UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA et al., *Plaintiffs*, v. AT&T INC. et al., *Defendants*.	Civil Action No. 11-01560 (ESH)

PLAINTIFFS' SUPPLEMENTAL STATEMENT
RESPECTING TRIAL WITNESSES

Plaintiffs propose a schedule that provides for staggered disclosure of a fixed number of likely trial witnesses, by name or entity, with the opportunity to add a limited number of additional trial witnesses for good cause shown by early February. This schedule is realistic and rests on two indisputable facts: (1) discovery is ongoing (and for most nonparties only just beginning) and the parties should not be locked prematurely into particular witnesses before having a chance to review documents and take depositions; and (2) if trial is to commence on February 13, there must be limits on the number of witnesses who can be deposed before then, and it would be unrealistic to pretend that the parties have the ability to reasonably conduct all the discovery they might otherwise desire.

Specifically, Plaintiffs propose the following schedule:

November 18: Plaintiffs provide initial list of up to 15 witnesses, either individuals or entities.

November 25: Defendants provide an initial list of up to 15 witnesses, either individuals or entities.

December 9: Plaintiffs provide supplemental list of up to 15 witnesses.

December 16: Defendants provide supplemental list of up to 15 witnesses.

January 12: Parties provide supplemental lists of up to 5 witnesses.

January 23: Parties identify trial witnesses from list of previously identified witnesses, with right to add limited number of additional witnesses for good cause shown before February 3.[1]

In contrast to this staggered schedule, Defendants' proposal seeks to require Plaintiffs to identify all Plaintiffs' potential fact witnesses, by name, next week. This is impossible. Party depositions are ongoing and will not be complete for some time. There are substantial disputes about the parties' productions. Nonparty depositions have not yet begun. Indeed, AT&T recognized that critical discovery has not yet been produced when they recently told the Court, when seeking documents from Sprint, that "[n]ewly generated documents are among the materials most relevant and important to the issues in this case." (AT&T 11/2/11 Opp. at 2.)

Defendants' proposal fails to set any limit on the number of discovery and trial witnesses, creating the likelihood of a deposition schedule that, in the short time before the January 10 end of discovery, would be unmanageable. Indeed, Defendants have yet to notice any of the 30 depositions they are permitted under the Case Management Order, while seeking the right to name an unlimited number of additional witnesses and asserting that they are likely to notice depositions under Fed. R. Civ. P. 30(b)(6), under which multiple individuals may have to be deposed. Even assuming a good-faith effort to

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[1] Respecting the identification of a final witness schedule, Plaintiffs' proposal follows Local Civil Rule 16.5, requiring simultaneous disclosure.

identify only likely trial witnesses, Defendants' proposal presages well over 100 depositions in December and early January. That is unreasonable, and Court intervention now is necessary to avoid it. Having persuaded the Court to set an early trial, Defendants cannot now insist on no limitations whatsoever on the number of potential trial witnesses.[2]

Plaintiffs' proposal implicitly places a *de facto* cap of 70 on the number of potential trial witnesses, with the opportunity for each side to make a good-cause addition, which makes sense in light of the compressed discovery schedule. Even this number is likely to be excessive under any sensible conception of an orderly four to six week February trial, particularly because it excludes expert witnesses. Indeed, the Court has already said that 60 fact witnesses would be too many. A much lower cap would be reasonable and consistent with customary practice in merger litigation.[3]

Plaintiffs have struck a provision permitting each side to call witnesses from the other side's list because Plaintiffs are concerned that such a provision, combined with any schedule under which Plaintiffs identify potential witnesses first, would permit Defendants

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[2] When urging an early trial date, AT&T asserted that, under its existing terms, the transaction would terminate on March 20 with potential extensions through September 20. (9/21/11/ Tr. at 21-22.) Defendants already have extended to June. *See* Greg Bensinger, *AT&T Sees Later Closing for T-Mobile Deal*, WALL ST. J., Nov. 4, 2011; AT&T Inc., Quarterly Report at 17 (Form 10-Q) (Nov. 3, 2011).

[3] In a majority of recent merger cases, courts have limited the number of witnesses, and Plaintiffs are aware of none involving as many as 70 fact witnesses. *See, e.g.*, *United States v. H&R Block, Inc.*, No. 11-00946 (BAH) (D.D.C. July 6, 2001); *United States v. Dean Foods Co.*, No. 10-59 (E.D. Wis. June 3, 2010); *United States v. JBS S.A.*, No. 08-5992 (E.D. Ill. Jan. 30, 2009); *United States v. First Data & Concord EFS, Inc.*, No. 03-2169 (RMC) (D.D.C. Oct. 31, 2003); *FTC v. H.J. Heinz Co.*, No. 00-1688 (JR) (D.D.C. July 19, 2000); *see also United States v. Microsoft Corp.*, No. 98-1232 (TPJ) (D.D.C. Aug. 6, 1998).

to avoid providing timely notice of whom they expect will be their principal witnesses. For example, if Plaintiffs include several AT&T executives on an initial list, Defendants may choose not to include those executives on their list and then claim the right to call those witnesses at trial. Defendants have insisted that they need to know the nature of Plaintiffs' case—this is a two-way obligation. In addition, Plaintiffs believe that it is premature to set a trial clock time limit at this point, as Defendants propose. Moreover, Defendants' proposal for the introduction of the testimony of up to 10 more witnesses (including their own employees) through deposition designations is premature and should be determined on a case-by-case basis closer to trial and in light of other witness identifications.

Finally, Plaintiffs note that while Plaintiffs' proposed schedule attempts to balance the competing demands for a speedy trial and a fair opportunity for discovery and trial preparation, some further adjustment may be necessary depending upon (1) the resolution of a dispute regarding a massive privilege claim; (2) the pace of nonparty discovery; and (3) the uncertainty inherent in trying to compress so much discovery into such a short schedule.

Dated: November 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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