UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF COLORADO, STATE OF CONNECTICUT, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSISSIPPI, STATE OF NEVADA, COMMONWEALTH OF VIRGINIA, and STATE OF WISCONSIN,

Plaintiffs,

-against-

DEUTSCHE TELEKOM AG, T-MOBILE US, INC., SPRINT CORPORATION, and SOFTBANK GROUP CORP.,

Defendants.

Case No. 1:19-cv-5434-VM

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY
AT&T INC.'S MOTION TO AMEND THE INTERIM PROTECTIVE ORDER

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INTRODUCTION

In its review of this transaction, the Plaintiff States and United States Department of Justice served compulsory Civil Investigative Demands upon AT&T seeking, among other things, production of some of AT&T's most competitively-sensitive business documents and information. AT&T responded to those demands as required, pursuant to statutory and contractual assurances of confidentiality, and takes no position on the merger now before the Court.

With the Plaintiffs now in possession of AT&T's responses to those CIDs, AT&T moves to amend the Interim Protective Order to prevent in-house employees of its competitors T-Mobile and Sprint from learning AT&T's most sensitive competitive secrets. Those amendments are necessary to align the Order with standard litigation practice and mitigate the risk of significant harm to AT&T and to competition.

In merger cases, the government often subpoenas sensitive information from the merging parties' rivals. But the government normally agrees to protect non-parties against the risk that such information will be misused. The standard protective order thus restricts competitively sensitive information to the merging parties' outside counsel unless in-house counsel can show a need to see particular documents. That is because courts understand that in-house counsel are routinely and unpredictably involved in competitive decision-making, and "it is very difficult for the human mind to compartmentalize and selectively suppress information once learned." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980).

AT&T has lived with such restrictions when *it* is the defendant in merger litigation. For example, the protective order in the recent AT&T/Time Warner merger litigation barred *all* of AT&T's in-house counsel from viewing competitively sensitive non-party information absent a

showing of particularized need. That restriction remained in place throughout the litigation subject to one narrow exception: a single designated in-house attorney for AT&T was allowed to attend trial sessions when the judge closed the courtroom to hear non-party information. But even that attorney did not have access to the documents produced by non-parties unless they happened to be discussed during the closed-door sessions. This process did not impair AT&T's ability to defend itself successfully.

The proposed Interim Protective Order would turn this practice on its head. Whereas a standard protective order requires merger defendants to prove a document-by-document and counsel-by-counsel need for access, this proposed Order presumes blanket access from the outset and subjects non-parties to an inappropriate burden of justifying exceptions. Indeed, it would grant *16* in-house counsel for the Defendants carte blanche access to AT&T's most competitively sensitive information. That approach would be exceptionally unfair to AT&T and the other rivals. And it would set a dangerous precedent for future litigation, creating disincentives for non-parties to accommodate government information requests in merger investigations.

For the reasons that follow, AT&T supports the proposed revisions to the Interim Protective Order submitted by Comcast Corporation et al. Alternatively, since the parties based the proposed Interim Protective Order on the AT&T/Time Warner protective order, the Court could delete sections E(1)(i) and E(2) of the Interim Protective Order and revert to the presumption against in-house counsel access to non-party confidential information in the

AT&T/Time Warner protective order, as shown in Exhibit A to the Declaration of Olivier N. Antoine.[1]

ARGUMENT

I. The Interim Protective Order Provides Overbroad Access to In-House Counsel and Should Be Amended To Provide Additional Protections for Non-Parties That Disclosed Their Confidential, Competitively-Sensitive Information.

During the investigation of this transaction, Plaintiff States subpoenaed, and AT&T produced, more than a hundred thousand pages of highly confidential documents, data, and information to Plaintiffs. Antoine Decl. ¶ 3. In addition, AT&T also produced significant data in response to DOJ investigatory subpoenas that Plaintiffs now also have in their possession. *Id.*

AT&T submitted these materials with a reasonable expectation that its confidential information would not be viewed by its competitors. Indeed, AT&T relied on confidentiality agreements with the NYAG and many other Plaintiff States, in addition to statutes and regulations protecting confidentiality in producing this material.[2] Antoine Decl. ¶ 3.

AT&T also relied on its recent experience as a Defendant in DOJ's suit to block AT&T's merger with Time Warner, as well as the practice in other recent merger cases, such as DOJ's recent suits to block the Aetna/Humana and Anthem/Cigna mergers. It has been common in such litigation for *no* in-house counsel to have access to confidential information. For example, prior to trial, *no* AT&T in-house counsel had access to *any* non-party confidential information. And at trial, only one AT&T in-house counsel had access to the closed courtroom when non-parties testified about confidential information.

[1] Pursuant to Section B(2) of the Interim Protective Order, counsel for AT&T joined a global meet-and-confer on July 2, 2019 that was attended by representatives from the Plaintiff States, Defendants, Comcast, Charter, and Altice. Declaration of Olivier N. Antoine ("Antoine Decl.") ¶ 4.

[2] *See, e.g.*, New York General Business Law § 343, Public Officers Law §87(2)(a)-(e).

Courts rightly place the burden on the defendants to file a motion showing cause to modify the protective order to permit particular in-house counsel to review confidential competitor documents for a specific purpose. *See, e.g.*, Amended Protective Order, ECF No. 58 at 11, *United States v. AT&T Inc.*, No. 1:17-cv-02511-RJL (D.D.C. Dec. 27, 2017) ("The Defendants reserve the right to move to amend this Order to allow disclosure of Confidential Information to certain in-house counsel.")[3]; Second Amended Protective Order, ECF No. 132 at 11, *United States v. Aetna Inc.*, No. 1:16-cv-01494-JDB (D.D.C. Sep. 30, 2016) ("Defendants may file motions with the Special Master seeking modification of this provision to share Confidential Information with a very small number of specified in-house attorneys, so long as those attorneys are not involved in Defendants' competitive decision-making."); Second Amended Protective Order, ECF No. 161 at 10-11, *United States v. Anthem Inc.*, No. 16-1493-ABJ (D.D.C. Sep. 26, 2016) (same).

The Interim Protective Order here turns that principle on its head: instead of placing the burden on the Defendants to demonstrate why their in-house attorneys need to see non-party documents, it *presumes* unfettered access for 16 in-house counsel—four for each Defendant—and forces non-parties to affirmatively file motions to establish why they need additional protection. By contrast, Defendants only bear a burden if they seek access for *even more than* 16 in-house lawyers.

This procedure would enable Defendants' in-house counsel to gain access to a treasure trove of competitive AT&T information that, once learned, cannot be unlearned and could be used to benefit Defendants in competing with AT&T. Among other highly sensitive data, this

[3] During litigation over its acquisition of Time Warner, AT&T filed a motion seeking to reserve the issue of in-house counsel access to confidential Non-Party information after hearing from any objecting Non-Parties. AT&T ultimately agreed to the DOJ's position, and the above language was entered. The requested access proved to be unnecessary, as AT&T was not prejudiced and prevailed.

information includes: (1) materials relating to AT&T's marketing, pricing, competitive strategies, and sales; (2) materials identifying AT&T's network deployments and capacity (including the specific location of each AT&T cell tower and its capabilities); (3) extremely granular customer-specific information that identifies the plans and devices AT&T customers purchase, their monthly usage (*i.e.,* number of texts, minutes, megabytes), and their monthly payments to AT&T; (4) detailed "porting" data that identifies the number of customers AT&T won from each competitor and the number of customers lost to each competitor; and (5) detailed information about AT&T's responses to corporate and government competitive bidding requests. Antoine Decl. ¶ 3. As multiple courts have held, information along the lines of what AT&T has produced is considered "competitively sensitive" and warrants protection. *See, e.g.*, *United States v. SBC Commc'ns, Inc.*, 339 F. Supp. 2d 116, 130 (D.D.C. 2004) (identifying various information including non-public marketing, sales, and pricing information as "competitively sensitive"); *United States v. Computer Assoc. Int'l*, No. Civ. A. 01-02062, 2002 WL 31961456, at *5 (D.D.C Nov. 20, 2002) (identifying additional topics including customer information and future business strategy information as "competitively sensitive").

The default assumption should not be that 16 in-house lawyers "could lock-up trade secrets in [their] mind[s], safe from inadvertent disclosure to [their] employer[s] once [they] had read the documents." *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992); *see also FTC v. Advocate Health Care*, 162 F. Supp. 3d 666, 668 (N.D. Ill. 2016) ("In-house counsel stand on different ground than outside counsel."). The risk of competitive harm here does not depend on any bad faith by Defendants' in-house counsel. Rather, as the D.C. Circuit has held, "it 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." *Exxon*, 636 F.2d at 1350.

Thus, AT&T respectfully submits that the Interim Protective Order should be modified per the redline submitted concurrently by Comcast Corporation et al. Alternatively, since the parties based the proposed Interim Protective Order on the AT&T/Time Warner protective order, the Court could delete sections E(1)(i) and E(2) of the Interim Protective Order and revert to the presumption against in-house counsel access to non-party confidential information in the AT&T/Time Warner protective order, as shown in Exhibit A to the Antoine Declaration.

Either result would be consistent with the protective orders entered in other recent merger cases including *AT&T*, *Aetna*, and *Anthem*. Such a change properly places the burden on Defendants to demonstrate why any in-house attorney(s) require access to highly sensitive non-party information from their competitors.

CONCLUSION

There may be exceptional situations where it is beneficial for in-house counsel to have limited access to confidential non-party information to prepare and try a case, but that justification does not warrant unfettered access by such a large number of insiders. The current stipulated Interim Protective Order does not provide adequate protections to non-parties who produced voluminous competitively sensitive information in reliance on assurances of confidentiality. Consequently, AT&T respectfully requests that the proposed amendments to the Interim Protective Order be adopted.

Dated: July 8, 2019

Respectfully submitted,

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