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

ANTHONY DALE, BRETT JACKSON, 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 et al.,

Defendants.

Case No. 1:22-cv-03189

Hon. Thomas M. Durkin

DEFENDANT T-MOBILE US, INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a)

Introduction

This case readily meets the test for transfer to the Southern District of New York ("SDNY"): It has no identifiable nexus to this district; the convenience of the witnesses—including at least six from Verizon and Altice—warrants transfer; and the transferee court (Judge Marrero), having previously adjudicated a challenge to the exact same merger, has vast experience with the law, evidence, and theories at issue here. Plaintiffs ask the Court to ignore these (and other) compelling reasons for transfer and instead defer to their choice of forum. But the caselaw from this district overwhelmingly holds that a named plaintiff's choice of forum is entitled to no weight in a purported nationwide class action such as this one. Moreover, Plaintiffs' protestations about "forum shopping" fail to obscure the reality that it is Plaintiffs who have manufactured a case so full of factual and legal defects that it should be dead on arrival in *any* district. Regardless, Plaintiffs' assertion that the Seventh Circuit would embrace their novel theories is not only wrong under Circuit law but also irrelevant to the issue of transfer.

Plaintiffs cannot and do not deny that obvious and exceptional efficiencies would flow from having Judge Marrero preside over this case. Having concluded a lengthy bench trial about the merger at issue, Judge Marrero is ideally suited to evaluate Plaintiffs' claims that, despite the commitments imposed by the FCC and the DOJ and the failure of proof on the merits at trial by state antitrust enforcers, the merger has nonetheless caused customers of Verizon and AT&T to suffer anticompetitive effects. Plaintiffs aver that analysis "turns on" familiarity with relevant law (Opp'n 13–14), but ignore Judge Marrero's 170-page opinion analyzing market structure and competitive effects under Section 7 of the Clayton Act, the very same statute invoked here. Plaintiffs would likewise have the Court turn a blind eye to these efficiencies because Judge Marrero (like the DOJ and the FCC) permitted the merger to proceed. Plaintiffs' overheated rhetoric, *see* Opp'n

13 (transfer would "compromise[] the integrity of the courts"), is unsupported and inconsistent with their own allegations that Judge Marrero was somehow misled into making his decision, Compl. at 37—a claim he is best positioned to evaluate. This is the type of situation 28 U.S.C. § 1404(a) was designed to address. The case should be transferred to the SDNY.

Argument

I. Plaintiffs' choice of forum does not weigh against transfer.

A. The named Plaintiffs' place of residence is entitled to no weight.

Plaintiffs argue that this case should remain in this Court because the named Plaintiffs are located near the Northern District of Illinois and the case's status as a class action purportedly "weighs against transfer." Opp'n 5. But as T-Mobile has explained, Mot. 11–12, a class "plaintiff's home forum is irrelevant" to the transfer analysis, *Georgouses v. NaTec Res., Inc.*, 963 F. Supp. 728, 730 (N.D. Ill. 1997), or at least "greatly discounted," *Jaramillo v. DineEquity, Inc.*, 664 F. Supp. 2d 908, 914 (N.D. Ill. 2009). That is because in a nationwide class action with millions of potential members, like this one, "any venue selected is bound to be inconvenient to some plaintiffs." *Id.*; *see also Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947) ("[W]here there are hundreds of potential plaintiffs, . . . the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."). The caselaw in this district is overwhelmingly in accord.[1]

Plaintiffs' contrary position relies almost entirely on inapt cases outside the class action

[1] *See, e.g.*, *Budicak, Inc. v. Lansing Trade Grp., LLC*, 2019 WL 3554165, at *3 (Aug. 5, 2019); *Lafleur v. Dollar Tree Stores, Inc.*, 2012 WL 2280090, at *5 (June 18, 2012); *Chambers v. N.A. Co. for Life & Health Ins.*, 2011 WL 5868214, at *4 (Nov. 18, 2011); *Simonoff v. Kaplan, Inc.*, 2010 WL 1195855, at *2 (Mar. 17, 2010); *Dortch v. Fin. Alts., Inc.*, 2002 WL 598518, at *2 (Apr. 17, 2002); *Boyd v. Snyder,* 44 F. Supp. 2d 966, 969 (1999); *Eugene v. McDonald's Corp.*, 1996 WL 411444, at *2 (July 18, 1996); *Genden v. Merrill Lynch*, 621 F. Supp. 780, 782 (1985).

context. Opp'n 4–5. Within the class context, Plaintiffs muster only two cases, both of which are unpersuasive outliers inconsistent with the weight of authority. Plaintiffs primarily rely on *AL & PO Corp.*, 2015 WL 738694 (N.D. Ill. Feb. 19, 2015), in which the court acknowledged that the majority approach was to ignore or greatly discount a class plaintiff's choice of forum, but hesitated to follow that approach because of uncertainty as to whether the class would "ultimately be certified." *Id.* at *2–3. This was error: where a plaintiff has filed a class action, and intends to move for a class certification, the mere fact that the case "has not yet been certified as a class action does not" allow the plaintiff to skirt the consequences of its litigation decisions. *Schenet v. Anderson*, 1986 WL 13751, at *2 (N.D. Ill. Dec. 1, 1986); *accord Lewis v. CIB Marine Bancshares, Inc.*, 2005 WL 8163035, at *5 (C.D. Ill. Aug. 19, 2005). Plaintiffs' second case simply block quotes *AL & PO Corp.* and is unconvincing for the same reasons. *See Taylor v. Midland Funding, LLC*, 94 F. Supp. 3d 941, 945 (N.D. Ill. 2015).

Further, in Plaintiffs' two outlier cases, the named plaintiffs resided in their chosen district, but six of the seven named Plaintiffs here do not reside in this district. *See* ECF 60 ¶ 2. Three reside in a neighboring state, making some travel unavoidable. Thus, keeping this case in this district would not allow them "to aggressively litigate their claims without significant inconvenience due to travel." *AL & PO*, 2015 WL 738694, at *3. And, regardless, "should litigating this case in the [SDNY] prove too inconvenient for the named Plaintiff[s], then another named plaintiff can be substituted for [them]." *Simonoff*, 2010 WL 1195855, at *2.

B. Plaintiffs concede that no material events took place in this district.

In addition, as the Seventh Circuit and this Court have repeatedly held, a plaintiff's choice of forum "has minimal value where none of the conduct complained of occurred in the forum." *Sacca v. Wyoming Whiskey, Inc.*, 2018 WL 11198064, at *3 (N.D. Ill. Feb. 7, 2018) (quoting *Chi., Rock Island & Pac. R.R. Co. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955)); *A&R Log. Holdings, Inc.*

v. Curl, 2015 WL 5561179, at *4 (N.D. Ill. Sept. 21, 2015); *Green v. Meeks*, 2020 WL 2513096, at *2 (N.D. Ill. May 15, 2020); *Cent. States Se. & Sw. Areas Pension Plan v. Lakeville Transp., Inc.*, 2018 WL 11387190, at *3 (N.D. Ill. July 2, 2018). That is precisely the situation here.

It is uncontroverted that none of the events giving rise to Plaintiffs' claims took place in this district. Opp'n 11–12 (identifying no events that took place in Illinois); *see* Mot. 10–11 (explaining that material events took place in New York). Instead, this action arises out of a merger agreement that was negotiated, signed, and closed in New York, and pricing decisions made by Verizon and AT&T in New York and Dallas, respectively. *See* Compl. ¶ 122; Dkt. 44 ¶ 14; Dkt. 44-13 at 67–76; Mot. 10–11. New York thus has the strongest connection to this lawsuit, diminishing the significance of Plaintiffs' forum choice and further supporting transfer to New York. Mot. 10–11; *see also FTC v. Graco Inc.*, 2012 WL 3584683, at *5 (D.D.C. Jan. 26, 2012) (giving little weight to plaintiff's choice of forum and finding that material-events factor favored transfer where merger agreement "was negotiated, drafted, and executed" in transferee district); *FTC v. Illumina, Inc.*, 2021 WL 1546542, at *4 (D.D.C. Apr. 20, 2021) (similar).

Plaintiffs seek to downplay the nexus with New York by pointing to other locations where some merger discussions may have occurred, such as Tokyo and Bellevue, Washington. Opp'n 11. But even if credited, that argument does not negate the fact that most of the key events at issue here did occur in New York and none occurred in this district. *See* Mot. 10–11; *see also New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 201, 204 (S.D.N.Y. 2020) (identifying additional New York events, including a T-Mobile advertising campaign and Sprint agreement with Altice). Because "no controverted issue of fact depends upon any event that occurred in the Northern District of Illinois," the burden of a trial in this matter "should not be imposed upon the Northern District of Illinois, an area which has no relation to the litigation." *Chi.*, 220 F.2d at 304.

Plaintiffs also invoke the merger's alleged "nationwide effects" as a reason to avoid transfer. Opp'n 11–12. But that "broad assertion further establishes that the [Northern District of Illinois] has no meaningful connection to this action." *Graco*, 2012 WL 3584683, at *5. Any argument that location of injury is what matters is unsupported by citations to caselaw, no doubt because the material-events inquiry looks to "the location of actions creating the injury." *George & Co. LLC v. Target Corp*., 2021 WL 2948910, at *3 (N.D. Ill. July 14, 2021); *accord Hays v. Kimco Facility Servs*., LLC, 2021 WL 4459476, at *3 (N.D. Ill. Sept. 29, 2021). That rule is not limited to IP cases. *Compare* Opp'n 12 *with Graco*, 2012 WL 3584683, at *5 (antitrust action); *Zimmer US, Inc. v. Ford*, 2012 WL 5509804, at *6 (N.D. Ind. Nov. 13, 2012) (contract case).

Plaintiffs' argument that the Clayton Act's broad venue provision protects their choice of forum fares no better. Opp'n 1, 4–5. As the Seventh Circuit has observed, "when Congress departs from" ordinary practice by authorizing broad venue in specific areas, "defendants' legitimate interests are protected by 28 U.S.C. § 1404(a)." *Bd. of Trs. v. Elite Erectors, Inc.*, 212 F.3d 1031, 1037 (7th Cir. 2000); *accord Hanahan v. Lucassen*, 1991 WL 120199, at *2 n.1 (N.D. Ill. Jan. 29, 1991). Accordingly, notwithstanding the Clayton Act's venue provision, Section 1404(a) is as "applicable to antitrust suits" as it is to any other suit, *United States v. Nat'l City Lines, Inc.*, 337 U.S. 78, 83 (1949); there is no "higher standard [that] must be met in order to transfer antitrust cases." *JM Comput. Servs., Inc. v. Schlumberger Techs., Inc.*, 1995 WL 293956, at *2 (S.D.N.Y. 1995); *accord Mair Holdings, Inc. v. Air Line Pilots Assoc.*, 2007 WL 9754294, at *7 (S.D. Tex. 2007); *Int'l Show Car Ass'n v. Am. Soc. of Composers*, 806 F. Supp. 1308, 1312 (E.D. Mich. 1992). The *Tiger Trash* decision that Plaintiffs repeatedly cite, Opp'n 1, 5, does not say otherwise. It stands for the uncontroversial proposition that the Clayton Act's venue provision is broad, *see* 560 F.2d 818, 824 (7th Cir. 1977), but is silent on *when* transfer is appropriate.

C. Plaintiffs cannot avoid transfer by claiming this is a more favorable district.

Plaintiffs did not file this suit in Chicago because of any connection to the District but rather because they perceive some legal advantage in proceeding under Seventh Circuit law. *See* Opp'n 6–8. They admit as much in accusing T-Mobile of trying to "defeat the advantages accruing to [them]" as a result of their selection of this forum. *Id.* at 5–6. While Plaintiffs' perception of advantage under Seventh Circuit law is dead wrong, it is not necessary for the Court to resolve that dispute because it is irrelevant to the transfer analysis. The Seventh Circuit instructs against deciding transfer motions based on a plaintiff's hope or expectation of a better outcome in a particular district. *Rsch. Automation, Inc. v. Schrader-Bridgeport Int'l, Inc.*, 626 F.3d 973, 979 & n.2 (7th Cir. 2010); *Chi.*, 220 F.2d at 303–04; *see also Packman v. Prudential Ins. Co. of Am.*, 2020 WL 4700642, at *2 (W.D. Wis. Aug. 13, 2020). Numerous other courts agree. *See, e.g.*, *H.L. Green Co. v. McMahon*, 312 F.2d 650, 653 (2d Cir. 1962) (abrogated on other grounds) ("A plaintiff may not resist the transfer . . . on the ground that the transferee court will or may interpret federal law in a manner less favorable to him."); *Johnson v. Russell Invs. Tr. Co.*, 2022 WL 782425, at *4 (W.D. Wash. Mar. 15, 2022) (similar). Thus, "where it appears that the plaintiff was forum shopping and that the selected forum has little or no connection with the parties or the subject matter, plaintiff's choice of forum is entitled to no weight whatever, and transfer of venue is appropriate." *Pierce v. Coughlin*, 806 F. Supp. 426, 429 (S.D.N.Y. 1992) (quotation omitted); *accord Grp.-A Autosports, Inc. v. Billman*, 2014 WL 3500468, at *4 (D. Mass. July 9, 2014).

Plaintiffs point to *Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964), for the proposition that § 1404(a) transfers should not be permitted to deprive Plaintiffs of the tactical advantages gained from their forum shopping. Opp'n 6. But that case involved claims arising under *state* law and the quoted language refers to "whatever advantages may flow from the state laws of the forum they have initially selected." *Van Dusen*, 376 U.S. at 633. Those considerations have no bearing

here because it is presumed that any federal court would reach the same result in a federal question case. *Wausau Benefits, Inc. v. Liming*, 393 F. Supp. 2d 713, 718 (W.D. Wisc. 2005) (citing *Bd. of Trs.*, 212 F.3d at 1037). This is particularly true here, where federal courts evaluate the question of antitrust standing by applying the proximate-cause factors set forth in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983). *See, e.g.*, *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 716 (7th Cir. 2006); *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 138 (2d Cir. 2021).

Plaintiffs cite *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003), but that case does not support their novel theory of antitrust standing. In *Gypsum*, the court considered whether a plaintiff who did not purchase gas directly from the defendants could nevertheless maintain an injunctive-relief claim on the theory that hoarding of gas line capacity by a cartel supposedly operated by the defendants caused plaintiff to pay higher prices. The court concluded that the plaintiff had suffered antitrust injury and that the direct-purchaser doctrine of *Illinois Brick* did not bar its equitable claims. *Id.* at 627. The court did not evaluate whether the plaintiff had properly alleged antitrust standing under the *Associated General Contractors* proximate-cause factors, as required. *See Fisher v. Aurora Health Care, Inc.*, 558 F. App'x 653, 655 (7th Cir. 2014); *Kochert*, 463 F. 3d. at 716–18; *accord Lexmark, Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132–33 (2014).

II. The remaining convenience factors heavily favor transfer.

T-Mobile has identified, by name, six non-party witnesses located within the SDNY or otherwise within that court's subpoena power and described what their testimony would include.[2]

[2] To the extent some Verizon witnesses are in New Jersey rather than New York, Opp'n 9, this is irrelevant—they are still within 100 miles of the New York courthouse, *see* Dkt. 44-8; Brass Decl.

Mot. 8–10; *see also Event News Network v. Thill*, 2005 WL 2978711, at *5–6 (N.D. Ill. Nov. 2, 2005) (for purposes of convenience factor, what matters is whether witnesses are within subpoena power of transferee court). T-Mobile also explained that other witnesses from Verizon or Altice, headquartered in New York, may testify. *Id.* Under Plaintiffs' own cases, that is all that is required. *See U.S. ex rel. Heathcote Holdings Corp. v. L'Oreal USA, Inc.*, 2011 WL 3511064, at *3 (N.D. Ill. Aug. 9, 2011) (party must "identify" witnesses and explain "their relevance").

Plaintiffs' suggestion that these witnesses may not actually testify is belied by their own allegations. Opp'n 9. The gravamen of Plaintiffs' complaint is the alleged harm caused by "AT&T and Verizon hav[ing] charged higher prices for nationwide wireless plans than they would have" without the merger, Compl. ¶ 122, which puts testimony by Verizon witnesses about their conduct in the center square. As but one example, Plaintiffs place great weight on Verizon CEO Hans Vestberg's statements to investors regarding potential price increases due to inflation, Compl.¶ 108, and cannot now seriously suggest his testimony will not be needed at trial. Convenience to such non-party witnesses is "the most important factor in the transfer balance." *Guignard v. Nat'l R.R. Passenger Corp.*, 2012 WL 1108242, at *3 (N.D. Ill. Apr. 1, 2012). That some other non-party witnesses *may* be inconvenienced regardless of the forum, Opp'n 9, is irrelevant. "The comparison between the transferor and transferee forums is not altered by the presence of other witnesses . . . in places outside *both* forums." *In re Toyota Motor Corp.*, 747 F.3d 1338, 1340 (Fed. Cir. 2014); *see Dillon v. Watson Bowman Acme Corp.*, 2003 WL 22454024, at *2 (N.D. Ill. Oct. 27, 2003). Priority is given to *identified* non-party witnesses in either the transferor or transferee forum. Only T-Mobile identified *any* non-party witnesses in these fora—and all are in New

Exs. 1–2. Verizon's CEO is on its Board and thus located at the New York corporate headquarters. *Id.* at Ex. 3. *No* identified third-party witnesses are within this Court's subpoena power.

York. As for convenience of the parties, large corporations and putative classes are presumed capable of litigating in any district, so this factor is, at worst, neutral. Mot. 12.

III. The interests of justice heavily favor transfer.

As the cases cited in T-Mobile's motion demonstrate, Mot. 13–14, judges in this district have transferred cases with the expectation that a particular judge in the transferee district will handle the matter. *Rosen v. Spirit Airlines, Inc.*, 152 F. Supp. 3d 1055, 1065 (N.D. Ill. 2015); *Gen. Elec. Co. v. R Squared Scan Sys., Inc.*, 1990 WL 7186, at *3 (N.D. Ill. Jan. 12, 1990); *see also Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986). They do so because familiarity with the controversy *is* a relevant transfer factor, *see Jaramillo*, 664 F. Supp. 2d at 915–16 (courts should "consider the level of familiarity of each court with the facts and circumstances surrounding the controversy")—even where there is no pending case in the transferee district, *see Preston v. Am. Honda Motor Co.*, 2017 WL 5001447, at *7–8 (N.D. Ill. Nov. 2, 2017).

Here, Judge Marrero is intimately familiar with the facts and circumstances of the merger. He presided over a trial in which numerous witnesses from the merging companies, DISH, and other interested parties testified, as well as renowned economists. He wrote a 170-page opinion evaluating the evidence in great detail. As a result of this experience, Judge Marrero is in the best position to preside over this case as well. Indeed, given Plaintiffs' theory that Defendants somehow misled Judge Marrero regarding the consumer benefits of the merger, Compl. at 37, he is *uniquely* well positioned to handle this case. That Defendants are seeking transfer to the SDNY and Judge Marrero in the face of these allegations, belies Plaintiffs' unsubstantiated suggestion that Defendants seek transfer because they believe Judge Marrero is somehow biased in their favor.

The few out-of-circuit cases that Plaintiffs cite are inapt. One involved concerns about defendant forum-shopping, *see Oceana v. Bureau of Ocean Energy Mgmt.*, 962 F. Supp. 2d 70,

78–79 (D.D.C. 2013), something not at issue here, *see supra* pp. 6–7. The rest declined to transfer because the cases in the transferee districts involved "distinct" legal issues, *Friends of the Earth v. Haaland*, 2022 WL 185196, at *3 (D.D.C. Jan. 20, 2022), or "very different" claims, *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 129–30 (D.D.C. 2001). By contrast, Plaintiffs' claims are virtually identical to those presented to Judge Marrero. Mot. 13–14. It is undisputed that the legal theories are the same; Plaintiffs point only to the fact that events have taken place since 2020. Opp'n 14. But while a trial in this case may involve additional facts, including testimony from the New York-based Verizon witnesses Plaintiffs made central to their case, substantial overlap in facts, evidence, and witnesses remain (such as New York Altice witnesses that Plaintiffs ignore). Judge Marrero is familiar with those facts and relevant law, and there is no need for this Court to "retrace [his] steps." *Gen. Elec. Co.*, 1990 WL 7186, at *3. Nor does the difference between a "public enforcer challenge" and a "private class action" matter. Opp'n 14. That distinction is relevant only for the threshold issue of antitrust standing, *Kochert*, 463 F.3d at 715–16 (7th Cir. 2006); there is no difference in the substantive antitrust laws. In fact, suits by state AGs are brought *on behalf of* private citizens, subject to the same standards. *See* 15 U.S.C. § 15c.

Finally, docket congestion is not the panacea Plaintiffs suggest: while Plaintiffs correctly note that the inadvertently cited March 2022 caseload data is not the most recent, they incorrectly imply that the June 2022 data supports them. It does not. As of June 2022, the SDNY's average time to disposition of civil cases was 5.7 months compared to 7.2 months here; average time to trial is also 4.5 months faster there. This factor also favors transfer, as does local interest because the material events occurred in New York. Mot. 14–15.

Conclusion

For these reasons, the Court should grant T-Mobile's motion to transfer venue.

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Respectfully submitted,

/s/ *Josh Krevitt*

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2022, 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/ Josh Krevitt
Josh Krevitt