IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs,* v. AT&T INC., et al., *Defendants.*	Case No. 1:11-cv-01560-ESH **Discovery Matter: Referred to Special Master Levie**

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO AT&T's MOTION TO COMPEL

On September 26, 2011, AT&T served a sweeping subpoena on Sprint, which is a nonparty in the above-captioned action, but also is the plaintiff in a related, parallel case in which all discovery has been deferred pending the outcome of the defendants' motion to dismiss Sprint's complaint. The next day, plaintiff United States ("DOJ") produced to the defendants 2.2 million pages of Sprint documents collected during the DOJ's investigation of the proposed AT&T-T-Mobile transaction. Nevertheless, AT&T insisted that it is Sprint's burden to determine what additional documents would satisfy their overly broad requests. On October 11, Sprint moved the court pursuant to Rule 26(c) to prevent the obvious unfairness that would result if AT&T were permitted to use its Rule 45 subpoena to conduct effectively party discovery of Sprint despite the deferral of discovery in Sprint's case. Judge Huvelle is hearing argument on that motion today. The resolution of Sprint's motion will guide the issue of whether AT&T may seek Sprint documents beyond those it already possesses. This Court should deny AT&T's

motion or postpone consideration of it pending the outcome of Sprint's motion for Rule 26(c) relief.

ARGUMENT

Nonparty status is given special consideration when courts determine whether a discovery request is unduly burdensome. *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007); *Cusamano v. Microsoft Corp.* 162 F.3d 708, 717 (1st Cir. 1998) ("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs"); *Rendon Group v. Rigsby*, 268 F.R.D. 124, 127 (D.D.C. 2010). Under Rule 45, "[T]he party issuing the subpoena has the burden to 'take reasonable steps to avoid imposing undue burden or expense' on the party subject to the subpoena." *Dean Foods Co. v. Prairie Farms Dairy, Inc.*, 2011 WL 841046, at *3 (C.D. Ill. Mar. 7, 2011). Sprint served objections to the subpoena the same day AT&T moved to compel.

AT&T has made *no effort* to determine what information requested in its extraordinarily broad "nonparty subpoena" it already possesses through the DOJ's production of Sprint documents to AT&T. This is inappropriate. *In re Motion to Compel Compliance with Subpoena Direct to Dep't of Veterans Affairs*, 257 F.R.D. 12, 19 (D.D.C. 2009) ("Until [the requesting party] at least makes the effort and fails for some reason not attributable to its own fault, this Court cannot possibly determine whether any subpoena to [the nonparty], no matter how limited, is still unduly burdensome because the information sought 'can be obtained from some other source that is more convenient, less burdensome, or less expensive.'"). *See Wyoming v. United States Dep't of Agriculture*, 208 F.R.D. 449, 454 (D.D.C. 2002); *Zoltek Corp. v. United States*, 61 Fed. Cl. 12, 20 (2004) (holding nonparty should not be burdened by producing duplicative documents); *see also Software Rights Archive, LLC v. Google Inc.*, 2009 WL

1438249, at *2 (D. Del. May 21, 2009) ("[T]here is far less need to burden the non-party" where documents at issue are "surely in the hands of the opposing party."). Here, AT&T *already* possesses 2.2 million pages of Sprint documents. AT&T wrongly suggests that Sprint must sort out what categories of information already produced to the DOJ are sufficient and which are not, based on requests that are obviously overly broad and vague. *See Alexander v. FBI*, 186 F.R.D. 12, 20 (D.D.C. 1998) ("The [nonparty] should not be forced to speculate as to the what type or class of documents plaintiffs are seeking.").

Moreover, the sweeping AT&T subpoena is functionally party discovery. The claim that AT&T has served "similar" subpoenas on other wireless carriers is without merit. Although AT&T has not provided examples of other subpoenas for comparison, it did reveal that the subpoena served on Verizon, the *largest carrier*, includes eight fewer requests than the Sprint subpoena. Defs.' Opp'n to Pets.' Mot. to Amend the Protective Order at 3 (Docket No. 58). AT&T improperly seeks a head start in Sprint's private action by abusing discovery in the DOJ case, knowing that Sprint currently has no reciprocal discovery. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 n.17 (1978) (when discovery requests seek information for "proceedings other than the pending suit, discovery is properly denied"). None of the cases cited by AT&T involve nonparty discovery requests where the nonparty is a party in a related proceeding or where the requesting party already possessed a significant production from the nonparty.

CONCLUSION

For the foregoing reasons, this Court should deny AT&T's motion to compel or, alternatively, stay resolution of the motion pending the outcome of Sprint's Rule 26(c) motion.

Dated: October 24, 2011

Respectfully submitted,

/s/ Tara L. Reinhart

Steven C. Sunshine (D.C. Bar No. 450078)
Gregory B. Craig (D.C. Bar No. 164640)
Tara L. Reinhart (D.C. Bar No. 462106)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005-2111
Tel: (202) 371-7000
Steven.Sunshine@skadden.com
Gregory.Craig@skadden.com
Tara.Reinhart@skadden.com

James A. Keyte (*pro hac vice*)
Matthew P. Hendrickson (*pro hac vice*)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036-6522
Tel: (212) 735-3000
James.Keyte@skadden.com
Matthew.Hendrickson@skadden.com

Counsel for Sprint Nextel Corporation

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2011, I caused the foregoing Memorandum of Points and Authorities in Opposition to AT&T's Motion to Compel to be filed using the Court's CM/ECF system. I also caused the foregoing document to be mailed via electronic mail to:

The Honorable Richard A. Levie
JAMS
555 13th Street, NW, Suite 400 West
Washington, DC 20004
Tel. (202) 533-2056
ralevie@gmail.com; rlevie@jamsadr.com
*With two hard copies by hand-delivery

Matthew C. Hammond
202-305-8541
matthew.hammond@usdoj.gov

Katherine Celeste
U.S. Department of Justice, Antitrust Division
450 Fifth Street, N.W., Suite 7000
Washington, DC 20001
202-532-4713
202-514-5381 (fax)
katherine.celeste@usdoj.gov

Counsel for the United States

Geralyn J. Trujillo
STATE OF NEW YORK
Office of the Attorney General
Antitrust Bureau
120 Broadway, 26th Floor
New York, NY 10271
Tel: 212- 416-6677
Fax: 212-416-6015
Geralyn.Trujillo@ag.ny.gov

David M. Kerwin
STATE OF WASHINGTON
Office of Attorney General
Antitrust Division
800 Fifth Avenue, S. 2000
Seattle, WA 98104
Tel: 206-464-7030
Fax: 206-464-6338
davidk3@atg.wa.gov

Representative Counsel for the Plaintiff States

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
202-326-7902
mkellogg@khhte.com

Counsel for Defendant AT&T Inc.

Mark W. Nelson
Cleary Gottlieb Steen & Hamilton LLP
2000 Pennsylvania Avenue, NW
Washington DC 20006
202-974-1622
mnelson@cgsh.com

Counsel for Defendants T-Mobile USA, Inc., and Deutsche Telekom AG

/s/ Tara L. Reinhart
Tara L. Reinhart (D.C. Bar No. 462106)
Counsel for Sprint Nextel Corporation