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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AT&T MOBILITY LLC, a limited liability
company,

Defendant.

Case No. 3:14-cv-04785-EMC

**ROBERTS PLAINTIFFS' OPPOSITION TO
ADMINISTRATIVE MOTION TO FILE
UNDER SEAL PORTIONS OF REPLY
BRIEF**

The Honorable Edward M. Chen

1 Plaintiffs in *Roberts v. AT&T Mobility LLC* (N.D. Cal. Case No. 3:15-cv-03418-EMC)
2 (“*Roberts* Plaintiffs”) oppose the Federal Trade Commission’s (“FTC”) administrative motion
3 (Dkt. 195) to seal the numerical information that the FTC submitted under seal to the Court in the
4 FTC’s reply in support of its motion to approve the FTC Agreement.

5 The information in question, which is currently redacted in the public version, includes:
6 the numbers of eligible customers eligible for the \$12 or \$31 payments under the FTC
7 Agreement; and information related to how the FTC calculated its assertion that the \$60 million
8 amount of the FTC Agreement represents between 32% and 47% of the FTC’s potential recovery
9 for the FTC’s claim (that is, for the non-comprehensive categories of throttling the FTC purported
10 to include in that calculation, which does not include any throttling post June-2015 and does not
11 include all throttling before that date).

12 The motion to seal states that the redacted numbers were “provided to the FTC [by
13 AT&T] in the course of confidential settlement negotiations,” and that AT&T designated the
14 information as “confidential.” Whether or not good cause ever existed for designating this
15 information in the first instance, no such good cause exists now that the Court has ordered the
16 FTC to “explicitly state” this information on which the FTC Agreement is based (Dkt. 194), after
17 the FTC’s moving papers did not do so. The affected and aggrieved consumers have the right to
18 know the underlying basis for the FTC Agreement, as the Court’s order implicitly recognizes,
19 including how many customers would be eligible for payments and in what amounts, and for the
20 FTC’s public claim of the supposed percentage of potential FTC recovery the FTC Agreement
21 monetary figure represents.

22 Moreover, unsealing the information in question is critical given that AT&T has now
23 revealed its intent to exploit the FTC Agreement as grounds to preclude, *de facto*, any recovery to
24 the putative class in *Roberts*. In its most recent filing, AT&T asserts that the FTC Agreement
25 provides “comprehensive remedies,” and on the basis of that assertion, it intends to argue for
26 outright denial of class certification in *Roberts* under a superiority analysis (Dkt. 197 at 2-3)—a
27 result which of course would have the practical effect of precluding full recovery for the putative
28 class in *Roberts*. AT&T’s effort to engineer a preclusive judgment via the FTC Agreement, while

1 keeping secret the basis for that agreement, would have the practical effect of stripping the
2 putative class in *Roberts* of the due process protections afforded to them via the class action
3 mechanism.

4 Given AT&T's now stated intention to pursue backdoor *de facto* preclusion in *Roberts*,
5 the Court should defer ruling on the FTC Agreement until after class certification in *Roberts* is
6 resolved, and at least until after the *Roberts* Plaintiffs have a full opportunity to take discovery
7 regarding the basis for the FTC Agreement, including the pertinent numerical information, the
8 facts the FTC considered, and the risks, challenges, and the authority limitations and potential
9 limitations the FTC apparently faced in these proceedings, which are not present in *Roberts*. In
10 all events, that would begin with the *Roberts* Plaintiffs being given access to the currently
11 redacted information. That is particularly important given that the information in question was
12 compiled and provided by AT&T in the context of settlement discussions and apparently was not
13 subject to adversarial discovery by the FTC. *See* Dkt. 195-1 (Rose Decl.), ¶ 2; Declaration of
14 Roger Heller, filed herewith ("Heller Decl."), Ex. A.

15 As should be clear, the *Roberts* Plaintiffs do not endorse or accept the various
16 numbers/percentages that have been filed by the FTC in these proceedings (even with respect to
17 the limited throttling the FTC says it considered—i.e., even putting aside that the FTC Agreement
18 provides nothing for any throttling by AT&T after June 2015 and excluded from consideration
19 certain throttling that occurred prior to that time¹), and the *Roberts* Plaintiffs intend to take
20 discovery regarding same. There is no proper justification for AT&T concealing the redacted
21 information.

22 The FTC filed this motion to seal because of AT&T's designation of the information and
23 Local Rule 79-5(e) which addresses that scenario. The FTC has stated that it "has not taken a
24 position on the issue." Heller Decl., Ex. A. Respectfully, the FTC should be insisting to AT&T
25 (perhaps it will) that the information be filed publicly under the circumstances.

26 With respect to AT&T, the *Roberts* Plaintiffs note that, after the FTC filed its motion to
27 seal, *Roberts* Plaintiffs' counsel wrote AT&T's counsel and stated that the information should not

28 ¹ Dkt. 196 at 4-5 & n.3.

1 be concealed from the public and requested that the information be promptly provided to *Roberts*
2 Plaintiffs as a first step. In response, AT&T misrepresented the *Roberts* Plaintiffs' position in
3 these proceedings,² and declined to provide the information. Heller Decl., Ex. A.

4 The motion to seal should be denied.³

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² AT&T counsel's response incorrectly stated that the *Roberts* Plaintiffs "told the Court that you do not seek to second guess the FTC's determination that the monetary relief in the proposed order is appropriate." Heller Decl., filed herewith, at Ex. A. Similarly, the first sentence of AT&T's reply brief in support of approval misstates the *Roberts* Plaintiffs' position. See Dkt. 197 at 1 (AT&T apparently trying to twist the *Roberts* Plaintiffs' position through partial, out-of-order, and out-of-context quotations, as: "The *Roberts* plaintiffs' response to the FTC's motion declares that they *do not* 'second guess the FTC's determination' that the proposed stipulated order 'represents an appropriate resolution' of the FTC action.") (emphasis added). The *Roberts* Plaintiffs said neither. What the *Roberts* Plaintiffs said and what they meant was that they *are not here to*—i.e., their role in these FTC proceedings is not to—interfere with how the FTC wants to resolve the FTC's own claim, *insofar as that does not improperly affect anything in Roberts*. Clearly, the *Roberts* Plaintiffs do not believe the relief provided by the FTC Agreement is sufficient or appropriate for the conduct that occurred. The *Roberts* Plaintiffs' role here has been to protect their claims and those of the putative class in *Roberts*, specifically to ensure that nothing about the FTC Agreement or the Court's potential approval thereof prejudices those claims or the ability to pursue full relief for the putative class in *Roberts*, which has become all the more important as: (a) it has become increasingly clear that the FTC Agreement falls well short of providing full or sufficient relief for the claims in *Roberts*; and (b) AT&T has now revealed that it intends to exploit the FTC Agreement, if approved, to preclude, *de facto*, recovery for the putative class in *Roberts*. *Roberts* Plaintiffs include this footnote so that AT&T will not continue to misrepresent or misinterpret *Roberts* Plaintiffs' position in these proceedings, in *Roberts*, or otherwise.

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³ Under Civil Local Rule 79-5(e)(1), AT&T's deadline to file a declaration justifying sealing the information in question is midnight on December 2, 2019. *Roberts* Plaintiffs are preemptively filing this motion in advance of AT&T's anticipated declaration, given the upcoming December 3, 2019 hearing. *Roberts* Plaintiffs reserve the right to supplement this opposition brief.

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Dated: December 2, 2019

Respectfully submitted,

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