

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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)	
UNITED STATES OF AMERICA, <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	Case No. 1:11-cv-01560 (ESH)
v.)	
)	Referred to Special Master Levie
AT&T INC., <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	
)	
_____)	

SPECIAL MASTER ORDER NO. 5

Before the Special Master are Plaintiffs’ Second Motion Seeking Relief To Facilitate Efficient Trial Preparation and Defendants’ Memorandum In Support Of Proposed Order Governing Trial Preparation.

The parties have submitted different proposals on four remaining pretrial procedural matters: (1) deposition protocols; (2) the exchange of exhibit lists and a schedule for resolving admissibility and confidentiality objections; (3) the technology tutorial; and (4) pretrial legal briefs. For the reasons that follow, Plaintiffs’ and Defendants’ Motions are each granted in part and denied in part.

I. Deposition Protocols

a. Background

The parties disagree about the application of Paragraph 7 of the Stipulated Scheduling and Case-Management Order (“CMO”). (Doc. 33). Paragraph 7 limits depositions of fact

witnesses to “one (7 hour) day.”¹ (*Id.*). The CMO allows the parties “to stipulate to additional time for individual depositions” with the consent of “affected non-parties.” (*Id.*). Absent such an agreement, “the length of depositions provided for in [the CMO] may be modified only by order . . . for good cause shown.”

The initial issue in dispute is whether the non-noticing party is entitled to use 2 of the 7 deposition hours for its own deposition of the witness. Plaintiffs contend that the parties should share deposition time and propose that the non-noticing party have up to 2 hours of the total 7. [Pls.’ Mem. in Supp. at 3–4 (Doc. 91)]. Defendants assert that Plaintiffs’ proposal will severely prejudice their ability to develop their case and that there are alternate means of accommodating the non-noticing party’s need to depose the witness should the noticing party use the entire 7 hours. [Defs.’ Mem. in Supp. at 2–3 (Doc. 92)]. Defendants suggest three options: (1) “the non-noticing party may seek agreement from the witness to accommodate additional questions by the non-noticing party so that the witness does not have to appear for a second deposition”; (2) the non-noticing party could seek an extension of the 7-hour limit from the Special Master; or (3) the non-noticing party could notice the witness for a separate deposition. [Defs.’ Proposed Order at ¶1 (Doc. 92-1)].

The second issue in dispute involving CMO ¶ 7 concerns time limits for depositions of Rule 30(b)(6) witnesses. (Pls.’ Mem. in Supp. at 4). This issue is raised by Plaintiffs and not specifically addressed by Defendants. Plaintiffs understand that Defendants’ position is that each witness produced in response to a Rule 30(b)(6) notice may be deposed for 7 hours. (*Id.*). Because the CMO counts all Rule 30(b)(6) witnesses as a single witness for purposes of the cap on the number of witnesses, Plaintiffs assert that a noticing party may have only 7 hours (or 14

¹ Paragraph 7 also provides that “deposition of five fact witnesses employed by or otherwise affiliated with a party may extend to two days in length at the discretion of the noticing party.” That provision is not at issue in the current dispute.

hours for up to 5 party witnesses) for each Rule 30(b)(6) notice regardless of the number of witnesses designated. (*Id.*; CMO ¶7).

b. Discussion

There are two interests implicated by the time issue: the noticing party's need to be able to conduct a professional and complete deposition without unduly restrictive time constraints and the non-noticing party's need to depose effectively the other side's witness. The parties are in agreement that, where the noticing party does not use the full 7 hours of deposition time, the non-noticing party may use the remainder. They also agree that, under the CMO, the parties may (with the consent of affected non-parties) stipulate to an extension of the time limit for a particular deposition. (*See* CMO ¶7).

There can be no serious disagreement that the 7-hour limit contemplates some degree of questioning by the non-noticing party. In contrast to a rigid application of a 5/2 hour split or some variation of a rigid split, the Special Master believes that the most efficient way to accommodate both interests is by agreement between the parties and the non-party to enlarge, within reason, the total time for the deposition. This approach, however, is based upon several premises: (1) each deposition will be conducted in a professional and efficient manner so that the examining attorney asks focused, directed questions and does not "run the clock"; (2) the witness answers questions directly and completely without filibustering and "running the clock"; (3) parties and non-parties will work together to avoid inconvenience to the witness necessitated by seeking additional time from the Special Master for another deposition; (4) where there is an agreement to enlarge the time for deposition, the attorney for the non-noticing party will exercise the same professionalism and efficiency expected of the noticing party's attorney; and (5) the need to enlarge time or otherwise continue the deposition will be the exception, rather than the rule.

Where the parties cannot reach an accommodation and the noticing party has used all or most of the permitted 7 hours, the non-noticing party may appeal to the Special Master for additional time. The non-noticing party must demonstrate “good cause” for the additional time (CMO ¶7), which may include a showing that the deposing party or witness inappropriately or unprofessionally used the deposition time or that the non-noticing party experienced other prejudice. The Special Master will consider arguments of the parties as well as any daily deposition transcripts, if available. Where matters are brought to the Special Master there will be ample opportunity to review the conduct of all involved in the deposition and, if warranted, the protocols can be modified prospectively or curative measures can be recommended to Judge Huvelle.

Another alternative is for the non-noticing party to notice independently the witness to obtain the right to an additional 7 hours of deposition time. The non-noticing party does not forfeit its right to notice the witness by moving for additional time before the Special Master.

In the event both parties notice the same non-party witness, each party is entitled under the CMO to 7 hours of questioning. The parties may use their 7 hours over the two days of depositions; the party taking the first deposition may reserve up to one hour of its deposition time to examine the witness on the subjects covered during the second deposition.

As for the Rule 30(b)(6) depositions, the CMO, drafted by the parties, treats a Rule 30(b)(6) notice as a single deposition regardless of the number of witnesses produced for the purposes of the witness limitation. (CMO ¶7). There is no reason to treat the time allocation for Rule 30(b)(6) depositions differently from the way they are treated for the cap on witnesses. The parties retain the options to agree to an enlargement of time as noted above or to seek relief from the Special Master based upon “good cause.” Any such request will afford the Special Master the opportunity to evaluate the scope and nature of the Rule 30(b)(6) request and apply a “rule of

reason.”

II. Exchange of Exhibit Lists and Schedule for Resolving Objections

a. Background

Plaintiffs propose an upper limit on the number of potential trial exhibits to prevent the parties from over-designating and slowing down the pretrial preparations in litigation over confidentiality and admissibility matters. (Pls.’ Mem. in Supp. at 5). Citing the Local Rule calling for simultaneous designation of trial exhibits, they propose simultaneous designation, albeit on a staggered schedule. (*Id.*). Recognizing that there will be confidentiality issues, Plaintiffs propose a schedule for briefing and resolution of those issues by the Special Master. (*Id.*).

Defendants do not oppose an exhibit cap *per se*, but suggest that the date suggested by Plaintiffs—more than one month before the close of discovery—is too early to finalize what that cap should be. (Defs.’ Mem. in Supp. at 4 n.2). Defendants also propose a hearing before the Special Master on the confidentiality issues.

b. Discussion

The Special Master agrees that a limitation on the number of exhibits is warranted. Nevertheless, it is too early at this time to determine the proper number of exhibits. The Court and the Special Master both have repeatedly exhorted the parties to streamline their exhibit list as a matter of respect for the Court’s time and as a matter of self-interest. A lengthy exhibit list will not necessarily enhance a party’s presentation of its case, since the presumed object is to focus Judge Huvelle on that select, defined universe of documents that each party wishes to emphasize. The parties are advised to use a tiered approach to exhibits, creating two separate binders: (1) key documents—referenced in the party’s legal brief and considered essential to presentation of that party’s case; and (2) supportive, background and reference documents. At a time to be

determined, the Special Master will discuss with counsel details about the number of documents.

While simultaneous designation of exhibits, consistent with the Local Rules, works well in general, this particular case warrants consideration of and application of rules specific to this case. Here, the Special Master concludes that sequential designation of exhibits, like sequential naming of witnesses, is preferable. Sequential designation with Plaintiffs proceeding first enables Defendants to designate exhibits that directly and efficiently respond to Plaintiffs' evidence and otherwise support Defendants' case. Plaintiffs may then designate rebuttal exhibits based upon those designated by Defendants.

The parties properly recognize that this case will involve citation and reference to confidential information, particularly evidence obtained from non-parties. Thus, the parties each acknowledge that there must be notice to non-parties of intent to use confidential information and pretrial rulings made by the Special Master on such confidential information.

As set forth below, the Special Master orders a schedule for the designation of exhibits, issuance of notice to non-parties, filing of objections and hearings before the Special Master.

III. Technology Tutorial

a. Background

The parties have agreed that the "teaching experts" will be experts who may also testify at trial. Plaintiffs argue that the most efficient and neutral way to present the teaching experts is with a "joint conversation" on a single day "with the tutors alternating lead roles on specific topics to ensure equitable time." (Pls.'s Mem. in Supp. at 5–6). So that both sides have advance notice of the topics to be discussed, Plaintiffs propose that the parties submit a list of topics to the Court on January 6, with the tutorial occurring on January 23. (*Id.* at 7).

Defendants propose that each side's expert have a separate day for presentation. (Defs.' Mem. in Supp. at 5). They contend that each side's experts should be allowed "to provide Judge

Huvelle with neutral information on the topics that they deem most important to understanding the technology and industry at issue, and to do so in separate presentations.” (*Id.* at 6).

b. Discussion

The tutorial is intended to provide Judge Huvelle with background on terminology, technology, the industry, and any other concepts involved in the issues underlying this litigation. [See Special Master Order No. 3 at 12, 15 (Doc. 82)]. The intent of the tutorial is education, not advocacy. Efforts to use the tutorial as a means to advance the theories or positions of the parties will not be appropriate.

In order to make the presentations optimally educational, the experts are directed to confer and develop a list of topics to be presented to Judge Huvelle. Each expert shall take the lead on particular topics as decided between the experts. The non-lead expert may share his/her views during or after the presentation of the lead expert on that topic. Each topic will be presented seriatim, and the agenda should be structured in such a way that each expert alternates as the lead presenter. The experts should expect that Judge Huvelle may pose questions at any time.

The tutorial shall take place in court on a designated day with the following day available, if needed, for any remaining issues. The parties are requested to consult with their experts and inform the Court of which of the following dates will work for the tutorial: January 11 and 12, 2012, or January 17 and 18, 2012.

IV. Legal Briefing

a. Background

Plaintiffs propose that each side submit pretrial briefs of no more than 10,000 words on January 20 and responses of no more than 4,000 words on February 3. (Pls.’ Mem. in Supp. at 7). Plaintiffs oppose attaching exhibits to the briefs as it is not necessary to preview the evidence in

briefs designed to provide a legal and factual overview of the case. (*Id.*).

Defendants argue that setting a word or page limit on the briefs at this stage would be arbitrary and premature. (Defs.' Mem. in Supp. at 6). They further argue that including exhibits will be helpful, especially as the parties will likely quote from the exhibits in their briefs. (*Id.* at 6–7). As for scheduling, Defendants propose sequential briefing tracking the submission of pre-filed expert testimony on January 29 and February 8. (*Id.* at 7).

b. Discussion

Consistent with the belief that sequential presentations more efficiently focus the issues, briefs will be filed sequentially with page or word limits. So that briefs may serve as a single reference point to explain each party's case, exhibits may be attached to the briefs. Limits will be placed on exhibits, as well as the length of the briefs. In the case of Plaintiffs, the word or page limit will include initial and rebuttal briefs. The specific limits, be they word or page limits, will be set at a future date.

The briefs shall set out summaries of each side's factual evidence and legal authority with references to exhibits. Citations to cases or exhibits shall be hyperlinked. Because rulings on the exhibits and confidential information will not be completed at the time briefs are filed, the parties may file redacted public versions pending rulings on the confidentiality of information referenced in the briefs or exhibits.

Plaintiffs' brief on its case-in-chief (*prima facie* case) shall be due on or before January 27, 2012. Defendants' brief on its case shall be due on or before February 3, 2012. Plaintiffs' rebuttal brief shall be due on or before February 9, 2012.

V. Conclusion

For the reasons stated, the Special Master grants in part and denies in part Plaintiffs' Second Motion Seeking Relief To Facilitate Efficient Trial Preparation and Defendants' Memorandum In Support Of Proposed Order Governing Trial Preparation.

It is ORDERED that

1. The following procedures shall, in conjunction with CMO ¶7, govern depositions:
 - a. The non-noticing party may ask questions at the close of the noticing party's questioning for any deposition noticed under CMO ¶7. Where the parties and non-party witness cannot reach an accommodation per CMO ¶7 to allow the non-noticing party sufficient time to depose a witness, the non-noticing party may appeal to the Special Master for additional time upon a showing of good cause.² The non-noticing party may, before or after moving for additional time with the Special Master, separately notice the witness for a deposition subject to the numerical limitations of CMO ¶7.
 - b. In the event both parties notice the same non-party witness, the parties may use the 7 hours to which they are each entitled over the two days of depositions. The party taking the first deposition may reserve up to one of its 7 hours of deposition time to examine the witness on the subjects covered during the second deposition.
 - c. Any depositions conducted of witnesses designated under Federal Rule of Civil Procedure 30(b)(6) shall count as a seven-hour deposition of a single "fact witness" for the purpose of the limitation on the length of depositions in

² The parties and non-party witness may attempt to reach the Special Master prior to adjournment of the deposition to see if a ruling might be obtained at that time.

CMO ¶7, regardless of the number of witnesses produced in response to the Rule 30(b)(6) notice.

2. The following schedule shall govern the submission of exhibit lists:

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|--------------------|---|
| January 23, 2012 | Plaintiffs submit list of exhibits (party documents and non-party documents) ³ ; Plaintiffs issue notice to each affected non-party. |
| January 26, 2012 | Defendants submit (1) objections to Plaintiffs' list ⁴ and (2) list of Defendants' exhibits (party documents and non-party documents) ⁵ ; Defendants issue notice to each affected non-party. |
| January 26, 2012 | Non-parties submit objections to documents on Plaintiffs' list. |
| January 29, 2012 | Plaintiffs and non-parties submit objections to documents on Defendants' list and Plaintiffs file responses to objections served by Defendants and non-parties. |
| January 29, 2012 | Plaintiffs submit rebuttal list, which includes only those documents that rebut documents on Defendants' list, with notice to affected non-parties. |
| January 30, 2012 | Defendants' and non-parties' submit objections to documents on Plaintiffs' rebuttal list. |
| January 31, 2012 | Defendants submit responses to objections filed by Plaintiffs and non-parties. |
| February 1–2, 2012 | Hearings before the Special Master on objections by parties and non-parties. |

3. The following procedures shall govern the technology tutorial:

³ This submission includes documents cited in the expert reports (initial and rebuttal) on the assumption that the written direct testimony of Plaintiffs' experts will not include any documents not referenced in the initial and/or rebuttal reports of Plaintiffs' experts.

⁴ Parties and non-parties are expected to confer about objections and withdraw any objections to which agreements are reached.

⁵ This submission includes documents cited in the reports of Defendants' experts on the assumption that the written direct testimony of Defendants' experts will not include any documents not referenced in the initial reports of Defendants' experts.

- a. The parties are to confer with their experts who will participate in the technology tutorial regarding their availability on January 11 and 12, 2012, or January 18 and 19, 2012, and notify the Court forthwith on the agreed upon dates.
 - b. Both experts shall be present for the tutorial. The experts are directed to confer and develop a list of topics to be presented. Each expert shall take the lead on particular topics as decided between the experts, and the topics shall be organized so that the experts alternate as lead presenter. The non-lead expert may share his/her views during or after the presentation of the lead expert on that topic. Each topic will be presented seriatim.
4. The following procedures shall govern the filing of pretrial briefs:
- a. Each party shall file a pretrial brief setting forth summaries of its factual evidence and legal authority. The briefs may include exhibits. All references to cases or exhibits shall be hyperlinked. The parties shall file redacted public versions of the briefs pending a ruling on the confidentiality of the information referenced in the briefs or exhibits.
 - b. Plaintiffs' brief on its case-in-chief shall be due on or before January 27, 2012. Defendants' brief on its case shall be due on or before February 3, 2012. Plaintiffs' rebuttal brief shall be due on or before February 9, 2012.
 - c. A limit on the length of the briefs and the number of the attached exhibits shall be set at a later date.

Date: November 27, 2011

/s/ Richard A. Levie
Hon. Richard A. Levie (Ret.)
Special Master