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' BRIEF IN OPPOSITION TO NON-PARTY
AT&T MOBILITY LLC'S OBJECTION TO MAGISTRATE JUDGE'S ORDER

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INTRODUCTION

Plaintiffs served a preservation subpoena on AT&T in 2022 and have been attempting to negotiate enforcement for nearly *two years*. Plaintiffs sought to engage with AT&T repeatedly in an effort to avoid court intervention. During that time, AT&T refused to provide even basic information about custodial discovery, such as identifying relevant custodians or even producing organizational charts. Even after Plaintiffs filed their motion to compel and then-Magistrate Judge Cole ordered the parties to give negotiations another try, AT&T simply maintained its categorical position that it should not have to run *any* custodial searches. And, in its briefing below, it *chose* not to dispute the relevance of Plaintiffs' proposed custodians, or to substantiate its claims of disproportionality and undue burden, or to identify any custodians it believed would be more appropriate. Now, having failed in this all-or-nothing strategy, AT&T argues that the Magistrate Judge should be reversed because he clearly erred in not properly weighing information that AT&T never gave him. For relief, AT&T seeks yet more delay: It asks this Court to order AT&T to participate in the meet and confer process it has effectively boycotted for two years now. That will, as the Magistrate Judge put it, "[a]dd[] an additional step [that would] only serve to slow things down even further." (Dkt. 340 ("Order") at 5.)

This case seeks redress for over 200 million wireless subscribers, including over 100 million of AT&T's own customers, based on the substantial reduction of competition (and higher prices) caused by the merger of T-Mobile and Sprint. Damages in this case to AT&T subscribers *alone* likely exceed a billion dollars. Custodial discovery is justified given the stakes and AT&T's centrality to this case, and Plaintiffs have bent over backwards to resolve enforcement of this subpoena without burdening the courts. AT&T's response has been intransigence. For the following reasons its objection should be overruled.

First, Magistrate Judge Berry based his decision on legal and factual findings that are undisputed. AT&T had the burden of substantiating its claim of undue burden, and it made virtually no effort to do so. (*See infra* Part I.A.)

Second, AT&T argues Magistrate Judge Berry clearly erred by "wholesale" adopting, purportedly without "permit[ting]" AT&T to weigh in, a list of custodians whose seniority supposedly makes them only marginally relevant. AT&T has waived this point because it failed to dispute those custodians' relevance before Magistrate Judge Berry and did not suggest more appropriate custodians. AT&T also fails to acknowledge that evidence from AT&T's actual *decisionmakers*—the custodians at issue here—has direct relevance in demonstrating how the merger affected AT&T's pricing and network strategy. And no one stopped AT&T from weighing in on custodians; instead, AT&T failed to give input on custodians despite numerous opportunities. (*See infra* Part I.B.)

Third, AT&T claims Magistrate Judge Berry clearly erred by supposedly prioritizing relevance over considerations of burden and proportionality. But AT&T made virtually no attempt to substantiate its claims of undue burden or disproportionality. Only now, after the Magistrate Judge has already ruled, has AT&T submitted a declaration purporting to quantify that burden. But even if that belated declaration could be considered on clear error review (which it cannot), what it actually shows is that the burden on AT&T is relatively minor compared to the multi-billion dollar stakes in this case. (*See infra* Part I.C.)

Fourth, AT&T advances arguments that would undermine the basic discovery framework embodied in the Federal Rules. AT&T claims that the court should have ordered it to again meet and confer about custodians, giving AT&T a redo when it has disregarded every past opportunity to engage meaningfully on that issue. AT&T also argues that Plaintiffs' good faith offers of

compromise (which AT&T *rejected* and refused to counter), should set the ceiling for the relief Plaintiffs can receive from the court. Accepting either argument would create a perverse incentive for parties not to engage in good faith discovery negotiations. (*See infra* Part I.D.)

BACKGROUND

A. The Merger and Reduction in Competition.

In April 2018, T-Mobile announced a merger with Sprint that would reduce the number of competitors in the retail wireless market from four to three. T-Mobile and Sprint were both "maverick" competitors whose price cuts and promotions pressured AT&T and Verizon to lower prices or risk losing subscribers. (Compl. (Dkt. 1), ¶ 35.) With only three competitors remaining post-merger, it is "less likely firms will engage in price wars and more likely they will align on price, avoid competition, and maximize profits." (*Id.* ¶ 53.) "[T]he elimination of a competitor does away with the pricing pressure offered by that firm's possibly superior efficiency and interest in acquiring volume," and the remaining competitors can "expect to charge higher prices without losing customers to better deals." (*Id.* ¶ 52.)

The merger resulted in higher prices for customers of not only the new T-Mobile, but also Verizon and AT&T. Evidence of AT&T's price increases due to the merger come from AT&T's executives themselves. In early 2022, after the merger, AT&T Senior EVP and CFO Pascal Desroches told investors that "a more normalized industry backdrop" (meaning less price competition from maverick competitors) would permit "surgical price increases" to boost AT&T's growth. (*Id.* ¶ 107.) AT&T CEO John Stankey told investors that "he saw room" to raise prices and predicted "prices would rise across the telecom industry 'over the next several quarters.'" (*Id.* (internal citation omitted).) On May 3, 2022, AT&T announced it would raise prices on older wireless plans by $6 per month and $12 per month for single and multi-line subscribers

respectively. (*Id.*) AT&T raised prices again in August 2024 with price hikes of $10 and $20 per month on users of legacy unlimited wireless plans. (Dkt. 257 at 3 n.4.)

B. Plaintiffs' Suit and Third-Party Discovery Efforts.

On June 17, 2022, Plaintiffs sued T-Mobile, SoftBank, and Deutsche Telekom on behalf of customers of AT&T and Verizon, seeking to recover damages for the harm to competition in the retail wireless market caused by the merger. A critical issue in the case will be how the merger affected AT&T's pricing and quality, and AT&T has exclusive possession of much of the evidence on that question. Accordingly, on October 19, 2022, Plaintiffs subpoenaed AT&T for documents related to the merger, the retail wireless market, and AT&T's wireless business. (Dkt. 257-2.)

Discovery was stayed pending a decision on T-Mobile's motion to dismiss. (Dkt. 71.) On November 2, 2023, this Court denied T-Mobile's motion to dismiss. (Dkt. 114.) The parties held a Rule 26(f) conference on November 10, 2023. (Dkt. 119.)

On January 31, 2024, AT&T served its responses and objections to Plaintiffs' subpoena. AT&T asserted Plaintiffs' discovery requests were "irrelevant . . . vague and ambiguous, overly broad, unduly burdensome, unreasonably cumulative and duplicative of their requests, and not proportional to the needs of the [case]." (Dkt. 257-3.) AT&T stopped all negotiations regarding Plaintiffs' subpoena when the Court granted T-Mobile permission to seek an interlocutory appeal under 28 U.S.C. § 1292(b). (Dkt. 176; Dkt. 257-4.) AT&T would not engage further with Plaintiffs' subpoena until after the Seventh Circuit denied T-Mobile's application for appeal on May 16, 2024. (Dkt. 184.)

During a meet and confer on September 6, 2024, Plaintiffs asked AT&T to provide organizational charts and a proposed set of custodians. (Dkt. 257-1, ¶ 14.) On September 20, 2024, AT&T claimed that it was "improper" for Plaintiffs to request that AT&T "provide a

proposed list of custodians, organizational charts, and search terms, to allow Plaintiffs to select which custodians and search terms they feel are appropriate," and AT&T instead insisted that (for post-merger documents) it would make only "targeted collections" for materials on a "sufficient to show" basis. (Dkt. 257-8.) On November 7, 2024, Plaintiffs offered AT&T a compromise that narrowed several document requests and invited AT&T (again) to identify potential custodians and negotiate search terms. (Dkt. 257-9.) On November 15, 2024, AT&T again refused to identify potential custodians or negotiate search terms, and again insisted on producing for the post-merger period only narrow "'go-get' documents sufficient to show certain information requested." (Dkt. 257-10.)

On February 24, 2025, Plaintiffs provided AT&T a list of 15 proposed custodians, identified by Plaintiffs' independent research, as well as a set of search terms. (Dkt. 257-12; Dkt. 257-13.) On March 3, 2025, Plaintiffs met and conferred again with AT&T, which continued to refuse to conduct any custodial searches. (Dkt. 257-1, ¶ 39.)

Throughout the parties' negotiations, AT&T never substantiated the burden associated with custodial discovery through hit-reports, cost estimates, or otherwise.

On March 21, 2025, Plaintiffs moved to compel AT&T's discovery using the custodians and search terms Plaintiffs proposed on February 24, 2025. (Dkt. 257.) On April 1, 2025, then-Magistrate Judge Cole ordered Plaintiffs and AT&T to take a "second try" at a negotiated resolution to AT&T's production. (Dkt. 277.) On May 8, 2025, Plaintiffs informed the Court that it had made a compromise proposal, that AT&T had declined the proposal, and that AT&T continued to "categorically refuse to conduct any custodial document searches" and "refuse[d] even to discuss any of Plaintiffs' proposed custodians or search terms or to disclose any relevant

custodians or terms it identified in its own investigation." (Dkt. 306.) AT&T did not dispute these facts. (Dkt. 307.)

C. Magistrate Judge Berry's Order.

On October 3, 2025, Magistrate Judge Berry issued a ruling that granted in part and denied in part Plaintiffs' motion to compel. (Order at 1.) In his opinion, the Magistrate Judge explained that "the scope of material obtainable pursuant to a Rule 45 subpoena is as broad as what is otherwise permitted under Rule 26(b)(1)." (Order at 2 (quoting *Kleimar N.V. v. Benxi Iron & Steel Am., Ltd.*, 2017 WL 3386115, at *7 (N.D. Ill. Aug. 7, 2017)).) Thus, as the Magistrate Judge explained, Plaintiffs' subpoena could properly seek "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." (Order at 2–3 (quoting Fed. R. Civ. P. 26(b)(1)).)

Magistrate Judge Berry also recognized that the court must "quash or modify a subpoena that subjects a person to an undue burden" (*id.* at 2 (quoting Fed. R. Civ. P. 45)), and he also explained that the party resisting the subpoena—AT&T—has the "burden of demonstrating that the subpoena subjects the party to an undue burden" (*id.* at 4 (internal alterations omitted) (quoting *Am. Soc. of Media Photographers v. Google, Inc.*, 2013 WL 1883204, at *2 (N.D. Ill. May 6, 2013))).

Applying that legal standard to the record before him, Magistrate Judge Berry concluded that the custodial documents and post-merger structured data were relevant and proportional, while pre-merger documents and structured data were not. (*Id.* at 3–4.) Indeed, with the exception of said pre-merger matter, as well AT&T's external communications with T-Mobile

and Verizon, Magistrate Judge Berry observed AT&T's briefing *conceded* Plaintiffs' requests were relevant. (*Id.* at 3.) As regards undue burden, Magistrate Judge Berry held that "AT&T [had] ma[de] virtually no attempt to carry [its] burden in response to the motion, addressing the issue in only one sentence that 'an inquiry by AT&T's in-house e-discovery team indicates that Plaintiffs' proposed custodians involves 8 terabytes of data.'" (*Id.* at 5.) Based on the record before the court, Magistrate Judge Berry concluded that it was "unclear" "what the costs would be to export, host, and review this data, whether deduplication could limit the burden of review, or how many hours it would take to review the ESI." (*Id.* at 5.)

In light of those findings, Magistrate Judge Berry's decision set out a path forward. Magistrate Judge Berry recognized that the court is ill-suited to decide granular questions of proper search-terms; accordingly, he ordered the parties to "begin the iterative process of honing search terms to strike an appropriate balance," recognizing that the court may "need to appoint a special master" if the parties cannot agree. (*Id.* at 5–6.) With regard to the identities of custodians, however, Magistrate Judge Berry adopted Plaintiffs' proposed list, finding that the proposed custodians "are all likely to have discovery that is relevant and responsive to the subpoena," and that AT&T had failed to establish undue burden. (*Id.* at 6.)

Magistrate Judge Berry also emphasized the need to avoid unnecessary delay. "Adding an additional step and more time to the process will only serve to slow things down further, and the Court believes that the most surefire way to ensure that the Plaintiffs get the documents they are entitled to under Rule 45 is to engage in custodial searches and reviews." (*Id.* at 5–6.)

Following the Magistrate Judge's decision, Plaintiffs and AT&T met and conferred in an attempt to resolve this dispute without need for further court intervention. The parties stipulated to extend AT&T's time to object while those negotiations were ongoing. (Dkt. 341; Dkt. 345.)

On November 17, 2025, AT&T filed its objection to Magistrate Judge Berry's ruling. (Dkt. 347 ("Obj.").)

STANDARD OF REVIEW

Magistrate judges are empowered to "hear and decide" any civil nondispositive motions referred by the district court. Fed. R. Civ. P. 72(a). "The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.*; *see also* 28 U.S.C. § 636(b)(1).

In reviewing a magistrate judge's nondispositive order, "the district court should not overturn [the] decision . . . merely because the district judge would have independently come to a different conclusion from the one reached by the magistrate judge on the same set of facts." *Olesky v. Gen. Elec. Co.*, 2013 WL 3944174, at *7 (N.D. Ill. Jul. 31, 2013). Instead, "the clear error standard means that the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997).

District courts will not "consider evidence that was not presented to the magistrate judge," *Oleksy*, 2013 WL 3944174, at *10, because doing so "would undermine the essential function of the magistrate judge in th[e] litigation, which [is] to decide [the referred] issues in the first instance." *Motorola Sols., Inc. v. Hytera Comm'cns*, 2025 WL 3286632, at *2 (N.D. Ill. July 17, 2025) (original alterations omitted).

ARGUMENT

I. MAGISTRATE JUDGE BERRY DID NOT CLEARLY ERR IN ADOPTING PLAINTIFFS' PROPOSED CUSTODIAN LIST.

A. Magistrate Judge Berry Adopted Plaintiffs' Proposed Custodian List Based on Legal and Factual Findings That AT&T Does Not Dispute.

AT&T objects to only a narrow portion of Magistrate Judge Berry's order: the decision to adopt Plaintiffs' list of proposed custodians. In granting that relief, however, Magistrate Judge Berry relied on legal and factual findings that AT&T does not dispute.

As to the governing law, AT&T does not dispute that "the scope of material obtainable pursuant to a Rule 45 subpoena is as broad as what is otherwise permitted under Rule 26(b)(1)," (Order at 2 (quoting *Kleimar N.V.*, 2017 WL 3386115, at *7)). AT&T likewise does not dispute that, in resisting Plaintiffs' subpoena, AT&T has the "burden of demonstrating that the subpoena subjects [it] to an undue burden" (*id.* at 4 (internal alterations omitted) (quoting *Am. Soc. of Media Photographers*, 2013 WL 1883204, at *2)).

As to the facts, AT&T does not dispute that the record below contained virtually *no* evidence from AT&T showing that Plaintiffs' proposed custodian list was unduly burdensome or disproportionate to the needs of the case. In particular, AT&T does not dispute that it failed to "present[] *any* argument [to Magistrate Judge Berry] as to why [Plaintiffs' proposed] custodians are unlikely to have relevant information" (*id.* at 6 (emphasis added)). It is undisputed that AT&T failed to present to Magistrate Judge Berry *any* evidence quantifying the cost of custodial searches, and that AT&T's only record evidence below on the burden of custodial searches consisted of "one sentence that 'an inquiry by AT&T's in-house e-discovery team indicates that Plaintiffs' proposed custodians involves 8 terabytes of data'" (*id.* at 5). AT&T also acknowledges (Obj. at 4) that it did not offer an alternative list of proposed custodians for Magistrate Judge Berry to consider.

On that record, adopting Plaintiffs' proposed custodian list was a reasonable exercise of discretion. AT&T's objection should be overruled.

B. The Court-Ordered Custodians Possess Relevant Discovery Proportional to the Case, and AT&T's New Arguments Are Meritless and Waived.

AT&T gives several reasons why it believes the court-ordered custodians are only marginally relevant such that discovery from them would be disproportionate to the needs of the case. Those arguments are meritless and, in any event, waived.

AT&T argues that the court-ordered custodians are disproportionate because many are "senior executives" whose responsibilities "span broader swaths of the business but at shallower depths," and who would therefore supposedly "have less information about specific transactions than employees lower in the hierarchy." (Obj. at 11–12.) AT&T failed to raise that argument before, and it is therefore waived. *See Olesky*, 2013 WL 3944174, at *10 ("When a district court reviews objections to a magistrate's decision on a nondispositive matter, such as a discovery dispute, it may not consider evidence that was not presented to the magistrate judge."). Regardless, AT&T's argument depends on erroneous assumptions about what kind of evidence will be valuable in this case: The most probative AT&T documents are unlikely to come from low-level custodians working on "specific transactions" (Obj. at 12); instead, the most probative AT&T documents will reflect how *AT&T's top decisionmakers* understood the changing competitive environment, as they decided the company's strategy on pricing, network quality, and related subjects. Indeed, post-merger, AT&T's CEO John Stankey and CFO Pascal Desroches both made public statements predicting that AT&T could profitably raise prices in light of industry conditions—and shortly thereafter, AT&T *did* raise prices significantly. (Compl. (Dkt. 1), ¶ 107.) Far from "clear error," there is in fact strong reason to believe that the internal communications of AT&T's senior executives would provide even more candid and probative

information regarding how changing industry conditions impacted AT&T's strategy on pricing and quality.

Apart from generalized complaints about the inclusion of "senior executives," AT&T raises specific objections to only two named custodians: Jennifer Robertson and Melissa Arnoldi. AT&T points out that those two custodians served in different positions over time at AT&T, and that, for "over a year," they served in positions that were unrelated to AT&T's retail wireless business. (Obj. at 10.) These objections cannot support a finding of clear error because, again, AT&T did not raise them previously. *See Olesky*, 2013 WL 3944174, at *10. And AT&T does not provide any basis to question the relevance of these two custodians for other time periods, nor does AT&T substantiate its claim that the other thirteen court-ordered custodians are irrelevant.

AT&T complains that Magistrate Judge Berry adopted the custodian list with "*zero* input from AT&T" (Obj. at 10), and faults the Magistrate Judge for not "permit[ting] [AT&T] to weigh in" on that list of custodians (*id.* at 12). But AT&T *repeatedly refused* to give "input," as part of its all-or-nothing discovery strategy. Plaintiffs repeatedly asked AT&T to identify custodians that might have information relevant to the case; AT&T refused. (Dkt. 257-14 at 2–3.) Indeed, AT&T *refused even to produce organizational charts* that Plaintiffs had requested for use in identifying potential AT&T custodians. (Dkt. 257-8 at 5–6.) In opposing the motion to compel, AT&T claimed that it had conducted "nineteen interviews with key employees" (Dkt. 282-1, ¶ 3), but AT&T never identified those employees to Plaintiffs, nor did AT&T's counsel disclose to Plaintiffs what they had learned from those interviews about AT&T custodians. AT&T cannot complain about Plaintiffs' use of public sources to identify custodians (Obj. at 2), given AT&T's refusal to disclose any information about potential custodians to Plaintiffs or Magistrate Judge Berry.

AT&T refused to disclose information about custodians as part of a calculated strategy to force Plaintiffs into accepting AT&T's proposed discovery protocol, which Plaintiffs viewed as facially inadequate, and to delay Plaintiffs' motion to compel custodial searches. But as Magistrate Judge Berry observed, "AT&T can[not] unilaterally decide how ESI production will proceed," and, at this stage, "delaying resolution of the parties' custodial search dispute would "only serve to slow things down even further" by "[a]dding an additional step and more time to the process . . . ." (Order at 5–6.) It was reasonable, and not clearly erroneous, for Magistrate Judge Berry to resolve the question of custodians on the record before him, rather than facilitate additional delay by requiring the parties to negotiate (and then likely re-litigate) that issue.

C. AT&T Failed to Substantiate Undue Burden Below, And Its Belated Cost Evidence Demonstrates That The Ordered Discovery Is Proportional.

AT&T also raises several arguments attacking the court-ordered custodian list based on supposed cost and undue burden. Those arguments are both waived and without merit.

In support of its objection, AT&T belatedly submitted a declaration that purports to quantify the cost and burden of custodial searches. (Dkt. 347-2, ¶ 7.) AT&T could have presented that evidence to Magistrate Judge Berry and did not. AT&T cannot demonstrate clear error based on "evidence that was not presented to the magistrate judge," *Oleksy*, 2013 WL 3944174, at *10.

Regardless, AT&T's belated cost estimate *refutes* AT&T's claim of undue burden and lack of proportionality. AT&T now estimates that it "is likely to incur over $1 million in total contract review costs" for custodial searches. (Dkt. 347-2, ¶ 7.) AT&T has not explained why it would be less costly to swap the current set of custodians for another. And by comparison, the stakes in this case are enormous: T-Mobile acquired Sprint for *$26 billion*, and an expert economist retained by state attorneys general estimated harm to competition would likely exceed $8.7 billion *per year*. (Compl. (Dkt. 1), ¶¶ 58, 77.) Although AT&T was not responsible for the

merger, it benefitted financially from reduced competition. Plaintiffs seek compensation for potentially billions of dollars in overcharges, caused by the merger, that were pocketed by *AT&T* (and Verizon). Against that backdrop, AT&T's claimed financial burdens are not *undue*, nor are they disproportionate to the needs of the case—and certainly not to such a degree as would make the ruling clearly erroneous. *See Bankers Life & Cas. Co. v. Alshoubaki*, 2016 WL 11940391, at *6 (N.D. Ill. June 27, 2016) ("Needless to say, any subpoena places a burden on the person to whom it is directed." (quoting *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980))).

AT&T claims that Magistrate Judge Berry failed to appreciate "the evident burdens associated with processing 8 terabytes of data," which AT&T calls "an enormous figure on its face . . . ." (Obj. at 8.) There is nothing self-evident about what it costs to process data, and the total quantity of data to be collected and processed, on its own, is not sufficient to support a claim of undue burden. Instead, courts in this District hold that "[t]he party asserting undue burden must present an affidavit or other evidentiary proof of the *time* or *expense* involved in responding to the discovery request." *Papst Licensing GmbH & Co. KG v. Apple, Inc.*, 2017 WL 1233047, at *3 (N.D. Ill. April 4, 2017) (emphasis added). As Magistrate Judge Berry explained, AT&T left "[t]he Court . . . completely in the dark," and the court properly declined to "speculate about such costs and potential burdens" without substantiation. (Order at 5.)

AT&T speculates that "even if [it had] offered concrete estimates" of the costs, "these figures would not have mattered" because "the parties were still disputing the scope of Plaintiffs' requests . . . and the Magistrate had not approved search terms." (Obj. at 9.) But even if AT&T could not quantify costs precisely, it bore the burden of providing *some* evidence to substantiate its claim of undue burden and disproportionality. Nothing prevented AT&T from providing cost

estimates. And regardless, AT&T's belated estimate is not disproportionate to the multi-billion dollar-stakes involved in this case.

AT&T faults Magistrate Judge Berry for evaluating the burden by comparing numerically the 15 custodians requested from AT&T to the 47 custodians agreed to by T-Mobile. (Obj. at 6.) But as the Magistrate Judge found, AT&T's litigation strategy had left "[t]he Court completely in the dark" about the "costs and potential burdens" of custodial searches. (Order at 5.) In that situation, it is not unreasonable for the Court to look to T-Mobile's discovery decisions as one factor in assessing proportionality of discovery to the needs of the case.

D. Sustaining the Objection Would Undermine the Federal Rules' Discovery Framework and Create Perverse Incentives.

Finally, AT&T raises several arguments that, if accepted, would undermine the Federal Rules' discovery framework.

AT&T argues that Magistrate Judge Berry should have ordered the parties to meet and confer on custodians. (Obj. at 9–10.) Accepting that argument would undermine the requirement that parties meaningfully meet and confer *before* judicial intervention. Fed. R. Civ. P. 37(a). Plaintiffs did so in good faith for nearly two years, including by making offers to compromise and seeking AT&T's input regarding proper custodians. By contrast, AT&T withheld information about potential custodians and refused to engage on that subject. Magistrate Judge Berry recognized that AT&T was improperly seeking to "unilaterally decide how ESI production will proceed," and he refused to "slow things down even further" by adding an "additional step" before resolving the dispute. (Order at 5–6.) In that circumstance, it is more than reasonable for the Magistrate Judge to decide the issue, rather than create further delay by ordering AT&T to engage in the meaningful meet and confer process it was obligated to (but did not) do long ago.

For like reasons, this Court should reject AT&T's argument that, because Plaintiffs extended a compromise offer of fewer custodians, Plaintiffs do not actually "need" documents from all 15 court-ordered custodians. (Obj. at 2.) That argument was not made to Magistrate Judge Berry and is therefore waived. More fundamentally, accepting that argument would improperly penalize Plaintiffs for fulfilling their obligation to negotiate this discovery dispute in "good faith," Fed. R. Civ. P. 37(a)(1). Plaintiffs offered to compromise on custodial searches as part of a broader proposal that would have required AT&T to produce pre-merger data; AT&T rejected that offer and provided no counteroffer. AT&T should not be permitted to use Plaintiffs' good faith offer as the new benchmark or ceiling for evaluating Plaintiffs' request for custodial documents on the merits. That tactic would dissuade parties from offering meaningful pre-motion compromises for fear they would later be pocketed by an adversary for use in subsequent litigation. *See* Fed. R. Evid. 408(a); *id.* cmt. (recognizing that admitting evidence of compromise offers would undermine the "public policy favoring the compromise and settlement of disputes").

CONCLUSION

For the foregoing reasons, AT&T's objection (Dkt. 347) should be overruled.

Dated: December 8, 2025

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CERTIFICATE OF SERVICE

I certify that, on December 8, 2025, the foregoing document will be electronically filed with the Clerk of Court using the Court's CM/ECF system, which will then send electronic copies to the registered participants as identified on the Notice of Electronic Filing.

Dated: December 8, 2025

/s/ Daniel P. Margolskee
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