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

ANTHONY DALE, JOHNNA FOX, BENJAMIN BORROWMAN, ANN LAMBERT, ROBERT ANDERSON, and CHAD HOHENBERY on behalf of themselves and all others similarly situated, Plaintiffs, v. T-MOBILE US, INC., Defendant.	Case No. 1:22-cv-03189 Hon. Thomas H. Durkin Hon. Jeffrey Cole

JOINT SUBMISSION REGARDING CONTESTED AMENDMENTS TO THE AGREED CONFIDENTIALITY ORDER

Plaintiffs Anthony Dale, Johnna Fox, Benjamin Borrowman, Ann Lambert, Robert Anderson, and Chad Hohenbery (collectively, "Plaintiffs"), Defendant T-Mobile US, Inc. ("T-Mobile"), and Non-Parties AT&T Mobility LLC ("AT&T"), Charter Communications Operating, LLC ("Charter"), Comcast Cable Communications, LLC ("Comcast"), Consumer Cellular, Inc. ("Consumer Cellular"), Cox Communications, Inc. ("Cox"), DISH Network Corporation ("DISH"), Google North America, Inc. ("Google"), Nsighttel Wireless, LLC ("Nsight"), U.S. Mobile, Inc. ("U.S. Mobile"), and Verizon Communications Inc. ("Verizon"), by and through undersigned counsel, hereby submit to the Court this Joint Submission Regarding Contested Amendments to the Agreed Confidentiality Order (ECF No. 98). *See* ECF No. 250.

BACKGROUND

Plaintiffs, customers of AT&T and Verizon, have asserted claims against T-Mobile relating to its 2020 merger with Sprint (the "Merger"). According to Plaintiffs' Complaint, the Merger permitted AT&T and Verizon to "profitably maintain prices … substantially above" competitive levels, causing harm to AT&T and Verizon subscribers. *See* Compl. ¶¶1, 129, ECF No. 1. In October 2022, Plaintiffs served subpoenas on AT&T, DISH, and Verizon, calling for the preservation of certain documents and information. On March 23, 2023, the Court entered the Parties' Agreed Confidentiality Order (ECF No. 98), which the Mobile Non-Parties did not get to participate in negotiating. Thereafter, the Plaintiffs and Defendant T-Mobile served subpoenas on several other non-party mobile carriers, mobile network operators, and/or mobile virtual network operators (the "Mobile Non-Parties"), seeking the production of documents, data, and other information. T-Mobile is a direct competitor or a key supplier to the Mobile Non-Parties. Ten Mobile Non-Parties have requested revisions to the existing Protective Order. The Parties and many of the Mobile Non-Parties have met and conferred and reached agreement for amending the Agreed Confidentiality Order on all but two topics.

CONTESTED PROPOSED AMENDMENTS

I. RESTRICTIONS AGAINST T-MOBILE'S IN-HOUSE COUNSEL REVIEW OF HIGHLY CONFIDENTIAL INFORMATION

A. The Mobile Non-Parties' Proposed Amendment

To protect their highly confidential and competitively-sensitive business information, the Mobile Non-Parties[1] propose that the Agreed Confidentiality Order be amended to prevent automatic disclosure to T-Mobile's in-house counsel of their Highly Confidential Information. The Mobile Non-Parties propose to instead provide a framework for disclosure where T-Mobile believes it is important for its in-house counsel to have access:

1) T-Mobile may first make a written request to any producing party where it identifies the particular Highly Confidential Information and up to two in-house attorneys to have access to that information who have responsibilities for the litigation of this action and do not currently, and for a period of nine months following the last occasion on which Highly Confidential Information is disclosed to such in-house litigation counsel shall not, participate in or advise on Competitive Decision-Making;[2]

2) T-Mobile and the producing party meet-and-confer; and

3) if an agreement cannot be reached, T-Mobile may file a letter motion with the Court seeking access for those in-house counsel to the specific Highly Confidential Information in question.

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[1] AT&T, Charter, Comcast, Consumer Cellular, Cox, DISH, Google, Nsight, U.S. Mobile, and Verizon. DISH agrees with the Mobile Non-Parties' position for all the reasons stated herein and also for the reasons DISH set forth in its Memorandum in Opposition to Plaintiffs' and T-Mobile's Separate Motions to Compel (ECF No. 283 at 25-28).

[2] "Competitive Decision-Making" means "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, except that any litigation-related decision relating to this Action shall not be considered Competitive Decision-Making."

This framework is detailed in Exhibit No. 1, attached as ECF No. 293-1.[3]

B. The Mobile Non-Parties' Position in Support of Their Proposed Amendment

1. Introduction

In response to extensive subpoenas from T-Mobile and Plaintiffs, the Mobile Non-Parties have been asked to produce a substantial volume of their most confidential and competitively-sensitive information to the parties, including T-Mobile, which is a direct competitor, a key supplier, or both, of each of the Mobile Non-Parties. This information includes topics that cut to the very heart of the Mobile Non-Parties' businesses, such as their pricing decision-making, their market analyses and competitive assessments, their costs of doing business, and their contracts with key customers or suppliers. In short, each Mobile Non-Party is being asked to turn over its competitive playbook to T-Mobile.[4]

Given the nature of the information sought, the Mobile Non-Parties objected to giving any T-Mobile employees—even in-house attorneys—presumptive and unfettered access to this information. Instead, the Mobile Non-Parties sought to

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[3] Exhibit 1 contains all proposed amendments to the Agreed Confidentiality Order. *See* ECF No. 293-1. Items in green font contain amendments that all parties and the Mobile Non-Parties agree to. Items in blue font contain amendments that one or more of the Mobile Non-Parties' proposed. Items in red font contain T-Mobile's proposed amendments. Items in purple font are T-Mobile's proposal *if* the Court adopts the Mobile Non-Parties proposed framework for disclosure of material to in-house counsel. The Mobile Non-Parties do not agree with T-Mobile's backup proposal in purple.

[4] T-Mobile's own description of the information it wants presumptively accessible to in-house counsel reflects the competitiveness of this information: "T-Mobile has an acute need in this case for its in-house counsel to have access to materials concerning the prices, costs, and strategic decisions of its competitors." *Infra* Sec. I(C)(1).

bring the in-house counsel provisions of the Agreed Confidentiality Order in line with the Amended Protective Order in the 2019 lawsuit brought by states' attorneys general challenging the Merger that is at issue in this action (the "Underlying Merger Litigation"[5]). In that lawsuit, many of the same Mobile Non-Parties successfully moved to amend the protective order to preclude plenary access by T-Mobile's in-house counsel. The Mobile Non-Parties' proposed modifications align with the protective order in the Underlying Merger Litigation, the law of the District, and is a fair compromise from standard litigation practice in antitrust cases, where in-house counsel are often prohibited altogether from reviewing highly confidential information. The proposed modifications will mitigate the serious risk of significant competitive harm to both the Mobile Non-Parties and, perhaps more importantly, the consumers and the industry that are the subjects of this litigation, all while balancing T-Mobile's claimed need for disclosing information to in-house counsel.

2. The Mobile Non-Parties' Proposal Is Consistent with the Protective Order Adopted in the Underlying Merger Litigation.

The Mobile Non-Parties' proposal here mirrors the solution reached by the Southern District of New York in the Underlying Merger Litigation. In that action, the court granted the motion of many of the same Mobile Non-Parties to amend the protective order to preclude the plenary access by T-Mobile's in-house counsel.

[5] *State of New York, et al. v. Deutsche Telekom AG*. No. 19-05434 (S.D.N.Y.).

There, as here, non-parties AT&T, Comcast, and others were asked to produce competitively-sensitive information to T-Mobile and Sprint. Several non-parties moved to amend the protective order to prohibit disclosure of certain information to their direct competitors' in-house counsel. *See State of New York,* Comcast, Charter, and Altice's Mot. to Modify Prot. Order (S.D.N.Y. Jul. 8, 2019), ECF No. 293-2; *State of New York,* AT&T's Mot. to Amend Prot. Order (S.D.N.Y. Jul. 8, 2019), ECF No. 293-3. In opposition to those motions, T-Mobile argued, "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." *State of New York,* Defs.' Ltr. (S.D.N.Y. Jul. 12, 2019), ECF No. 293-4 at 3. At oral argument, T-Mobile argued that its in-house counsel "are extremely active in this case. . . . They're involved in every decision we make, and this is as important a litigation as the company has been through perhaps in its history." *State of New York*, Hr'g Tr. at 8:20-24 (S.D.N.Y. Aug. 1, 2019), ECF No. 293-5.

Despite T-Mobile's arguments that it needed its in-house counsel to have wholesale access to its competitors' highly confidential information, the court entered an order prohibiting disclosure of information designated "Highly Confidential" to in-house counsel absent either (1) agreement from the producing party or (2) a showing of good cause to the court as to why *certain* in-house counsel needed to review specific highly confidential information. *State of New York*, Am. Interim Prot. Order (S.D.N.Y. Aug. 14, 2019), ECF No. 293-6 at 13-14. Moreover,

the court correctly placed the burden on the defendants in moving for in-house counsel to gain access to any highly confidential information. *Id.* at 15. Even though T-Mobile's in-house counsel did not have absolute access to non-party highly confidential information in the Underlying Merger Litigation, T-Mobile still prevailed in the litigation, and the Merger closed.

Given that the framework ordered by the court worked for the parties and non-parties in that case, the Mobile Non-Parties proposed it again here as a compromise rather than simply seeking to preclude in-house counsel access altogether. Even though T-Mobile argued that the Underlying Merger Litigation was perhaps "as important a litigation" in T-Mobile's "history" (*State of New York*, Hr'g Tr. at 8:20-24 (S.D.N.Y. Aug. 1, 2019), ECF No. 293-5), it insists its need for in-house counsel to have presumptive access to the Mobile Non-Parties' highly confidential information is "significantly greater" in this matter. *See infra,* Sec. I(C)(1). In support, T-Mobile offers the same arguments that were rejected by the Southern District of New York. Even though T-Mobile searches for some distinction between the two situations, in both, the Parties will have had the Mobile Non-Parties' most confidential information to advocate their views of the Merger's competitive effects. And therefore, in both cases, the relevant question is the circumstances under which those Mobile Non-Parties' highly confidential information may be disclosed to T-Mobile employees.

T-Mobile's argument that it needs its in-house counsel to access the Mobile Non-Parties' highly confidential information because class certification is at issue in

this matter fails for the same reasons. Class certification is not unique to this case, and protective orders in antitrust class-action litigation frequently impose outside counsel only provisions. *See, e.g., In re MultiPlan Health Ins. Provider Litig.*, Min. Entry (N.D. Ill. Dec. 30, 2024), ECF No. 293-7; *In re MultiPlan Health Ins. Provider Litig.,* Prot. Order (N.D. Ill. Jan. 5, 2025), ECF No. 293-8; *In re Delta Dental Antitrust Litig.*, Agreed Prot. Order (N.D. Ill. Nov. 2, 2020), ECF No. 293-9.

More fundamentally, even were this matter to have a greater focus on certain Mobile Non-Parties than the Underlying Merger Litigation, nothing changes the fact that T-Mobile is again ably represented in this matter by outside counsel—three large and experienced outside law firms—and would have recourse to move for access to certain highly confidential information, like it did in the Underlying Merger Litigation should the need arise. The Mobile Non-Parties respectfully submit the same framework that was approved and successfully utilized in the Underlying Merger Litigation is appropriate to employ again here.

3. The Mobile Non-Parties' Proposal Is a Fair Compromise Between Foreclosing In-House Access Altogether and Providing Absolute Access.

Beyond the Underlying Merger Litigation, the Mobile Non-Parties' proposal reflects the middle ground courts have reached on this issue in confidentiality orders governing antitrust litigation. Given that, as here, antitrust litigation often involves the exchange of highly sensitive documents with a direct competitor or a key supplier, confidentiality orders in such cases routinely prohibit in-house counsel from reviewing highly confidential documents ***altogether***. *See, e.g.*, *In re MultiPlan Health Ins. Provider Litig.*, Min. Entry (N.D. Ill. Dec. 30, 2024), ECF No. 293-7

(accepting defendants' proposal to prohibit in-house counsel access); *In re MultiPlan Health Ins. Provider Litig.,* Prot. Order (N.D. Ill. Jan. 5, 2025), ECF No. 293-8 at 4-7 (limiting highly confidential information to outside counsel); *In re Delta Dental Antitrust Litig.*, Agreed Prot. Order (N.D. Ill. Nov. 2, 2020), ECF No. 293-9 at ¶ 7(b) (limiting access to highly confidential information to outside counsel); *Bootler, LLC v. Google, LLC*, Stip. Prot. Order (N.D. Ill Aug. 22, 2024), ECF No. 293-10 (limiting in-house counsel access to highly confidential material), *Bootler, LLC,* Min. Entry (N.D. Ill. Sept. 18, 2024), ECF No. 293-11 (granting entry of the stipulated protective order); *Medline Indus., LP v. C.R. Bard, Inc.*, Thir. Am. Prot. Prot. Order (N.D. Ill. Nov. 21, 2022), ECF No. 293-12 at ¶ 4(d) (limiting in-house counsel access to highly confidential material).

That is because courts—including this Court—understand that in-house counsel are routinely and unpredictably involved in competitive decision-making and other business advising, and "once an in-house counsel acquires highly confidential information, that individual cannot rid herself of that knowledge: she cannot perform a prefrontal lobotomy on herself." *Silversun Indus., Inc. v. PPG Indus., Inc.*, 296 F. Supp. 3d 936, 946 (N.D. Ill. 2017); *Federal Trade Comm'n v. Advoc. Health Care Network*, 162 F.Supp.3d 666, 670 (N.D. Ill. 2016) (similar); *Federal Trade Comm'n v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.D.C. 1980) ("[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."). Rather than seeking to prohibit access by T-Mobile's in-house counsel

altogether, the Mobile Non-Parties instead proposed a reasonable compromise between that position and T-Mobile's position that would allow default and absolute access for T-Mobile's in-house counsel.

In evaluating the proposed amendments to the Agreed Confidentiality Order, the risk of inadvertent disclosure of highly confidential information by in-house counsel to competitive decision makers "cannot be ignored." *Silversun Indus., Inc.*, 296 F. Supp. 3d at 945. This is precisely why this Court denied in-house counsel access to highly confidential materials in *Silversun Industries, Inc. v. PPG Industries, Inc.*, reasoning that the risk of inadvertent disclosure by in-house counsel to senior decision-makers at the company precluded in-house counsel from accessing certain materials. *Id.* at 947. The Court put it simply: "what is beyond debate is that once Highly Confidential information [] is disclosed, 'the bell cannot be unrung.'" *Id.* (internal citation omitted). Moreover, this Court made explicit that in-house counsel need not directly participate in competitive decision-making to make disclosure impermissible: "Even where in-house counsel does not directly participate in competitive decision-making–or claims not to–if the in-house counsel's contact with those who do creates the opportunity for inadvertent disclosure of confidential information, a court may limit counsel's access to such information." *Id.* at 945-46.

Similarly, in *Federal Trade Commission v. Advocate Health Care Network*, this Court granted a motion to amend a confidentiality order to protect intervening non-parties from the defendants' in-house counsel accessing their highly

confidential information. 162 F. Supp. 3d at 674. This Court reasoned that "the only sure way to protect the Intervenors' confidential information is to carve out a special category of Highly Confidential information for them that is not accessible to in-house designees" and "the risk of potential harm to the defendants from restrictions imposed against their in-house counsel accessing the Intervenors' Highly Confidential information is substantially outweighed by the risk of inadvertent disclosure and harm to the Intervenors." *Id.* at 674. T-Mobile's argument that structured data will not be disclosed to its in-house counsel is cold comfort. *Infra* Sec. I(C). Even if in-house counsel cannot review tens of billions of rows of data—something only an expert witness would do in any detail—in-house counsel will have unrestricted access to documents "concerning the prices, costs, and strategic decisions of its competitors," (*infra* Sec. I(C)(1)), in T-Mobile's words).

It is also standard practice for courts to place the burden on the party seeking in-house access to justify permitting particular in-house counsel to review confidential competitor documents for a specific purpose. *See, e.g.*, *United States v. AT&T Inc.*, Am. Prot. Order (D.D.C. Dec. 29, 2017), ECF No. 293-13 at 11 (providing the "Defendants reserve the right to move to amend this Order to allow disclosure of Confidential Information to certain in-house counsel"); *United States v. Aetna Inc.*, Sec. Am. Prot. Order (D.D.C. Sep. 30, 2016), ECF No. 293-14 at 11 (providing the "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"); *United States v. Anthem Inc.*, Sec. Am. Prot. Order (D.D.C. Sep. 26, 2016), ECF No. 293-15 at 10-11 (providing the same). Here, however, T-Mobile's proposal turns that principle on its head: instead of placing the burden on Defendant *T-Mobile* to demonstrate why its in-house attorneys need to see the Mobile Non-Parties' business secrets, it *presumes* unfettered access for in-house counsel and forces the Mobile Non-Parties to affirmatively request modification to ensure adequate protection.

Under the existing Agreed Confidentiality Order or T-Mobile's proposal, T-Mobile's in-house attorneys would automatically have access to substantial and significant competitive information of *multiple* competitors and/or customers. Once this information is learned, it cannot be forgotten and could be used to benefit T-Mobile in competing or negotiating with the Mobile Non-Parties, which could also harm competition in the wireless industry more broadly. Such information, which spans multiple facets of the companies' businesses, includes: (1) materials relating to the Mobile Non-Parties' marketing, pricing, competitive strategies, and sales; (2) materials identifying the Mobile Non-Parties' network deployments and capacity; (3) the specific business terms that the MNOs (e.g., AT&T and Verizon) have with MVNOs (e.g., Comcast, Cox, and Charter); and (4) detailed information about the Mobile Non-Parties' responses to corporate and government competitive bidding requests. These are merely examples of the requested information, precisely the types of sensitive information for which "the bell cannot be unrung" once learned. *Silversun Indus., Inc.*, 296 F. Supp. 3d at 947.

It cannot be seriously contested that the information requested is highly confidential, and T-Mobile even agreed during the Underlying Merger Litigation that "[m]ovants are competitors in the mobile wireless industry [and] certain information they produced during the investigation and will provide in the litigation may be competitively sensitive." *State of New York,* Defs.' Ltr. (S.D.N.Y. Jul. 12, 2019), ECF No. 293-4 at 1. Numerous courts agree that this type of information is competitively sensitive. *See, e.g.*, *Silversun Indus., Inc.*, 296 F. Supp. 3d at 941 ("Competitive decision-making includes 'business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions.'") (internal citation omitted).

4. Conclusion

The current Agreed Confidentiality Order does not adequately protect the Mobile Non-Parties, which will be producing some of their most sensitive, confidential information to a direct competitor and key supplier. Nor does T-Mobile's proposal. The Mobile Non-Parties' proposed modifications serve as a compromise between the Agreed Confidentiality Order and protective orders entered in recent antitrust cases that restrict competitively-sensitive information from being shared with a direct competitor or key supplier, comport with prior rulings by this Court and the protective order entered in the Underlying Merger Litigation, and mitigate the serious risk of significant harm to the Mobile Non-Parties and, more broadly, customers who benefit from competition among the Mobile Non-Parties and T-Mobile.

C. T-Mobile's Response to Mobile Non-Parties' Proposed Amendment

T-Mobile is defending itself against treble-damages antitrust claims brought by the customers of its competitors. Those claims relate to pricing for services provided by AT&T and Verizon, which Plaintiffs allege were "inflated." Plaintiffs seek to recover *from T-Mobile* the excess payments allegedly made by putative class members *to AT&T and Verizon*. Because the focus of this litigation is on the post-merger pricing decisions of T-Mobile's competitors, those competitors' documents and data are central to liability, damages, and class certification. T-Mobile's in-house counsel cannot meaningfully provide strategic guidance relating to T-Mobile's defense without some access to competitive information produced by non-parties, including information about the prices charged for services, the rationale for any price changes, the quality of the services provided, and the costs of providing service.

Judge Durkin, well-aware of the nonparty discovery that Plaintiffs' claims would entail, approved the parties' stipulated confidentiality order, which already imposes restrictions on access to Confidential and Highly Confidential materials and provides that information produced in discovery may be used "only for the prosecution or defense of claims, including any appeal thereof or the settlement of this action." ECF No. 98 at 7-11. Parties seeking modifications to that order "ha[ve] the burden of showing good cause to modify the protective order." *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 881 F.3d 550, 566 (7th Cir. 2018). While T-Mobile's position is that the existing Confidentiality Order provides sufficient protection for

producing parties, T-Mobile has offered to make certain changes to address the issues and concerns raised by the Mobile Non-Parties.

As an initial matter, T-Mobile is willing to impose significant restrictions on in-house counsel access to Highly Confidential information produced by non-parties. *See* ECF No. 293-1, Sections 2(A), 4(B)(2)(c). Under T-Mobile's proposal, T-Mobile would designate just "four (4) in-house counsel with responsibilities for the litigation of this Action who do not participate in Competitive Decision-Making." To qualify for access, in-house counsel "must have responsibilities for the litigation of this action and not currently, and for a period of nine (9) months following the last occasion on which Highly Confidential Information is disclosed to such in-house counsel, participate in or advise on Competitive Decision-Making at the company." Designated In-House Counsel would be required to execute a Designated In-House Counsel Agreement Concerning Confidentiality. Before any information designated Highly Confidential is disclosed to the Designated In-House Counsel, T-Mobile would provide to Plaintiffs and the designating party a Notice of Designated In-House Counsel that would include a written statement setting forth the name of the in-house counsel, and their past, current, and reasonably foreseeable future job responsibilities in sufficient detail to allow Plaintiffs and Designating Parties to evaluate whether they are involved, or may become involved, in competitive decision-making. This process (1) limits the number of T-Mobile lawyers who have access to Highly Confidential information, (2) limits, by job description and responsibilities, the T-Mobile lawyers eligible to receive Highly Confidential

information, and (3) provides an opportunity for Plaintiffs and Designating Parties to object to disclosure on an individual counsel-by-counsel basis. Given that, for example, the parties have agreed to up to 60 third-party depositions per side, four in-house counsel is a reasonable number to meet the discovery demands of this case.

In addition, T-Mobile understands that Mobile Non-Parties consider structured data to be particularly sensitive. T-Mobile therefore agreed to treat structured data differently and, under T-Mobile's proposal, structured data produced by non-parties would not be viewed by any T-Mobile employee, including by T-Mobile's Designated In-House Counsel.

Mobile Non-Parties have not demonstrated good cause to modify the existing Confidentiality Order beyond these two changes proposed by T-Mobile. However, if this Court disagrees, T-Mobile respectfully submits that the framework proposed by the Mobile Non-Parties should *not* apply to materials cited, relied upon, or used in expert reports, depositions, substantive briefs or motions, or in the trial of this matter ("Cited Materials"). Subjecting Cited Materials to the burdensome process requested by the Mobile Non-Parties would be exceptionally burdensome for T-Mobile and would generate a significant number of disputes that would need to be resolved by the Court. For the reasons described more fully below, T-Mobile's in-house counsel has significant need to receive and review Cited Materials and Cited Materials should be excluded from the burdensome process proposed by Mobile Non-Parties.

1. T-Mobile Has an Acute Need for Access to Information Produced by Mobile Non-Parties

In considering whether an attorney should have access to confidential materials, the Court should weigh a party's legitimate interest in ensuring that the information be protected against the other party's competing interest in having its counsel have access to that information. *See, e.g.*, *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55, 57-58 (D.D.C. 2007) (collecting cases); *In re Plastics Additives Antitrust Litig.*, 2005 WL 8179861, at *2 (E.D. Pa. Aug. 24, 2005) (modifying protective order to permit "automatic dissemination of highly confidential business materials to in-house counsel" that do not engage in competitive decision-making because (in part) it would "streamlin[e] the document discovery process, avoid[] prolonged negotiations and disputes over requests"); *United States v. Sungard Data Sys., Inc.*, 173 F. Supp. 2d 20, 21 (D.D.C. 2001) (permitting in-house counsel access to highly confidential information because "deny[ing] 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" would require them to "fight with one hand behind their backs").

T-Mobile has an acute need in this case for its in-house counsel to have access to materials concerning the prices, costs, and strategic decisions of its competitors. Plaintiffs' Complaint alleges that (1) the quality-adjusted prices for services provided by AT&T and Verizon, as well as industry-wide prices, are "inflated" (2) the Merger is the cause of the inflated prices, and (3) putative class members—i.e.,

customers of AT&T and Verizon—have been harmed by the allegedly inflated prices charged by AT&T and Verizon. Thus, *T-Mobile's* liability and *T-Mobile's* exposure depend significantly on the prices that have been independently set by non-parties, the reasons those non-parties elected to charge those prices, the quality of the services provided by non-parties, and the factors that impact non-party pricing, including changes in costs and demand. And class certification depends on variations in the answers to those questions. T-Mobile cannot evaluate or contribute to strategic decisions about the litigation without access to information that Mobile Non-Parties will designate as Highly Confidential.

For these reasons, the Amended Interim Protective Order entered in the prior merger case, *State of New York v. Deutsche Telekom AG,* is not an appropriate model for this case. No. 19-05434 (S.D.N.Y. Aug. 14, 2019), ECF No. 293-6. There, the court directed that the standard for disclosure of highly confidential information to in-house counsel would be: "Good cause, taking into account, but not limited to, the receiving party's need for disclosing the information to in-house counsel, and potential prejudice to the producing party if the information is disclosed." *State of New York v. Deutsche Telekom AG*, Order ¶7 (S.D.N.Y. Aug. 8, 2019), ECF No. 293-16. While the court adopted a similar framework to that proposed by Mobile Non-Parties, T-Mobile did not have the same "need for disclosing the information to in-house counsel" in the underlying merger case as it does in this class action. In the underlying merger case, the principal issues concerned future-looking information, i.e., whether T-Mobile would "pursue

anticompetitive behavior" post-merger and whether "Sprint, absent the merger, would continue operating as a strong competitor in the nationwide market for wireless services." *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 189 (S.D.N.Y. 2020). The litigation principally focused on the anticipated competitive conduct of T-Mobile and Sprint. While non-party information was *relevant* to the claims asserted in that case, it was not, as it is here, the *crux* of the case against T-Mobile and the sole basis for a substantial damages claim. T-Mobile's need for its in-house counsel to have access to non-party information in order to understand the nature of the claims against it, the viability of any class plaintiffs seek to certify, and the resulting potential exposure (if any), and to assess and determine strategy is obviously significantly greater here than it was in the prior merger case. Mobile Non-Parties suggest T-Mobile is offering the "same arguments" seeking access to the same confidential information as in the underlying merger litigation. But in *this* case, T-Mobile cannot defend itself against claims about its competitors' independent pricing decisions in the wake of the Merger without information about its competitors' pricing, pricing decisions, and pricing inputs.

Many of the cases Mobile Non-Parties cite are similarly inapposite because they concern challenges to unconsummated mergers where the only remedy sought was an injunction. *See FTC v. Advoc. Health Care Network*, Compl. ¶¶1-10, 69 (N.D. Ill. Dec. 22, 2015), ECF No. 293-17 (government action to enjoin unconsummated merger); *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.D.C. 1980) (same); *United States v. AT&T Inc.,* Compl.¶¶2-10, 48 (D.D.C. Nov. 20, 2017), ECF No. 293-

18 (same); *United States v. Aetna Inc.*, Compl. ¶¶2-14, 69 (D.D.C. Jul. 21, 2016), ECF No. 293-19 (same); *United States v. Anthem Inc.*, Compl. ¶¶2-15, 86 (D.D.C. Jul. 21, 2016), ECF No. 293-20 (same). Not surprisingly, the Mobile Non-Parties are unable to identify a single case where the plaintiffs were seeking to recover from a defendant payments made to a non-party that had independently set its own prices. Thus, none of Mobile Non-Parties' cases are persuasive. *See, e.g.*, *In re MultiPlan Health Ins. Provider Litig.*, Am. Compl. ¶¶50-79 (N.D. Ill. Nov. 18, 2024), ECF No. 293-21 (alleging defendants conspired to fix prices and seeking damages for prices set *by defendants*); *In re Delta Dental Antitrust Litig.*, 484 F. Supp. 3d 627, 631 (N.D. Ill. 2020) (alleging defendants engaged in "a multifaceted conspiracy" and seeking damages relating to prices set *by defendants*); *Bootler, LLC v. Google, LLC*, Compl. (N.D. Ill. May, 06, 2024), ECF No. 293-22 (alleging that Google infringed plaintiff's patents and engaged in anticompetitive conduct to exclude plaintiff from the relevant market). This case is not like *any* of the antitrust cases cited by the Mobile Non-Parties. Here, by seeking to hold T-Mobile liable for the independent conduct of its competitors, Plaintiffs are forcing T-Mobile to defend pricing decisions that it knows absolutely nothing about. It would be fundamentally unfair to deny T-Mobile's in-house counsel access to information relevant to its competitors' historical pricing decisions because that information is (arguably) competitively sensitive, while at the same time allowing Plaintiffs to pursue claims against T-Mobile that are entirely based those on the same third-party pricing decisions, which T-Mobile did not have any role in setting.

2. T-Mobile's Proposal Properly Balances the Competing Interests

Under T-Mobile's proposal, materials designated Highly Confidential cannot be disclosed except to a maximum of four Designated In-House Counsel who are not involved in competitive decision-making today, and will not be for at least nine months after accessing Highly Confidential materials. Disclosure to Designated In-House Counsel does not create any serious risk to the producing party. The fact that an attorney representing a party is in-house counsel "cannot… serve as the sole basis for denial of access" to information because "status as in-house counsel cannot alone create [the] probability of serious risk to confidentiality." *Braun Corp. v. Vantage Mobility Int'l, LLC,* 265 F.R.D. 330, 333 (N.D. Ind. 2009). For that reason, there is no *per se* ban on in-house counsel access to highly confidential or competitively sensitive information. *See, e.g.*, *Kraft Foods Global, Inc. v. Dairilean, Inc.*, 2011 WL 1557881 (N.D. Ill. Apr. 25, 2011) (granting in-house access to material designated Highly Confidential, stating "Courts have rejected a per se rule barring the disclosure of confidential information to in-house counsel or other parties"). The concern at the core of all the decisions the parties cite is whether there is a risk of inadvertent disclosure—T-Mobile's limit on the *number* and *type* of in-house counsel able to see Highly Confidential information significantly and properly reduces that risk, while still permitting T-Mobile the ability to defend itself.

3. Mobile Non-Parties' Proposal Is Overly Restrictive and Burdensome

If applied as proposed, Mobile Non-Parties' "framework" would impose unnecessary burdens on T-Mobile and the Court and would hamstring T-Mobile's ability to evaluate Plaintiffs' claims and to defend against them. Mobile Non-Parties' proposal would require T-Mobile to identify, by Bates number, *every single document* designated Highly Confidential to which its counsel needs access and to bring document-specific requests to each designating party for approval. If the designating party denies the request following a meet-and-confer with T-Mobile, T-Mobile would then be required to bring disputes as to *each document* to this Court.

The framework proposed by Mobile Non-Parties is all but certain to result in a very significant number of disputes before this Court. T-Mobile has a demonstrable need to provide in-house counsel with access to the materials on which T-Mobile's liability depends, the vast majority of which will be found in the productions of non-parties. T-Mobile submits that the Court should reject the framework proposed by Mobile Non-Parties because T-Mobile's proposals to limit access to Highly Confidential to only four Designated In-House Counsel is more than sufficient to protect non-parties' legitimate interests. *See* Section 2(A) (defining Designated In-House Counsel); Section 4(B)(2)(c).

If the Court adopts the framework proposed by Mobile Non-Parties, Cited Materials should be excluded from the burdensome process proposed. T-Mobile will obviously have sufficient grounds to seek disclosure of material designated Highly Confidential if such material is used in a deposition, in an expert report, or in

substantive briefing. And, under the proposal of the Mobile Non-Parties, T-Mobile would have to issue requests to *each* non-party in connection with *each* expert report, *each* brief, and *each* deposition in which such material is used. Assuming that the non-parties do not agree to the disclosure of information to T-Mobile's in-house counsel, T-Mobile would then need to meet and confer with each non-party, and submit disputes as to each document to the Court. This process will be grossly inefficient, will materially impede the progress of the case, and will impose undue burdens on T-Mobile and on the Court. If the Court adopts the framework proposed by the Mobile Non-Parties, it should exclude Cited Materials from that framework.

II. DISH'S ADDITIONAL POSITION REGARDING AMENDMENTS TO THE AGREED CONFIDENTIALITY ORDER

A. DISH's Position

In addition to the reasons identified by the other Mobile Non-Parties for modification of the Agreed Confidentiality Order, with which non-party DISH Network Corporation ("DISH") agrees, DISH has unique objections to the Agreed Confidentiality Order based on the Amended Final Judgment entered in *United States v. Deutsche Telekom AG*, No. 1:19-cv-2232-TJK, ECF No. 139 (D.D.C. Oct. 23, 2023) (the "Final Judgment").[6] The Final Judgment recognized that after the merger of Sprint and T-Mobile, DISH would become both a customer of and competitor to T-Mobile. For these reasons, the Final Judgment included a section

[6] The requirements of the Final Judgment remain in effect until its expiration on April 1, 2027. *Id.* at 38, Section XIX, Expiration of Amended Final Judgment.

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.* at 29-30, Section XIII, Firewall. The Final Judgment directed the parties to develop Firewall procedures to safeguard against anticompetitive behavior arising from the disclosure of competitively sensitive information within competitor carriers that could result from their unique relationship. DISH has advised T-Mobile that the Agreed Confidentiality Order, as well as T-Mobile's proposed modifications to it, which allow T-Mobile's in-house counsel access to DISH's competitively sensitive information, are antithetical to the conduct that the Final Judgment's directive sought to prevent. T-Mobile has dismissed DISH's concerns out of hand. It is DISH's position that the modifications to the Agreed Confidentiality Order proposed by the Mobile Non-Parties not only provide adequate protection for DISH's competitively sensitive information, but also conform to the Final Judgment.

B. T-Mobile's Position Against DISH's Proposed Amendment

The Firewall provision has no bearing on in-house counsel's access to DISH's highly confidential material. The Firewall provision was designed to prevent disclosure of competitively sensitive information obtained in the course of T-Mobile providing certain transition services to DISH and applies only to employees within each company that are involved in the marketing, distribution, or sale of competing products. *United States v. Deutsche Telekom AG*, No. 1:19-cv-2232-TJK, ECF No. 139 at 29-30 (D.D.C. Oct. 23, 2023). The provision is not a general bar to in-house

counsel overseeing litigation accessing materials produced in response to a subpoena. Further, the Firewall procedure does allow certain individuals at each company to access highly confidential information even in the course of providing transition services. *Id.* at 30-31. That includes full access to multiple in-house counsel providing legal support, including T-Mobile's proposed in-house counsel here, further showing that the Firewall provision was not intended to prevent access to sensitive information by in-house counsel providing legal services.

JOINTLY SUBMITTED BY

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