**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

*Plaintiffs*,

- against -

DEUTSCHE TELEKOM AG, *et al.*,

*Defendants*.

19 Civ. 5434 (VM)

# MEMORANDUM OF LAW IN SUPPORT OF MOTION OF NON-PARTIES COMCAST CORPORATION, CHARTER COMMUNICATIONS, INC., AND ALTICE USA, INC. TO MODIFY THE STIPULATED INTERIM PROTECTIVE ORDER

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Non-parties Comcast Corporation ("Comcast"), Charter Communications, Inc. ("Charter"), and Altice USA, Inc. ("Altice"; collectively, the "Cable MVNOs") move pursuant to Paragraph B(2) of the Stipulated Interim Protective Order entered by the Court on June 28, 2019 (the "Stipulated Order," ECF 69) to modify the Stipulated Order by replacing it with the Proposed Amended Protective Order submitted as Exhibit 1 to this motion (the "Proposed Order").[1]

## PRELIMINARY STATEMENT

The Stipulated Order is inadequate because it permits disclosure of the Cable MVNOs' highly confidential and competitively sensitive information to employees of the Defendants—according to Defendants, their direct competitors. The Stipulated Order's lax protection of confidential information falls far short of the norm in recent antitrust merger litigations and is contrary to the typical approach to protective orders in antitrust litigation generally, including in other cases before this Court. It is also contrary to the terms of the protective order adopted by the Federal Communications Commission ("FCC") *in this precise merger*, which permits the disclosure of highly confidential third-party data *only to outside counsel*. Unless strengthened significantly, the Stipulated Order creates a substantial risk that this litigation—the objective of which is *to preserve* competition—will itself actually cause harm to the competitive process.

As explained below, Defendants have argued that the Cable MVNOs compete directly with them in the retail wireless business, and the Cable MVNOs are also wholesale customers or potential customers of Defendants. During the antitrust and regulatory review of this merger, the Cable MVNOs disclosed large amounts of extremely sensitive information concerning their competitive plans for their mobile wireless businesses and their negotiations and actual or

[1] A redline comparison of the Stipulated Order and the Proposed Order is submitted as Exhibit 2. All exhibits are attached to the Declaration of Arthur J. Burke filed contemporaneously with this motion.

potential relationships with mobile network operators ("MNOs"), including Sprint. Such materials possess the utmost commercial and strategic sensitivity for the Cable MVNOs. Disclosure of this information directly to Defendants' employees, as the Stipulated Order permits, risks irreparably harming the Cable MVNOs in future competition and negotiations.

Despite the harm resulting from disclosure of such sensitive information to Defendants, the Stipulated Order permits every item of information the Cable MVNOs have provided to the government to be made available in its entirety to *sixteen* employees of Defendants (four each from T-Mobile, Sprint, and their parents Deutsche Telekom and SoftBank), selected by Defendants from their in-house lawyers. Stipulated Order, ¶ E(1)(i). The Stipulated Order contains no assurance that those lawyers will be precluded from involvement in strategic or competitive decision-making. Moreover, the scant protection that the Stipulated Order offers with respect to those employees will expire after only nine months. *Id.* After March 2020, the same employees who had unfettered access to the Cable MVNOs' highly sensitive materials will be unlimited in their freedom to advise the Defendants' business leaders on any topics, *even their plans to compete and negotiate with the Cable MVNOs*.

As noted, the provision of the Stipulated Order giving in-house counsel blanket access to non-party "Confidential Information"[2] is out of the ordinary for merger litigation—and antitrust litigation more generally—and it is inconsistent with the FCC protective order in this matter. There is no reason why this Court should afford less protection to non-party information in this case than is typical for non-party information in similar litigated merger challenges or other

[2] The Stipulated Order defines Confidential Information, with an exception not at issue here, as "(i) any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(1)(G); or (ii) any document, transcript, or other material containing such information that has not been published or otherwise made publicly available." Stipulated Order ¶ A(1)(b).

antitrust litigation. Accordingly, the Court should strike the provision of the Stipulated Order permitting Confidential Information to be shared with Defendants' in-house counsel.

Further, the Stipulated Order is also inadequate with respect to the destruction of Confidential Information by the parties. All recipients of non-party Confidential Information should be required to return or destroy non-party materials within 30 days after the final termination of this litigation, rather than merely use "good faith" efforts to do so within 90 days, as the parties have stipulated.

For these reasons and those set forth below, the Court should replace the Stipulated Order with the Proposed Order. The Cable MVNOs understand that the States take no position and/or do not object to the changes reflected in the Proposed Order.[3]

## BACKGROUND

Comcast, Charter, and Altice are nascent players in the retail wireless business, which is dominated by the "Big 4" MNOs: Verizon, AT&T, T-Mobile, and Sprint. The Cable MVNOs are traditional providers of cable television and broadband internet service, which now offer, or plan to offer, mobile wireless services to their customers. Comcast and Charter introduced retail wireless products in 2017 and 2018, respectively, and Altice anticipates launching its own product this summer. At the end of the first quarter of 2019, the Cable MVNOs collectively had

[3] Before filing this motion, the Cable MVNOs met and conferred with the parties, as required by Paragraph B(2) of the Stipulated Order. Burke Decl. ¶ 2. On July 2, 2019, counsel for T-Mobile suggested the possibility of a two-tiered protective order that would have permitted non-"Highly Confidential" information to be provided to in-house counsel. *Id.* On July 3, in response to this suggestion and in an effort to reach a compromise, the Cable MVNOs circulated a proposed two-tiered protective order. *Id.* Defendants did not respond until Sunday, July 7 at 11:15 p.m.—the eve of the deadline for motions under Paragraph B(2)—when they rejected the proposal entirely. *Id.*

On July 8, the Cable MVNOs had further discussions with counsel for the States concerning the language of the Proposed Order. The Proposed Order contains certain changes not specifically discussed in this brief, reflected in the redline in Paragraphs A(1)(b), E(7), and E(9)(f), as to which the Cable MVNOs understand that the States take no position and/or do not object. Earlier versions of those proposed changes were contained in the Cable MVNO's July 3 proposal, which Defendants rejected on July 7.

approximately 1.7 million retail wireless customers, compared to T-Mobile's and Sprint's more than 100 million customers.[4]

Unlike MNOs, the Cable MVNOs do not own wireless networks. Instead, the Cable MVNOs purchase access to the MNOs' radio access networks, which they then use to offer their own wireless services to retail customers. Such arrangements are referred to as "mobile virtual network operator" or "MVNO" arrangements. Accordingly, the Cable MVNOs are simultaneously (1) potential competitors of T-Mobile and Sprint in the retail wireless business and (2) wholesale wireless customers or potential customers of T-Mobile and Sprint.

Although Cable MVNOs have very few wireless customers compared to the "Big 4," Defendants have argued that the Cable MVNOs are significant to assessing the competitive impact of the proposed merger. For example, T-Mobile and Sprint have argued that their proposed transaction is not really a "4-to-3" merger because the Big 4 MNOs compete with Cable MVNOs.[5] T-Mobile and Sprint have also argued that the merger is necessary to foster investment in 5G mobile broadband technology which, according to them, will successfully

[4] *See* T-Mobile US, Inc., Quarterly Report (Form 10-Q), at 41 (Apr. 25, 2019), https://www.sec.gov/ix?doc=/Archives/edgar/data/1283699/000128369919000077/tmus03312019form10-q.htm (59.08 million prepaid and postpaid customers as of March 31, 2019); Sprint Corp., Annual Report (Form 10-K), at 40 (May 29, 2019), https://www.sec.gov/Archives/edgar/data/101830/000010183019000022/sprintcorp201810-k.htm (41.59 million prepaid and postpaid subscribers as of March 31, 2019); Comcast Corp., Quarterly Report (Form 10-Q), at 30 (Apr. 25, 2019), https://www.sec.gov/Archives/edgar/data/902739/000116669119000010/cmcsa-3312019x10q.htm (1.405 million wireless lines as of March 31, 2019); Charter Communications, Inc., Quarterly Report (Form 10-Q) at 34 (Apr. 30, 2019), https://www.sec.gov/Archives/edgar/data/1091667/000109166719000085/chtr3312019-10q.htm (310,000 mobile lines as of March 31, 2019).

[5] *See*, *e.g.*, T-Mobile US, Inc. and Sprint Corporation, Description of Transaction, Public Interest Statement, and Related Demonstrations, at 105, *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, FCC WT Docket No. 18-197 (June 18, 2018), https://ecfsapi.fcc.gov/file/10618281006240/Public%20Interest%20Statement%20and%20Appendices%20A-J%20(Public%20Redacted)%20.pdf (arguing that "Comcast and Charter [a]re [a]ggressively [e]ntering [w]ireless" and "should be included in an assessment of the transaction's implications for competition").

compete with wireline broadband providers like the Cable MVNOs in providing high-speed internet access to residential consumers.[6]

For their part, the States allege that the merger of T-Mobile and Sprint will reduce competition in the sale of access to MVNO arrangements, harming MVNOs and ultimately increasing prices and decreasing quality and innovation for retail wireless customers. Am. Compl. (ECF 65), ¶¶ 85-89. The States also allege that Sprint was the only U.S. MNO willing to offer MVNOs "core control"—which "gives MVNOs more control over the economics of the relationship and allows MVNOs freedom to innovate and provide subscribers with new and improved services"—and they allege that Sprint in fact entered into an MVNO arrangement giving Altice core control. *Id.* ¶¶ 86-87. The States further allege that Sprint negotiated with Comcast and Charter for core control MVNO agreements prior to the proposed merger with T-Mobile, but that New T-Mobile will be unwilling to give MVNOs core control. *Id.* ¶¶ 87-88. Thus, according to the States, the proposed merger will result in MVNOs reaching less favorable agreements with MNOs, which in turn "will reduce the quality of service that MVNOs can provide to their retail customers, reduce innovation, and increase the prices subscribers pay." *Id.* ¶ 89.

In light of the forgoing claims and allegations, it is clear that highly sensitive information pertaining to the MVNOs' competitive plans and abilities have been put at issue in this action. The Cable MVNOs have already produced many documents and substantial information that the DOJ and the States have used to assess the competitive effects of the proposed merger. In response to civil investigative demands ("CIDs"), the Cable MVNOs produced materials and

[6] *See*, *e.g.*, *id.* at 58 ("The combined company intends to directly and aggressively compete against conventional in-home wired broadband products . . . .").

provided testimony pertaining to key strategic and competitive issues affecting their wireless and wireline businesses, including the following topics:

- their negotiations with existing and/or new MNO providers of wholesale wireless services and their internal views of the wholesale wireless market, including with respect to the Cable MVNOs' discussions and negotiations with Verizon, T-Mobile, AT&T, and Sprint;
- the specific terms of their MVNO arrangements with MNOs, including Comcast's and Charter's MVNO agreements with Defendants' competitor Verizon and Altice's iMVNO agreement with Sprint;
- pricing and marketing strategies for their retail wireless offerings;
- their long-term strategic and other plans for their retail wireless businesses, and the financial results and outlooks of those businesses;
- substantial other nonpublic information concerning the performance of those businesses;
- their analyses of the relationship between their wireline and wireless products (e.g., the impact of their wireless products on wireline customer retention); and
- their assessment of potential future competition between wireless and wireline broadband.

Each of these topics, and other topics addressed in the Cable MVNOs' responses to the CIDs, has substantial significance to the Cable MVNOs' strategic and competitive plans. Accordingly, any disclosure to or use by Defendants of this information for business purposes threatens harm to the Cable MVNOs as they attempt to compete with Defendants to provide services to consumers or potentially negotiate with Defendants concerning wholesale arrangements.

These highly sensitive materials, which were sought and obtained by the States during their parallel investigations,[7] will undoubtedly be sought by the Defendants through discovery in this action. Although Defendants previously represented that they "expect relatively little

[7] The Cable MVNOs provided these materials to the DOJ and the States in reliance on the confidentiality provisions of the federal Antitrust Civil Process Act and State laws.

non-party discovery" (ECF 58 at 2),[8] they or the States may also seek to compel further materials of similar competitive significance from the Cable MVNOs during pretrial discovery.

## ARGUMENT

Under the Stipulated Order, if a non-party "determines that th[e] Order does not adequately protect its Confidential Information," it may move for "additional protection from the Court." Stipulated Order ¶ B(2). Likewise, the Federal Rules authorize the Court to grant a motion for a protective order by a person from whom discovery is sought, including by "designating the persons who may be present while the discovery is conducted" and by "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(E) & (G). Good cause for a protective order exists when "dissemination of confidential information will place [the producing party] at a competitive disadvantage." *Cohen v. City of N.Y.*, 255 F.R.D. 110, 118 (S.D.N.Y. 2008).

In antitrust cases, a high degree of protection is warranted for non-party information because of the serious risk that the discovery process itself can cause "harm to competition from having competitively sensitive information disclosed to competitors." DOJ ANTITRUST DIVISION MANUAL at III-68 (5th ed. 2018), *available at* https://www.justice.gov/atr/file/761141/download ("ANTITRUST DIVISION MANUAL"). Courts recognize that non-parties risk being harmed through antitrust litigation if their discovery materials are not adequately protected. *See*, *e.g.*, *F.T.C. v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 671-72 (N.D. Ill. 2016) (distinguishing the "exceedingly confidential information" that non-parties produce in response to government subpoenas in a merger case from "garden variety trade secrets"); *United States v. Dentsply Int'l,*

[8] *See also id.* ("The government also had access to compulsory process of nonparty documents and information, and was able to hear from all interested parties over the past year. With this record, it is difficult to imagine that additional discovery would be material to Plaintiffs' case.").

*Inc.*, 187 F.R.D. 152, 160 (D. Del. 1999) (rejecting disclosure of confidential information to in-house counsel in light of the "nonparty status of [defendant's] competitors and distributors whose confidential information is at risk"). Moreover, because the parties may lack an "incentive" to protect third-party interests, *Advocate Health*, 162 F. Supp. 3d at 673, the courts should protect the interests of non-parties that produce sensitive materials in cases like this one. For the following reasons, the Stipulated Order is inadequate to mitigate the risks to competition posed by discovery in this action.

## I. The Stipulated Order Should Be Modified so that Defendants' In-House Counsel Do Not Have Access to Non-Party Confidential Information

Irreparable competitive harm will result if Defendants' in-house counsel access the materials produced by the Cable MVNOs to the Plaintiff States. The Cable MVNOs' Confidential Information relates to the most sensitive aspects of their emerging wireless businesses in which they both attempt to compete with Defendants and also rely upon Defendants as actual or potential suppliers of wholesale network access. This information also relates to significant aspects of their wireline broadband businesses, against which Defendants claim they intend to compete. Disclosure of such highly sensitive information to Defendants, through their in-house counsel, would harm the Cable MVNOs both as competitors to Defendants in selling wireless plans to consumers and as customers or potential customers of Defendants for wholesale MVNO arrangements.

### A. Providing All Non-Party Confidential Information to Defendants' In-House Counsel is Out of the Ordinary and Should Not be Permitted

Courts regularly find that information revealed during discovery that possesses "extreme sensitivity" should be protected against disclosure to in-house counsel. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470-72 (9th Cir. 1992); *see*, *e.g.*, *In re Dental Supplies*

*Antitrust Litig.*, 2017 WL 1154995, at *4 (E.D.N.Y. Mar. 27, 2017) (granting motion to add "Outside Attorney's Eyes Only" designation to protective order to protect nonparty's interests); *Sullivan Mktg., Inc. v. Valassis Commcn's, Inc.*, 1994 WL 177795, at *2-*4 (S.D.N.Y. May 5, 1994) (restricting "access to certain sensitive information . . . to outside counsel, their staff, and consultants retained for this litigation"). The reason why "courts often allow the disclosure of confidential information to *outside* counsel only [is] precisely because it protects the interests of competitors who might be harmed if such information were revealed to *inside* counsel." *F.T.C. v. Lab Corp. of Am.*, 2011 WL 13227777, at *1 (C.D. Cal. Jan. 27, 2011) (emphases in original).

Courts recognize that "[i]n-house counsel stand on different ground than outside counsel," and that different standards are warranted in light of the risk that non-parties' sensitive information may, even inadvertently, factor into the parties' competitive decision-making as in-house counsel advise their business colleagues. *Advocate Health*, 162 F. Supp. 3d at 668-70; *see also*, *e.g.*, *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980) (explaining that in-house counsel have "a unique relationship to the corporation in which they are employed" because "their continuing employment often intimately involves them in the management and operation of the corporation of which they are a part").

To avoid harm to competition from the discovery process, protective orders in merger cases like this one commonly limit access to non-party confidential information to the defendants' outside counsel. The DOJ has recognized that, given the potential for "harm to competition from having competitively sensitive information disclosed to competitors," such protective orders typically include "[r]estricting access to confidential material and information to the [Antitrust] Division, the parties' outside counsel, and certain consultants." ANTITRUST DIVISION MANUAL at III-68 to -69. Indeed, in the four recent merger cases that the States recently described as

"similar in scope and complexity" (ECF 74 at 2), protective orders were entered that restricted disclosure to outside counsel only. Those protective orders appropriately placed the burden on the defendants to move for leave to disclose confidential materials to in-house counsel.[9]

For example, last year in the challenge to the AT&T/Time Warner merger—one of the merger cases of "similar" scope and complexity—the DOJ expressly argued that in-house counsel should not be granted access to non-parties' confidential information. There, the DOJ rightly observed: "Disclosing third parties' confidential information to Defendants' in-house counsel in this case poses serious risks to these third parties with little justification. Disclosure to in-house counsel is not a legal or practical imperative, and defendants in merger litigation frequently proceed with protective orders that are limited to outside counsel only." Ex. 7 at 4 (collecting examples of outside-counsel-only protective orders). The very same considerations apply in this case.

Moreover, during its evaluation of this proposed transaction, the FCC issued a protective order restricting access to highly confidential business information to outside counsel and outside consultants not involved in competitive decision-making, which is the standard protective order that the FCC typically adopts in merger proceedings. Ex. 8 at ¶ 7. The FCC order does not permit in-house counsel to review this highly confidential material. The FCC has correctly recognized that it would be inappropriate for any in-house counsel to have access to sensitive commercial and strategic materials of the merging parties or other participants in the proceeding, especially where those participants are direct competitors of the merging parties. Defendants engaged in effective advocacy under these FCC restrictions for over a year—there is no reason to move the goalposts at this late date.

[9] These cases were Aetna/Humana, Anthem/Cigna, AT&T/Time Warner, and Deere/Precision Planting. *See* Ex. 3 at ¶ E(1)(c); Ex. 4 at ¶ E(1)(c); Ex. 5 at ¶¶ E(1)(c), E(2); Ex. 6 at ¶¶ 5(b)(1), 5(c).

**B. The Stipulated Order is Inadequate to Protect against In-House Counsel's Involvement in Competitive and Strategic Decision-Making**

The Stipulated Order also offers far too weak assurances as to the roles of the in-house counsel who would have access to Confidential Information. The Stipulated Order provides that the "day-to-day duties" of each in-house lawyer shall not include "advising on or participating in decisions related to ***ordinary-course commercial matters***." Stipulated Order ¶ E(1)(i) (emphasis added). Not only is the meaning of "ordinary-course commercial matters" unclear, it seems deliberately chosen not to encompass all competitive decision-making and strategic matters. Courts regularly preclude disclosure of competitively sensitive information to in-house counsel with responsibilities related to competitive decision-making. *See*, *e.g.*, *Brown Bag*, 960 F.2d at 1470-71; *Advocate Health*, 162 F. Supp. 3d at 669; *Sullivan Mkt'g*, 1994 WL 177795, at *3. Similarly, the FCC protective order in this matter bars counsel "involved in Competitive Decision-Making" from accessing confidential information. Ex. 8, ¶ 2; *id.* app. B.[10] In light of Defendants' failure to agree that their designated in-house counsel would not be barred from matters relating to competition and strategy, this Court should reject their request to provide in-house counsel with non-parties' confidential materials.[11]

Further, even the Stipulated Order's limited protections will expire a mere nine months after the order's entry, on March 28, 2020—less than six months after the scheduled trial in this action. Stipulated Order ¶ E(1)(i). At that time, the Confidential Information will still have

[10] The Cable MVNOs do not concede that Defendants' employees without involvement in competitive decision-making could appropriately receive non-party Confidential Information. Indeed, at least one court has expressed concern about "applying the competitive decision making standard to confidential information [of] hapless nonparties," recognizing that such information is produced under compulsion by competitors who did not choose to "undertake[] the risks of disclosure." *Dentsply*, 187 F.R.D. at 160 & n.7.

[11] Already, Defendants have begun to designate in-house lawyers to have access to non-party Confidential Information who are objectionable because of their roles. For example, one of T-Mobile's designees holds herself out as an "[e]xecutive-level in house attorney" who "[a]dvises CEO and executive committee leaders on managing legal and business risks." Ex. 9 at 1. Plainly, this executive-level attorney has been and will remain involved in shaping T-Mobile's business strategy. The Cable MVNOs reserve the right to challenge particular in-house counsel pursuant to Paragraph E(2) of the Stipulated Order.

particularly heightened competitive significance. Restraining in-house counsel from involvement in "ordinary-course" commercial matters for a short period provides little comfort that non-party information will not be misused, because in-house counsel cannot unlearn what they will have seen under the Stipulated Order. *Exxon*, 636 F.2d at 1350 ("[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.").

### C. Defendants Have Not Shown any Prejudice Resulting from Limiting Non-Party Confidential Information to their Outside Counsel

Further, barring in-house counsel from access to non-party Confidential Information will not prejudice Defendants. Defendants are advised by capable and experienced antitrust counsel who are intimately familiar with the issues to be tried and have managed to navigate the FCC review process for over a year without providing in-house counsel access to highly confidential third-party information. This is to be expected. As the court explained in *Advocate Health*, "it is difficult to see how [in-house counsel] would have any special insight into confidential materials from companies they don't work for—or at least that they would have a familiarity sufficiently different from that possessed by their outside counsel that could justify the risk of exposing the highly confidential information provided by the defendants' competitors." 162 F. Supp. 3d at 673.

The parties have not attempted to show that review by Defendants' in-house counsel of non-party Confidential Information is necessary to their defense of this action. Without such a showing, there is no basis for that information to be provided to in-house counsel in light of the risks that such disclosure poses to the non-parties. *See Infosint S.A. v. H. Lundbeck A.S.*, 2007 WL 1467784, at *5 (S.D.N.Y. May 16, 2007) ("A confidentiality order that excludes in-house counsel may be found to cause minimal prejudice when '[o]utside counsel has been involved in

this litigation from the beginning and is fully familiar with the facts.'") (quoting *Sullivan Mktg.*, 1994 WL 177795, at *3). For example, in *Dentsply*, the court granted a motion for a protective order prohibiting non-parties' confidential business information from being given to an in-house lawyer for the defendant. The court found "an unacceptably high risk of either utilization or inadvertent disclosure of confidential information to the severe detriment of nonparties," and held that the information could be shared with the in-house lawyer only upon an "extraordinary detailing of the circumstances warranting disclosure" and "an explanation of why reliance on the representations and opinions of outside counsel would not be adequate." 187 F.R.D. at 161-62. Similarly, in *Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525 (N.D. Cal. 2000), the court rejected an argument that Intel's in-house counsel with responsibility for the case should have access to confidential discovery materials because Intel did not show it would be prejudiced from being forced to "rely on its competent outside counsel." *Id.* at 529.[12] Here, likewise, the Court should not condone review by in-house counsel of non-party Confidential Information in the absence of a concrete showing (which Defendants have not made) that Defendants are somehow uniquely *unable* to rely on their capable outside counsel.

* * *

In sum, the Court should strike the Stipulated Order's provision permitting in-house counsel access to non-party Confidential Information, as reflected in the Proposed Order. If, however, the Court is inclined to permit disclosure of any non-party Confidential Information to Defendants' in-house counsel, then the Court should significantly strengthen the provisions of the Stipulated Order. In particular, any protective order permitting disclosure of non-party information to Defendants' in-house counsel should, at a minimum: (1) allow non-parties to

[12] Courts recognize that "fundamental fairness" does not require in-house counsel to have access to highly confidential third-party documents, especially where outside counsel of record had such access. *New York v. Microsoft Corp.*, 2002 WL 31628220, at *2 (D.D.C. Nov. 18, 2002)

designate as "Highly Confidential" documents, testimony, and other materials that have the greatest competitive sensitivity, and limit such Highly Confidential materials to Defendants' outside counsel;[13] (2) limit the number of in-house counsel to one per Defendant, and prescribe that such in-house counsel must not participate in any competitively sensitive decision-making for Defendants and will not do so for five years;[14] and (3) require in-house counsel to review non-party materials at the offices of outside counsel, or by using a secure electronic data room to prevent such materials from being printed in Defendants' offices or retained on Defendants' computer systems.[15] If the Court deems these or other protections appropriate in lieu of the Proposed Order, the Cable MVNOs will be pleased to submit a revised order.

## II. The Stipulated Order Should Be Modified to Strengthen the Protections Concerning Return and Destruction of Non-Party Confidential Information

The Court should also strengthen the Stipulated Order with respect to other weaknesses concerning the return and destruction of Confidential Information after this litigation.

*First*, under the Stipulated Order, the recipients of Confidential Information will have 90 days after the expiration of time for appeal to make a "good faith effort" to return, destroy, or delete such Confidential Information. Stipulated Order ¶ I(1). This provision harms third-parties

[13] *See* Ex. 7 at 5 (DOJ brief in AT&T/Time Warner arguing that, "[a]t a minimum, any protective order providing for disclosure to in-house counsel should limit such disclosure to Confidential Information, and exclude in-house counsel from accessing Highly Confidential Information."). Protective orders that provide heightened protection for highly confidential information, including that such information will be disclosed only to outside counsel for the parties, are common in antitrust cases as well as commercial litigation generally. *See*, *e.g.*, *Dental Supplies*, 2017 WL 1154995, at *4; *see also Advocate Health*, 162 F. Supp. 3d at 668 n.1 (noting that "attorneys'-eyes-only" protective orders "have become *de rigeur*, at least where outside counsel are to have access to the information") (internal quotation omitted). Such orders have been entered in this Court's matters. *See*, *e.g.*, Stipulation and Confidentiality Order, *Caruso Mgmt. Co. v. Int'l Council of Shopping Centers*, Case No. 1:18-cv-11932-VM-RWL (S.D.N.Y.), dated March 25, 2019, ECF 39 (antitrust case); Stipulated Confidentiality Agreement and Protective Order, *GMA Accessories, Inc. v. Charlotte Olympia Holdings, Ltd.*, Case No. 1:17-cv-06049-VM-KHP (S.D.N.Y.), dated September 26, 2017, ECF 21.

[14] *See* Ex. 7 at 5 (DOJ brief in AT&T/Time Warner arguing that, if in-house counsel were permitted to access Highly Confidential Information, those in-house counsel should be "require[d] . . . to certify that they do not participate in competitively sensitive decision-making for their employers and will not do so for five years.").

[15] *See F.T.C. v. Sysco Corp.*, 83 F. Supp. 3d 1, 5 (D.D.C. 2015) (requiring in-house counsel authorized to review confidential material to conduct review only using a "secure electronic data room or document review platform" or at outside counsel's offices).

who provided, or will provide, Confidential Information. There is no justification for permitting the parties to retain non-parties' extremely sensitive information for such a long time after this litigation has concluded. Nor are "good faith" efforts to delete such information adequate in light of the information's extreme sensitivity. Accordingly, the Stipulated Order should be modified so that the recipients will have 30 days to certify return, destruction, or deletion of the Confidential Information. This is more than sufficient time for Defendants' sophisticated outside counsel to expunge non-party Confidential Information from their records.

*Second*, the Stipulated Order permits any "[c]ounsel for the Parties . . . to retain court papers, deposition and trial transcripts and exhibits, and work product," even if those materials contain Confidential Information. *Id.* Although the Cable MVNOs do not object to the Defendants' outside counsel of record retaining court papers and work product to the extent necessary to comply with ethical obligations, they object to this provision to the extent that it permits Defendants' in-house counsel to retain unredacted materials containing Confidential Information. To the extent that any of Defendants' in-house counsel is given access to such materials (which should not be allowed, as shown above), they should be required to destroy all copies within 30 days of final termination of the litigation.

## CONCLUSION

For the foregoing reasons, the Stipulated Order should be modified by replacing it with the Proposed Order.

Dated: July 8, 2019

Respectfully submitted,

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