 2024 WL 579976, at *6 ("plaintiffs are the master of their complaint"). Moreover, T-Mobile's own CEO told his Board of Directors that MVNOs have no impact on the competitiveness of the MNO market. Compl. ¶ 31.[24] When information is irrelevant, then "*any burden whatsoever*" on DISH to produce such information …is "by definition undue." *Builders Ass'n of Greater Chicago*, 2001 WL 664453, at *8 (italics in original). The Court should not compel DISH to produce MVNO structured data.

[24] Quoting the notes of T-Mobile Board member Thorsten Langheim that, according to T-Mobile CEO John Legere, "T-Mobile 'has no concern or doesn't see impact on post-paid phone business from cable MVNO upcoming launches.'"

4. Subscribers' Addresses Are Not Proportional to the Needs of This Case and Should Be Denied.

Plaintiffs ask the Court to compel DISH to include subscribers' Census Block Groups with its production of structured data. Pls.' Mot. at 15. In correspondence, DISH informed Plaintiffs that Boost structured data captures subscribers' ZIP codes. Bojedla Decl. Ex. Q. If Boost structured data does not capture subscribers' Census Block Groups, Plaintiffs ask the Court to compel DISH to produce the addresses of over six million wireless subscribers. Pls.' Mot. at 15. DISH can confirm that Boost structured data does not capture information for subscribers' Census Block Groups.[25]

The private addresses of DISH's wireless subscribers are not only DISH's highly sensitive confidential commercial information, but also each subscriber's confidential personal information. DISH complies with all applicable privacy laws and regulations and takes rigorous precautions to maintain customers' privacy and safeguard their confidential personal information. Blum Decl. ¶ 20. Disclosure of its customers' confidential personal information could harm not only DISH but, more importantly, the customers whose information was disclosed. *Id.*

Plaintiffs claim they need Census Block Group data to allow their "experts to assess the impact of the merger on the retail wireless market." Pls.' Mot. at 15. They do not explain why their experts are unable to assess the impact of the Merger using ZIP code information. Nor do they explain why assessing the impact of the Merger requires violating the privacy rights of over six million DISH customers. Plaintiffs have not met their burden of showing a substantial need for the confidential information of both DISH and its customers.

[25] Plaintiffs filed their Motion to Compel without meaningful conferral regarding their eleventh-hour question to DISH as to whether Boost structured data captures Census Block Group information. This issue otherwise may have resolved.

C. The Court Should Not Compel DISH to Produce Highly Confidential Competitively Sensitive Information to a Competitor Without Proper Safeguards.

The Court should not compel DISH to produce its highly confidential competitively sensitive information, including information about pricing and cost data,[26] strategic planning and forecasts,[27] and customer acquisition and retention[28] to a direct competitor without proper safeguards. In *FTC v. Advocate Health Care Network*, the Court recognized the risk of harm arising from unfettered disclosure of confidential information to a competitor and granted non-party intervenors' motion to amend the confidentiality order in that case. *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 673-674 (N.D. Ill. 2016) (Cole, M.J.). The Court should order similar modification to the Agreed Confidentiality Order entered in this case because it fails to adequately protect DISH's highly confidential competitively sensitive information or comport with the firewall provision of the Final Judgment.[29]

Specifically, the Agreed Confidentiality Order does not prevent the disclosure of DISH's highly sensitive confidential information to T-Mobile's in-house counsel involved in the marketing, distribution, or sale of competing products. Rather, it allows disclosure of Highly Confidential Information to "designated in-house counsel agreed to by the Parties who have responsibility for the preparation and trial of the action, provided that individuals do not regularly participate in the commercial business activities of the party." Agreed Confidentiality Order ¶ 4.B.2.a. Precisely what activities are "commercial business activities" is left undefined and unexplained. In conferral, DISH stated that modification of the Agreed Confidentiality Order to include an Outside Counsel Only ("OCO") designation would allow DISH to produce highly

[26] Plaintiffs' Request Nos. 7, 8, 13, 14, 15, 16, 18, 25; T-Mobile's Request Nos. 15, 16, 25, 30.
[27] Plaintiffs' Request Nos. 6, 7, 9, 10, 11, 12, 13, 14, 22; T-Mobile's Requests Nos. 1, 2, 10, 21, 24.
[28] Plaintiffs' Request Nos. 13, 19, 22; T-Mobile's Request Nos. 17, 18, 20, 21, 24.
[29] Blum Decl. Ex. A at 29-30, Section XIII, Firewall.

sensitive information without risking the harm of disclosure to its direct competitor. Yin Decl. ¶¶ 28, 39.

Disclosure of DISH's highly sensitive commercial information to T-Mobile without adequate safeguards would cause demonstrable harm to DISH. Blum Decl. ¶ 18. Indeed, the Competitive Impact Statement and the Final Judgment recognized the importance of shielding DISH's competitively sensitive information from competitor T-Mobile. *Id*. Exs. A and B. The Final Judgment mandated that DISH and T-Mobile "shall implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed…to components or individuals within the respective companies involved in the marketing, distribution, or sale of competing products." *Id.* Ex. A at 29-30.

Plaintiffs have said they do not oppose modification of the Agreed Confidentiality Order to adequately safeguard DISH's highly confidential competitively sensitive information but acknowledge that "T-Mobile may." Pls.' Mot. at 14. In fact, T-Mobile does. T-Mobile disputes the applicability of the Final Judgment's firewall provision to any discovery produced here by DISH. Yin Decl. ¶ 39. While T-Mobile proposed modifications to the Agreed Confidentiality Order "to allay DISH's concerns" and "in the spirit of compromise," these modifications do not in fact address or mitigate DISH's concerns. *Id.* ¶¶ 41, 44, Exs. I and K. T-Mobile proposes restricting access to DISH's Highly Confidential Information within T-Mobile to "four (4) in-house counsel…who do not participate in the Competitive Decision-Making at the Defendant,"[30] but identified in-house counsel Heather Johnson and January Kim—who are directly involved in

[30] T-Mobile's proposal defines "Competitive Decision-Making" as "decision-making relating to a competitor, potential competitor, customer, or distribution partner including decisions regarding contracts, marketing, pricing, product or service development or design, product or service offerings, research and development, or licensing, acquisition, or enforcement of intellectual property rights." Yin Decl. ¶ 41 Ex. I, ¶ 2.A.

competitive decision making at T-Mobile—as two of the four counsel[31] it intends to designate. *Id.* ¶ 41, Ex. I. DISH understands that Ms. Johnson leads T-Mobile's antitrust efforts and that Ms. Kim reports to her. *Id.* ¶¶ 41, 49-50, Exs. N, O. Involvement in mergers and acquisitions is inherently within the scope of competitive decision-making. *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 4 (D.D.C. 2015) (denying in-house counsel responsible for evaluating mergers and acquisitions access to competitors' confidential information because "[c]learly, there is some risk of inadvertent use or disclosure of a competitor's confidential information when a lawyer's responsibilities include evaluating competitors for potential acquisition.")

"[M]erely insisting that one is not 'involved in competitive decision-making' cannot pretermit inquiry into the underlying facts or serve as a shibboleth the mere invocation of which permits access to Highly Confidential Information." *Advocate Health Care Network*, 162 F. Supp. 3d at 669 (N.D. Ill. 2016) (denying in-house counsel access to competitors' highly confidential information where social media posts contradicted their declarations claiming no role in competitive decision-making). DISH does not mean to suggest that T-Mobile's in-house counsel would deliberately misuse DISH's highly confidential competitively sensitive information. Still, the risk remains that "such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." *Silversun Indus., Inc. v. PPG Indus., Inc.*, 296 F. Supp. 3d at 941 (denying in-house counsel for defendant accused of misappropriating trade secrets access to plaintiff's current, sensitive, and significant trade secret information where defendant could not show counsel had no role in competitive decision-making). "The inescapable reality is

[31] T-Mobile has not revealed the names of the other two in-house counsel it would designate under its proposal, merely telling DISH counsel that T-Mobile "will let you know if [*sic*] other attorneys that may need to access confidential materials." Yin Decl. ¶ 41 Ex. I. It is unreasonable for T-Mobile to expect DISH to agree to its proposal without knowing who would be permitted to access DISH's highly confidential competitively sensitive information.

that once an in-house counsel acquires highly confidential information, that individual cannot rid herself of that knowledge." *Silversun* at 946. DISH should not be forced to endure the risk that its highly confidential information might inadvertently be disclosed to one of its "foremost competitor[s]." *Advocate Health Care Network*, 162 F. Supp. 3d at 670. The Court should order appropriate modification of the Agreed Confidentiality Order to adequately protect DISH's highly confidential competitively sensitive information.

D. If the Court Orders Additional Discovery, DISH Should Be Protected from Significant Expense.

If compelled to comply with the Parties' requests for custodial discovery in whole or in part, DISH will need to devote significant time and will incur reasonable and significant costs. Hastings Decl. ¶¶ 17-18, Ex. A. Rule 45 requires that an order compelling production "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(d)(2)(B)(ii); *Stormans Inc. v. Selecky*, No. C07–5374 RBL, 2015 WL 224914, at *4 (W.D. Wash. Jan. 15, 2015) (finding that Rule 45(d)(2)(B)(ii) compliance expenses included attorneys' fees for production-related legal tasks); *Gumwood HP Shopping Partners, L.P. v. Simon Property Group*, No. 3:11-cv-00268-JD-CAN, 2014 WL 12780298, at *4 (S.D. Ind. Nov. 20, 2014) (ordering serving party to pay for non-party's production of search results that "generated voluminous data requiring substantial costs to locate, identify, and prepare for production").

Plaintiffs handwave away the significant time and expense involved in their requested custodial productions by referring to DISH's "resources," "market capitalization of over $8 billion," and the capabilities of "modern document review software" as if those factors render the verifiable costs of production a nullity. Pls.' Mot. at 12-14. In contrast, T-Mobile implicitly acknowledges that cost-shifting would be proper, as the same courts that "routinely direct[ed]

custodial searches of non-parties" also ordered cost-shifting to protect those non-parties from significant expense. T-Mobile's Mem. at 11; *Rochester Drug Co-Operative v. Mylan Inc*., No. 22-MC-0007 (ECT/JFD), 2022 WL 1598377, at *12 (D. Minn. May 20, 2022) (ordering cost-shifting for production of information from legacy backup systems); *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 929-930 (N.D. Ill. 2010) (ordering cost-shifting for search and production of custodial data); *Bailey Indus., Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 673-674 (N.D. Fla. 2010) (ordering cost-shifting for photocopying of hardcopy documents and search and production of electronic custodial data). DISH respectfully requests that if the Court grants either Motion to Compel custodial discovery, in whole or in part, the Court also orders cost-shifting from the successful moving Party to protect DISH from the significant expense of custodial production.

E. <u>DISH Should Be Granted Leave to Seek Protection from Further Discovery</u>.

In its responses and objections, DISH told the Parties that it was prepared to produce reasonable, relevant, and proportional discovery appropriate for a non-party. Instead of first evaluating DISH's full production to determine their need for additional information, the Parties brought their simultaneous Motions to Compel. Even if the Parties prevail here, it will not be the end of the discovery burdens they intend to place on DISH. Although T-Mobile filed its comprehensive Motion in tandem with Plaintiffs "[t]o avoid burdening the Court and DISH with iterative motions," T-Mobile has made clear that it "will certainly seek" to depose DISH Chairman Charlie Ergen. T-Mobile's Mem. at 3, 13. Plaintiffs likely will want to issue their own subpoena then. Indeed, one can presume that the Parties will seek to depose all the DISH employees whose custodial data they seek in their Motions,[32] at which point DISH and the Parties will be back before

[32] T-Mobile indicates that it will not stop with the deposition of Mr. Ergen by noting that one reason T-Mobile requires custodial searches is to determine "who made the decisions Plaintiffs have put squarely at issue in this case." T-Mobile's Mem. at 12.

the Court again, arguing over the burden of those depositions.

The Court has previously remarked on the strain that runaway discovery places on judicial resources. Memorandum Op. and Order at 6, 8, ECF No. 206. "[I]t is for the court to assure that parties do not dictate the scope of discovery or that things get out of hand." Memorandum Op. and Order at 4-5 n.3, ECF No. 206. As a non-party whose "unwanted burden thrust upon [it] is a factor entitled to *special weight* in evaluating the balance of competing needs," DISH is entitled to know when the unwanted burden placed upon it—and the Court—will be removed. *Uppal*, 124 F. Supp. 3d at 813 (italics in original). Rather than wait for the Parties to begin issuing their deposition subpoenas, non-party DISH per Local Rule 5.6[33] respectfully requests that the Court allow DISH to move for a protective order setting appropriate limits on further discovery from DISH.[34]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' and T-Mobile's Motions to Compel in their entirety. Additionally, the Court should order the Agreed Confidentiality Order be modified to protect DISH's (and other non-parties') highly confidential competitively sensitive information. If the Court orders further discovery from DISH, the Court should protect non-party DISH from significant expense resulting from compliance. Finally, the Court should allow DISH to move for a protective order setting appropriate limits on future discovery from DISH.

[33] "No pleading, motion [except for motion to intervene], or other document shall be filed in any case by any person who is not a party thereto, unless approved by the court." N.D. Ill. L.R. 5.6.

[34] DISH has not yet sought the Court's approval to seek a protective order in the hope that the parties might agree on a resolution that will avoid another "typical 'I want this-I don't want to give it to you' discovery dispute." Minute Entry (Feb. 26, 2025), ECF No. 241.

Dated: April 11, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I electronically filed a copy of the foregoing through the Court's CM/ECF system, which will send notifications of the filing to all counsel of record.

/s/ *Monica McCarroll*
Monica McCarroll