UNITED STATES OF AMERICA v. AT&T INC. et al Doc. 78

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 IN SUPPORT OF DEFENDANTS' PROPOSED ORDER GOVERNING TRIAL WITNESSES

Defendants respectfully request that the Special Master enter Defendants' Proposed Order Governing Trial Witnesses.

As discussed at yesterday's conference, three principles should govern the disclosure of potential fact witnesses. *First*, time is of the essence to ensure that each side has an opportunity to depose witnesses on the other side's list prior to the close of fact discovery on January 10, 2011. *Second*, Plaintiffs bear the burden of proof and should provide their list first, so that Defendants can determine what witnesses they will need to call in response. *Third*, it is premature, prior to discovery, to set a limit on the number of fact witnesses each side may ultimately call at trial. A better approach to ensuring a manageable trial is to give each side a certain number of hours to present its case at trial, including direct examination, cross-examination, and rebuttal, but exclusive of attorney argument. The number of fact witnesses may also be reduced by the judicious use of deposition designations.

1. The Court's initial scheduling order directed that "[p]reliminary witness lists" be exchanged "at the earliest possible time." 9/23/11 Order at 7. Despite that injunction, Plaintiffs have repeatedly delayed and resisted disclosing their witnesses. More than six weeks after the

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Court's order, Defendants are still no closer to receiving a witness list. Yet Plaintiffs seek to push the date back still further, and even then they want to parse out their list in two portions. Such delays are inappropriate and inconsistent with the expedited nature of this case.

Under Defendants' proposal, Plaintiffs, which have the burden of proof, would provide their preliminary list of fact witnesses on November 15, and Defendants would respond with their list three weeks later, on December 6.[1] This will ensure that each side has adequate time to depose the other side's witnesses before the January 10 discovery cut-off. On January 12, each side will provide a revised witness list and can both subtract witnesses and add up to five new witnesses. Any added witnesses will be subject to discovery and deposition. If either side elects not to call a witness on its January 12 list, the other side may elect to do so.

2. Plaintiffs' proposal to limit each side to an initial designation of 30 fact witnesses is both premature and misguided. It is premature because, until Defendants see Plaintiffs' list of potential witnesses (along with "a brief description of the subjects about which each potential witness is expected to testify," Defs.' Proposed Order ¶ 1), Defendants do not know how many (or which) witnesses they will need to counter Plaintiffs' case. Plaintiffs' proposal is misguided because, as explained in Defendants' earlier memorandum, a better, more equitable approach to manage trial time is to give each side a certain number of hours to present its case, including direct examination, cross-examination, and rebuttal, but exclusive of attorney argument. Such an arrangement ensures that equal trial time is available to each side, whether one side has few witnesses who spend a long time on the stand or many witnesses each of whom is on the stand for a shorter period.

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[1] Expert witness disclosures are already separately established in the Court's order.

Plaintiffs' case is likely to focus on the few competitors that Plaintiffs claim matter in the market. Defendants' case will broaden that focus to show the much broader array of market participants competing fiercely for customers. As a result, Defendants will need to call witnesses from a number of different competitors, even if each witness is presented only for a short period.[2]

The government's estimates of total time in this case have ranged from 4 weeks to 6 weeks. Assuming 5.5 hours of trial time per day, 4 days a week, a 6-week trial would allow approximately 66 hours per side. A chess clock approach, rather than arbitrary limits on the number of witnesses, is a better way to control overall trial time, while allowing each side to present its case and to plan its witnesses as it believes best within the limits set by the Court.

Plaintiffs have objected that the absence of limits will encourage over-designation of witnesses. But each side would have a good-faith obligation to list those witnesses, and only those witnesses, that it believes it may want to call at trial. More importantly, it will be impossible to settle on a more final list until after depositions have been taken. Defendants have no objection to "final trial witness lists" being submitted before trial. Defendants also favor procedures for advance notice of the order in which witnesses will appear at trial. But Defendants object to any effort to limit their choice of witnesses before they have even taken discovery. A chess clock approach will better and more fairly ensure that each side presents its case efficiently and compactly.

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[2] Remarkably, Plaintiffs have reneged on the parties' earlier agreement that, if either side elects not to call a witness on its list, the other side may do so. This about-face – which would force Defendants protectively to duplicate names already on Plaintiffs' list – makes clear that Plaintiffs' real motive is to limit Defendants' ability to present their case.

3. Despite the provision for nationwide service of process, there are likely to be some witnesses from remote locations who have only limited testimony to offer. For the convenience of those witnesses and the efficient conduct of the trial, Defendants propose that each side may present up to 10 witnesses by means of brief deposition designations in lieu of live testimony. The other side may counter-designate a comparable amount. An alternative approach for such witnesses might be to have an agreed upon summary of their testimony. Either approach would help streamline the trial while ensuring that the Court has a complete picture of the competitive landscape.

CONCLUSION

Defendants respectfully request that the Special Master enter the Proposed Order Governing Trial Witnesses submitted by Defendants and specify the amount of total trial hours available to each side for direct examination, cross-examination, and rebuttal.

Dated: November 9, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, I caused the foregoing Memorandum in Support of Defendants' Proposed Order Governing Trial Witnesses to be filed using the Court's CM/ECF system, which will send e-mail notification of such filings to counsel of record. This document is available for viewing and downloading on the CM/ECF system. A copy of the foregoing also shall be served via electronic mail on:

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