July 12, 2019

VIA ECF

Hon. Robert W. Lehrburger
500 Pearl Street, Room 1960
United States Courthouse
New York, NY 10007

Re: *State of New York, et al. v. Deutsche Telekom AG, et al.*, No. 1:19-cv-05434-VM (S.D.N.Y.)

Dear Judge Lehrburger:

I write on behalf of all Defendants. Under Your Honor's Individual Practice II.D governing discovery disputes, Defendants submit this letter in response to the noncompliant motions filed by several non-parties (collectively, "Movants") to amend the Stipulated Interim Protective Order entered by the Court in this matter on June 28, 2019, ECF No. 69 ("Protective Order"). Comcast, Charter, and Altice filed a joint motion (ECF No. 90), and AT&T filed separately (ECF No. 96). Consistent with Your Honor's Individual Practices, Defendants are not submitting formal briefing at this time, but we would be happy to do so if that would be helpful to the Court's resolution of these issues.

The Court entered the Protective Order under Fed. R. Civ. P. 26 "upon good cause shown." ECF No. 69 at 1. Accordingly, Movants have the burden to demonstrate good cause justifying their proposed amendments. *See United States v. Anthem, Inc.*, No. 1:16-CV-1493 (ABJ), 2016 WL 11164044, at *2 (D.D.C. Sept. 22, 2016), *report and recommendation adopted*, No. CV 16-1493 (ABJ), 2016 WL 11164027 (D.D.C. Sept. 26, 2016) ("[T]he party or, in this case, non-party, which seeks to modify a protective order bears the burden of showing that good cause exists to justify the desired change."). For the reasons explained below, Movants have failed to meet this burden.

Background. In an attempt to avoid burdening the Court with unnecessary disputes on these issues, Defendants shared an initial draft protective order with Plaintiffs on June 13, 2019, and over the following two weeks engaged in extensive discussions with Plaintiffs, acting through lead counsel New York, to address the confidentiality concerns of third parties, including with respect to in-house counsel access to Confidential Information. After the Parties engaged in several rounds of revisions to the draft protective order in response to the requests from third parties, Defendants understood from discussions with Plaintiffs that the significant concessions by Defendants, as reflected in the Protective Order, would address those concerns. Based on that understanding, the Parties finalized and filed the proposed order with the Court on June 27, 2019. Nevertheless, Movants requested a meet-and-confer shortly after the Court's entry of the Protective Order and then filed their motions.

Competitive Sensitivity. Defendants agree with Movants that, because Movants are competitors in the mobile wireless industry, certain information they produced during the investigation and will provide in the litigation may be competitively sensitive. However, Movants offer no evidence that they would be harmed by disclosure of their potentially highly relevant materials to a small number of Defendants' in-house litigation counsel under the Protective Order.

Legal Standard. Contrary to Movants' suggestion, the Protective Order's approach of restricting access to in-house counsel who are not involved in competitive decision-making is consistent with well-established law. *See, e.g.*, *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 & n.3 (Fed. Cir. 1984) (leading case establishing in-house counsel's involvement in competitive decision-making as

relevant standard); *F.T.C. v. Whole Foods Mkt., Inc.*, 2007 WL 2059741, at *2 (D.D.C. July 6, 2007) (permitting access to confidential information where in-house counsel was not "involved in competitive decision-making"); *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) (applying *Whole Foods* test).

Courts apply the "competitive decision-making" test on a case-by-case basis and review the role and responsibilities of each in-house counsel. "Denial or grant of access . . . cannot rest on a general assumption that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order. . . . Whether an unacceptable opportunity for inadvertent disclosure exists . . . must be determined . . . by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained." *U.S. Steel*, 730 F.2d at 1468. In some cases, such as those cherry-picked by Movants, courts have found that in-house counsel is too involved in competitive decision-making to allow access to competitively sensitive confidential information. In other cases, however, courts have permitted access where, as here, the selected in-house counsel is not involved in competitive decision-making. *See, e.g.*, *AB Electrolux*, 139 F. Supp. 3d at 393; *Whole Foods Mkt.*, 2007 WL 2059741, at *3; *United States v. Sungard Data Sys.*, Inc., 173 F. Supp. 2d 20, 24 (D.D.C. 2001).

Other Protective Orders Not Binding. Movants' restrictive view on in-house counsel access is premised in large part on the protective orders negotiated between the DOJ and merging parties in a few recent merger litigations and the DOJ's views on the issue (*see* ECF No. 91 at 7, 9-10 & n.9, 14 & nn.13-14), but those negotiated protective orders and the position of the DOJ on procedural issues like this do not establish the relevant legal standard and do not bind this Court. In any event, as noted above, other recent merger litigations brought by both the DOJ and FTC *do* permit in-house counsel access to confidential information. Similarly, this Court is not required to adopt the same terms as the FCC's protective order and, in any event, the Protective Order already requires that certain information the FCC considers to be highly competitively sensitive "shall be treated by the Parties consistent with the terms of applicable Federal Communications Commission orders and rules." *See* ECF No. 69 at ¶ E.(8) (procedures for sensitive NRUF/LNP data).

No Involvement in Competitive Decision-making. Contrary to Movants' assertion that the Protective Order "contains no assurance" to address their competitive sensitivity concerns, Paragraph E(1)(i) and Appendix B already provide significant protections on this issue. *See* ECF No. 69 at ¶ E(1)(i) (limiting access to "in-house litigation counsel of each Defendant with responsibilities for the litigation of this Action and whose day-to-day duties with the company do not currently, and for a period of nine (9) months following the Court's entry of this Order shall not, include advising on or participating in decisions related to ordinary-course commercial matters"); *id.* at Appendix B (requiring such in-house litigation counsel to attest to requirements of Paragraph E(1)(i) and abide by Protective Order under threat of "civil and criminal penalties for contempt of Court").

These provisions satisfy the requirement from the case law that in-house litigation counsel with access to Confidential Information not be involved in competitive decision-making. However, as requested by Movants (ECF No. 91 at 14), Defendants are willing to revise the Protective Order to further address their concerns with specific language that makes clear that the designated in-house litigation counsel (i) do not currently, and for 9 months following entry of the order will not, participate in "competitive decision-making"; and (ii) will only review underlying Confidential Information of Movants using a secure electronic review platform or at the offices of outside counsel. *See* Attachment 1, Proposed Amended Protective Order at ¶ E(1)(i) (redline showing proposed changes); *see also Sysco*, 83 F. Supp. 3d at 3 (in-house counsel "[u]se of such [electronic review] systems will provide additional safeguards to protect against inadvertent disclosure of Confidential Material").

Movants suggest that four in-house litigation counsel per Defendant is too many, but they offer no reasoned basis for that position. There is no "magic number." Instead, as noted, this issue is decided on a case-by-case basis based on the "competitive decision-making" standard. Subject to the safeguards in the Protective Order, four in-house litigation counsel per Defendant is appropriate and reasonable under the circumstances of this case, which will determine the future of both T-Mobile and Sprint and is thus of extraordinary importance to all four Defendants, two of which are foreign majority shareholders of the U.S. Defendants entitled to their own counsel. Moreover, Movants' objection is misplaced because Paragraph E.(2) of the Protective Order already includes a mechanism for non-parties to object to any particular designated counsel based on their roles. Accordingly, this issue is more appropriately decided on a case-by-case basis, rather than based on some speculative concern about the number of counsel per Defendant in the abstract. With respect to the counsel who have already executed Appendix B, attached to this letter are declarations demonstrating those individuals are not involved in competitive decision-making. Buckland Decl. ¶¶ 5-8; Fell Decl. ¶¶ 5-6; Stapper Decl. ¶ 4. The proposed revisions to Paragraph E.(1)(i) and these declarations should address any concerns Movants may have on this issue.

Prejudice to Defendants. Movants inappropriately seek to deprive Defendants of the counsel of their choice in this litigation, solely on the basis of their status as in-house counsel. Movants' suggestion that Defendants' in-house litigation counsel are merely "employees" ignores the important counseling they provide to their clients and misunderstands their co-equal position in the litigation bar. *See U.S. Steel*, 730 F.2d at 1468 ("Like retained counsel . . . in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions. In-house counsel provide the same services and are subject to the same types of pressures as retained counsel.").

As described in the attached declarations, T-Mobile and Sprint, like many other companies, choose to be represented in litigation through a combination of in-house and outside counsel. Buckland Decl. ¶ 5; Fell Decl. ¶ 4. In-house litigation counsel for the Defendants play a critical role in litigation strategy and legal decision-making for their clients, and the Plaintiffs' attempt to block the proposed merger presents one of the highest stakes litigations ever faced by the companies. Buckland Decl. ¶¶ 9-12; Fell. Decl. ¶¶ 7-10; Stapper Decl. ¶¶ 5-8. In a litigation that will decide the future of both companies, fairness dictates that a limited number of Defendants' in-house litigation counsel, subject to appropriate safeguards, be permitted access to potentially highly relevant Confidential Information. *See Sysco*, 83 F. Supp. 3d at 4–5 ("It would be unfair, in the court's view, for the government to attempt to prevent a private business transaction based, even in part, on evidence that is withheld from the actual Defendants (as distinct from their outside counsel)."); *Sungard*, 173 F. Supp. 2d at 21 ("To deny outside counsel access to the lawyers most familiar with their clients' business and the industry in which they compete and who will have a much deeper and complete understanding of the documents being produced and of the expert testimony to be derived from it is to make [defendants] fight with one hand behind their backs.").

Other Proposed Changes. Defendants are willing to agree that return or destruction of Confidential Information should occur within 60 rather than 90 days, as shown in the attached redline. *See* Attachment 1, Proposed Amended Protective Order at ¶ I. Defendants do not agree to the other changes in Paragraph I, or the changes in Paragraphs A(1)(b) and E(7), as Movants have not explained why they are necessary, and thus they plainly have not established the required good cause for those proposed changes.

Respectfully submitted,

/s/ David I. Gelfand

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cc (via ECF): All Counsel of Record