UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. AT&T INC., DIRECTV GROUP HOLDINGS, LLC, and TIME WARNER INC., *Defendants*.	Case No. 1:17-cv-02511-RJL

PLAINTIFF'S MOTION TO ENTER PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT

The United States of America ("Plaintiff") respectfully asks the Court to enter the proposed Protective Order attached as Exhibit A. The parties have met and conferred twice regarding the appropriate scope of a protective order governing the designation and use of confidential information in this action. While the parties have narrowed the issues in dispute, they were unable to reach complete agreement. Plaintiff submits that its proposed order properly safeguards the rights of third parties, provides for the resolution of confidentiality disputes before trial, and promotes the efficient administration of this action. In most relevant respects, Plaintiff's proposed order is also identical to the protective orders issued recently in *United States v. Aetna*, No. 16-cv-01494, and *United States v. Anthem*, No. 16-cv-01493.

In contrast, Defendants' order would expose third parties' confidential information to review by the in-house attorneys of their rivals. By potentially revealing third parties' competitively sensitive information to the very people they will face at the negotiating table or their competitors in the marketplace, Defendants' proposed order would undermine third parties'

confidence in the treatment of their confidential information. Defendants' proposal would also require the disclosure of third parties' confidential information before the Court resolves their objections to the protective order, and it would provide no concrete process for sorting out confidentiality issues for exhibits and deposition designations before trial.

Should the Court decide to grant access to Defendants' in-house counsel, Plaintiff requests that the protective order (1) provide that third parties may designate certain competitively sensitive materials as "Highly Confidential" and by doing so limit the disclosure of those materials to outside counsel only, and (2) require that Defendants list particular in-house counsel who will be given access to confidential information and require those in-house counsel to certify that they do not participate in competitively sensitive decision-making and will not do so for a period of five years. Plaintiff submits that any such order should take the form of the proposed protective order that is attached as Exhibit B.

BACKGROUND

During its investigation of AT&T's proposed acquisition of Time Warner, Plaintiff received information from more than 100 individuals and organizations, much of it containing highly sensitive business information, including short- and long-term business plans, strategies for negotiating complex business relationships, and information about pricing, costs, and margins. Third parties generally provided their confidential business information to the government with the reasonable expectation that it would be kept confidential and, in the event of litigation, that it would be protected under an appropriate protective order. Some of these third parties are individuals who provided unsolicited concerns about the proposed merger; others are likely unfamiliar with the litigation process. Among these third parties are video

programming distributors that compete against AT&T and DIRECTV, and others are creators and aggregators of video content that compete against Time Warner.

Given the nature of the Defendants' proposed transaction, many of these third parties are competitors of one of the Defendants and customers or suppliers of the other. They engage in complex, high-stakes negotiations with the Defendants over the terms of agreements to distribute video programming. As Defendants themselves acknowledge, the terms of these agreements are "among the most closely guarded, strategic business information maintained" at these companies, with disclosure of the information limited even within the companies themselves. *See Cablevision v. Viacom et al.*, No. 13-cv-01278, Dkt. No. 110-8, Decl. of Richard J. Warren (S.D.N.Y. July 23, 2015) (declaration from a high-ranking executive at Time Warner as part of litigation, in which Time Warner, as a third party, sought to resist a motion to compel the production of its agreements with video distributors).

ARGUMENT

A. A provision granting access to Defendants' in-house attorneys would put third parties' confidential information at risk and cause delay.

Defendants have proposed that the confidential information of third parties be disclosed to "no more than five in-house litigation counsel working on this matter per Defendant." This provision would allow Defendants' employees to access highly sensitive information, including details about negotiating strategy and the terms of video distribution agreements—the kind of information that one of the Defendant's own executives stated is among these companies' "most closely guarded" secrets. With respect to the safeguarding of competitively sensitive information, courts have acknowledged that "[i]n-house counsel stand on different ground than outside counsel." *FTC v. Advocate Health Care*, 162 F. Supp. 3d 666, 668 (N.D. Ill. 2016). "Although in-house counsel serve as legal advocates and advisors for their client, their continuing employment

often intimately involves them in the management and operation of the corporation of which they are a part." *FTC v. Exxon Corp*., 636 F.2d 1336, 1350 (D.C. Cir. 1980). Given access to confidential information, even the most careful in-house counsel would be "in the 'untenable position' of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal [a competitor's] trade secrets." *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992). In a recent merger case where the defendants sought to modify their protective order to add access for in-house counsel, the Court found that "it simply blinkers reality to believe that non-party competitors' confidential information can be sufficiently protected by the proposed modification." *United States v. Deere & Co.*, No. 16-cv-08515, Dkt. No. 286, slip op. at 3 (N.D. Ill. Apr. 26, 2017).

Disclosing third parties' confidential information to Defendants' in-house counsel in this case poses serious risks to these third parties with little justification. Disclosure to in-house counsel is not a legal or practical imperative, and defendants in merger litigation frequently proceed with protective orders that are limited to outside counsel only. *See, e.g.*, *United States v. Aetna*, No. 16-cv-01494, Dkt. No. 132 (D.D.C. Sept. 30, 2016); *United States v. Anthem*, No. 16-cv-01493, Dkt. No. 161 (D.D.C. Sept. 26, 2016); *United States v. US Airways*, No. 13-cv-01236, Dkt. No. 55 (D.D.C. Aug. 30, 2013); *United States v. BCBS of Michigan*, No. 10-cv-14155, Dkt. No. 172 (E.D. Mich. May 14, 2012); *United States v. Dean Foods Co.*, No. 10-cv-00059, Dkt. No. 30 (E.D. Wis. May 20, 2010).

Providing for in-house counsel access would also cause delay, as third parties are likely to file objections and seek additional protections for their confidential information. Plaintiff proposes to move the case forward by seeking a protective order without access for in-house

counsel, while acknowledging that Defendants may seek to amend the protective order at a later time to add in-house counsel if they wish, provided that Plaintiff and third parties have sufficient time to object. *See* Ex. A, para. E(2).

At a minimum, any protective order providing for disclosure to in-house counsel should limit such disclosure to Confidential Information, and exclude in-house counsel from accessing Highly Confidential Information. Third parties should not be concerned that their most sensitive business documents could be seen by their competitors and negotiating partners. In addition, third parties should have the benefit of knowing upon receipt of the protective order which in-house counsel would be permitted to access Confidential Information and require those in-house counsel to certify that they do not participate in competitively sensitive decision-making for their employers and will not do so for five years. *See Deere*, No. 16-cv-08515, Dkt. No. 286, slip op. at 2 (finding inadequate the assurances of in-house counsel that they are not currently involved in competitive decision-making because their roles may change in the future). These additional protections are included in the protective order that Plaintiff has attached as Exhibit B.

B. Third parties deserve an opportunity to have their objections heard before their confidential information is disclosed.

Defendants have proposed that Plaintiff turn over the materials it received during the merger investigation before third parties have an opportunity to object and have their objections resolved by the Court. The materials at issue contain confidential information that belongs to third parties, not Plaintiff, and the third parties should be able to decide whether the protective order adequately safeguards their interests before their confidential information is disclosed. To protect third parties' ability to seek additional protections from the Court, Plaintiff proposes that objections be resolved before third party confidential information is disclosed.

Plaintiff's proposal best protects the rights of third parties and ensures that they have a say in the disposition of their competitively sensitive information. This procedure is consistent with the protective orders adopted in several prior similar cases in this Court, including the litigation challenging AT&T's proposed acquisition of T-Mobile in 2011. *See United States v. Aetna*, No. 16-cv-01494, Dkt. No. 132 (D.D.C. Sept. 20, 2016); *United States v. Anthem*, No. 16-cv-01493, Dkt. No. 161 (D.D.C. Sept. 26, 2016); *United States v. US Airways*, No. 13-cv-01236, Dkt. No. 55 (D.D.C. Aug. 30, 2013); *United States v. AT&T*, No. 11-cv-01560, Dkt. No. 79 (D.D.C. Nov. 10, 2011). Defendants have offered no justification for departing from this standard practice.

Defendants would have Plaintiff disclose third parties' confidential information to outside counsel, even if the third party has filed a motion seeking additional protection from the Court, as long as the third party has not sought "to prevent Outside Counsel from receiving" those materials. Under Defendant's proposal, Plaintiff would be obligated to produce a third party's confidential information based on its own interpretation of the third party's objection and without any input from or consultation with the third party. If a third party files a motion with the Court, it may not specifically object to the disclosure of information to outside counsel, but rather may seek broad additional protections and leave its objection to outside counsel implicit. In such circumstances it may not be clear whether the third party has sought "to prevent Outside Counsel from receiving" its confidential information under the Defendants' proposal. Plaintiff is willing to work with Defendants to produce third party materials if the third party agrees that such production is unobjectionable, but any such disclosure should be after the third party has agreed or the Court has ruled on the third party's motion.

C. Procedures for presenting Confidential Information at trial should be established now to avoid interfering with the trial.

The only area of dispute where Plaintiff is proposing something different from what was adopted in prior cases is its proposed Paragraph F. This provision outlines a procedure for the parties to address confidentiality issues for exhibits and depositions designations well in advance of trial. Plaintiff's proposal would require the parties to exchange redactions and objections to those redactions on a schedule to coincide with the existing schedule for exchanging exhibit lists and deposition designations. As those are exchanged, the parties will already be discussing and attempting to resolve disputes over admissibility and other issues, and it only makes sense to address confidentiality issues at the same time.

Defendants would ignore these issues until later, but there is no virtue in postponing the inevitable. If procedures are established now, all parties will know what to expect and what steps they will need to take over the necessarily compressed pre-trial schedule. Better that these tasks are spelled out now, rather than under what will surely be shorter deadlines on the eve of trial. The overall burden on Defendants would be no greater than if these issues were saved for trial, as they will need to designate confidential portions of these materials anyway. Having a process in place will cause the parties to be disciplined in their approach to confidentiality in the first instance, which may reduce the overall burden on Defendants. Now is the time to set up these procedures so that confidentiality disputes will not interfere with the trial. Plaintiff thus asks the Court to adopt its proposed Paragraph F.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court grant this motion and enter the protective order that is attached hereto as Exhibit A. In the alternative, should the Court decide to permit disclosure to in-house counsel, Plaintiff respectfully requests that the Court enter the protective order attached hereto as Exhibit B.

Dated: November 28, 2017

Respectfully submitted,

/s/ Craig Conrath

Craig Conrath
Eric D. Welsh (D.C. Bar #998618)
Justin T. Heipp (D.C. Bar #1017304)
U.S. Dept. of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Phone: (202) 598-8916
Email: craig.conrath@usdoj.gov

Attorneys for United States of America

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, I caused a true and correct copy of the foregoing to be served upon the parties of record via the Court's CM/ECF system.

/s/ Craig Conrath

Craig Conrath
U.S. Dept. of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Phone: (202) 598-8916
Email: craig.conrath@usdoj.gov

Attorney for United States of America