IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPRINT NEXTEL CORPORATION, *Plaintiff,* v. AT&T Inc., et al., *Defendants.*	Case No. 1:11-cv-01600-ESH
CELLULAR SOUTH, INC., et al., *Plaintiff,* v. AT&T Inc., et al., *Defendants.*	Case No. 1:11-cv-01690-ESH

JOINT REPORT REGARDING LOCAL CIVIL RULE 16.3(c)

Plaintiff Sprint Nextel Corporation ("Sprint"), in response to the Court's November 2, 2011 Order for Initial Scheduling Conference, files this Joint Report Regarding Local Civil Rule 16.3(c) ("Report") on behalf of Plaintiffs Sprint, Cellular South, Inc., and Corr Wireless Communications L.L.P. ("Plaintiffs") and Defendants AT&T Inc., AT&T Mobility LLC, Deutsche Telekom AG and T-Mobile USA, Inc. ("Defendants") in the above-captioned matters (the "Private Actions"). Counsel for Sprint and Defendants met in person on November 17, with counsel for Cellular South and Corr Wireless participating by telephone. The parties discussed

the Rule 16.3(c) topics further on December 1. For the most part, the parties disagree on the fundamentals of managing these actions; therefore, this Report separately sets forth the parties' positions as to each topic in LCvR 16.3(c) where the parties disagree. Attached as Exhibit 1 is Plaintiffs' Proposed Case Management Plan. Attached as Exhibit 2 is Plaintiffs' Proposed Protective Order Concerning Confidentiality. Attached as Exhibit 3 is Defendants' Proposed Case Management Plan.

1. Dispositive Motion. On November 2, 2011, this Court granted in part and denied in part Defendants' motions to dismiss the complaints in the Private Actions. Under Fed. R. Civ. P. 12(a)(4)(A), Defendants answered the complaints on November 16, 2011.

2. Amendment of the Pleadings.

   (a) Plaintiffs' Position. No additional parties may be joined, but the pleadings may otherwise be amended before December 16, 2011.

   (b) Defendants' Position. No additional parties may be joined. Amendment of the pleadings is governed by Fed. R. Civ. P. 15.

3. Assignment to a Magistrate. The parties agree that the Private Actions should not be assigned to a magistrate judge for all purposes.

4. Possibility of Settlement. The parties agree that there is not a realistic possibility of settlement at this time.

5. ADR Procedures. The parties agree that the Private Actions would not benefit from alternative dispute resolutions procedures at this time.

6. Resolution by Summary Judgment.

(a) Plaintiffs' Position. The Private Actions cannot be resolved by summary judgment.

(b) Defendants' Position. Some or all of the remaining claims in the Private Actions will be subject to resolution by summary judgment. A date for submitting dispositive motions should be discussed at a status conference following resolution of *United States, et al. v. AT&T Inc., et al.*, 1:11-cv-01560 ("the DOJ Action"), as provided for in Defendants' Proposed Case Management Plan.

7. Parameters of Discovery.

(a) Plaintiffs' Position. In the interest of efficiency and judicial economy, the fact discovery in the DOJ Action should serve as the vast majority of discovery in the Private Actions. This would permit all parties to rely on documents, written discovery responses and deposition transcripts as if the facts had been discovered in these actions. Moreover, the parties in good faith would undertake to avoid replicating discovery taken in the DOJ Action. As a result, only streamlined discovery in the Private Actions would be necessary, which would allow these actions to move quickly toward resolution. Plaintiffs propose a schedule that

contemplates fact discovery continuing through March 16, 2012. Plaintiffs' proposal avoids potential interference with the DOJ Action, because it contemplates discovery unfolding on an independent, parallel track. Proposed fact and expert discovery dates and limitations are set forth in Plaintiffs' proposed Case Management Plan, attached as Exhibit 1.

Defendants' position, by contrast, completely ignores the unique posture of the Private Actions. Plaintiffs assert a cause of action to enjoin Defendants' acquisition on grounds that it violates Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially reducing competition in wireless service markets. *See* Sprint Compl. ¶¶ 218-28; CS Compl. ¶¶ 97-106. This is the very same Section 7 violation that the U.S. Department of Justice ("DOJ") is seeking to establish. *See* DOJ Second Amended Compl. ¶¶ 47-48. The only difference is that, as private parties, Plaintiffs here must prove the additional element of standing. *See* 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 335f, at 73 (3d ed. 2007) ("To prevail, a private plaintiff must establish both (1) that is has standing *and* (2) that the defendant has violated the antitrust laws.") (emphasis in original); *see also* Memorandum Opinion at 10 n.11, *Sprint Nextel Corp. v. AT&T Inc., et al.*, No. 1:11-cv-01600-ESH (D.D.C. Nov. 2, 2011) (citing 2A Areeda, *supra*, ¶ 335f).

Given this, Defendants' position is inefficient and unfair to all involved. It is pointless and wasteful to require the existing discovery in the DOJ Action to be redone in the Private Action, which necessarily will entail wholesale duplicative document requests and countless depositions of individuals that already have been

deposed in the DOJ Action, including numerous third-parties. It is also pointless to ask Plaintiffs to serve discovery requests for particular parts of the record in the DOJ Action. The entire record is relevant, because (with the DOJ not having to establish standing) the entire record necessarily goes to establishing the Section 7 violation.

Plaintiffs' proposal is designed not to interfere with the DOJ Action in any way, including with the February 13, 2012 trial date. It is, in fact, Defendants' proposal that contemplates imposing burden on those involved in the DOJ Action by forcing Plaintiffs to demand duplicative discovery from them.

(b) Defendants' Position. Plaintiffs first provided the second, third and fourth paragraphs of their above position at approximately 6 p.m., December 2, 2011. Given the filing deadlines, Defendants are not in a position to respond to Plaintiffs' legal arguments substantively in this filing. Instead, Defendants will include their substantive response in their Statement of the Case, which they will file on Tuesday, December 6, 2011.

Defendants propose that discovery in the Private Actions proceed on a separate track from the DOJ Action and that it be tailored to the remaining claims in the Private Actions. Because there is little overlap between the claims in the DOJ Action and the claims remaining in the Private Actions, Defendants do not agree that fact discovery in the DOJ Action should serve as the vast majority of discovery in the Private Actions. Nor do Defendants agree that confidential

information subject to the Protective Order in the DOJ Action can be used for purposes of the Private Actions, as Plaintiffs' proposal appears to contemplate. Further, in order to avoid interference with the litigation and trial of the DOJ Action, Defendants propose a sequencing of discovery in the Private Actions which will allow the parties to proceed with party document discovery now, but defer party written discovery, party depositions, expert discovery, and all non-party discovery until after a dispositive ruling or other final disposition in the DOJ Action. Defendants' proposal, which is set forth in Defendants' Proposed Case Management Plan, attached as Exhibit 3, provides for a status conference one week after a dispositive ruling or other final disposition in the DOJ Action, at which time the Court and the parties will be in the best position to determine an appropriate schedule for remaining discovery and other pretrial activities. Defendants do not believe it is necessary or useful to set additional dates for the close of discovery, expert discovery, and similar pretrial matters at this time given that all such matters are likely to be affected in some way by the resolution of the DOJ Action.

8. Initial Disclosures.

(a) Plaintiffs' Position. As Plaintiffs outlined above, the procedural posture of the Private Actions is unique, because the bulk of documents related to the claims or defenses already have been produced either to the DOJ during its regulatory investigation or in response to AT&T subpoenas served in DOJ Action. In fact, Defendants in the Private Actions have had Plaintiffs' documents that were

produced in the DOJ investigation since late September and have had Plaintiffs' responses to the AT&T subpoenas for more than a week. Consequently, initial disclosure obligations under Fed. R. Civ. P. 26(a)(1) can be satisfied most efficiently by the existing document productions rather than by describing custodians and categories of documents. Given the unique circumstances, Plaintiffs can be deemed to have satisfied their obligations, and all that Defendants need to do to satisfy their obligations is to provide Plaintiffs with (1) the documents they produced to the DOJ in its investigation and (2) materials produced to the DOJ in the DOJ Action. Plaintiffs' proposed Case Management Plan, attached as Exhibit 1, specifies a procedure for handling these initial disclosures. There is no burden on Defendants, and insisting on taking the formal steps of identifying witnesses and listing categories of documents as provided in Rule 26(a)(1) would merely involve pointless delay and expense.

(b) Defendants' Position. Defendants object to Plaintiffs' position on initial disclosures, both as to scope and as to timing, and propose that the parties exchange initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) on or before December 20, 2011. Plaintiffs' position is based on an incorrect premise that the claims and defenses in the DOJ Action are co-extensive with Plaintiffs' remaining claims in the Private Actions. In fact, the DOJ Action on the one hand, and the Private Actions on the other hand, involve different parties and different claims. Discovery in the Private Actions should be limited to the narrow claims remaining in those respective cases following this Court's November 2 Order granting in part and denying in part Defendants' motions to dismiss. Most of the documents

that Defendants produced in the DOJ Action are not relevant to those claims and therefore are not subject to discovery or disclosure in the Private Actions.

Moreover, Plaintiffs have not identified any of the individuals likely to have discoverable information on their remaining claims as required by Fed. R. Civ. P. 26(a)(1). Defendants therefore object to Plaintiffs' position that they have already satisfied their initial disclosure obligations under Rule 26(a)(1) and their position that such obligations can be satisfied "most efficiently" by looking to the documents produced in the DOJ Action.

9. Protective Orders Concerning Confidentiality.

(a) Plaintiffs' Position: A protective order should be entered as soon as possible to ensure efficient resolution of the Private Actions. Plaintiffs' proposed Protective Order Concerning Confidentiality is attached as Exhibit 2.

(b) Defendants' Position: Plaintiffs first served Defendants with their proposed Protective Order on November 29, 2011. Defendants are reviewing Plaintiffs' proposal and will respond by December 7, 2011.

10. Pretrial Schedule.

(a) Plaintiffs' Position. Plaintiffs contemplate a streamlined trial in which evidence admitted in the DOJ trial would be deemed admitted in the Private Actions. Following the DOJ trial, the parties would identify issues that remain that are

unique to Plaintiffs' claims or Defendants' defenses and would limit the trial to resolution of those issues. Under Plaintiffs' proposal, set forth in Exhibit 1, trial could start on the earliest available date following the close of evidence in the DOJ Action. Plaintiffs' proposal would greatly limit the need for live witnesses, narrow the fact issues to be resolved and require significantly less of the Court's time than trial of the DOJ Action.

Defendants' proposal, by contrast, is clearly designed to give Plaintiffs a trial date after the first half of 2012, which is AT&T's last-announced anticipated closing date. *See* AT&T Inc., Quarterly Report at 17 (Form 10-Q) (Nov. 3, 2011) (stating that AT&T "anticipate[s] closing the transaction in the first half of 2012"). If AT&T still plans to close the transaction in that time frame, then Defendants in effect are asking the Court to allow Defendants to close the transaction and "scramble the eggs" of AT&T and T-Mobile prior to Plaintiffs having their day in court. This is an extremely prejudicial manner in which to resolve the Private Actions, because it could prevent Plaintiffs from ever obtaining an effective remedy. *See F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008); *Bon-Ton Stores, Inc. v. May Dept. Stores Co.*, 881 F. Supp. 860, 878 (W.D.N.Y. 1994); *see also Taleff v. Southwest Airlines Co.*, Civ. No. 11-02179, Order at 9 n.11 (N.D. Cal. Nov. 30, 2011) (finding that a private party has never been able to obtain post-closing divestiture remedies in a Section 7 action). In those circumstances, Plaintiffs would have no choice but to seek a preliminary injunction prior to any anticipated closing.

Plaintiffs also note that Defendants are now sending contradictory signals as to their plans for the proposed transaction, which obviously has implications concerning the "just, speedy, and inexpensive determination" of these actions. *See* Fed. R. Civ. Proc. 1. On the one hand, Defendants continue to press for the earliest possible trial date in the DOJ Action, and have been insisting that third-parties in that Action (including Plaintiffs) respond without delay to their discovery demands. On the other hand, on November 23, 2011, Defendants withdrew their pending license transfer applications from the Federal Communications Commission ("FCC"). *See* Letter from Patrick J. Grant, Counsel for AT&T Inc., and Nancy J. Victory, Counsel for Deutsche Telekom AG, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 11-65 (dated Nov. 23, 2011). However, because FCC approval is a necessary precondition to the closing of the transaction, the withdrawal raises serious questions as to whether any transaction ultimately will be presented to the FCC for approval, or, if one is, what that transaction will be. In fact, Jim Cicconi, AT&T's Senior Executive Vice President of External & Legislative Affairs, commented that "[t]here are essentially two reasons why an applicant would withdraw a merger application – either it intends to abandon the transaction altogether, or it plans to submit a new application reflecting changes to the transaction or materially changed circumstances." *See* Jim Cicconi, *Withdrawal by Right*, http://attpublicpolicy.com/wireless/withdrawal-by-right/ (posted Nov. 29, 2011).

It is both disingenuous and unfair of Defendants to seek to proceed with a transaction as fast as possible (subject to the incongruous events at the FCC), and then to ask this Court to have these Private Actions proceed as slowly as possible. It is also manifestly unjust for Defendants to have full access to the record in the DOJ Action (all relevant to the merits of the common Section 7 violation), with Plaintiffs inevitably (and impossibly) being forced to play catch-up at the end of the DOJ Action. There is no defensible reason for Defendants' proposed schedule, whereas, by contrast, Plaintiffs' proposal for a trial on the earliest date available following the DOJ Action is designed (i) not to interfere with the DOJ case, and (ii) to effectuate an efficient resolution of any remaining factual disputes in the Private Actions in a time frame that makes sense under the circumstances.

(b) Defendants' Position. Plaintiffs first provided the second, third and fourth paragraphs of their above position at approximately 6 p.m., December 2, 2011. Given the filing deadlines, Defendants are not in a position to respond to Plaintiffs' legal arguments substantively in this filing. Instead, Defendants will include their substantive response in their Statement of the Case, which they will file on Tuesday, December 6, 2011.

As discussed above, Defendants' Proposed Case Management Plan sets a status conference for one week after a dispositive ruling or other final disposition of the DOJ Action, at which time the Court would be in the best position to determine the most efficient schedule for any necessary remaining pretrial activities and trial in the Private Actions. In addition, Defendants do not agree

that the rules of evidence would permit the wholesale admission in the Private Actions of evidence developed in the DOJ Action. Where the parties can reach agreement by stipulation to the use of specific evidence developed in the DOJ Action, they may do so.

11. Referral of Discovery Matters to Special Master. The parties agree discovery matters should be referred to a Special Master. The parties shall submit agreed referral orders, or joint proposed referral orders that note any areas of disagreement, by December 16, 2011.

(a) Plaintiffs' Position. Plaintiffs ask that Hon. Richard A. Levie (Ret.) be assigned Special Master in these actions, if Judge Levie's workload permits. Judge Levie is now familiar with the parties and issues in these actions through his work in the DOJ Action. As a result, assigning Judge Levie in these actions would provide for the most efficient resolution of discovery issues.

(b) Defendants' Position. Even though the issues in the DOJ Action differ from the issues in the Private Actions, Defendants do not oppose designating Judge Levie as the Special Master in the Private Actions, provided that his work in these cases would not interfere with his service in the DOJ Action.

Dated: December 2, 2011

Respectfully submitted,

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