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.

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

Defendants.

Case No. 1:22-cv-03189

Hon. Thomas M. Durkin

Hon. Albert Berry, III

PLAINTIFFS' STATUS REPORT REGARDING DISH MOTION TO COMPEL

Plaintiffs write following Magistrate Cole's direction to "take a second try" at conferring with DISH Network Corp. ("DISH") and then "report their results." ECF No. 277. Unfortunately, DISH's post-briefing negotiation tactics continue its long pattern of obfuscation, speculation, and prevarication that dominated the year of meet and confers that predated Plaintiffs' motion to compel. Plaintiffs and DISH thus remain at impasse and require the Court's intervention.[1]

Plaintiffs seek monetary damages flowing from, and injunctive relief to remediate, the anticompetitive merger between Sprint Corporation and T-Mobile US, Inc. As detailed in the pending motion, Plaintiffs subpoenaed DISH—a critical non-party that played a "starring role" in securing approval of the merger by committing to emerge as a replacement competitive force "from day one," ECF Nos. 253, 299—for documents and structured data relevant to the parties' claims and defenses. DISH's CEO, Charlie Ergen, even "exchanged text messages" with the head of the DOJ's Antitrust Division who "advised him on how to secure regulatory approval" of the merger. ECF No. 299 at 1 (quoting Melody Wang & Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal from the Start*, ProMarket (Apr. 23, 2021)).

Since the briefing on Plaintiffs' motion to compel, Plaintiffs and DISH have met and conferred by video conference on April 28, May 5, May 9, and May 22, 2025. In those conversations, Plaintiffs reiterated their request for so-called search term hit reports detailing the number of unique documents returned by their proposed search methodology. Search term hit count reports serve two purposes. First, they are a necessary step for a responding party seeking to substantiate a claim of undue burden. Second, if an undue burden is shown, they allow for refinement of the propounding party's search methodology, by identifying candidate terms (those

[1] Plaintiffs have conferred with T-Mobile, as this Court requested, and understand that the T-Mobile and DISH discussions are ongoing, but will be completed in the near-term and that T-Mobile will report on its progress then.

generating disproportionate numbers of hits) for narrowing and refinement.

On May 9, 2025, DISH finally committed to test and provide hit count reports for all of Plaintiffs' proposed search terms.[2] That same day, Plaintiffs narrowed their existing search term proposal to DISH. Ex. A. And the following day, DISH represented that it would "expect to have a hit report for Plaintiffs' revised search terms [at] some point in the week of May 19." Ex. B. But on May 19, 2025, DISH walked back its prior commitment and instead "declined to test" most of Plaintiffs' search terms. Ex. C. For example, DISH refused to test patently relevant terms, including (1) those designed to capture DISH's interactions with T-Mobile, (2) DISH's failure to emerge as a viable fourth wireless carrier following T-Mobile's divesture commitments, and (3) DISH's interactions with the Department of Justice's monitoring trustee.[3] It instead provided a report for a cherry-picked "subset of Plaintiffs' revised search terms," *id.*, purporting to identify 308,491 responsive document "hits" (462,736 counting email attachments as separate hits) and claiming that such a review burden was undue. Ex. D.

It is important to understand that DISH has opted *not* to run its hit reports on an industry standard e-discovery platform. Instead, DISH is apparently running some version of Google Search on Google Workspace documents, which does not have basic litigation tools, such as document de-duplication or email threading. Without de-duplicating, a single, identical email

---

[2] An objecting party should "provide[] hit counts for searches run with each of the proposed terms regardless of whether it believe[s] the terms [are] appropriate" to substantiate its burden. *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21 C 305, 2023 WL 4181198, at *11 (N.D. Ill. June 26, 2023); *accord* 10 Sedona Conf. J. 339, 354 (2009) ("counsel may not use his superior information as to the location or nature of responsive documents to thwart good faith discovery requests by refusing to engage cooperatively to identify . . . the search terms likely to produce responsive documents").

[3] Specifically, DISH declined to test 140 search term strings, including, e.g., (1) running T-Mobile's email domain across its email to, from, and cc lines (despite testing the analogous terms for AT&T and Verizon's email domains), (2) (DISH OR Boost OR Genesis OR "Gen Mobile" OR "Ting Mobile" OR Republic Around(20) ("T-Mobile" OR Tmobile OR TMO OR "T-Mo") AROUND(20) ("MNSA" OR "Master Network Services Agreement")), and (3) "monitoring trustee" OR ((monitor OR monitors OR monitoring) AROUND(3) trustee) AROUND(10) "DOJ Consent Decree").

appearing in five custodians' files would be reported as five separate document "hits," despite the fact that only one document would need to be reviewed and produced. Without threading, a single email thread with twenty responses in the thread could be reported as twenty separate document hits, despite the fact that only one copy of the email thread would need to be reviewed and produced. These errors compound: if an email thread with twenty responses appears in five custodians' files, DISH's "hit report" would erroneously count that single document as one hundred separate "hits," instead of the single document that would need to be reviewed and produced. Furthermore, DISH simply assumed (without testing) that 50% of emails would include an attachment; a traditional litigation ESI platform would obviously give a true count of non-duplicative attachments. Processing the documents and hosting them for the short amount of time necessary to create a real hit report could be done for a few thousand dollars, far, far less than DISH has spent litigating this motion.[4]

During a meet and confer on May 21, 2025 and by written correspondence on May 22, 2025, Plaintiffs explained these deficiencies. DISH's refusal to accurately substantiate its claimed burden (and offer a real opportunity to reduce it) amounts to a waiver of that objection, requiring full compliance with Plaintiffs' proposed search methodology. *E.g.*, *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21 C 305, 2023 WL 4181198, at *11 (N.D. Ill. June 26, 2023) (ECF No. 299 at 5) (compelling production pursuant to "Plaintiffs' proposed search terms and custodians" where objecting party "failed to substantiate its burden by providing hit counts for any of the individual disputed search terms or any of its specific proposed modifications").

[4] The assertion by DISH—a company that had 2024 revenues of $15.83 billion—that its cost estimate of $72,900 to create the required hit report itself presents an undue burden is not a serious one. In any event, that cost estimate is for ***six*** months of hosting and ***fifty*** attorney user licenses. Even accepting DISH's vendor's estimate of costs, generating a hit report would cost approximately $10,000, consisting of one month of hosting ($6,600) and project management time ($1,600), plus loading fees.

Plaintiffs also explained to DISH that even if its hit report's estimate of a few hundred thousand documents was accurate (and as explained, it is not accurate), that would not come close to amounting to an undue burden for a critical non-party in an antitrust case affecting hundreds of millions of American consumers. Ex. D. In analogous merger litigation, a non-party wireless carrier was compelled to produce 2.2 million supplemental documents, for a total of 4.8 million documents. Special Master Order No. 2, *United States v. AT&T Inc.*, No. 1:11-cv-1560 (D.D.C. Nov. 6, 2011), ECF No. 75. Finally, Plaintiffs reminded DISH of proposals they had made to reduce DISH's burden further, including that DISH simply produce all documents hitting on Plaintiffs' search terms without a responsiveness review (which would virtually eliminate DISH's document review burden).[5] Ex. D. Plaintiffs offered DISH one final opportunity to substantiate its burden. *Id.* DISH refused. Ex. E. Plaintiffs and DISH therefore remain at impasse and respectfully request the Court's resolution of this dispute.[6]

DISH has also recently disclosed that it destroyed relevant electronically stored information. With the express authorization of Judge Durkin, Plaintiffs served a preservation subpoena on DISH in October of 2022. DISH has just now disclosed, however, that it deleted the files of at least one custodian (its former Chief Commercial Officer Stephen Bye) in January of 2023. DISH claims, at odds with the Federal Rules, that it had no duty to preserve Mr. Bye's files because Plaintiffs did not specifically request him as a custodian in October 2022. But *DISH itself* proposed Mr. Bye as one of its four most salient custodians, *see* ECF No. 253, at 9; ECF

[5] *In re Actavis Holdco, U.S., Inc.*, No. 19-3549, 2019 WL 8437021, at *1 (3d Cir. Dec. 6, 2019) (affirming MDL district court's "wide latitude in controlling discovery," including discretion to order the "production of documents without a manual relevance review") (collecting cases).

[6] DISH's complaint that Plaintiffs and T-Mobile did not sufficiently coordinate their negotiations is a red herring. Without receiving the search term hit reports from DISH necessary for it to substantiate its objections, Plaintiffs cannot even begin coordinating negotiations with T-Mobile.

No. 283, at 4 n.3, and the duty to preserve is not limited to specific sources of responsive information—it extends to "any and all responsive information sought by [a] subpoena." *Ervine v. S.B.*, No. 11 C 1187, 2011 WL 867336, at *2 (N.D. Ill. Mar. 10, 2011); *see also AOT Holding AG v. Archer Daniels Midland Co.*, No. 19-2240, 2021 WL 6118175, at *6 (C.D. Ill. Sept. 3, 2021) ("A simple letter . . . requesting [the recipient] preserve records . . . would have been a sufficient triggering event" for a duty to preserve). DISH's failure to preserve Mr. Bye's files after being subpoenaed adds to the urgency of Plaintiffs' motion, which should be granted promptly before further discovery is lost.

DISH should therefore be ordered to produce within thirty days all requested structured data and all responsive, non-privileged documents hitting on Plaintiffs' search term and custodian proposal.

Dated: May 30, 2025

/s/ Brendan P. Glackin
Brendan P. Glackin (*pro hac vice*)
Lin Y. Chan (*pro hac vice*)
Nicholas W. Lee (*pro hac vice*)
Sarah D. Zandi (*pro hac vice*)
Jules A. Ross (*pro hac vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Phone: (415) 956-1000
bglackin@lchb.com
lchan@lchb.com
nlee@lchb.com
szandi@lchb.com
jross@lchb.com

Gary I. Smith Jr. (*pro hac vice*)
HAUSFELD LLP
580 California Street, 12th Floor
San Francisco, CA 94111
Phone: (267) 702-2318
gsmith@hausfeld.com

Swathi Bojedla (*pro hac vice*)

Jose Roman Lavergne (*pro hac vice*)
Shana R. Herman (*pro hac vice*)
HAUSFELD LLP
1200 17th Street NW, Suite 600
Washington, D.C. 20036
Phone: (202) 540-7200
sbojedla@hausfeld.com
jlavergne@hausfeld.com
sherman@hausfeld.com

Renner K. Walker (*pro hac vice*)
HAUSFELD LLP
33 Whitehall St., 14th Floor
New York, N.Y. 10004
Phone: (646) 362-3075
rwalker@hausfeld.com

Robert Litan (*pro hac vice*)
BERGER MONTAGUE PC
2001 Pennsylvania Avenue, NW, Suite 300
Washington, D.C. 20006
Phone: (202) 559-9745
rlitan@bm.net

Joshua P. Davis (*pro hac vice* forthcoming)
BERGER MONTAGUE PC
59A Montford Avenue
Mill Valley, CA 94941
Phone: (415) 215-0962
jdavis@bm.net

Joel Flaxman
ARDC No. 6292818
Kenneth N. Flaxman
ARDC No. 830399
LAW OFFICES OF KENNETH N. FLAXMAN P.C.
200 S Michigan Ave., Suite 201
Chicago, IL 60604
Phone: (312) 427-3200
jaf@kenlaw.com
knf@kenlaw.com

Counsel for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I certify that on May 30, 2025, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which will then send electronic copies to the registered participants as identified on the Notice of Electronic Filing (NEF).

Respectfully submitted,

/s/ Brendan P. Glackin

Brendan P. Glackin (*pro hac vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111 3339
Phone: (415) 956-1000
bglackin@lchb.com
Counsel for Plaintiffs and the Proposed Class