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

STATEMENT OF THE CASE

Pursuant to the Court's Initial Scheduling Conference Orders, Plaintiffs Sprint Nextel Corporation ("Sprint") and Cellular South, Inc., together with its subsidiary Corr Wireless Communications, L.L.C. (collectively, "Cellular South"), respectfully submit the following statement of the case.

I. Plaintiffs' Cause of Action

Plaintiffs bring a cause of action pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, to enjoin the acquisition by AT&T Inc., and its wholly owned subsidiary AT&T Mobility LLC (together, "AT&T"), of T-Mobile USA, Inc. ("T-Mobile"), a subsidiary of Deutsche Telecom AG (collectively, "Defendants"). The two elements of Plantiffs' cause of action are: (1) that the acquisition violates Section 7 by substantially reducing competition in

wireless service markets; and (2) that Plaintiffs have standing under Section 16 of the Clayton Act, 15 U.S.C. § 26. *See* IIA Phillip E. Areeda et al., *Antitrust Law* ¶ 335f, at 73 (3d ed. 2007) ("To prevail, a private plaintiff must establish both (1) that it has standing *and* (2) the defendant has violated the antitrust laws.") (emphasis in original); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1257, 1265, 1272-73 (E.D. Pa. 1987) (analyzing the two elements of a competitor plaintiff's Section 7 cause of action, considering first whether the acquisition violated Section 7 by substantially reducing competition in the horizontal output markets, and, second, whether the plaintiff would suffer antitrust injury, and thus had standing to challenge the violation); *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1152-53, 1164-66 (W.D. Ark. 1995) (same), *aff'd sub nom. Cmty. Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998); *Bon-Ton Stores, Inc. v. May Dept. Stores Co.*, 881 F. Supp. 860, 865-67, 877-78 (W.D.N.Y. 1994) (same).[1]

The basic outline for establishing the first element of Plaintiffs' cause of action is familiar. As this Court has explained, a *prima facie* case of a Section 7 violation is established by "show[ing] that the merger would produce a firm controlling an undue percentage share of the relevant market, and [would] result [] in a significant increase in the concentration of firms in that market." *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 180 (D.D.C. 2001) (Huvelle, J.) (quoting *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001)) (internal quotation marks omitted); *see also United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83

[1] Section 7 of the Clayton Act prohibits a corporation from acquiring "the whole or any part of the assets of another [corporation]…where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 15 of the Clayton Act authorizes private suits for injunctive relief by any party "threatened [with] loss or damage by a violation of the antitrust laws," including acquisitions that violate Section 7. 15 U.S.C. § 26.

(D.C. Cir. 1990); *United States v. H & R Block, Inc.*, Civ. No. 11-00948 (BAH), 2011 WL 5438955, at *8 (D.D.C. Nov. 10, 2011). Such a showing "establishes a 'presumption' that the merger will substantially lessen competition" in the relevant markets. *Sungard*, 172 F. Supp. 2d at 180 (quoting *H.J. Heinz Co.*, 246 F.3d at 715). Once this presumption is established, "the burden of producing evidence to rebut the presumption shifts to the defendants." *F.T.C. v. Swedish Match*, 131 F. Supp. 2d 151, 167 (D.D.C. 2000). To rebut the presumption, "defendant must 'show that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market.'" *Sungard*, 172 F. Supp. 2d at 180 (quoting *H.J. Heinz Co.*, 246 F.3d at 715).

Here, Plaintiffs allege, and will establish, a *prima facie* case for harm to competition and increased market power for AT&T in the relevant market (or markets) for wireless services. This is Count I of both Sprint's and Cellular South's complaints, *see* Sprint Compl. ¶¶ 218-28; CS Compl. ¶¶ 97-106, and it remains intact after this Court's ruling on Defendants' Motions to Dismiss. Plaintiffs allege and define the relevant wireless service product and geographic markets, *see* Sprint Compl. ¶¶ 114-23, 128-32; CS Compl. ¶¶ 29-35, and describe the undue increases in concentration in those markets. Sprint Compl. ¶¶ 135-48; CS Compl. ¶¶ 78-83. Under established merger-review guidelines and precedents, this showing leads to a presumption that the acquisition will substantially lessen competition for wireless services. *See H & R Block, Inc.*, 2011 WL 5438955, at *28-29 (*prima facie* case established upon showing of significant increase in concentration in the relevant markets); *Swedish Match*, 131 F. Supp. 2d at 167 (same); *Bon-Ton Stores, Inc.*, 881 F. Supp. at 875-76 (same); *Tasty Baking Co.*, 653 F. Supp. at 1265 (same). Moreover, even beyond this compelling *prima facie* case, as alleged, the anticompetitive effects of this acquisition would actually be "far worse than

the high market shares and concentration levels indicate," Sprint Compl. ¶ 3, given, among other things, T-Mobile's status as a low-price leader and innovator, Sprint Compl. ¶¶ 154-58, 195-96; CS Compl. ¶¶ 73-76, and the fact that the acquisition also gives AT&T increased power to undermine Plaintiffs' ability to discipline AT&T's post-merger price increases, by interfering with Plaintiffs' access to necessary inputs. Sprint Compl. ¶¶ 3, 160-69; CS Compl. ¶¶ 50-63.

Plaintiffs have alleged, and will establish, standing to pursue the horizontal count in the wireless service markets, because this Section 7 violation threatens them with antitrust injury. This is the second element of Plaintiffs' cause of action. "Antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," meaning that the "injury [] reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Plaintiffs allege, and will prove, threatened antitrust injury on the ground that the acquisition gives AT&T increased power to interfere with access to a "necessary input"—here, handsets—which will impair Sprint's and Cellular South's ability to remain viable wireless service providers in the relevant output markets.[2]

As this Court found in ruling on Defendants' Motions to Dismiss, this threat of harm to Sprint and Cellular South constitutes cognizable antitrust injury:

> Mobile wireless devices, and smartphones in particular, are Sprint's and Cellular South's first-run movies, mall locations suitable for department stores, and shelf space and promotional

[2] Indeed, as the Federal Communications Commission's ("FCC") staff report found, the acquisition's exclusionary effects on rivals' access to inputs are an additional way in which the acquisition harms competition in the relevant wireless service markets. *See* Federal Communications Commission, Staff Analysis and Findings, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, at ¶¶ 96, 98 (Nov. 29, 2011) (finding that the record contained facts supporting concerns about potential competitive harms relating "to the cost of certain inputs that [wireless] providers need in order to compete in the product markets we have defined [*i.e.*, the wireless output markets]").

> time, for they are necessary inputs for plaintiffs' businesses. Like the plaintiffs in *Six West*, *Bon-Ton Stores*, and *Tasty Baking*, Sprint and Cellular South have alleged that the transaction in question threatens their continued access to these inputs. As a general matter, plaintiffs' threatened injuries are those of the type the antitrust laws were designed to prevent, and courts have approved claims similar to those specifically raised here.

Mem. Op. at 19-20, Nov. 2, 2011 (Docket No. 28) (internal citations omitted).

Similarly, the Court found that Cellular South adequately alleged that the acquisition gave AT&T the ability to interfere with Corr Wireless's access to GSM roaming. Mem. Op. at 37. Having found allegations of antitrust injury, the Court concluded that Sprint and Cellular South adequately alleged standing to pursue their Section 7 causes of action, just like the competitor plaintiffs in *Tasty Baking*, *Bon-Ton Stores*, and *Six West Retail Acquisition, Inc. v. Sony Theatre Management, Corp.*, No. 97 CIV. 5499 (DNE), 2000 WL 264295 (S.D.N.Y. Mar. 9, 2000). As the Court explained, "where private plaintiffs have successfully pleaded antitrust injury, the fact that they are defendants' competitors is no bar." Mem. Op. at 43.

In sum, both Sprint's and Cellular South's cases are now set to proceed through discovery and trial on the two elements that comprise their cases: first, on the merits of the alleged Section 7 violations in the output wireless services markets, and second, on the element of standing as to which this Court found that each complaint adequately pled a theory that the proposed acquisition would enable AT&T to interfere with a "necessary input" for that output competition.

* * * * *

Although their position is not explicit, in the recently filed Joint Report Regarding Loc. Civ. R. 16.3(c) (Docket No. 40) ("Joint Report"), Defendants appear to assert that Plaintiffs are not entitled to prove the alleged Section 7 violations in wireless service markets. Thus,

Defendants object to using the discovery record in the Department of Justice's ("DOJ") action in Plaintiffs' cases, and assert that Plaintiffs are entitled to discovery only on a "narrow" purported "mobile wireless devices claim" and (for Cellular South only) a "GSM roaming claim." Joint Report at 5-8; Defs.' Proposed Case Mgmt. Plan at 2 (Docket No. 40-3) ("Defs.' CMP"). Defendants also propose a schedule in Plaintiffs' cases that precludes full discovery until resolution of the DOJ's action, does not even provide for a trial date, and appears specifically calculated to deny Plaintiffs an opportunity to be heard prior to the closing of the transaction. *See* Joint Report at 9-12; Defs.' CMP at 4. Defendants purportedly will attempt to justify their position for the first time in their Statement of the Case.[3] Accordingly, Plaintiffs explain herein how Defendants' position is manifestly unfair, highly prejudicial, and lacks any foundation in the law.

First, and most importantly, Defendants' position as to the scope of Plaintiffs' cases is legally baseless and fundamentally misconstrues the elements of a private Section 7 cause of action. Defendants' Motions to Dismiss challenged whether Plaintiffs adequately alleged <u>standing</u> to pursue the claimed Section 7 violation in wireless service markets—that is, the alleged Section 7 violation was not even at issue. As the Court noted, Defendants did not

[3] Plaintiffs and Defendants met to discuss the Joint Report on November 17, 2011. At that meeting, Plaintiffs outlined the two elements of their cause of action, and made their proposals for initial disclosures and the parameters of discovery, including that discovery in the DOJ case should serve as the vast majority of discovery in Plaintiffs' cases. Defendants rejected these proposals, but could not explain how Plaintiffs could pursue their cases without discovery concerning wireless service markets, particularly given Defendants' denials of Count I of Plaintiffs' complaints. At that meeting, Defendants also rejected Plaintiffs' proposals as to the timing of discovery and trial, but did not offer a schedule of their own. Plaintiffs sent their proposed Case Management Plan and Protective Order, along with their sections of the Joint Report, to Defendants on November 29, outlining in writing what Plaintiffs had proposed at the initial conference. Defendants provided their Case Management Plan and language for the Joint Report to Plaintiffs at 12:30 p.m. on December 2, the day that it was due. With Defendants' position finally articulated, even if only generally, Plaintiffs updated their portions of the Joint Report to explain how Defendants' proposal was unfair, prejudicial, and legally flawed. Defendants then chose to reserve their position for the Statement of Case filings made today.

challenge whether Plaintiffs "state[d] a claim 'that the acquisition violates [§] 7 by increasing AT&T's market power in the relevant wireless markets.'" Mem. Op. at 14 n.18 (quoting Pls.' Joint Opp'n at 16). Accordingly, as is common in evaluating antitrust injury and standing, the Court assumed the Section 7 violation alleged by Plaintiffs, and simply evaluated whether Plaintiffs had alleged antitrust injury stemming from that violation. *Id.* at 1-2, 9-10.

As noted above, the Court concluded that Plaintiffs adequately alleged antitrust injury on the ground that the acquisition threatened to impair their access to inputs necessary to provide wireless services—the relevant output services markets to which these inputs relate. The Court expressly found that this injury was directly analogous to the "input" injuries that provided standing to the competitor plaintiffs in *Tasty Baking*, *Six West*, and *Bon-Ton Stores*. It is indisputable that the competitor plaintiffs in those cases asserted that the acquisitions violated Section 7 by reducing competition in the horizontal output markets.[4] The threat that those acquisitions posed to the plaintiffs' access to necessary inputs afforded standing to pursue those claimed Section 7 violations in the output markets. *See Six West*, 2000 WL 264295, at *22-23 (access to first run movies); *Bon-Ton Stores, Inc.*, 881 F. Supp. at 878 (access to mall space); *Tasty Baking Co.*, 653 F. Supp. at 1272-73 (access to shelf space). Thus, Plaintiffs must prove that AT&T's acquisition violates Section 7 by harming competition in the relevant wireless service markets in order to prevail in their cases.

[4] *See Six West*, 2000 WL 264295, at *21 n.35 (finding the relevant product and geographic markets for the Section 7 violation to be "film exhibition" in Manhattan—that is, the horizontal output market); *Bon-Ton Stores, Inc.*, 881 F. Supp. at 865, 869-75 (finding the relevant product and geographic markets for the Section 7 violation to be "traditional department stores" in Rochester—that is, the horizontal output market); *Tasty Baking Co.*, 653 F. Supp. at 1260, 1262, 1265 (finding the relevant product and geographic markets for the Section 7 violation to be "snack cakes and pies" in six regions—that is, the horizontal output markets).

That is, Plaintiffs have to prove the Section 7 violation—just as the DOJ must in its case—by defining the wireless service markets and establishing anticompetitive effects in those markets. The only material difference from the DOJ case is that Plaintiffs must also separately prove the element of standing, as to which the Court denied Defendants' Motions to Dismiss. As a leading antitrust treatise explained:

> Unlike the United States government, which is authorized to sue anyone who violates the antitrust laws, a private antitrust plaintiff must show "standing" to sue. **In addition to proving everything that would entitle the government to relief**, the private plaintiff must also show (1) that the acts violating the antitrust laws caused—or, in an equity case, threatened to cause—it injury-in-fact to its "business or property;" (2) that this injury is not too remote or duplicative of the recovery of a more directly injured person; [and] (3) that such injury is "antitrust injury," which is defined as the kind of injury that the antitrust laws were intended to prevent and "flows from that which makes defendants' acts unlawful[.]"

Areeda, *supra*, ¶ 335a, at 61-62 (emphasis added); *see also* Mem. Op. at 10 n.11 (citing *id.* ¶ 335f).

Plaintiffs' obligation to prove the additional element of standing, does not, as Defendants' position nonsensically implies, narrow or change the nature of the Section 7 violation Plaintiffs must prove, or make it any different from the Section 7 violation asserted by the DOJ.[5] Rather, all of the elements and evidence in the DOJ action are at issue in Plaintiffs'

[5] As the Court recognized, Plaintiffs still must prove that the acquisition harms wireless consumers in order to establish the Section 7 violation. *See* Mem. Op. at 13 (noting that Plaintiffs' "[a]llegations of harm to [wireless] consumers" are "relevant to showing an antitrust violation"); *see also Cmty. Publishers*, 892 F. Supp. at 1152-53, 1167-68 (DOJ and competitor plaintiff proved the same Section 7 violation); *Bon-Ton Stores, Inc.*, 881 F. Supp. at 865, 869-78 (state attorney general and competitor plaintiff proved the same Section 7 violation); Areeda, *supra*, ¶ 335f, at 75 ("[E]very plaintiff, governmental or private, must always offer a coherent explanation of how and why the alleged conduct violates the antitrust laws. Absent such a theory, no cause of action has been stated. If the claimed theory and alleged facts would not support a suit by the government, which need not prove standing, then there is no violation. If the government suit would not be dismissed, then suit by private plaintiffs must also be allowed unless they lack standing. Put another way, if both

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cases, because (with the DOJ not having to establish standing) all of that material necessarily is relevant to establishing the Section 7 violation.

Given this, Plaintiffs have proposed that the fact discovery in the DOJ's case should serve as the vast majority of discovery in their actions and have asked only for targeted, non-duplicative discovery of issues or evidence not raised or present in the DOJ record. *See* Joint Report at 3-5. This is the only efficient way to handle discovery concerning the first element of Plaintiffs' cause of action. Defendants, by contrast, ask for the pointless and wasteful duplication of discovery in Plaintiffs' cases, unfairly and unnecessarily burdening all those involved, including numerous third parties. *Id*.

Second, Defendants simply cannot reconcile the jumbled mix of conflicting and incoherent positions inherent in their plan for Plaintiffs' case. The only unifying element is that Defendants wish to prejudice Plaintiffs at every turn. To start, Defendants have denied Count I of Plaintiffs' complaints. *See* Defs.' Sprint Answer ¶¶ 218-28; Defs.' CS Answer ¶¶ 97-106. Those counts outline Plaintiffs' cause of action for a Section 7 violation in wireless service markets. Defendants' denial of those counts is an obvious acknowledgement that Plaintiffs must prove the Section 7 violation alleged within them, and yet Defendants cannot explain how Plaintiffs could possibly do so without access to discovery concerning that violation. Defendants also neglect to mention that they already have received millions of pages of Plaintiffs' documents through the DOJ litigation and now are clearly trying to make discovery one-sided. There is no justification for Defendants' manifestly unfair proposal that they receive months of unilateral, unfettered access to the DOJ record (which all goes to the common Section 7

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government and private suits are rejected, there has been no violation; if only the private suit fails, lack of standing must be the explanation.").

violation), while Plaintiffs are unable to pursue full discovery, particularly when such discovery has already been produced and can be replicated at no real costs to Defendants. As Defendants surely intend, Plaintiffs will never be able to cure this imbalance in access to the evidence.

In another bit of incoherence, Defendants say they want a "sequencing of discovery in the Private Actions," because Plaintiffs' cases are "likely to be affected in some way by the resolution of the DOJ Action." Joint Report at 5-6. Defendants cannot have it both ways. On the one hand, Defendants' vague suggestion that Plaintiffs' actions could be "affected" by the DOJ action is another tacit acknowledgement that Plaintiffs' and the DOJ's cases overlap, as both involve the same Section 7 violation. In that case, the unfairness of denying Plaintiffs access to discovery concerning that violation is obvious once again. On the other hand, Defendants' suggestion that the cases should be sequenced makes no sense, if, as Defendants (incorrectly) say, the cases are somehow wholly distinct. If Plaintiffs' cases are so different from the DOJ's case, then Plaintiffs should not have to wait for the resolution of the DOJ's action to take full discovery. They should, instead, get a chance to develop a full discovery record while the DOJ case is ongoing, in time for a trial immediately after the conclusion of the DOJ's trial, so that they can be heard prior to the closing of the transaction.

The issue of timing leads to yet another set of contradictions. As outlined in the Joint Report, Defendants continue to press for the earliest possible trial date in the DOJ case. *See* Joint Report at 10-11. Yet Defendants have withdrawn their pending license transfer applications from the FCC, and have offered no explanation or timeframe for how they intend to obtain the necessary approvals from the FCC.[6] *Id.* And Defendants here refuse to even propose

[6] In fact, it is not clear what transaction Defendants will pursue or when they will pursue it. *See* Jim Cicconi, AT&T Senior Executive Vice President of External & Legislative Affairs, *Withdrawal by Right*, http://attpublicpolicy.com/wireless/withdrawal-by-right/ ("There are essentially two reasons *(cont'd)*

a trial date in Plaintiffs' actions, seemingly intent on denying Plaintiffs a hearing before they close the transaction. *Id.* Whatever Defendants' plans concerning the timing of the transaction now are, it is unfair and highly prejudicial to deny Plaintiffs an opportunity to be heard and access to discovery while it could actually make a difference, and instead to allow Plaintiffs to develop their cases only after the Defendants have irrevocably "scrambled the eggs" of AT&T and T-Mobile.[7]

Third, Defendants cannot continue to use the pendency of the DOJ case and the February 13, 2012 trial date as an excuse to delay Plaintiffs' statutory right to a meaningful day in court prior to AT&T closing the transaction. Plaintiffs' schedule does nothing to interfere with the DOJ's trial date and assumes a separate (and abbreviated) trial in Plaintiffs' action after the completion of the DOJ's case. *See* Joint Report at 3-5, 8-11; Pls.' Proposed Case Mgmt. Plan at 12 (Docket No. 40-1). Plaintiffs' schedule also minimizes interference with discovery in the DOJ case by simply allowing both Plaintiffs and Defendants to use the evidence in that case without duplication of effort. *See* Joint Report at 3-5. Plaintiffs' proposal likewise minimizes the burden on all third parties. *Id.*

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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.") (posted Nov. 29, 2011). Thus, there is a significant possibility that the parties and the Court are devoting substantial resources to a transaction that may never happen—certainly not in its present form.

[7] *See F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) (explaining that pre-closing injunctive relief is preferred in Section 7 cases, because "even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets' often precludes 'an effective order of divestiture'") (quoting *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1966)); *Bon-Ton Stores, Inc.*, 881 F. Supp. at 878 (explaining that pre-closing preliminary injunctive relief is "the remedy of choice for preventing an unlawful merger" because "it becomes difficult, and sometimes virtually impossible, for a court to unscramble the eggs") (quoting *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989)) (internal quotation marks omitted).

Finally, even accepting Defendants' position that Plaintiffs are only pursuing a purported "wireless device claim," Defendants still cannot justify denying Plaintiffs full discovery concerning competition in the wireless service markets. First, Plaintiffs would need such discovery in order to understand the source and effects of AT&T's buying power in the handset market. As the Court recognized, AT&T's handset buying power is intimately tied to its market power in the wireless service (output) market.[8] Second, Defendants have asserted "public interest" and "efficiencies" defenses against Plaintiffs, presumably aiming to establish that the transaction is good for wireless consumers. *See infra*, Part II. Plaintiffs therefore would need complete discovery concerning all of the effects of the transaction on wireless consumers in order to address these asserted defenses.

II. Defendants' Affirmative Defenses

Defendants have asserted two affirmative defenses in their Answers to Plaintiffs' complaints. *See* Defs.' Sprint Answer; Defs.' CS Answer. First, Defendants assert that "[g]ranting the relief sought is contrary to the public interest." Plaintiffs are aware of no cognizable "public interest" defense under the antitrust laws to an anticompetitive acquisition. In any event, Plaintiffs dispute the contention that this acquisition is in the public interest.

Second, Defendants assert that "the expansion of capacity and other overwhelming efficiencies that will result from this transaction will benefit consumers." Plaintiffs dispute the suggestion that Defendants' purported efficiencies constitute a valid defense. *See Swedish Match*, 131 F. Supp. 2d at 171 (finding an efficiency defense

[8] Mem. Op. at 32 ("Because plaintiffs have alleged facts about the proposed transaction's effects on the output market (the market for mobile wireless services), and because they posited links between AT&T's increased selling power in the output market and its increased purchasing power in the input market, they have stated a plausible claim to antitrust injury in the market for wireless devices.").

"inappropriate" when the acquisition in question "would generate undue market share and increased concentration") (citation omitted).

Even if the Court were to consider this latter defense, "high market concentration levels require 'proof of extraordinary efficiencies'" to overcome the presumption of anticompetitive harm. *H & R Block, Inc.*, 2011 WL 5438955, at *44 (quoting *H.J. Heinz Co.*, 246 F.3d at 720). Additionally, to be even potentially cognizable, asserted efficiencies must be "merger specific," meaning "they must be efficiencies that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *H.J. Heinz Co.*, 246 F.3d at 721. They must also be "reasonably verifiable by an independent party," *H & R Block, Inc.*, 2011 WL 5438955, at *44, and represent more than "mere speculation and promises about post-merger behavior." *H.J. Heinz Co.*, 246 F.3d at 721. Certainly, one of the major issues in these cases is whether Defendants will be able to offer proof of extraordinary and cognizable efficiencies in an effort to overcome the strong presumption of anticompetitive harm that Plaintiffs plan to establish through their *prima facie* case.

Finally, as noted above, Defendants' affirmative defenses are yet another reason why the DOJ record should be used as discovery in Plaintiffs' cases.[9] Defendants' efficiencies models, already the subject of discovery in the DOJ case,[10] purport to account for numerous aspects of competition in the relevant wireless service markets, and Defendants contend that they are an affirmative defense to the claims of adverse effects on competition. Defendants can offer

[9] Notably, Defendants asserted the same two defenses against the DOJ. *See* Answer to Pls.' Second Amended Compl., *United States, et al. v. AT&T Inc., et al.*, 1:11-cv-01560 (D.D.C. Oct. 5, 2011).

[10] *See* Special Master Order No. 4, *United States, et al. v. AT&T Inc., et al.*, 1:11-cv-01560 (D.D.C. Nov. 21, 2011) (Docket No. 88).

no justification for denying Plaintiffs access to discovery concerning the effects of the transaction on wireless service markets when they have made their purported efficiencies a central part of their defense of Plaintiffs' cases.

Dated: December 6, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 6, 2011, I caused the foregoing Statement of the Case to be filed using the Court's CM/ECF system.

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