

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

ANTHONY DALE, BRETT JACKSON,  
JOHNNA FOX, BENJAMIN BORROW-  
MAN, ANN LAMBERT, ROBERT ANDER-  
SON, and CHAD HOHENBERY on behalf of  
themselves and all others similarly situated,

*Plaintiffs,*

v.

DEUTSCHE TELEKOM AG et al.,

*Defendants.*

Case No. 22-cv-3189

Judge Thomas M. Durkin

Magistrate Judge Jeffrey Cole

**DEFENDANT T-MOBILE US, INC.'S REPLY IN SUPPORT OF MOTION TO  
COMPEL DISH NETWORK CORP. TO PRODUCE DISCOVERY RESPONSIVE TO  
T-MOBILE'S SUBPOENA**

## I. INTRODUCTION

DISH refuses to produce highly relevant documents largely on the grounds that, as a nonparty, it should not be burdened with discovery. But as this Court has held, “the law does not seek to absolve nonparties from any burden, nor could it.” *Papst Licensing GmbH & Co. KG v. Apple, Inc.*, 2017 WL 1233047, at \*4 (N.D. Ill. Apr. 4, 2017). Instead, nonparties resisting discovery on grounds of burden must establish that the burden is *undue*. *Id.* That is a case-specific inquiry requiring the weighing of several factors, including relevance, the parties’ need for the discovery sought, and the burden on the nonparty, among other things. *Id.* at \*3.

This case is like no other in that Plaintiffs seek to hold T-Mobile liable for alleged injuries caused by the actions of nonparties. Even though Plaintiffs never purchased any T-Mobile phone plans or paid one cent to T-Mobile for such services, Plaintiffs assert that T-Mobile should pay them over a billion dollars and dismantle T-Mobile’s 5G network because DISH has failed to replicate Sprint’s competitiveness and AT&T and Verizon charged Plaintiffs higher fees. While T-Mobile disputes Plaintiffs’ allegations, it has no choice but to seek evidence that is exclusively in the possession of these nonparties to defend itself against Plaintiffs’ claims. To minimize the burden on DISH, T-Mobile proposed targeted “go get” production where possible and proposed limited search-term based custodial production where T-Mobile, as an outsider, could not identify specific responsive documents. But DISH has rebuffed these efforts and refused to engage with T-Mobile about custodial discovery at all, failing to even specify its burden during the parties’ meet and confer.

Faced with the Parties’ motion, DISH belatedly provided some information concerning its burden, but it has not established significant burden, much less burden that outweighs the relevance of the information T-Mobile seeks. Among other problems, DISH provides no information

concerning its burden associated with producing the “go get” documents T-Mobile requested. And while DISH has offered information about the cost associated with the custodial searches that T-Mobile has proposed, it ignores that T-Mobile has offered to discuss ways to reduce that burden through modifications of the search terms or alternative means to locate responsive information on a “go-get” basis—such as custodial interviews. Because DISH’s burden arguments do not meet the compromises T-Mobile would have suggested were DISH willing to meet and confer, they are simply a variation on a refusal to conduct any custodial searches at all. Nonparties have an obligation to conduct a reasonable, diligent search for responsive documents, which includes searching the files of individual employees who are likely to have responsive documents. This is the kind of case in which that kind of effort by nonparties is required. Given that discovery is targeted at DISH-specific allegations, and T-Mobile’s inability to obtain that information from other sources to defend against billion-dollar claims, DISH has failed to show that any burden on it is undue. The Court should grant T-Mobile’s motion.

## **II. ARGUMENT**

### **A. DISH Should be Compelled to Produce Data Concerning its Subsidiary Brands**

None of the arguments DISH advances in its opposition warrants denying T-Mobile’s request for data concerning DISH’s subsidiary MVNO brands. As T-Mobile explained in its opening brief, MVNOs are highly relevant to several hotly contested issues in this case, including market definition, the proper treatment of MVNO subscribers in measuring market concentration, the state of the competition in the retail mobile wireless telecommunications services (“RMWTS”) market post-merger and Plaintiffs’ failure to mitigate their purported damages. Dkt. 255 at 4-8. DISH does not even attempt to refute these points, nor could it. Ignoring all of the reasons T-Mobile set forth for needing data concerning its subsidiaries, DISH claims that it is “unclear” why the Parties are seeking this information because in its view, Plaintiffs’ claims relate solely to “the

MNO market, not the MVNO market.” Dkt. 283 at 23. Not so. The crux of Plaintiffs’ claim is that, following T-Mobile’s acquisition of Sprint, competition has substantially lessened in the RMWTS market, which Plaintiffs specifically allege “includes firms known as mobile virtual network operators (or ‘MVNOs’).” Dkt. 1 ¶¶ 23, 31. Indeed, DISH itself stated in its SEC filings that Boost and Gen Mobile brands compete against AT&T, Verizon, T-Mobile and other MVNOs within that market. Dkt. 256-20 at 5. Based on Plaintiffs’ assertions and DISH’s statements in its own public filings, there can be no credible dispute that DISH’s MVNO subsidiaries compete in the relevant market and that their data is relevant to this case. *United States v. Dean Foods Co.*, 2011 WL 382897, at \*2-3 (E.D. Wis. Feb. 3, 2011) (holding that data relating to nonparties’ ability to compete is “highly relevant” in a Section 7 case); *see also* Dkt. 255 at 4-8.

DISH’s argument that T-Mobile does not have a “substantial need” for data concerning Gen Mobile and Ting Mobile because they only make up a “small segment of the retail wireless and MVNO markets” is likewise meritless. Dkt. 283 at 22. Even if DISH’s subsidiary brands are “small player[s] in this market,” that “does not negate the facts that the information sought is relevant, non-cumulative and discoverable.” *AFMS LLC v. United Parcel Serv. Co.*, 2012 WL 3112000, at \*6 (S.D. Cal. July 30, 2012). Particularly where, as here, an industry-wide assessment of the competitive landscape is necessary, courts have found substantial need even for information that “provides only one small piece of the puzzle.” *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 339 n.25 (N.D. Cal. 1995). As courts reason, “[t]he whole picture may be greater than the sum of its parts, but there can be no picture at all unless the parts are collected one-by-one.” *Id.*; *accord AFMS*, 2012 WL 3112000, at \*6. Moreover, DISH is uniquely able to provide the information sought, “meaning [T-Mobile] meets the substantial need test.” *In Re Apple iPhone Antitrust Litig.*, 2020 WL 5993223, at \*10 (N.D. Cal. Oct. 9, 2020).

DISH's claimed burden does not excuse it from complying with T-Mobile's subpoena either. DISH acknowledges that its employees could gather and produce the requested data in a manner that minimizes disruption to its business before the close of discovery. Dkt. 283 at 23. DISH, like all citizens, must "provide evidence of which [it is] capable upon appropriate request." *Uppal v. Rosalind Franklin Univ. of Med. & Sci.*, 124 F. Supp. 3d 811, 813 (N.D. Ill. 2015). "The obligation to search business records may create some inconvenience, but this [is] always the case when a third party receives a subpoena. The evidentiary needs of our legal system unfortunately sometimes pose burdens for third parties." *Pizzuto v. Tewalt*, 2024 WL 4417419, at \*5 (D. Idaho Oct. 4, 2024). Given the nature of Plaintiffs' claims, the relevance of the information sought, T-Mobile's inability to obtain the information from any other source and the amount at stake in this litigation, DISH's professed burden is not undue. *Id.*

#### **B. DISH Should Produce "Go Get" Documents Sought by T-Mobile**

DISH does not contest the relevance of the "go get" documents T-Mobile requested. *See* Dkt. 283 at 19-21. Nor does DISH articulate any undue burden associated with collecting and producing the requested information. *Id.* While DISH argues that it does not maintain the information requested or that it is available from other sources, the evidence T-Mobile submitted shows otherwise. Dkt. 255 at 8-10.

Starting with DISH's CLV data and computation methodology, DISH argues that it "has pointed T-Mobile to publicly available information and DISH's prior productions." Dkt. 283 at 21. But as T-Mobile explained to DISH, the SEC filings that DISH directed T-Mobile to do not contain such information. Dkt. 255 at 10; Dkt. 256-3 at 7-8; Dkt. 256 ¶ 19. None of the documents that DISH produced to date discloses DISH's CLV data or computation method either. Dkt. 256-3 at 7-8. Tellingly, DISH does not cite to any public sources or previously produced documents that contain the information, which it presumably would have if its claims were correct.

DISH's argument that it does not maintain CLV data on a subscriber-by-subscriber basis is a red-herring, as T-Mobile is not insisting that DISH produce CLV data on that basis. Dkt. 255 at 10; Dkt. 256 ¶ 19. Instead, T-Mobile has repeatedly clarified that it is seeking the information as maintained by DISH in its ordinary course of business. *Id.* And evidence shows that DISH does maintain this information, as its documents explicitly reference its CLV data (although they do not disclose the actual data or computation method) and DISH's senior finance manager wrote on his LinkedIn page that his job responsibilities include preparing quarterly updates of DISH's CLV data. Dkt. 256-19 at \*740; Dkt. 256-23 at \*481; Dkt. 256-37 at 1.

DISH's refusal to produce documents sufficient to show the prices, plans, and features of DISH's and its subsidiaries' historical mobile wireless plans is likewise improper. DISH attempts to distort the parties' dispute concerning this request as one about the "form" of the information sought, but that is not so. Dkt. 283 at 20. T-Mobile is amenable to receiving the requested information as structured data, individual documents or whatever other "form" DISH maintains the information. But the problem here is that DISH's subscriber-level structured data that it offered to produce will only contain abbreviated descriptions of its plans and will not include most of the features and terms of those plans. Dkt. 255 at 10; Dkt. 256 ¶¶ 15, 18; Dkt. 256-5 at 3; Dkt. 256-7. Notably, DISH does not claim that the missing information is unavailable from other documents or data sources that it maintains in the ordinary course of business. Dkt. 283 at 20.

The Court should also reject DISH's refusal to produce documents sufficient to show the amount it paid to AT&T for network access and a breakdown of its costs, losses and profits for its mobile wireless business. Dkt. 283 at 20. As T-Mobile explained, the foregoing information is necessary to rebut Plaintiffs' specific allegations about DISH's business model and the prices of mobile services across the RMWTS market. Dkt. 255 at 9-10. T-Mobile further explained why it

needs more granular information than what is publicly available. *Id.* For example, the aggregated cost, profit and loss data reported in DISH's SEC filings does not provide a means to test Plaintiffs' allegations that DISH is cutting costs on services needed to retain subscribers, thereby protecting its profit margin at the expense of growing its business because DISH's ultimate plan is to sell its spectrum rather than becoming a serious competitor. *Id.* at 9.

DISH does not dispute that its SEC filings lack the details that T-Mobile seeks. Dkt. 283 at 20. DISH nevertheless insists that T-Mobile work with whatever is available because "T-Mobile is perfectly capable of hiring experts and consultants who can do sophisticated studies on DISH's publicly available financial information beyond just what its outside counsel can find out." *Id.* (cleaned up). This argument is flawed, as an expert's analysis must be based on actual data, not merely what they can surmise. *Compaq*, 163 F.R.D. at 338. Experts, no matter how sophisticated, cannot make up details about specific costs and profits that underly DISH's aggregated figures reported in its SEC filings. And such details are exclusively in DISH's possession, not any other public sources that T-Mobile's experts can research. The lone case that DISH cites in support of its argument is thus readily distinguishable, as the discovery at issue there concerned publicly available market intelligence. *See In Re Apple iPhone*, 2020 WL 5993223, at \*5.

DISH does not claim that it lacks the information sought by T-Mobile or that retrieving the information would be unduly burdensome. Nor could it, as a breakdown of DISH's costs and profits would have to roll up to the aggregated figures reported in DISH's SEC filings. Further, according to DISH's network access agreement with AT&T, DISH is "invoiced on a monthly basis and is responsible for payment for all charges attributable to DISH's Numbers and Services."<sup>1</sup>

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<sup>1</sup> See DISH Network Corporation, Form 10-Q for the quarterly period ended September 30, 2021, Exhibit 10.1 at Art. V, ¶ 1, available at <https://ir.echostar.com/static-files/53a6cb6c-f805-47ec-85a9-a5ade051a909> (last visited April 15, 2025).

The monthly invoices and records of DISH's payments, including any offsets for disputed charges or other credits, should be in DISH's possession and readily identifiable.

For the foregoing reasons, DISH should be compelled to conduct a reasonable, diligent search for and produce documents or data sufficient to show (1) DISH's CLV data and computation methodology, (2) the details of its historical plans on par with the information DISH provides on its website about its current plans, (3) the monthly invoices DISH receives from AT&T for network access and records of DISH's payment (including offsets and credits), and (4) a breakdown of DISH's costs, profits, and losses. *See V5 Techs. v. Switch, Ltd.*, 332 F.R.D. 356, 366 (D. Nev. 2019) ("A person subpoenaed for the production of documents is under an affirmative duty to seek that information reasonably available to her."). To the extent DISH contends that no responsive documents or data exists, it should be ordered to submit a declaration from its representative so stating under oath and detailing the diligence DISH has undertaken to locate responsive documents. *Id.* at 367; *Pizzuto*, 2024 WL 4417419, at \*5.

**C. DISH Should Produce Documents from Custodial Sources**

DISH accuses T-Mobile of illogically seeking custodial discovery before reviewing the information DISH has agreed to produce. Dkt. 283 at 13. That is wrong. T-Mobile agreed to hold off on seeking additional documents for multiple requests included in its subpoena until DISH has completed its planned supplemental production. Dkt. 256-3 at 2-3. The requests that T-Mobile agreed to table cover various topics related to DISH's build out of, and deployment of services on, DISH's facilities-based 5G network; correspondence with regulatory agencies; DISH's network quality and capacity; and DISH's network coverage area and changes thereto, among other things. *Id.* T-Mobile has not moved on these requests because DISH agreed to produce additional reports submitted to the monitoring trustee charged with overseeing DISH's compliance with its network build out and service deployment commitments, as well as confidential submissions to the FCC in



WT Docket 22-212,<sup>13</sup> established to monitor DISH's facilities-based 5G deployment. Given the types of information that DISH's supplemental production is expected to cover and DISH's representation that that production will contain responsive information concerning various topics related to DISH's network, T-Mobile agreed to receive those documents first and seek additional information if there are any gaps. Dkt. 256-3 at 2-3; Dkt. 256-6 at 2-4; Dkt. 285-1 at 235.

By contrast, DISH has expressly refused to produce responsive documents for certain *other* requests based on a host of boilerplate objections or otherwise directed T-Mobile to nonresponsive sources, necessitating T-Mobile's motion. Dkt. 256-3 at 8-10. For example, in response to T-Mobile's Request No. 16, which seeks documents concerning how DISH determines the prices of its plans, DISH lodged objections and stated that it would not produce anything beyond subscriber-level structured data. Dkt. 256-2 at 27-28. However, structured data would show only what the prices are, not how DISH determines them, such as the basis, factors and methodology for its pricing decisions. Similarly, in response to Requests Nos. 18, 20 and 24—which seek documents concerning how DISH decides whether to launch new plans or retire existing ones, DISH's promotions and marketing efforts to compete and the effectiveness of those efforts, and DISH's analyses of its churn rates and factors that cause its subscribers to switch to and from its plans—DISH again lodged objections and refused to produce any documents. Dkt. 256-2 at 30-31, 32-33, 37-38. For Request No. 21, which seeks documents concerning DISH's plans to grow its business, including any potential or planned partnerships with other entities such as device manufacturers or content providers to fuel that growth, DISH stated that it will produce reports and submissions to the FCC and the monitoring trustee. Dkt. 256-2 at 33-34. Because the FCC and the monitoring trustee oversee DISH's compliance with its network build out and service deployment commitments, these type of compliance reports and submissions that DISH intends to

produce would not include responsive information on “the operation of [DISH’s] business” or future plans as requested by T-Mobile. *See* Dkt. 284-1, Ex. A at 28, ¶ F. Likewise, in response to Request Nos. 5, 10, 12 and 13, which calls for internal discussions about a statement made by DISH’s Chairman and DISH’s purchase and acquisition of spectrum, DISH refused to produce any documents beyond its initial production of 383 documents, which did not contain responsive information. Dkt. 256-2 at 14-15, 19-20, 22-24; *see also* Dkt. 256-3 at 8-9.

Documents responsive to the foregoing requests are directly relevant to specific allegations made by Plaintiffs and T-Mobile cannot obtain them from any sources other than DISH. Dkt. 255 at 10-11. Because DISH has refused to produce responsive documents for these requests, there is no reason for T-Mobile to wait and see what DISH’s supplemental production contains. T-Mobile proposed a limited number of custodians and search terms tailored to locate responsive documents and invited DISH to propose modifications, but DISH declined to do so. *Id.* at 11. T-Mobile asked DISH to propose other means to locate responsive documents, including through custodial interviews, but again DISH refused, claiming that even having discussions with custodians is too burdensome. *Id.*; Dkt. 256 ¶ 21. DISH’s wholesale refusal to conduct *any* custodial discovery stands in contrast to other nonparties like AT&T, for example, which committed to conducting robust “custodial interviews and searching both custodial and noncustodial sources for responsive documents and data.” Dkt. 275 at 2, 4-6. DISH also declined to provide any information concerning its purported burden. Dkt. 256 ¶ 21.

In its Opposition, DISH disclosed for the first time that T-Mobile’s proposed search terms return about 230,000 documents after deduplication and may cost about [REDACTED] to review. Dkt. 283 at 17. That hit count should start a negotiation; it is not a reason to refuse to produce documents. For its part, T-Mobile has always been willing to confer with DISH on search terms

and custodians to reduce DISH's burden to the extent possible. DISH cannot refuse to engage in such discussions and then use burden as a basis to refuse custodial discovery altogether. *See Velez v. Chicago*, 2021 WL 3930427, at \*1 (N.D. Ill. Sept. 2, 2021).<sup>2</sup>

#### **D. DISH's Confidentiality Concerns Do Not Bar Discovery**

DISH argues that it should not be compelled to produce highly confidential information unless and until the confidentiality order is modified. Dkt. 283 at 25-28. A separate joint filing thoroughly briefs this issue. Dkt. 293. As T-Mobile explains there, the modifications proposed by DISH and other nonparties are inappropriate in this case given the centrality of nonparty discovery to resolution of both class certification and merits issues. *Id.* at 14-23. And the Firewall provision DISH references applies only to information shared during T-Mobile's provision of transition services to DISH relating to T-Mobile's divested business, not documents produced in discovery in future legal proceedings. *Id.* at 24-25. Regardless, T-Mobile will comply with any ordered modifications to the confidentiality order. As such, DISH's confidentiality concerns cannot be "a basis for withholding information in the ordinary course of discovery." *United Artists Corp. v. United Artist Studios LLC*, 2019 WL 9049050, at \*5 (C.D. Cal. Oct. 7, 2019).<sup>3</sup>

### **III. CONCLUSION**

For the foregoing reasons, the Court should grant T-Mobile's motion to compel DISH.

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<sup>2</sup> DISH's request for cost-shifting is premature. *See* Dkt. 283 at 28-29. Cost-shifting is not automatic and instead requires the balancing of several factors, including the cooperativeness of the responding party. *See DeGeer v. Gillis*, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010). The Court should resolve this issue after the parties and DISH complete their additional meet and confer and submit their report to the Court. Dkt. 277.

<sup>3</sup> DISH complains about having to produce pre-merger documents and addresses of its subscribers. Dkt. 283 at 18-19, 24. But T-Mobile's search terms and data requests are limited to post-merger period and T-Mobile did not ask for subscriber addresses. DISH's request for leave to file a motion for protective order to limit depositions of its employees is premature, as no deposition subpoenas have been served, nor has any meet and confer occurred. A premature motion on this issue is not only wasteful of the Court's limited resources, but will also prejudice T-Mobile, as DISH has not yet produced documents that will inform which witnesses to depose, the topics to be covered and the need for the depositions.

DATED: April 21, 2025

Respectfully submitted,

*/s/ Rachel S. Brass*

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Rachel S. Brass (*pro hac vice*)  
Caeli A. Higney (*pro hac vice*)  
GIBSON, DUNN & CRUTCHER LLP  
One Embarcadero Center, Suite 2600  
San Francisco, CA 94111-3715  
Phone: 415-393-8200  
[RBrass@gibsondunn.com](mailto:RBrass@gibsondunn.com)  
[CHigney@gibsondunn.com](mailto:CHigney@gibsondunn.com)

Minae Yu (*pro hac vice*)  
GIBSON, DUNN & CRUTCHER LLP  
333 South Grand Avenue  
Los Angeles, CA 90071-3197  
Phone: 213-229-7000  
[Myu@gibsondunn.com](mailto:Myu@gibsondunn.com)

Clifford C. Histed ARDC No. 6226815  
Michael E. Martinez ARDC No. 6275452  
K&L GATES LLP  
70 West Madison Street Suite 3300  
Chicago, IL 60602-4207  
Phone: (312) 807-4448  
[clifford.histed@klgates.com](mailto:clifford.histed@klgates.com)  
[michael.martinez@klgates.com](mailto:michael.martinez@klgates.com)

*Counsel for Defendant T-Mobile US, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2025, I electronically filed a copy of the foregoing through the Court's CM/ECF system, which will send notifications of the filing to all counsel of record.

/s/ Rachel S. Brass

Rachel S. Brass