

ATTACHMENT 1

1 Brett W. Johnson (#021527)
2 Tracy A. Olson (#034616)
3 SNELL & WILMER L.L.P.
4 One East Washington Street, Suite 2700
5 Phoenix, Arizona 85004-2556
6 Telephone: 602.382.6000
7 E-Mail: bwjohnson@swlaw.com
8 tolson@swlaw.com

9 *Attorneys for Defendant T-Mobile USA, Inc.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Dr. Michael P. Ward, D.O., et al.

Plaintiffs,

v.

Bennie G. Thompson, in his official capacity
as Chairman of the House Select Committee
to Investigate the January 6th Attack on the
United States Capitol, et al.

Defendants.

No. 3:22-cv-08015-DJH

**T-MOBILE USA, INC.’S REQUEST
FOR CLARIFICATION OR, IN THE
ALTERNATIVE, INDICATIVE
RULING**

Assigned to: Hon. Diane Humetewa

T-Mobile USA, Inc. (“T-Mobile” or the “Company”) respectfully requests this Court clarify its October 7, 2022, Order Denying Plaintiffs’ Motion for Injunction Pending Appeal, or in the Alternative, for an Administrative Injunction (the “Order”). [Doc. 68.]

In its Order, the Court twice stated it understood the Committee had clarified that it was no longer seeking the production of records that include Plaintiff Dr. Kelli Ward’s “patient phone numbers.” Since the issuance of the Order, the Committee has informed T-Mobile that it did not, and will not, narrow the Subpoena in such a way and that T-Mobile is obligated to produce all records associated with the number ending in 4220 that are responsive to the Committee’s Subpoena, without excluding any subset of call records.¹

¹ There is no disagreement that the Committee previously narrowed its Subpoena to only Dr. Kelli Ward’s phone line ending in 4220.

Snell & Wilmer
LLP
LAW OFFICES
One East Washington Street, Suite 2700
Phoenix, Arizona 85004-2556
602.382.6000

1 The Plaintiffs, on the other hand, have now insisted that in light of the language in the Order,
2 the parties must agree on a process for redacting the telephone numbers before T-Mobile
3 produces any records to the Committee.

4 Because the Order contains an apparent misunderstanding of the Committee’s
5 position concerning the records requested by the Subpoena, T-Mobile respectfully requests
6 the Court clarify its Order. Specifically, T-Mobile requests that the Court clarify the degree
7 to which its denial of Plaintiffs’ request for an injunction or administrative stay pending
8 appeal was dependent on the Court’s belief that the Committee had agreed to further narrow
9 the Subpoena to exclude records of Ms. Ward’s calls involving telephone numbers
10 associated with her medical patients.

11 Finally, T-Mobile requests that the Court consider its request for clarification now
12 even though—as the Court is likely aware—Justice Kagan has temporarily enjoined T-
13 Mobile from producing any records in response to the Subpoena. If and when Justice Kagan
14 or the Supreme Court lifts that temporary injunction and does not grant an injunction or stay
15 pending appeal, T-Mobile needs to ensure that any production of records to the Committee
16 accords with the Subpoena and this Court’s orders. This Court’s prompt clarification of the
17 Order will therefore facilitate T-Mobile’s ability to timely comply with its obligations under
18 the Subpoena.

19 **FACTS**

20 After this Court granted the Committee’s motion to dismiss [Doc. 55], Plaintiffs filed
21 a notice of appeal and a Motion for Injunction Pending Appeal, or in the Alternative, for an
22 Administrative Injunction with this Court, seeking to prevent T-Mobile from complying
23 with the Subpoena during the pendency of the appeal [Docs. 56, 57].

24 On October 7, 2022, this Court entered its Order, denying Plaintiffs’ motion. In its
25 Order, the Court twice stated that the Committee had clarified it was not seeking any of
26 Plaintiffs’ “patient phone numbers.” [Doc. 68 at 4, 7.] In discussing Plaintiffs’ claims that
27 disclosure of records that included patient telephone numbers would irreparably harm the
28 Plaintiffs, the Court first noted that it had already rejected Plaintiffs’ legal arguments that

1 the physician-patient privilege or HIPAA prevented the disclosure of such records. [*Id.* at
2 4.] The Court went on, however, to add that “the Select Committee clarified at the hearing
3 that it does not seek any of Plaintiffs’ patient telephone numbers, thus assuaging any [patient
4 privacy] concerns Plaintiffs have asserted regarding their disclosure.” [*Id.*] Similarly, in
5 denying Plaintiffs’ request for an administrative injunction, the Court observed that the
6 Committee had “substantially narrowed the subpoena,” including because “counsel for the
7 Select Committee clarified at the hearing it does not seek Ms. Ward’s patient phone
8 numbers.” [*Id.* at 7.]

9 Plaintiffs subsequently sought an emergency injunction or stay from the Ninth
10 Circuit. The Ninth Circuit denied Plaintiffs’ motion. In so doing, the Ninth Circuit panel
11 majority characterized Plaintiffs’ HIPAA claims as “insubstantial” and did not appear to
12 base its decision on whether the Committee had narrowed the Subpoena to exclude records
13 including patient phone numbers. [Doc. 72.]

14 The Committee subsequently requested T-Mobile promptly produce all records
15 associated with the telephone number ending in 4220. Exhibit A (October 24, 2022, Email
16 from Select Committee). Plaintiffs, citing the Court’s statements in the Order, have insisted
17 that the parties implement a process for redacting the telephone numbers of Dr. Kelli Ward’s
18 patients before T-Mobile produces any call detail records to the Committee. Exhibit B (Oct.
19 23, 2022, Email from Plaintiffs’ Counsel).²

20 ARGUMENT

21 I. This Court Has Authority to Clarify Its Order.

22 Courts have an inherent power to clarify non-final orders. *See Balla v. Idaho State*
23 *Bd. of Corr.*, 869 F.2d 461, 465 (9th Cir. 1989). While “there is no Federal Rule of Civil
24

25 ² Plaintiffs are still seeking an injunction of the Committee’s subpoena pending appeal.
26 Although the Ninth Circuit denied their request on October 22, 2022, Plaintiffs filed an
27 Application for Emergency Stay with the U.S. Supreme Court on October 26, 2022. Justice
28 Kagan entered an administrative stay pending review of Plaintiffs’ Application. However,
if the administrative stay is lifted and no further stay or injunction pending appeal is issued,
T-Mobile is obligated to comply with the Committee’s subpoena.

1 Procedure specifically governing ‘motions for clarification,’” federal courts frequently will
2 “rule[] on a motion for clarification without resort to [Federal Rule of Civil Procedure]
3 standards.” *United States v. Philip Morris USA, Inc.*, 793 F. Supp. 2d 164, 168 (D.D.C.
4 2011); *see also, e.g., Adams v. Symetra Life Ins. Co.*, No. CV-18-0378-TUC-JGZ (LAB),
5 2020 WL 4814249, at *1 (D. Ariz. Aug. 19, 2020) (similar). “The general purpose of a
6 motion for clarification is to explain or clarify something ambiguous or vague, not to alter
7 or amend.” *Adams*, 2020 WL 4814249, at *1 (quoting *United States v. All Assets Held at*
8 *Bank Julius, Baer & Company*, 315 F.Supp.3d 90, 99 (D.D.C. 2018)). Courts have
9 “encouraged parties to file motions for clarification when they are uncertain about the scope
10 of a ruling.” *Id.* (quoting the same).

11 Plaintiffs’ pending appeal also does not limit this Court’s ability to clarify the Order.
12 While a pending appeal generally divests the district court of jurisdiction, that rule is not
13 absolute. *See Nat. Res. Def. Council v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir.
14 2001). At least two exceptions authorize this Court to clarify the Order despite Plaintiffs’
15 pending appeal.

16 First, the Court may clarify the Order pursuant to Rule 62(d), which permits district
17 courts to, among other things, modify orders concerning injunctions pending appeal even
18 while an appeal is underway. *See Fed. R. Civ. P. 62(d)*. Because the Order at issue relates
19 to a post-appeal injunction, this Court may clarify the Order regardless of appeal status. *See*
20 *Fed. R. Civ. P. 62(d)*. Second, the Court may grant the requested relief because clarification
21 of any differing understandings concerning the scope of the Subpoena will ultimately aid in
22 the Ninth Circuit’s review of the matter. *See, e.g., Dressler v. Seeley Co. (In re Silberkraus)*,
23 336 F.3d 864, 869-70 (9th Cir. 2003) (“[W]e have recognized an exception to the general
24 rule where the district court action aids us in our review.”).

25 **II. Clarification Is Necessary to Guide T-Mobile’s Compliance with the**
26 **Committee’s Subpoena.**

27 As set out above, the Order twice states the Court’s understanding that, based on
28 statements made at the hearing, the Committee had agreed to narrow the Subpoena to

1 exclude “Plaintiffs’ patient telephone numbers.” [Doc. 68 at 4, 7.] The Committee has,
2 however, since informed T-Mobile that it did not, and will not, narrow the scope of the
3 Subpoena, and that it believes T-Mobile is required to produce *all* responsive records
4 relating to the telephone number ending in 4220.

5 That direct conflict between the statements in the Court’s Order and the Committee’s
6 explicitly stated position puts T-Mobile in an impossible position. Should Justice Kagan or
7 the Supreme Court lift the administrative injunction, T-Mobile expects the Committee will
8 demand that it promptly comply with the Subpoena by producing *all* responsive records
9 relating to the telephone number ending in 4220, without exception. If T-Mobile complies
10 with that demand, however, it at least conceivably risks running afoul of the spirit of this
11 Court’s order, which assumed that the Committee had agreed to narrow the Subpoena to
12 exclude the phone numbers of Dr. Kelli Ward’s patients.

13 For that reason, T-Mobile respectfully asks that the Court clarify whether its denial
14 of Plaintiffs’ request for an injunction pending appeal relied on the Court’s belief that the
15 Committee had narrowed the Subpoena. If the Court clarifies that it would have denied
16 Plaintiffs’ request in any event, then T-Mobile would plan to produce all responsive records,
17 as requested by the Committee.³ If, on the other hand, the Court indicates that it would
18 have granted Plaintiffs’ motion but for its belief that the Committee had narrowed its
19 subpoena, then T-Mobile would not produce those records pending further direction from
20 the courts or agreement of the parties.

21 **III. In the Alternative, the Court Can Issue an Indicative Ruling.**

22 If, however, the Court does not concur that it has jurisdiction to clarify its Order, T-
23 Mobile requests in the alternative that the Court issue an indicative ruling under Rule
24 62.1(a). Pursuant to Rule 62.1, if a district court lacks jurisdiction to grant a motion because
25 of a pending appeal, the district court may “(1) defer considering the motion; (2) deny the

26 ³ As noted above, the Ninth Circuit’s order denying Plaintiffs’ request for an injunction
27 pending appeal does not cite or otherwise rely on any narrowing of the Subpoena to exclude
28 patient phone numbers, and the majority described Plaintiffs’ HIPAA arguments as
“insubstantial.” [Doc. 72 at 3.]

1 motion; or (3) state either that it would grant the motion if the court of appeals remands for
2 that purpose or that the motion raises a substantial issue.” Fed. R. Civ. P. 62.1(a). T-Mobile
3 requests the Court issue an order stating how it would rule on the present motion so that T-
4 Mobile may seek remand, if necessary, from the Ninth Circuit.

5 **CONCLUSION**

6 For the reasons set forth above, T-Mobile respectfully asks the Court to provide the
7 requested clarification.

8 DATED this 28th day of October, 2022.

9
10 SNELL & WILMER L.L.P.

11
12 By: /s/ Brett W. Johnson
13 Brett W. Johnson
14 Tracy A. Olson
15 One Arizona Center
16 400 E. Van Buren, Suite 1900
17 Phoenix, Arizona 85004-2202

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CERTIFICATE OF SERVICE

I certify that on October 28, 2022, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing, which electronically sends a copy of same to be served on all registered parties.

/s/ Abigail Bahorich

EXHIBIT A

From: Record, Brittany <Brittany.Record@mail.house.gov>
Sent: Monday, October 24, 2022 3:11 PM
To: DaCunha, Alyssa
Cc: Moskowitz, Yonatan; Tonolli, Sean
Subject: Ward Production

EXTERNAL SENDER

Hi Alyssa,

Thanks for meeting with us today. With regard to your question on the call, the Select Committee has not withdrawn its request for any of the call detail records associated with Dr. Kelli Ward. At oral argument before the district court, the Select Committee stated that it did not have an investigative interest in Dr. Ward's medical practices, but it did not disclaim an interest in any subset of Dr. Ward's call detail records. The relevant exchange is reproduced below.

THE COURT: All right. And I guess, let me -- let me ask you, Mr. Columbus, because it -- it's also sort of a question in my mind because, again, there seems to be a little bit of a difference in what is being litigated here. At this juncture, and you can correct me if I'm reading too much into your response, at this juncture you're not necessarily seeking any of the patient information. In fact, is it fair to say you're not even seeking any patient identities in the call records?

MR. COLUMBUS: We have no interest in anything related to Dr. Ward's medical practices. We are seeking call records, which are basically phone numbers and times and dates of calls or texts sent. They have no content in it. They do not come with a name. We -- this case is not about Dr. Ward as a doctor. She, of course, is like many people uses her telephone for multiple purposes and we are interested only in her efforts as it relates of the work of this Select Committee.
Oct. 4, 2022, H'rg Trans. at 5-6.

Dr. Ward's counsel later stated at oral argument that "[t]here is no way to take the patients out. Their numbers are going to be there." *Id.* at 11.

Dr. Ward also acknowledged in her brief to the Ninth Circuit that "[t]he Committee ha[d] agreed to limit the scope of the subpoena only to records pertaining to Dr. Kelli Ward's phone number on the account." Pltfs-Appellants' Emergency Motion for Injunction Pending Appeal at 3, n.3. At no point did Dr. Ward (or the Select Committee) represent that the Select Committee had withdrawn its request as to any subset of the call detail records associated with Dr. Kelli Ward.

As the Select Committee has stated repeatedly, it has no interest in Dr. Ward's medical practice. But the Select Committee (like T-Mobile) has no way of knowing which phone numbers in Dr. Ward's call detail records pertain exclusively to her patients. And the Select Committee cannot take Dr. Ward's word for it, given her vigorous efforts to impede the Select Committee's investigation. Dr. Ward has repeatedly and unsuccessfully sought judicial relief on various

grounds, including the presence of her patients' phone numbers in her call detail records. She has lost, and T-Mobile is under a legal obligation to provide the subpoenaed records to the Select Committee immediately.

The Select Committee therefore expects T-Mobile to produce the records forthwith, consistent with the representations the company has made to plaintiffs and the Select Committee, namely, that it would proceed with production in the event the Ninth Circuit denied relief.

Thanks again for your time and attention to this matter,

Brittany M. J. Record

Senior Counsel, Select Committee to Investigate the January 6th Attack on the Capitol of the United States

U.S. House of Representatives

EXHIBIT B

From: Alexander Kolodin <akolodin@davillierlawgroup.com>
Sent: Sunday, October 23, 2022 10:17 AM
To: Johnson, Brett W. (PHX)
Cc: Laurin Mills; Brant Hadaway; Veronica Lucero; Roger Strassburg; Yuka Bacchus
Subject: Screening Out Patient Phone Numbers (Ward v Thompson)

[EXTERNAL] akolodin@davillierlawgroup.com

Dear Brett:

Upon closer review of the Order and dissent, I realized that the Committee has dropped the request for patient phone numbers. Dissent pg. 5 (Moreover, because the Committee is “no longer seeking . . . [Ward’s] patient phone numbers[.]”). We hope that T-Mobile will hold off on production until SCOTUS can decide whether to grant a stay. However, if at some point, T-Mobile has to make disclosure of some phone records we need to agree on a protocol for redacting patient phone numbers. Do you have time for a zoom call on that point with Laurin, Brant, and I next week?

Alexander Kolodin

Partner

Davillier Law Group, LLC

4105 North 20th Street, Suite 110
Phoenix, AZ 85016

Phone (602) 730-2985 Ext. 701 | Cell (602) 820-4240 | Fax (602) 801-2539

Please visit our website at: www.davillierlawgroup.com

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