IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPRINT NEXTEL CORPORATION,	)	
Plaintiff,	)	
v.	)	Case No. 1:11-cv-01600-ESH
AT&T INC., et al.,	)	
Defendants.	)	

DEFENDANTS' STATEMENT OF THE CASE

Defendants AT&T Inc. ("AT&T"), AT&T Mobility LLC, T-Mobile USA, Inc. ("T-Mobile"), and Deutsche Telekom AG ("DT") (jointly, "Defendants") hereby file their Statement of the Case pursuant to the Court's Order for Initial Scheduling Conference (Nov. 2, 2011) [DN 30].

A. On March 20, 2011, AT&T entered into a stock purchase agreement to acquire T-Mobile from its parent company, DT, and to merge AT&T's and T-Mobile's mobile wireless telecommunications services businesses. On September 6, 2011, Plaintiff Sprint Nextel Corporation ("Sprint") filed an action under section 16 of the Clayton Act, 15 U.S.C. § 26, seeking to permanently enjoin the transaction. *See* Compl. ¶ 11 (Sept. 6, 2011) [DN 1].

Defendants moved to dismiss Sprint's complaint. On November 2, 2011, the Court granted in part and denied in part Defendants' motion. The Court dismissed, *inter alia*, Sprint's claim that the transaction will result in anticompetitive effects in markets for mobile wireless services because Sprint, as a competitor to the merging parties, could not prove antitrust injury based on those effects. *See* Mem. Op. at 14 (Nov. 2, 2011) [DN 28]. The Court determined that

Sprint had antitrust standing to assert only one claim regarding the transaction: The Court ruled that Sprint had standing to pursue the allegation that the transaction will give AT&T monopsony power such that AT&T could dictate terms to manufacturers of mobile wireless devices and "impair plaintiffs' access to these necessary inputs." Mem. Op. at 21. The Court thus made clear that Sprint's claim was limited to "threatened loss or damage *in the market for mobile wireless devices*." Mem. Op. at 21 (emphasis added).

Sprint will not be able to prove that claim. First, the geographic market for mobile wireless devices is global, so the size of the combined company will not endow it with market power, let alone monopsony power. Second, Sprint will not be able to demonstrate that there is a greater likelihood of exclusive handset arrangements in the future in light of the dynamic competition and innovation that characterize the mobile device market. Third, with respect to any isolated exclusive handset arrangements that might arise, those arrangements, like similar exclusive arrangements in other markets, have acknowledged procompetitive benefits. Sprint will not be able to demonstrate that any restrictions on access are sufficient to outweigh these benefits. Fourth, even to the extent that Sprint is able to demonstrate a net anticompetitive effect stemming from potential exclusive handset arrangements, any such threatened anticompetitive effects would be far outweighed by the efficiencies that will result from the transaction. Finally, even if Sprint were to prove that it will suffer some cognizable harm with respect to exclusive handset arrangements that would not be outweighed by the transaction's efficiencies, enjoining the entire transaction would not be an appropriate remedy for that harm.

B. In the Local Rule 16.3 Report submitted on December 2, 2011, Sprint argued that "the fact discovery in the DOJ Action should serve as the vast majority of discovery in the Private Actions" because Sprint's complaint raises "the very same Section 7 violation that the

U.S. Department of Justice ('DOJ') is seeking to establish." *See* Joint Report Regarding Local Rule 16.3(c) at 3-4 (Dec. 2, 2011) [DN 40]. Sprint is fundamentally mistaken about the scope and content of the claims and defenses in this action. A private plaintiff such as Sprint may enforce section 7 of the Clayton Act only insofar as "the acts violating the" statute threaten to cause it "antitrust injury." 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 335a, at 61-62 (3d ed. 2007). DOJ has alleged that AT&T's acquisition of T-Mobile would violate section 7 because "the effect of such acquisition may be substantially to lessen competition," 15 U.S.C. § 18, in markets for "[m]obile wireless telecommunications services," DOJ Sec. Am. Comp. ¶ 12, *United States v. AT&T*, No. 11-cv-1560 (D.D.C. Sept. 30, 2011) [DN 39]. Following settled law, this Court held that Sprint lacks antitrust standing to pursue that claim. *See* Mem. Op. at 12-14; *see also, e.g.*, 2A Areeda ¶ 335f, at 73 ("antitrust injury is absent when a plaintiff complains that its competitors' merger was illegal because it increased market concentration unduly").

Instead, the Court determined that Sprint's complaint provided a basis for antitrust standing only insofar as it involved an alleged violation of section 7 "in the market for mobile wireless *devices*." Mem. Op. at 21 (emphasis added). DOJ has not alleged a violation in that market. *See* DOJ Sec. Am. Comp. ¶¶ 11-13. Therefore, the claims and defenses in the DOJ Action and this action involve different alleged violations of section 7 in different markets. The two cases accordingly will involve very different evidentiary records, and discovery in this case will not be "duplicative" of discovery in the DOJ Action, as Sprint asserts. DN 40 at 5.

In any event, the most efficient way to address this disagreement over the scope of Sprint's remaining claim is through the discovery process. Under Defendants' Proposed Case Management Plan, Sprint will have the ability to serve discovery requests on Defendants seeking documents which it believes are relevant to its remaining claim. Defendants will provide

appropriate responses to such discovery based on their understanding of the scope of Sprint's remaining claim. If the parties fail to reach agreement on Defendants' obligations to respond to Sprint's requests, Sprint can move to compel further production. This process, by focusing on specific requests for particular types and categories of documents, will clarify the differences in the parties' positions and enable this Court (or a Special Master if ordered by the Court) to resolve any disputes promptly and efficiently.

The parties also disagree fundamentally on the appropriate pretrial schedule for the remaining narrow claim. Defendants' proposed schedule comports with this Court's observations that Plaintiff's claim regarding the transaction should not be permitted to "gum up" the efficient resolution of the DOJ Action, regardless of the timeline for the DOJ Action. *See* Tr. of Sept. 21, 2011 Status Hearing at 63:8 and 65:8-9 (rejecting Plaintiffs' request to have wholesale access to all discovery in DOJ Action). Plaintiff's proposed schedule, in contrast, departs from that paramount objective, substituting instead a process in this case that is guaranteed to tie up judicial and party resources and distract from efficient discovery and trial preparation in the DOJ Action.

Indeed, Sprint acknowledges that, even under its (incorrect) theory of the case, *some* additional discovery – Sprint says "streamlined discovery," DN 40 at 3 – will be required in this case. Such discovery necessarily will consume the time and energy of many of the same employees of Defendants who are critical witnesses in the DOJ Action. Particularly if the parties are permitted to engage in deposition, expert, and non-party discovery during the pendency of the DOJ Action, discovery in this case threatens to interfere significantly with the litigation and trial of the DOJ Action. And that interference will result in prejudice to Defendants. To avoid interference with the litigation and trial of the DOJ Action, and the resulting prejudice to

Defendants, the Court should adopt Defendants' Proposed Case Management Plan, which provides for immediate party document discovery in this case, followed by a scheduling conference seven days after a dispositive ruling or other final disposition in the DOJ Action. The Court and the parties will be in a far better position at that time to determine the timing and scope of any necessary further proceedings in this case.[1]

[1] Contrary to Sprint's assertion in the Local Rule 16.3 Report, the schedule for this litigation need not depend on the timing for the closing of the transaction; the Court has power to grant effective relief post-merger to redress any proven antitrust violation. *See generally California v. Am. Stores Co.*, 495 U.S. 271, 283-85, 295-96 (1990); *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008).

Dated: December 6, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, I caused the foregoing document to be filed with the Clerk of the Court using the 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.

/s/ James R. Wade
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