

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SEBASTIAN CORDOBA, and RENÉ ROMERO, individually and on behalf of all others similarly-situated,

Plaintiffs,

VS.

DIRECTV, LLC, individually and as
successor through merger to DIRECTV,
Inc.,

Defendant.

CIVIL ACTION FILE NO.:

1:15-CV-03755-MHC

PLAINTIFFS' MOTION TO AMEND THE PROTECTIVE ORDER

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I. INTRODUCTION

Pursuant to the Court’s Order denying without prejudice Plaintiffs’ Motion for Clarification of, or in the Alternative, Amendment to, the Protective Order, Dkt. 223, Plaintiffs’ Counsel report that a AAA arbitrator found in favor of Plaintiff Rene Romero and awarded him damages of \$165,100 and injunctive relief requiring DIRECTV to retrieve and destroy his personal information. *See* Declaration of Daniel Hutchinson (“Hutchinson Decl.”), Ex. A (Award of Arbitrator (June 1, 2021)).

As the Court is aware, Mr. Romero asserted that DIRECTV’s ongoing disclosure of his personal information in the context of this litigation without his written consent violated the Satellite Television Extension and Localism Act of 2010, 47 U.S.C. § 338 (“STELA”). The AAA arbitrator agreed. The arbitrator performed an independent analysis and reached a decision consistent with the factual findings and analysis of STELA performed by this Court. *See Cordoba v. DirecTV, LLC*, 320 F.R.D. 582, 592, 593, n.8 (N.D. Ga. 2017); Dkt. 142, at 17.

Each of the 9,100 individuals on DIRECTV’s Matched Accounts List has an identical STELA claim but they have no way of knowing it. During discovery in this case, DIRECTV produced the names and contact information of the 9,100 individuals. The current terms of the Protective Order prohibit Plaintiffs’ Counsel

from using that information to communicate directly with the individuals to make them aware that DIRECTV violated their privacy rights, and that DIRECTV continues to do so to this day. But for the cloak of secrecy, and because these individuals are not class members, Plaintiffs' Counsel would have communicated directly to the individuals in a manner compliant with the applicable attorney communication ethics rules.

In its prior Order, this Court stated that Plaintiffs' request to amend the Protective Order was premature because Plaintiff Romero's STELA "claim must be arbitrated" first. Dkt. 223 at 9. Plaintiffs' request was "denied without prejudice to refiling after Plaintiff Rene Romero's STELA claim against... DIRECTV...is resolved." *Id.* at 10-11. The AAA Arbitrator's express finding that DIRECTV violated STELA underscores the need for this Court to remove the cloak of secrecy that the current Protective Order grants to DIRECTV with respect to the highly valuable legal claim that thousands of people possess. Otherwise, they have no way to know about the violation of their rights because the entity responsible for that violation seeks to avoid responsibility by relying on this Court's authority to enforce the Protective Order.

Plaintiffs' Counsel therefore respectfully request that the Court amend the protective order in the form attached hereto as Exhibit C to the Hutchinson

Declaration.¹ As this Court acknowledged, “individuals on the Matched Accounts List have no way of knowing about their potential STELA claim unless someone notifies them.” *Id.* at 7. If the Court amends the Protective Order, Plaintiffs’ Counsel intend to contact these individuals through a written communication that complies with all applicable attorney solicitation and ethics rules. Plaintiffs’ Counsel submits that it is important to inform these individuals that they may have a STELA claim against DIRECTV and provide further information about pursuing those claims individually in arbitration, should any of them wish to do so.

II. Factual Background

A. The Protective Order.

On October 27, 2015, Plaintiff Sebastian Cordoba filed the instant action, alleging that DIRECTV violated the Telephone Consumer Protection Act, 47 U.S.C. § 227. Dkt. 1. On April 8, 2016, the Court entered the Protective Order. Dkt. 45. At the time, Plaintiffs’ Counsel did not know that DIRECTV would subsequently violate STELA during the course of this litigation. The Protective Order provides for changed circumstances, stating: “The Court may modify the terms and conditions of the Protective Order for good cause, or in the interest of

¹ A redlined version of the Protective Order is attached as Exhibit D to the Hutchinson Declaration.

justice, or on its own order at any time in these proceedings.” *Id.* at ¶ 12.

Following the entry of the Protective Order, DIRECTV violated the privacy rights under STELA of approximately 9,100 individuals on its Matched Accounts List.²

B. The Court’s Order Denying the Motion to Amend the Protective Order without prejudice.

On July 2, 2020, Plaintiffs moved to clarify, or, in the alternative, amend the protective order. Dkt. 198. That motion sought the Court’s permission to contact the 9,100 individuals on the Matched Accounts List or to amend the Protective Order to permit that contact. *Id.* at 19, Dkt. 198-4. On September 24, 2020, the Court denied Plaintiffs’ motion as “premature” and instructed Plaintiffs to refile after “Plaintiff Rene Romero’s STELA claim against Defendant DIRECTV . . . is resolved.” Dkt. 223 at 9, 10-11. The Court’s order noted that “individuals on the Matched Accounts List have no way of knowing about their potential STELA claims unless someone notifies them.” *Id.* at 7. Further, the Court held that “DIRECTV has made its bed by compelling arbitration and should not be able to avoid arbitrating STELA claims brought by individuals on the Matched Accounts List.” *Id.* at 8.

² The Court previously recounted the detailed factual background of this dispute in its Order denying the motion to amend the protective order. *See* Dkt. 223 at 1-5.

C. The AAA Arbitration Finds that DIRECTV violated STELA.

On November 30, 2020, after DIRECTV failed to resolve Mr. Romero's STELA claim through the DIRECTV Customer Agreement's pre-dispute procedures, Mr. Romero commenced an AAA Consumer Arbitration against DIRECTV. Through discovery obtained in arbitration, Mr. Romero learned that DIRECTV had never retrieved or destroyed Mr. Romero's personal information. Despite Mr. Romero bringing his STELA claim before this Court and this Court's repeated findings supporting that claim, *see Cordoba*, 320 F.R.D. at 592, 593, n.8; Dkt. 142, at 17, DIRECTV continued to flout this Court's authority by violating STELA. In the AAA arbitration, the parties fully briefed DIRECTV's liability under STELA.

On June 1, 2021, the AAA arbitrator issued her final award. *See* Ex. A. That award determined that DIRECTV violated STELA, awarded Mr. Romero liquidated damages of \$1,000 and additional damages of \$164,100 (which adds up to \$100/day of violation), ordered DIRECTV to "retrieve and destroy or cause the destruction of Claimant's PII ... from Dr. Aron and deliver to Claimant an affidavit from either Dr. Aron (or a person with knowledge at her firm) or an employee of Respondent attesting to the destruction of Claimant's PII," and awarded reasonable attorneys' fees which must be doubled under DIRECTV's

Customer Agreement. *Id.* at 2.

D. The JAMS Arbitration.

Most individuals on the Matched Accounts List are subject to a Customer Agreement specifying AAA arbitration. A minority of customers who stopped having service prior to June 30, 2016, however, have a Customer Agreement requiring JAMS arbitration. Plaintiffs' Counsel therefore commenced a JAMS arbitration on behalf of Leonidas Falla, a previously retained individual on the Matched Accounts List. *See* Dkt. 231. The JAMS arbitrator decided that DIRECTV did not violate STELA, explicitly disagreeing with this Court's views regarding this matter. *See* Hutchinson Decl. Ex. B, at 3 (disagreeing with the Court's finding that Claimant Falla accepted the Privacy agreement via conduct); *id.* at 6 (rejecting the Court's conclusion that the "legitimate business activity" exception to STELA does not apply).

With potentially thousands of individual arbitrations to come, there is a chance that other arbitrators will disagree on one point or another. Some may agree with DIRECTV and this one JAMS arbitrator. Many others will likely agree with this Court's findings, Plaintiffs' Counsel, and the AAA arbitrator. But, because DIRECTV insisted upon arbitration, the victims of DIRECTV's STELA violations cannot collectively litigate these claims as a class, making inconsistent

judgments unavoidable. Plaintiffs' Counsel believe that it should be up to each person on the Matched Accounts List to decide if they wish to pursue their claims once they have been informed of their legal rights.

III. ARGUMENT

A. Plaintiffs' Counsel meet the "Good Cause" and "Interests of Justice" standards for modifying the Protective Order.

Plaintiffs' Counsel request that the Court modify the Protective Order to remove the secrecy and permit them to communicate with the persons on the Matched Accounts List. Modifying a protective order is within the Court's discretion. *See Preserve Endangered Areas of Cobb's History v. United States Army Corps of Eng'rs.*, 87 F.3d 1242, 1246 (11th Cir. 1996) ("The District Court's entry of a protective order must be reviewed for abuse of discretion."); *see also Chi. Tribune Co. v. Bridgestone/Firestone Co.*, 263 F.3d 1304, 1309 (11th Cir. 2001) (reviewing a modification of the then-applicable protective order under an abuse of discretion standard).

The Protective Order permits the Court to "modify the terms and conditions of the Protective Order for good cause, or in the interest of justice, or on its own order at any time in these proceedings." Dkt. 45, at ¶ 12. Attached hereto as Exhibits C and D to the Hutchinson Declaration are clean and redlined versions of Plaintiffs' Counsel's proposed amendments to the Protective Order.

Good cause and the interest of justice exist here for four main reasons.

First, this Court agreed with Plaintiffs that individuals on the Matched Accounts List could not otherwise learn of their STELA claims unless someone told them.

Second, DIRECTV, as this Court acknowledged, “made its bed by compelling arbitration” and thus should be held to its agreements with its consumers. Dkt. 223

at 8. *Third*, Mr. Romero’s award demonstrates that these STELA claims are meritorious and may be worth thousands of dollars in damages to many claimants.

Fourth, discovery in arbitration has shown *that DIRECTV has continued to violate STELA*. Absent knowledge of these facts and the ability to pursue injunctive relief in arbitration, individuals on the Matched Accounts List have no way to make DIRECTV retrieve and destroy their improperly disclosed personal information.

1. Individuals on the Matched Accounts List have no way of knowing of their STELA claims as long as Plaintiffs’ Counsel are prohibited from communicating with them.

There are 9,116 individuals on the Matched Accounts List, including Mr. Romero. Even through “extraordinary diligence,” there is no way for these individuals to know “about their potential STELA claims unless someone notifies them.” Dkt. 223 at 7-8. Uniquely under the facts of this case, the individuals on the Matched Accounts List cannot know that they have STELA claims—only Plaintiffs’ Counsel, DIRECTV, and Dr. Aron know whose information has been

improperly disclosed. Moreover, the fact that STELA protects satellite television customer information is not generally known by the general public. In order for individuals who are on the Matched Accounts List to receive meaningful information regarding their claims, those claims, and their potential value, must be explained in some detail. Thus, if Plaintiffs' Counsel are not permitted to communicate with these individuals about this issue, then the rights of each one of those persons will never be vindicated, nor will DIRECTV's behavior—which an AAA arbitrator expressly found to be illegal—be challenged. During Mr. Romero's arbitration it was revealed that, at that time and to this day, DIRECTV has neither retrieved nor destroyed these individuals' improperly disclosed personal information. Surely, DIRECTV should not be permitted to reap the rewards of misconduct that violated—and continues to violate—a federal statute by burying these undisputed facts behind the veil of the protective order after having succeeded in forcing these individuals to arbitration. Plaintiffs' Counsel's communication would inform them of facts and legal claims they could not possibly know otherwise.

For those individuals to make an informed choice as to whether they wish to pursue their claims, it is essential they be told of the possibilities for recovery, and that there are attorneys willing to represent them who understand the claims at

issue and who have successfully pursued the claims in a prior case. Anything less would provide insufficient context for any individual on the Matched Accounts List to appreciate their legal rights.

2. It Is in the Interests of Justice for DIRECTV's Conduct to Be Brought To Light.

It is in the interests of justice to amend the Protective Order to allow Plaintiffs' Counsel to communicate with those persons on the Matched Accounts List, for two reasons. *First*, it is a general principle that proceedings in federal court should be conducted transparently and openly. "Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case." *Brown v. Advantage Eng'r, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992). This public interest is the focus of the analysis, not the purpose for which the records are to be used. "Although we must examine the reason why closure or nonclosure is sought, the real focus of our inquiry is on the rights of the public in maintaining open records and the check[] on the integrity of the system, insured by that public access." *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (internal quotation marks and citations omitted).

The individuals on the Matched Accounts List are not named anywhere in this case's docket. As such, as this Court already found, there is no way for the public—more specifically the affected members of the public—to know that *their*

information has been disclosed in violation of STELA. The relevant records are, for all practical purposes, sealed. Moreover, because a significant portion of the individuals affected by DIRECTV's STELA violations are Spanish speakers, it is possible that they may not be able to access the Court docket in English.

Second, the scope and ongoing nature of the STELA violations caused by DIRECTV's misconduct only came to light through the discovery that Mr. Romero obtained in arbitration. DIRECTV flatly refused to answer discovery regarding Mr. Romero's STELA claims while his claims were pending in this Court. Thus, the court docket does not reveal that DIRECTV has continued to violate STELA.

While there are legitimate reasons to limit access to information put at issue in court proceedings, "[t]he defendant's desire to prevent the use of [information] in other proceedings is simply not an adequate justification for its sealing."

Wilson, 759 F.2d at 1571; *see also Brown*, 960 F.2d at 1015-16 (reversing trial court and ordering records unsealed for the purpose of facilitating other proceedings); *Deman Data Systems, LLC v. Schessel*, Case No. 8:12-cv-2580, 2017 U.S. Dist. LEXIS 55029, at **4-6 (M.D. Fla. Apr. 11, 2017) (granting motion to unseal an order for use by the movant in other proceedings, citing *Brown*); *Center for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1103 (9th Cir. 2016) (holding, in motion to unseal records, "[d]ue to the strong presumption for public

access and the nature of the instant motion for a preliminary injunction, Chrysler must demonstrate compelling reasons to keep the documents under seal”).

DIRECTV can articulate no reasonable basis for maintaining the secrecy of these records in this way other than to avoid additional arbitrations regarding its conduct. This is not a valid basis for overcoming the presumption of public access, especially as that access is otherwise unobtainable. The interests of justice weigh heavily in favor of modifying the Protective Order.

3. It Is In the Interest of Justice for DIRECTV to be forced to Arbitrate Its STELA Violations.

In addition, as the Court noted, “DIRECTV repeatedly emphasized its ‘consumer-friendly’ arbitration procedures before this Court and the Eleventh Circuit Court of Appeals.” Dkt. 223 at 8. DIRECTV “made its bed” with arbitration and it is in the interest of justice that the 9,116 individuals on the Matched Accounts List be informed of their rights to arbitrate DIRECTV’s STELA violations. But if these individuals are not informed of DIRECTV’s violation of their rights, those “benefits,” such as they are, would be wholly illusory. “Litigation is the pursuit of practical ends, not a game of chess.” *City of Indianapolis v. Chase Nat’l Bank of City of New York*, 314 U.S. 63, 69 (1941) (Frankfurter, J.).

DIRECTV refuses to allow Plaintiffs’ Counsel to contact Matched Account

List customers and pursue individual arbitrations because it did not intend for customers to *actually pursue* thousands of arbitrations, despite seeking to compel arbitration at every turn. But Plaintiff Romero nonetheless persisted and pursued arbitration. Despite the headwinds he faced in pursuing arbitration in a forum and rules dictated by DIRECTV, Plaintiff Romero prevailed.

If other individuals pursue arbitration, those consequences would be wholly the result of DIRECTV's own actions, both in terms of the underlying liability stemming from its STELA violations and the forum and procedures it selected and imposed on its customers to adjudicate that liability. In all respects, DIRECTV brought this upon itself, and should not be permitted to avoid liability by keeping its customers in the dark as to their rights. And indeed, if this Court does not amend the protective order to allow Plaintiffs' Counsel to bring these claims to light, that would not be neutral; rather, the "status quo" has permitted DIRECTV to engage in ongoing STELA violations. Only the secrecy afforded by DIRECTV's attempts to enforce the Court's Protective Order has so far kept Plaintiffs' Counsel from contacting thousands of individuals about enforcing their rights against DIRECTV. The only party that will benefit from the Court refusing to amend the Protective Order is DIRECTV. Plaintiffs' Counsel's view is that the Court should refuse to remain party to such secrecy in these circumstances.

4. The Strength of the STELA Claims Demonstrates “Good Cause.”

Mr. Romero’s arbitration award demonstrates the strength of each Matched Accounts List member’s STELA claim. In that award, the arbitrator carefully determined that “STELA requires affirmative written or electronic consent or a court order *before* disclosure of PII.” Ex. A at 2. Each DIRECTV customer on the Matched Accounts List suffered the same STELA violation and is entitled to damages and injunctive relief.

Further, the arbitrator’s award is wholly consistent with this Court’s orders. Specifically, in its class certification order, this Court stated that DIRECTV’s disclosure of the Matched Account List to Dr. Aron, a non-party to this litigation, “did not fall within any of the exceptions permitting disclosure of data.” *Cordoba*, 320 F.R.D. at 593, n.8. Further, in granting Plaintiffs leave to amend their complaint to add a STELA claim, the Court rejected the argument that sharing the Matched Accounts List with Ms. Aron would be a “legitimate business activity” and thus an exception to STELA under 47 U.S.C. § 338(i)(4)(B)(i). Dkt. 142, at 17. The Court stated that this construction of STELA would “give satellite carriers carte blanche to disclose confidential customer data to non-parties during litigation; more broadly, it would allow them to characterize nearly any activity as ‘necessary to render, or conduct a legitimate business activity related to, a satellite

service or other service provided by the satellite carrier to the subscriber.’’ *Id.* at 18. That is precisely what happened here as DIRECTV wrongfully disclosed individuals’ personal information and continues to violate STELA.

Given these findings, there is “good cause” to amend the Protective Order to allow Plaintiffs’ Counsel to contact the Matched Accounts List individuals and pursue claims under STELA which provides for \$100/day in statutory damages. 47 U.S.C. § 338(i)(7).

C. The individuals on the Matched Account Lists are not class members so no court-ordered notice is applicable here; all communication from Plaintiffs’ Counsel to the non-class member individuals would be governed by applicable attorney solicitation rules.

Plaintiffs’ Counsel propose to communicate with individuals on the Matched Accounts Lists to inform them of the existence of their STELA claim against DIRECTV and their right to arbitrate it. Plaintiffs’ Counsel are mindful that the Court observed that the previously proposed letter would constitute “an attorney advertising communication” because it “would invite individuals on the Matched Accounts List to contact Plaintiffs’ Counsel,” and that the Court expressed doubts that any class notice under Rule 23(d)(1)(B)(i) containing such a solicitation would be appropriate. Dkt. 223 at 9-10. Plaintiffs’ Counsel respectfully request that the Court reconsider its view on that point.

As a threshold matter, Plaintiffs' renewed requested is not for Court-ordered class notice under Rule 23(d)(1)(B)(i). These individuals are not, and cannot be, part of any Rule 23 class because DIRECTV maintains that their claims must be arbitrated. It is not the equivalent of the Court "approving" or "condoning" the form or content of the letter. In their prior motion, Plaintiffs raised the possibility of a letter explicitly sanctioned by the Court. *See* Dkt. 198, at 18-19. In doing so, Plaintiffs did not mean to suggest this was the only appropriate form of communication in this context, or that Rule 23 must or should govern communications to individuals on the Matched Accounts List. Indeed, Plaintiffs' position is that the Protective Order should be modified to permit Plaintiffs' Counsel to communicate with the individuals on the Matched Accounts list to inform them of their STELA claims and that counsel's communication would be governed by the applicable attorney solicitation rules.

If the Court were to grant Plaintiffs' motion, it would be simply finding that good cause exists to modify the Protective Order to permit Plaintiffs' Counsel to communicate with the approximately 9,100 individuals. Such a finding would not constitute the Court's blessing of Plaintiffs' Counsel, nor any endorsement by the Court that the 9,100 individuals take any particular action. Plaintiff's Counsel understands that all communication with public concerning the offering of legal

services must comport with all applicable ethics guidelines.

Ultimately, the decision regarding whether to pursue claims against DIRECTV resides with the individuals on the Matched Accounts List. Such individuals are free to ignore the communication and are equally free to pursue their claims against DIRECTV without Plaintiffs' Counsel (either on their own or with counsel of their choosing). However, under the current Protective Order, none of the individuals on the Matched Accounts List have any freedom to make any decisions regarding their claims. Absent Plaintiffs' Counsel's proposed amendment to the protective order, those claims will never be pursued. For the reasons set forth above, Plaintiffs' Counsel believe that result would be a manifest injustice to those individuals, one that can be only remedied by this Court. It is for this reason that Plaintiffs respectfully request that the Court modify the Protective Order to allow the proposed communication.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue an Order entering the modified the Protective Order attached hereto as Exhibit C.

Respectfully submitted,

Dated: June 24, 2021

WADE, GRUNBERG & WILSON, LLC

/s/ G. Taylor Wilson

G. Taylor Wilson
State Bar No. 460781
twilson@wgwlawfirm.com
1230 Peachtree Street N.E., Ste. 1900
Atlanta, GA 30309
Telephone: (678) 787-0216

**LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP**

Jonathan D. Selbin (pro hac vice)
jselbin@lchb.com
Douglas I. Cuthbertson (pro hac vice)
dcuthbertson@lchb.com
Sean A. Petterson (pro hac vice)
spetterson@lchb.com
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592

Daniel M. Hutchinson (pro hac vice)
dhutchinson@lchb.com
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

MEYER WILSON CO., LPA

Matthew R. Wilson (pro hac vice)
Email: mwilson@meyerwilson.com
Michael J. Boyle, Jr. (pro hac vice)
Email: mboyle@meyerwilson.com
1320 Dublin Road, Ste. 100
Columbus, OH 43215
Telephone: (614) 224-6000
Facsimile: (614) 224-6066

*Attorneys for Plaintiffs, the NDNC Class,
and the Proposed IDNC Class*

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rules 5.1.C and 7.1.D of the Northern District of Georgia, that the foregoing was prepared in 14-point Times New Roman Font.

June 24, 2021.

/s/ Daniel M. Hutchinson
Daniel M. Hutchinson

CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all attorneys of record.

June 24, 2021.

/s/ Daniel M. Hutchinson
Daniel M. Hutchinson