

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE
OF NEW YORK, STATE OF
WASHINGTON, STATE OF CALIFORNIA,
STATE OF ILLINOIS, COMMONWEALTH
OF MASSACHUSETTS, STATE OF OHIO,
AND COMMONWEALTH OF
PENNSYLVANIA,

Plaintiffs,

v.

AT&T INC., T-MOBILE USA, INC., AND
DEUTSCHE TELEKOM AG,

Defendants.

Civil Action No. 1:11-cv-01560-ESH

Hon. Ellen S. Huvelle

**MEMORANDUM OF LAW IN SUPPORT OF
NON-PARTY GOOGLE INC.'S MOTION TO INTERVENE**

Non-party Google, Inc. (“Google”) submits this motion to intervene for the limited purpose of seeking additional protection of its confidential information under the Stipulated Protective Order Concerning Confidentiality entered in the above-captioned action (“this Action”) on September 15, 2011 (the “Protective Order”) (Dkt. No. 24) pursuant to Paragraph B.2 of the Protective Order.¹ As it stands, the Protective Order fails to require the parties always to provide advance notice to Google of potential disclosure of its confidential information on the public record, in open court or to experts retained by the parties. Google therefore wishes to seek limited additional relief to ensure such advance notice is always given. Since the Protective

¹ Google does not seek intervention for any other purpose, including for the purpose of litigating a substantive claim or participating in discovery in this Action. See In re Vitamins Antitrust Litig., No. 99-197, 2001 WL 34088808, at *2 (D.D.C. Mar. 19, 2001) (noting that the non-parties seeking intervention in that case “do not seek to intervene for the purpose of litigating a substantive claim, but rather for the limited purpose of modifying the Protective Order entered by this Court . . .”).

Order expressly recognizes the right of non-party Protected Persons like Google to seek additional protection of their confidential information under that order, this motion to intervene for a limited purpose should be granted.

BACKGROUND

During the course of its investigation into AT&T, Inc.'s ("AT&T") proposed acquisition of T-Mobile USA, Inc. ("T-Mobile"), in May of this year, the DOJ issued a Civil Investigative Demand to Google (the "CID") directing Google to produce certain documents. In compliance with the CID, Google produced a substantial volume of documents of a highly confidential and competitively sensitive nature to the DOJ, such as internal product development and launch plans ("CID Materials").

The DOJ filed suit challenging AT&T's proposed acquisition of T-Mobile on August 31, 2011. Google is not a party to this suit. The Protective Order was entered on September 15, 2011, and Google received a copy of it from the DOJ on September 16, 2011. Based on correspondence from the DOJ, Google understands that the DOJ intends to produce Google's CID Materials to the Defendants' outside counsel in this Action in accordance with the Protective Order, so that the CID Materials might be shared with Defendants' experts and might be used at a hearing or at trial.

The Protective Order allows non-parties like Google to seek additional relief from the Court if they find that the Protective Order does not adequately protect their interests. See Protective Order ¶¶ B.2, A.1. As is explained in its accompanying motion seeking additional relief,² Google has determined that the Protective Order does not adequately protect the confidential information it produced to DOJ in response to the CID. Google therefore seeks to

² Concurrently herewith, Google has filed a Motion for Additional Relief Under the Protective Order.

intervene for the limited purpose of exercising its right to seek additional relief under the Protective Order to protect its confidential information against disclosure without prior notice.

ARGUMENT

I. GOOGLE INTERVENES AS OF RIGHT BECAUSE IT HAS “AN INTEREST RELATING TO THE PROPERTY OR TRANSACTION THAT IS THE SUBJECT OF [THIS] ACTION.”

Federal Rule of Civil Procedure 24(a) provides that:

“Intervention of Right. On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

Google satisfies this standard for intervention.

First, Google’s motion to intervene is timely, having been filed within the deadline set by the Court for seeking additional relief under the Protective Order. Google has filed its motions to intervene and for additional protection within ten days after receipt of a copy of the Protective Order. See Protective Order ¶ B.2.

Second, Google has an interest relating to the property or transaction which is the subject of this action. Google submitted confidential documents to the DOJ as part of the DOJ’s investigation of AT&T’s proposed acquisition of T-Mobile and wishes to ensure that the confidentiality of those documents is adequately protected. The current Protective Order does not do that. Specifically, the current Protective Order does not require the parties always to provide Google advance notice of potential disclosure of its confidential information on the public record, in open court or to experts retained by the parties in this Action. The Court has recognized the potential need of non-parties like Google for additional protection of their confidential information beyond the safeguards of the Protective Order, and for that very reason explicitly granted non-party Protected Persons the right to seek additional relief. See Protective

Order ¶ B.2. It is furthermore well-established in the D.C. Circuit that a non-party's need to protect against disclosure of its confidential information is an interest justifying intervention as of right under Rule 24(a). See United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1293 (D.C. Cir. 1980) (allowing non-party to intervene as of right under Rule 24(a) to protect from disclosure information it had disclosed to the government).

Third, Google's interests are not adequately represented by the existing parties. No other party has the same interest in protecting the confidentiality of Google's documents. Indeed, according to the current Protective Order, the Defendants "wish to designate up to ten (total) in-house lawyers to have access to Confidential Information," including the confidential information that Google produced to the DOJ. See Protective Order ¶ C.9. What's more, the parties in this Action may want to use Google's confidential documents to advance their arguments at a hearing or at trial and therefore could well have incentives to disclose rather than protect Google's confidential information. And, without Google's limited intervention in this matter, the parties in fact are permitted to use Google's confidential documents in open court and share them with their experts without providing Google any notice and any opportunity to object.

II. GOOGLE MAY ALSO PERMISSIVELY INTERVENE

In the alternative, Google may permissively intervene for the limited purpose of seeking additional relief under the Protective Order. Federal Rule of Civil Procedure 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." The D.C. Circuit has held that under "Rule 24(b), every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." EEOC v. Nat'l Childrens' Ctr., Inc., 146 F.3d 1042, 1045 (D.C. Cir. 1998); see also In re Vitamins Antitrust Litig., No. 99-197, 2001 WL 34088808, at *2 (D.D.C.

Mar. 19, 2001) (“third parties may permissively intervene for the purpose of contesting protective orders”). Here, the Court has already expressly acknowledged the interest of non-parties like Google in challenging the Protective Order. Limited permissive intervention is therefore also appropriate.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court grant Google’s motion to intervene as of right, or in the alternative, to permissively intervene for the limited purpose of seeking additional relief under the Protective Order.³

Dated: September 26, 2011

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³ Pursuant to Local Civil Rule 7(m), counsel for Google conferred in advance of filing this motion with counsel for the United States and for the defendants, but the parties could not reach agreement.

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[PROPOSED] ORDER

Upon review and consideration of Non-Party Google Inc.'s Motion To Intervene, it is this
____ day of _____, 2011, hereby

ORDERED that the motion is **GRANTED**; and it is further

ORDERED that non-party Google Inc. be permitted to appear in the above-captioned
action only for the limited purpose of seeking additional relief under the Stipulated Protective
Order Concerning Confidentiality entered in the above-captioned action, and not for any other
purpose at this time.

SO ORDERED.

ELLEN SEGAL HUVELLE
United States District Judge