

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, :  
 :  
 : Plaintiff, : CV No. 17-2511  
 vs. :  
 : Washington, D.C.  
 : Monday, March 19, 2018  
 AT&T, INC., ET AL., : 2:45 p.m.  
 :  
 :  
 Defendants. :  
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AFTERNOON SESSION  
TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT SENIOR JUDGE

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25

1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: Your Honor, recalling civil action  
3 number 17-CV-2511, the United States of America v. AT&T, Inc.,  
4 et al.

5 THE COURT: All right counsel, let's take a look at,  
6 see if I've got your updated PX 005.

7 MR. CONRATH: Your Honor, may I interrupt with a  
8 preliminary matter?

9 THE COURT: Sure.

10 MR. CONRATH: I apologize.

11 THE COURT: Not a problem.

12 MR. CONRATH: I've been deputized by this  
13 distinguished array of people who represent third parties over  
14 here.

15 THE COURT: Okay.

16 MR. CONRATH: To encourage, there are people that  
17 have concerns about confidentiality, to encourage the Court if  
18 it's possible to work in a confidentiality discussion sometime  
19 during this afternoon. At least one of the counsel has a  
20 serious personal commitment for tomorrow.

21 THE COURT: Okay.

22 MR. CONRATH: If I could add our own, we're of course  
23 in the process today and tomorrow of preparing witnesses who  
24 will appear on Wednesday and Thursday for whom there are  
25 confidentiality issues.

1           So the sooner we can get the Court's guidance and how,  
2 that will help us prepare for a smooth presentation that  
3 respects confidentiality in open court.

4           THE COURT:    Sure.

5           MR. CONRATH:   So I pass those two things on and I'm  
6 sorry for interrupting.

7           THE COURT:    Okay, that's fine.

8           Let me, we still haven't had a chance on our side to go  
9 through your revised chart.  And now that I have looked at your  
10 revised chart and compare it to my chart, I see that one of the  
11 exhibits, well actually, three of the exhibits that I was going  
12 to ask you about, looks like you're not using them anymore.

13          MR. PETROCELLI:  May I approach?

14          THE COURT:    Yes.

15          MR. PETROCELLI:  May I address the Court on this?

16          THE COURT:    Yes.  It was 005, 0013 and 0028.

17          MR. PETROCELLI:  So here's the explanation.

18          THE COURT:    Are they still going to use them or you  
19 don't have an objection or both?

20          MR. PETROCELLI:  Our objection was that they needed a  
21 witness to address the document in court.  So on the assumption  
22 that there will be witnesses to address the documents, we  
23 didn't have any further issue with the document.

24          THE COURT:    Okay.

25          MR. PETROCELLI:  So in the shorter list that you

1 have, it does not include for the most part documents that if  
2 presented through a witness we would have little issue. So  
3 that's why you see fewer documents on here.

4 THE COURT: I see. I think what we might do then is  
5 break a little early today so I can do a comparative of these  
6 two.

7 MR. PETROCELLI: Yes.

8 THE COURT: For tomorrow's discussion. I feel like  
9 I'm a little bit out of sequence with where the parties are.

10 MR. PETROCELLI: So for example, on the newer and  
11 shorter list the next exhibit would be Exhibit 49.

12 THE COURT: Yes.

13 MR. PETROCELLI: And if you will see, Your Honor,  
14 from Exhibit 49 all the way through the following page up to  
15 Exhibit 163, there's about 7, 8 exhibits there.

16 All of those exhibits are the same issue which is that  
17 that's a third party and if the third party does not come in,  
18 we object on hearsay.

19 If the third party comes here and testifies about the  
20 documents, then they may meet the requirements for admission,  
21 but that's the nature of those objections.

22 And you'll see that many of the documents on this list  
23 fall in the category of third parties and until and unless the  
24 witness takes the stand and can establish the necessary  
25 foundation, we have asserted various hearsay objections among

1 others.

2 THE COURT: So these won't be, we don't know yet if  
3 they're going to have someone, right?

4 MR. PETROCELLI: Exactly.

5 Now the next, the next non third party exhibit, Your  
6 Honor, is Exhibit 200. You'll see that's a Time Warner  
7 document.

8 MR. WELSH: Your Honor, may I be heard on the  
9 subject?

10 THE COURT: Which one?

11 MR. WELSH: Just on the prior ones just to comment.

12 THE COURT: Sure, absolutely.

13 MR. WELSH: Thank you.

14 So Your Honor, we will have, to Mr. Petrocelli's point, we  
15 will have witnesses that will come in, third parties as well as  
16 party witnesses on these documents.

17 So we, I wanted to know too at the onset following up from  
18 conversations had with the Court last week and then hearing  
19 again today. We're mindful of the Court's view of the  
20 sponsorship issue. And we also greatly appreciate the Court's  
21 time that you're willing and in the generous nature of that and  
22 giving time to us.

23 So we will be adding some additional witnesses and will be  
24 talking with the defendants about that with regard to  
25 sponsorship issues.

1 THE COURT: Right.

2 MR. WELSH: If appropriate, Your Honor, I thought  
3 what might help a little bit on, in terms of the relevance  
4 argument here is to maybe provide a little bit more background  
5 and context for the Court, at least from the government's  
6 perspective. It might help cut across all of these different  
7 documents and issues that we're talking about here.

8 So if I may, if we just step back a minute and think about  
9 what the government has to do here.

10 The government has to come into the Court and through the  
11 witnesses and through the documents tell the Court what the  
12 existing state of affairs is in this market today. So who are  
13 the players in it? We've got AT&T of course is one of the  
14 largest distributors in the country of video content.

15 And then we have on top of that other distributors, both  
16 in terms of the traditional distribution models is the cable  
17 companies, Telecom and satellite companies such as DISH that  
18 are distributing. They're also the virtual distributors out  
19 there that are going over the top. So we have to present that  
20 to Your Honor.

21 We also have to present the other part of this equation in  
22 the virtual integration that the defendants want to do which is  
23 on the programming side.

24 So we have Turner as a programmer. And Turner has very  
25 important and very popular content which has been referred

1 throughout in the industry as being must have content.

2       So we present our witnesses and we'll present exhibits to  
3 Your Honor that you'll be able to understand what the  
4 importance of Turner's content is.

5       And that's because post merger, if the merger were to  
6 occur, it's the government's position that AT&T and DirecTV  
7 will have an incentive and be in line to take that content that  
8 they obtain, this must have content. This very important  
9 content of Turner and use that to its advantage and against the  
10 other distributors out there, AT&T's competitors.

11       So we bring in the evidence and the exhibits and the  
12 witnesses to set that ground for you and that's why we have so  
13 many documents. And that's why we go to the FCC filings so  
14 that Your Honor can understand how industry players and in  
15 particular AT&T and DirecTV have viewed this situation up to  
16 now.

17       So for example, when we look at Exhibit PX Exhibit 2 which  
18 we had briefly touched on before the break, that is a document  
19 that was -- excuse me -- that was submitted by AT&T and as to  
20 some program access rules and in that document AT&T talks about  
21 virtual integration of programmers and it talks about how they  
22 would have the incentive and ability to use that programming  
23 and to control that as a weapon to hinder competition  
24 downstream.

25       So again, the relevance of these statements is that this



1 tells the Court this is the view of AT&T back in 2012 that the  
2 very type of thing that is going on here now today that they  
3 propose today to do with this merger that in 2012 they were of  
4 the view well, that can actually be used as a weapon to hinder  
5 competition and to harm consumers downstream. So that's why we  
6 bring these documents in as an example, Your Honor, of what  
7 we're doing here.

8 Another one, Your Honor, is PX 355 which is an AT&T and  
9 DirecTV submission in 2015. Now this submission was made in  
10 connection with the AT&T and DirecTV merger and again, picking  
11 up on the point I mentioned a moment ago when we talk about  
12 Turner here today and the importance of Turner content to  
13 distributors which Your Honor will hear about from witnesses on  
14 the stand, AT&T told the FCC back in 2015, AT&T and DirecTV  
15 they made the very point that don't worry about this  
16 acquisition because we're not getting any must have content.

17 So they were distinguishing the situation where there  
18 might be some competitive issues if you're getting must have  
19 content versus if you're not getting it.

20 And another one, Your Honor, is PX 450. Again, this is  
21 another FCC filing, this one from AT&T in October of 2015.  
22 This was in connection with a review of the Charter, Time  
23 Warner cable merger and in that case again AT&T stated to the,  
24 and represented to the FCC in its filings that there was an  
25 incentive to share programming with each other at reasonable

1 rates while using that programming to raise their rival's cost.  
2 That's on PX 450003.

3       Again, issues that are going centrally to the government's  
4 case here about this vertical merger will give them the ability  
5 and incentive to raise rival's cost which will be the other  
6 distributors out there. So whether it be Charter or Cox or  
7 Comcast, AT&T would use the Turner content to be able to  
8 increase the cost of those rivals in the market place. And  
9 then that gets passed down to the consumer in higher prices.

10       So that's why all of these, I just want to put some  
11 context of why the FCC filings matter and why they're important  
12 because it's back then the defendant said one thing which go  
13 directly to what the government is alleging and arguing here  
14 and will present evidence on here and now today they're coming  
15 into court and basically saying a lot of hand waiving, don't  
16 worry about it because it's not going to be an issue.

17       The other thing I'll just say again, it comes back to  
18 documents and it also comes back to their own witnesses, Judge.  
19 Again, you see a lot of email. You'll see a lot of decks,  
20 power point decks and slides. The reason why is that the  
21 people that are in the business today at AT&T, DirecTV, Time  
22 Warner, they're the same people that are going to be in that  
23 business if this merger goes forward.

24       So the statements that they make in their emails among  
25 each other, the statements that they make in their power point

1 about how they view the industry today, what they would do in  
2 some cases if the merger goes through, but in other cases just  
3 what they do and how they operate, that's going to I think be  
4 helpful and informative to Your Honor so you can then take it  
5 and move forward.

6       Because what Your Honor has to do here is a predictive  
7 exercise of looking forward if the merger were to occur, what  
8 would be the state of affair in terms of competition in the  
9 industry and the consumer harm. So all of this evidence that  
10 we bring to Your Honor goes to these points.

11       One final thing and then I'll pass to Mr. Petrocelli. We  
12 talked before the lunch break about the Google document PX 003,  
13 Your Honor, that power point deck. With respect to that, Your  
14 Honor, again it's confidential so I can't get into a lot in  
15 great detail, but I would say which is public and I can talk  
16 about is that the defendants in their answer in paragraph 5 of  
17 their answer they make the points the first sentence Google's  
18 YouTube TV service is a powerful and recent example that  
19 disproves the government's central thesis. They have just  
20 squarely put it on Google, the fact that Google YouTube TV did  
21 not carry Turner, that that completely undercut the  
22 government's case, that's it.

23       Google, the exhibit, Google as a witness will come in and  
24 will tell the Court through testimony that Turner is valued.  
25 And that they now have Turner on YouTube TV. And Your Honor

1 will understand again, I can't get into it explicitly now  
2 because of the public session, but you'll understand why.

3 Thank you, Your Honor.

4 THE COURT: Okay, thank you.

5 Mr. Petrocelli.

6 MR. PETROCELLI: Yes, Your Honor.

7 I'd like to respond to counsel's argument. And I think  
8 the purpose of that argument was to revisit the issue of the  
9 various regulatory filings in the other matters.

10 As I indicated before, while those documents may have had  
11 some pertinence or relevance to the prior proceedings, the  
12 government cannot prove this case by what somebody, even if it  
13 were AT&T for example, said with respect to another set of  
14 issues in another matter. It depends on this particular  
15 transaction which is a very specific transaction, Your Honor.

16 Now to give you an example. He was quoting various  
17 statements that were made with respect to the other, those  
18 other deals. In this case, Your Honor, I call this the  
19 incredible shrinking case, there is, AT&T is acquiring Time  
20 Warner. Time Warner consists of three sets of assets.

21 Number one is Warner Brothers, movies, TV shows, cartoons,  
22 et cetera.

23 Number two is HBO, Sopranos, Game of Thrones.

24 Number three are the Turner cable networks. There is no  
25 broadcast networks so you have TNT, you have CNN, Cartoon

1 Network and some others.

2       The government is making no claim in this case because  
3 after a year and a half they had no evidence that there will be  
4 any withholding of any of this programming by AT&T or Time  
5 Warner post merger. No withholding of Warner Brothers. No  
6 withholding of programming from others of HBO and no  
7 withholding of the networks by Turner.

8       Their own expert has admitted it would not be profitable  
9 post merger to withhold these assets. It would not be  
10 profitable.

11       There's no claim of a price increase with respect to  
12 Warner Brother assets, with respect to HBO assets.

13       There's a single claim of a price increase in this case,  
14 Your Honor, one claim. And it's the claim that I mentioned in  
15 court before. On day one it started out as 27 cents per month  
16 per sub and the per subscriber and then a couple of weeks  
17 later, frankly after I made my comment in court, the expert  
18 changed his numbers and their expert now is up to 45 cents.

19       So what you are going to hear is that this merger ought to  
20 be blocked on the basis of a 45 cent per month per subscriber  
21 price increase which comes to about \$5 a year on a cable bill.

22       Now you're going to hear from us that the academic  
23 bargaining model that was used to come up with that \$5 a year  
24 is completely misapplied in this case and when you do it the  
25 right way, you don't come up with a price increase to the

1 consumers, you actually come up with a price decrease to the  
2 consumers.

3       Then one final thing. In paragraph 38 of their complaint,  
4 they alleged that as a result of this merger the prices of  
5 DirecTV after the merger to its own consumers and subscribers  
6 will increase.

7       Their expert after he did his analysis agreed with us.  
8 The prices will not increase. In fact, the DirecTV prices will  
9 go down to consumers.

10       So the comments that Mr. Welsh was adverting to in other  
11 cases involve situations that have none of the characteristics  
12 of this case which is down to frankly a very narrow issue about  
13 this 45 cent price increase.

14       They have a second argument that they say that we're now  
15 going to, the benign word, the benign word is coordinate but  
16 it's a polite way of saying collude that after this merger that  
17 Time Warner AT&T are going to somehow collude with Comcast  
18 NBCU. Those are the two arguments that they're making. These  
19 arguments were not present in these other cases, Your Honor,  
20 and so there's no utility to reading hundreds and hundreds of  
21 pages of advocacy pieces.

22       And frankly, the government has switched sides on some of  
23 these positions. In the Comcast NBCU case they filed a  
24 competitive impact report and you're dealing with a broadcast  
25 network. You're dealing a venerable broadcast network, namely

1 NBC. You are dealing with Regional Sports Network, a much,  
2 much greater than what you have in this case.

3 Yet they said in that case that all of this would be fine  
4 with a simple remedy of an arbitration and standstill clause.  
5 In this case when we volunteered on our own to offer our  
6 distributors that very same mechanism, they now say it's  
7 completely ineffective. So they're making the opposite  
8 argument that they made in that case.

9 Now both sides can play this game. The reality is it's of  
10 no help to the Court because the Court is going to have to  
11 decide the case not what somebody said five years ago in  
12 connection with a different transaction, but what the evidence  
13 is on this case.

14 And this issue that counsel said about must have that  
15 Turner's networks are must have because right now there's  
16 basketball games, they call it March Madness that are on the  
17 Turner networks.

18 Your Honor, you are going to hear evidence in this case  
19 that every single programming, whether it's ESPN, whether it's  
20 NBC, whether it's you name it, everybody says all of their  
21 programming is must have. It's a marketing term and it's what  
22 they say in the industry in order to sell their stuff. There's  
23 no antitrust significance at all to that.

24 You're not going to get any value from reading those  
25 materials on these kinds of issues. You will get value from

1 talking to the witnesses, the people who live this business.

2 We're going to be calling key Turner witnesses. We're  
3 going to be calling the chairman and CEO of Time Warner. We're  
4 going to be calling the chairman and CEO of AT&T. We're going  
5 to be calling other high executives.

6 These are the people that you are going to look in the  
7 eye. You're going to see whether they're rationale for this  
8 merger makes sense to you, whether it's truthful. And as far  
9 as the documents are concerned, you won't see a document in  
10 this case, Your Honor.

11 And the government is trying to suggest that because I  
12 have been arguing vehemently that there should be witnesses to  
13 talk about documents, that's not a novel proposition. I have  
14 been trying cases for 40 years, that's how documents are  
15 introduced.

16 We in no way are distancing ourselves from our documents.  
17 There's nothing wrong with our documents, Your Honor. The  
18 government keeps taking snippets and cherry picking them and  
19 that's why they want to put four boxes of documents into the  
20 record without a witness. Once the witnesses talk about the  
21 documents, you'll see that the documents make perfect sense in  
22 the context of this case and what's going on in this case.

23 You won't see any document for example that's going to say  
24 hey, let's do this merger so we can get more money from  
25 consumers, so we can raise prices. Hey, let's do this merger



1 because we want to withhold programming. You're going to see  
2 none of those documents, Your Honor.

3       Instead, they want to talk about documents that go back  
4 ten years before, five, six years before AT&T even acquired  
5 DirecTV. I think that's not only irrelevant but it's going to  
6 prejudice the record to have all of that material strewn  
7 throughout the record. So we would stand on those prior  
8 objections.

9       Beyond that, Your Honor, what I was about to tell you is  
10 that on the sheet that you do have, beside the third party  
11 documents which are numerous, and would require a witness to  
12 come in, they're not that many additional company documents on  
13 here. And a number of the company documents on here to which  
14 we have noted in a hearsay objection, that can be dealt with  
15 very easily.

16       I heard Mr. Welsh say they are not planning to introduce  
17 any of these documents for any multiple hearsay purposes. So  
18 if the document reports on some hearsay, it's not being offered  
19 for the truth of the matter.

20       With that representation many of these hearsay objections  
21 can come off the list if that's what they're representing to  
22 the Court and to us that they're not intending to offer any of  
23 these documents for the truth of the matter asserted with  
24 respect to multiple levels of hearsay.

25       And we're prepared to go through these one by one. I

1 appreciate that this was just given to you and your staff this  
2 morning, Your Honor, and you've not had a chance to review  
3 this. But we can go through them now or whenever you would  
4 like.

5 THE COURT: What's your thinking on emails from the  
6 third parties, from one of your company, one of the companies  
7 you represent?

8 MR. PETROCELLI: An email let's say between AT&T and  
9 the third party?

10 THE COURT: Yes, like this one PX 0089. I don't know  
11 if that's still one of your objections. Let me look at your  
12 objection list.

13 MR. PETROCELLI: It is.

14 THE COURT: Yes, so this is to a --

15 MR. PETROCELLI: That looks like it's from two  
16 people.

17 THE COURT: Mr. Bond?

18 MR. PETROCELLI: Yes, he doesn't work for us. This  
19 looks like it's an internal Comcast email. Mr. Burke to  
20 Mr. Bond. I don't think there's --

21 THE COURT: So that's in a different company all  
22 together?

23 MR. PETROCELLI: Yes, I believe all of these  
24 documents that you'll see where it says the beginning Bates  
25 range, you'll see Sienna, Goog, Comp these are the names of the

1 third parties and that's how you can kind of tell they're third  
2 parties. And these are, I believe, almost entirely within the  
3 third party companies. They don't involve Time Warner or AT&T.

4 MR. WELSH: Your Honor --

5 MR. PETROCELLI: If there are, there may be some  
6 exceptions, but I'm not sure.

7 MR. WELSH: Just a note that PX 89 is a Comcast  
8 document.

9 MR. PETROCELLI: Internal Comcast.

10 MR. WELSH: Internal Comcast.

11 MR. PETROCELLI: Yes, that's what I thought.

12 THE COURT: That's an email from someone at Comcast  
13 to --

14 MR. PETROCELLI: I have it right here. Yes, it's to  
15 people within Comcast, Your Honor. There are no other people  
16 copied on this email.

17 THE COURT: I see. Your objection there is hearsay?

18 MR. PETROCELLI: Hearsay and yes, we need witness  
19 testimony.

20 MR. WELSH: There'll be a witness for this.

21 THE COURT: There's going to be a witness for this  
22 one?

23 MR. WELSH: Yes.

24 THE COURT: All right. Let me see if there's any  
25 other in my notes.

1 I think what I'll do, I'm going to look at this stuff  
2 later this afternoon, after we break and then I'll be in a  
3 better position to compare the two and then ask you questions  
4 about it tomorrow.

5 MR. PETROCELLI: Thank you, Your Honor.

6 THE COURT: Mr. Welsh, do you have anymore to say on  
7 this particular point that we've been going over or should we  
8 switch to a different topic?

9 MR. WELSH: I think we can switch to a different  
10 topic.

11 Are you talking about in terms of the point FCC filings?

12 THE COURT: Yes, those files or just the relevancy  
13 objections in general. Do you have anything further on that  
14 point?

15 MR. WELSH: No, Your Honor, I think I have stated  
16 what the government's position is.

17 THE COURT: Okay.

18 MR. WELSH: Thank you.

19 THE COURT: All right, so let's spend a little time  
20 on the confidentiality issue that you want to talk about for a  
21 confidentiality draft. I think I have a copy.

22 MR. WELSH: May I approach, Your Honor?

23 THE COURT: Yes, you may.

24 MR. WELSH: Your Honor, with respect to  
25 confidentiality I believe that there are two proposed orders

1 that have been submitted to the Court.

2 One for plaintiff, one for defendants. I think that the  
3 proposals are very similar in most respects. I think the  
4 difference that exists is if not entirely it's largely in  
5 paragraph two which talks about the use of confidential  
6 information at trial.

7 The plaintiff's proposal is to have the following language  
8 which I understand defendants have not incorporated into their  
9 draft.

10 The plaintiff's position would be that the language would  
11 read in examining or cross examining witnesses counsel shall  
12 make no public disclosure of information or materials  
13 designated confidential information.

14 If either party anticipates the need to seal the courtroom  
15 for a particular testimony, counsel shall notify the Court and  
16 all other parties at least 24 hours in advance of the witness's  
17 testimony.

18 I believe that that is the only or at least the most  
19 salient difference between the two. I think that that may be  
20 it.

21 We have included this language, Your Honor, out of I guess  
22 a couple of different, for a couple of different reasons.

23 One I think the first statement is rather unobjectionable  
24 that there won't be public disclosure of information and we  
25 want to continue that in this order because of concerns that

1 the existing order, the amended protective order has some  
2 language that says unless the Court issues another order and  
3 the documents and testimony that's confidential that might be  
4 submitted could lose its protection if it's on the exhibit list  
5 and comes into a courtroom.

6 So we want to have an order that will speak to that issue.  
7 So that's what goes to that sentence.

8 The other sentence, Your Honor, is really out of concern  
9 for a couple of different things. One is we want to protect  
10 the third parties information. They have expressed concerns.  
11 Several of the third parties are represented here today and  
12 might wish to speak to Your Honor about their concerns in this  
13 regard.

14 But we do think that it's helpful to have at least a  
15 sentence in here that will talk about the possibility of trying  
16 to deal with things in a closed session. Both sides as I  
17 understand, certainly the plaintiff, I can't speak for defense,  
18 but I understand that they've articulated this, that we're  
19 going to try to do our best to bring this case to Your Honor  
20 and to do it in a public session as much as we possibly can.

21 We appreciate though that there will be a time when that  
22 may not be possible, whether it be with third parties or even  
23 with the defendant's own witnesses.

24 And so having a sentence in here that would permit the  
25 opportunity to go ahead and to move into closed session we

1 think is going to be helpful. We will try not to do that too  
2 much. But to have the ability to notify Your Honor in advance,  
3 24 hours in advance, that we have a witness coming up. They  
4 have expressed some concern, there is a potential problem here  
5 of some disclosure issues and so we feel that we may have to go  
6 and take some of that examination into a closed session, so  
7 that's why that sentence is there, Your Honor.

8 We have seen in this case some tension here between what  
9 the defendants are saying in terms of confidentiality and their  
10 wanting to have an open courtroom and then what is happening in  
11 practice. And that causes some concern. That leads to some  
12 views that we are maybe going into these closed sessions.

13 So for example, Your Honor, we know and again, some of  
14 this is confidential so I am going to be careful in how I  
15 phrase this. We have an example where there's a contractual  
16 term between Turner, Time Warner and a third party distributor.

17 In deposition testimony that has been presented, they are  
18 designating information to be confidential that cannot be  
19 shared in a courtroom, the public courtroom. Turner has  
20 designated, Time Warner has designated it.

21 We have the third party who on the very same subject was  
22 asked in their deposition they designated that testimony as  
23 well. Virtually the same as you look at it.

24 Unfortunately what has happened though is that the  
25 defendants then have been pursuing this third party and telling

1 them no, those pages are overly designated. And you need to  
2 withdraw those designations and pull back.

3 So we're seeing some tension here where on the one hand  
4 the defendants say one thing and on the other hand they are  
5 asking something different of the third parties. That creates  
6 a real problem and it's a fairness issue.

7 So Your Honor, that's just one example of how this is  
8 happening and I have got the documents if you're interested. I  
9 can give you the deposition transcript pages and you can see as  
10 well as a letter from counsel to the third party.

11 We're also seeing a problem though, Your Honor, with  
12 respect to there are confidentiality designations as to their  
13 own exhibits. This is the defendant's exhibits.

14 So for example, Your Honor, and I can hand this to you,  
15 you've got a copy of the document but not with their  
16 designations. This is PX Exhibit 8. This is a Time Warner  
17 document, it's a board book, board briefing strategy book.

18 The whole thing has been designated confidential, Your  
19 Honor. Every single word of this document has been designated  
20 confidential. If we put a witness on the stand because  
21 Mr. Petrocelli says we have to have sponsorship of all of our  
22 exhibits with the witness. I put an executive of the Time  
23 Warner on the stand and start asking questions about this, I  
24 think the most I can ask him is do you have PX Exhibit 0008 in  
25 front of you. I'm not sure I can ask him another question in



1 open session. So it's a problem.

2 This is another example, Your Honor, PX 460.

3 THE COURT: Why couldn't you? For example, why  
4 couldn't you ask well, did you create this document?

5 MR. WELSH: I could ask him that and I could set a  
6 foundation. You're right, Your Honor. But if I wanted to get  
7 into the substance of the document.

8 So if I wanted to say Mr. Bewkes, who's on the board, the  
9 chairman CEO of the company. So you received this document.  
10 Let's go and look at page 21 of the document. I want to direct  
11 you to the paragraph that begins X. I want to talk to you  
12 about that subject.

13 I can't do that because they've designated that page.  
14 They've designated that paragraph confidential.

15 Another example is on PX 460 which is a document that they  
16 have given to our, it was attached to one of their experts.  
17 This document again, the entirety of the document every single  
18 page has a red box around it which means it's confidential.  
19 Every single page. We cannot explore this in open court. So  
20 it's a real problem, Your Honor. These are just a few  
21 examples.

22 THE COURT: Is that a board document?

23 MR. WELSH: This is not. This is a document that  
24 actually wasn't produced to us in the litigation. It showed up  
25 for the first time attached to their expert's report. So I use

1 these only --

2 THE COURT: Are they slides?

3 MR. WELSH: It's a power point deck, Your Honor.

4 Happy to hand one to Your Honor if you would like to take a  
5 look at it.

6 THE COURT: Yes.

7 MR. WELSH: You probably have enough paper but I'll  
8 hand up that one as well as the PX 0008. There are many other  
9 examples that I've got others here. I don't think I need to  
10 belabor the point. But it's essentially a two fold concern,  
11 Your Honor.

12 One is with respect to the treatment of the third parties  
13 and their information which they have legitimate concerns over.

14 The other is how are we going to go about presenting our  
15 case in court when we have designations both of documents and  
16 exhibits that go far, far beyond what we understood Your Honor  
17 was talking about the other day, the word by word sort of  
18 designation.

19 Here we have entire decks, entire emails, entire sections  
20 of important documents, important exhibits that have been  
21 designated confidential by the other side.

22 And while we try to work these things out, at some point  
23 we're in first day of trial and we haven't been able to work  
24 these things out so that we can make sure that this goes on as  
25 smoothly as it possibly can in open court. So that's an issue.

1           THE COURT: Were you able in the case of say PX 460,  
2 which like you say is a bunch of slide decks.

3           MR. WELSH: Correct.

4           THE COURT: Were you able to engage in a discussion  
5 with the opposing counsel as to why, I mean go through it and  
6 say why is this marked as confidential?

7           MR. WELSH: I don't know the status of that, Your  
8 Honor. I do know with many of these others we have gone  
9 through this process of trying to pull back as much as we can.

10          It's actually a very laborious process. We've got a number  
11 of attorneys at the division who are working on this going  
12 through the documents and saying well, we don't agree with  
13 this, we don't agree with that. We send that list back to  
14 defendants.

15          They then are looking at it and they'll make some  
16 adjustments if they can. Some cases they do, in some cases  
17 they don't and then it comes back to us.

18          Then we look at it again and say yes or no. But the  
19 process is just taking an inordinate amount of time and we're  
20 left in a situation where we are going to have and again, I do  
21 have some others where in fact, if I show Your Honor one I  
22 think this might be helpful to your point.

23          Your Honor, this is PX 12. This is I think illustrative  
24 of what's going on so we have a pricing and again there is a  
25 deck with an email and a deck attached.

1           Now on this one some of the redactions, the confidential  
2 nature of it has been designated in these red boxes and some of  
3 them are directly on prices which is fine.

4           They can do the prices, but then we get to entire pages  
5 such as PX 12-006 and PX 12-008. And those bulleted points  
6 there are, they have been designated as confidential. So we're  
7 precluded from going into those pages in open court with the  
8 witness.

9           So again, there are many other examples like this, but  
10 that's how the process has gone.

11           THE COURT: Were you able to have a discussion on  
12 this one?

13           MR. WELSH: I'm sorry?

14           THE COURT: Were you or your team members able to  
15 have a discussion on this one with opposing counsel?

16           MR. WELSH: I believe so and I believe that's why we  
17 have the boxes the way that we do.

18           THE COURT: Okay.

19           MR. WELSH: Originally when all of these documents  
20 were produced to us they were of course all designated  
21 confidential across the board without any of these red boxes.

22           Your Honor, that's what I think led to at least the need  
23 and the concern including the language into our proposed order  
24 that is before you.

25           THE COURT: What's the government's, what's the

1 government's thinking on whether something should be marked  
2 confidential? What would need to be demonstrated by the party  
3 who's marking confidential that it would necessarily result of  
4 substantial likelihood result in harm to the company?

5 MR. WELSH: Well, I think there are a number of  
6 different criteria that one could take whether it's trade  
7 secret and confidential in that respect. Whether it would be  
8 harmful to the company I think is a too generous of a position,  
9 because what we've seen also and it's important to note is that  
10 much of what we see coming back from the defendants that they  
11 put these little red boxes around tends to be the statements  
12 that are the most disquieting to them. And they don't want  
13 that into the public realm, so we run into this issue.

14 It's not a question of, it's the, the percent number  
15 that's on the page that they've redacted out, but it's  
16 something that's a statement made by one person to another  
17 which is a significant part of the document.

18 Suddenly we see a red box around that information to keep  
19 that from public scrutiny. That's not, that's not what  
20 confidentiality is about, and I don't think and it's certainly  
21 not the government's position that that sort of information  
22 should be protected from disclosure to the public.

23 Thank you, Your Honor.

24 THE COURT: Did you want to challenge their claim of  
25 confidentiality in that situation?

1 MR. WELSH: Well, under the amended protected order  
2 it's the obligation of the defendants in this case to move the  
3 Court to seek protection of the information. The burden is  
4 placed on them under the amended protective order.

5 So we have been trying to work with them to see if we can  
6 reduce the concerns as much as possible and hopefully not bring  
7 these to Your Honor. We've not been successful in that regard.

8 We of course will continue to do, to work with them to see  
9 if we can get there, but we are running into a bit of an issue.

10 THE COURT: So what does your third party -- you're  
11 the one that more so than the defendants that have third party  
12 witnesses who, you know, who are in need of protection as to  
13 their business confidential information.

14 MR. WELSH: Correct, Your Honor.

15 THE COURT: For fear that it might endanger their  
16 ability to deal effectively in future negotiations, any of the  
17 defendants or a merge entity.

18 MR. WELSH: Right.

19 THE COURT: So it's understandable that they would  
20 have concerns like that.

21 So your proposal as it's currently structured, you believe  
22 would be completely satisfactory to those third parties; is  
23 that right?

24 MR. WELSH: We hope so. They're here and maybe they  
25 would be better to speak for them because I certainly wouldn't

1 do that, but we tried.

2 THE COURT: Have they seen it, your proposal that is?

3 MR. WELSH: They did not see it before we submitted  
4 it to Your Honor.

5 THE COURT: Okay.

6 MR. WELSH: So again, they are here and can speak to  
7 the issue, but we have tried to do what we could to meet Your  
8 Honor's concerns.

9 We share those about the public setting. At the same time  
10 there is a legitimate need for confidentiality to apply.  
11 Certainly for the third parties and we know that this District  
12 Court has a long standing history and there's, there's case law  
13 in this regard where the third party is afforded greater  
14 protection and is the Hubbard case, if I recall correctly, U.S.  
15 v Hubbard out of this Circuit Court here.

16 The third party is typically given a little bit more  
17 protection because they're not the ones that come to this court  
18 as part of the merger, the merger transaction.

19 THE COURT: So as to those portions of its documents  
20 that they wish to be designated as confidential, do they go to  
21 you in the first instance to say here's what we want to have  
22 marked as confidential to see if you'll agree with them?

23 MR. WELSH: I think the way the process worked is  
24 that we receive their millions of pages of documents with  
25 everything being stamped confidential.

1 THE COURT: Everything.

2 MR. WELSH: Everything. You name it. So if it was  
3 even a public press release statement.

4 THE COURT: That's not very helpful.

5 MR. WELSH: It's not, Your Honor. So we have gone  
6 through that and we have focused our attention of course on the  
7 exhibits and not on the rest of the production and we have gone  
8 back to them and said we disagree. We don't think that this  
9 document can possibly be confidential.

10 They then engage and we get something back and then we  
11 look at and say, you know, we agree and we have agreed on some.  
12 Or we say no, we can't agree on that and you need to go back  
13 and look at that further and refine it and correct it so that  
14 we can try to get it to a manageable amount so that we can  
15 actually have a worthwhile examination of a witness in open  
16 court. That's the process. And it's been unfolding. It's  
17 been a slow process let's say that.

18 THE COURT: How many witnesses do you think you'll  
19 have that are third parties that pose this kind of problem,  
20 dilemma?

21 MR. WELSH: I think that it's going to probably be a  
22 potential concern for most. Maybe not all, but most where  
23 there'll be some portion that I'm sure they're going to want  
24 the examination to be in closed session.

25 THE COURT: You've explained to them that we can't do



1 that?

2 MR. WELSH: I also think that what we're going to see  
3 with defendants is exactly the same problem. I think that  
4 almost every single one of their witnesses and I'm having  
5 trouble thinking of an exception that we'll get into their  
6 documents on the stand, even more so today than yesterday  
7 because of where we are with the need for getting the documents  
8 in front of the witnesses and we will have to have them explain  
9 in some detail what's going on in these documents and on  
10 particular topics.

11 As it stands now with most of those documents we would  
12 have some problems. And certainly with respect to some of the  
13 more important issues. When we get into financial figures for  
14 example, that we might be looking at, we won't be able to  
15 examine the witness in open court on that because of  
16 designations.

17 There will be other pages too where just talking about  
18 their position on negotiations and contract, Turner's  
19 negotiations and contracts with other distributors, they're  
20 going to take the position that that's confidential and can't  
21 be in a public setting. That is their position. They've  
22 expressed it in their documents with these red boxes.

23 We will not be able to ask a witness on the stand about  
24 when you had a negotiation with this particular third party  
25 distributor back in 2015 that you were of the view of X. We

1 cannot ask that question as it stands now on the stand because  
2 of their designations.

3       They take the position that what happened in 2015, what  
4 happened in 2014 that because those relate to contracts that  
5 were entered into by Turner with distributors, with third party  
6 distributors that are long term contracts, some of these go  
7 out, five, six years, that because those negotiations back  
8 there have not come around again, even if they have come around  
9 again, they are confidential apparently to them.

10       So they don't want that out in the public because they  
11 don't want the third party to hear about their thinking about  
12 how they're going about the negotiations.

13       So I'm just wanting to alert the Court that things that we  
14 talk about here and have been talking about openly that one of  
15 the key issues here is how do negotiations occur between a  
16 programmer Turner and a distributor and AT&T or Cox and how  
17 that might change post merger. We won't be able to go into  
18 that in sufficient detail at all in a public setting based on  
19 where we stand with the confidentiality designations.

20       So again, that's why the language has been added so that  
21 again we will try our best to keep it to a minimum, but it's  
22 unfortunately going to be a reality I fear.

23               THE COURT: What is it about your case that requires  
24 you to need, not want, need third party testimony?

25               MR. WELSH: We absolutely need third party testimony.

1           THE COURT: What is it about your case that requires  
2 you to have that?

3           MR. WELSH: We need the third parties to come in and  
4 to tell Your Honor these are third party distributors.

5           THE COURT: Right.

6           MR. WELSH: That are competing with AT&T. They're  
7 going to come in and tell Your Honor that we have negotiated  
8 with Turner about this way in the past. We view Turner's  
9 content as being important, as being must have content that we  
10 need to have in our business.

11          THE COURT: Yes.

12          MR. WELSH: They're going to tell Your Honor that  
13 they're concerned about this merger. They're going to tell  
14 Your Honor that their concern is that the merger is going to  
15 result in AT&T having control over Turner and over Turner's  
16 content, that they'll be able to then increase the price to  
17 them of Turner content and if they don't pay for the Turner  
18 content, then they turn off the tab and they don't get a  
19 renewed contract.

20          They're going to talk to Your Honor and tell Your Honor  
21 about the negotiations that occur pre merger today in the past,  
22 in the last three years about how that dynamic works between  
23 the parties and how important it is.

24          And then they're, Your Honor is going to hear other  
25 evidence in this case that will show you that that bargain

1 that's occurring between Turner and the distributor, that  
2 bargain, that leverage is going to change post merger, it's  
3 going to shift because of AT&T's control over Turner. That's  
4 what the third parties are going to come in and tell Your  
5 Honor.

6 THE COURT: So basically it's their prognostication  
7 as to what will happen should the merger go through, right?

8 MR. WELSH: No, no, it's not. It's part.

9 What they're going to talk to Your Honor about is today,  
10 yesterday, how they view Turner. How they viewed the content.  
11 Why it matters to their business. How they operate their  
12 business.

13 THE COURT: But why would that thinking which they're  
14 willing to testify in court about be confidential? The part  
15 that's confidential isn't it like profit margins and  
16 calculation of profit and how they structure their negotiations  
17 with, how they would structure their negotiations with AT&T so  
18 that they would get the best deal that they could under the  
19 circumstances?

20 MR. WELSH: I think all of that is, and I'm not going  
21 to speak for them. I'm not going to speak for what their  
22 concerns are on confidentiality but I agree with what you're  
23 saying. I think there are other things too.

24 I think that their view and their approach of how they go  
25 at it with the defendants, I think is if they feel that's

1 confidential and something that needs to be heard only in a  
2 closed courtroom, I'm not in a position to say yes or no on  
3 that. So I leave that to explain to Your Honor and that's  
4 again what our proposed order is also designed to do.

5 THE COURT: With that kind of data that I was just  
6 alluding to, whatever form it takes, I don't know from  
7 knowledge yet because I haven't seen the exhibits.

8 MR. WELSH: Yes, Your Honor.

9 THE COURT: I don't know what form it would take, but  
10 what I'm trying to discern is the extent to which they need  
11 that to be known to the Court in order to prove their  
12 conclusion.

13 We know what their conclusion is. You've just said it in  
14 open court. It's not a surprise to anybody.

15 They think that it will put them at a competitive  
16 disadvantage. They're afraid that if this were to go through,  
17 this is their conclusion, if this goes through they'll be in a  
18 worse position than they're in now and it's going to cost them  
19 more money to get those must haves that AT&T, the merged entity  
20 would have to offer, okay, fine. We know that's what the  
21 conclusion is.

22 And they're willing to say it in open court apparently.  
23 But I've closed the doors for them to say those things.

24 What I'm trying to figure out is the stuff that's  
25 confidential, business confidential that they want to keep out

1 of the public eye and out of AT&T's possession I might add too.  
2 Do they need that to prove the basis for their prognostication  
3 or is the prognostication really just based on instinct? Their  
4 feeling based on prior experience? That's what I'm trying to  
5 figure out. What's the relationship between the two things of  
6 the conclusion and the secret data, how is it linked?

7 MR. WELSH: I don't have the ability to answer that  
8 question because I'm just not, I'm not them.

9 THE COURT: That's for the expert?

10 MR. WELSH: I think it's for the third parties to  
11 express to Your Honor their view and again the proposed order,  
12 I think both parties proposed order permits this that before  
13 someone is going to get into confidential information the third  
14 party has the ability to approach the Court to raise a concern  
15 about that.

16 So I think that it's important. Again, many of the third  
17 parties are represented here today and I understand they may  
18 have, they're available to speak to Your Honor. There might be  
19 an issue with one person not being available tomorrow or more  
20 than one.

21 So if it's possible that they could be heard, I think that  
22 might be helpful and it would certainly answer some of Your  
23 Honor's questions.

24 THE COURT: Let's hear from Mr. Petrocelli.

25 MR. WELSH: Thank you, Your Honor.

1           MR. PETROCELLI: Your Honor, I need to round out the  
2 picture a little bit.

3           First of all, we objected to putting in the order anything  
4 about sealing the courtroom because as I told the government,  
5 that is solely within the province of the Judge. And I didn't  
6 want to be presumptuous about writing anything in an order  
7 about sealing a courtroom.

8           It's a rare thing to do and logistically it would be  
9 extremely difficult in this trial to be constantly closing the  
10 courtroom for every witness essentially and my view was that  
11 the lawyers for the third parties are going to be here and Your  
12 Honor invited them to sit in front of the bar and if there's an  
13 issue, it can be addressed at that time, at side bar or  
14 whatever.

15           So that was the first problem that I had with their order.

16           The second problem is you need to understand, Your Honor,  
17 these are competitor witnesses who I think every single one of  
18 them will tell you they oppose this merger. They're working  
19 very closely with the government. They have met many, many  
20 times.

21           The government is working with them and scripting out  
22 their testimony. We have to cross these people on the blind.  
23 I don't know what they're going to be asked and in the meantime  
24 --

25           THE COURT: But you know what the bottom line is.

1           MR. PETROCELLI: I know what the bottom line is and  
2 to that point it is all prognostication. There's not a single  
3 witness you're going to hear in this trial, none of these third  
4 parties are going to say that they heard a witness say that any  
5 of these things are going to happen. That they read any  
6 documents that said any of these things are going to happen.  
7 They are simply going to say I'm afraid it's going to happen.

8           THE COURT: Have you deposed these folks?

9           MR. PETROCELLI: We did, Your Honor.

10          THE COURT: Now when you deposed them obviously, it  
11 wasn't in an open setting, right?

12          MR. PETROCELLI: Correct.

13          THE COURT: Closed door setting.

14          MR. PETROCELLI: Correct.

15          THE COURT: While you're in that setting were they  
16 willing and able to allude to and reference confidential  
17 information that was in their possession?

18          MR. PETROCELLI: Well, they're taking the position  
19 that all the negotiations are confidential and it's just too  
20 broad. And I said to you the last time I was here that what's  
21 good for the goose is good for the gander. So the rules have  
22 to apply to all of these parties as well as the third parties.

23          My hope was to be able to conduct the examination very  
24 much along the lines that you were just doing. I don't need to  
25 get into any secret data or anything. I mean this is all



1 basically common sense.

2           THE COURT: Well I'm kind of sitting here thinking  
3 and I could be absolutely incorrect, absolutely wrong; that  
4 there is no necessary relationship between anything that's  
5 confidential from prior negotiations and their concern and  
6 their prognostication that a merged entity would put them at  
7 some kind of a competitive disadvantage. They've reached that  
8 conclusion independent of it. That it's just their, it's their  
9 concern based on years of being in the industry and, you know,  
10 facing up more formidable, more sizable, more well-financed  
11 institution. I don't know. But it's not as if there were,  
12 there's some kind of like a mathematical equation that's based  
13 on premises, based on prior negotiations on finance structure  
14 or something that's confidential that they would be alluding  
15 to.

16           MR. PETROCELLI: They have no mathematical  
17 calculations or any even financial calculations, Your Honor.  
18 It's all speculation about what could happen. Because they  
19 think the company is going to have more leverage. It's that  
20 simple. You're going to hear that like ten times. I just  
21 don't think we're going to need to get into the details.

22           The problem with this case is overkill, Your Honor. We  
23 have tons and tons of documents. And thousands and thousands  
24 of pages of deposition testimony. Most of the documents are  
25 completely irrelevant. There may be one word or two or one

1 page in there.

2 Now we have added a team of lawyers working around the  
3 clock for weeks trying to get this right with the government.  
4 We have gone over these documents a couple of times, the most  
5 resent time we did these red boxes. He cherry picked a few of  
6 the ones. But trust me, there are many, many documents where  
7 there's just a fact or figure that's red boxed. The government  
8 was suppose to get back to us on whether they disagreed with  
9 these red boxes. We have not heard back from them.

10 We are more than willing to keep this process going. But  
11 I'm telling you, most of these documents contain irrelevant  
12 information that isn't going to be used in court. And if it is  
13 used in court they can simply say Mr. Witness look at that  
14 document, look at that page and you can look at it, Your Honor,  
15 and we can get through it without closing the courtroom.

16 On the third party side, Your Honor, the government has  
17 not challenged a single designation of the third party. So  
18 we're getting whipsawed here. They're challenging everything  
19 on our end. Nothing on the third parties, that's  
20 understandable because they're working together. But we have  
21 to be prepared to cross a witness that they're working with and  
22 I'm seeing a deposition and I'm reading it to get ready for the  
23 cross examination and page after page after page it's just  
24 talking about negotiations and, yeah, they're a really tough  
25 negotiator. They beat us up on this point. It's not

1 confidential Judge.

2 THE COURT: Well let's turn the coin over. The  
3 things that your clients want to have treated as confidential  
4 what extent of those like --

5 MR. PETROCELLI: It has to be same, Your Honor.  
6 We're not asking for any preferential treatment. I think that  
7 what's happening here is that --

8 THE COURT: Are they finance numbers, profit margin,  
9 percentage of profits?

10 MR. PETROCELLI: I just saw this document that he  
11 showed the Court. This says deep dive data in platform. This  
12 is some very technical document that some expert relied on. I  
13 highly doubt any of this is going to see the light of day in  
14 the courtroom.

15 Briefing Book for Board Strategy Session. This is the  
16 document they said was entirely marked as confidential. I'm  
17 happy to go back and revisit this and see if we can pare all of  
18 that down, but I don't know whether they intend to use this or  
19 not.

20 THE COURT: Remind me again this document you're  
21 alluding to PX 460. What company is this from?

22 MR. PETROCELLI: This is AT&t, 460 Your Honor?

23 THE COURT: Yes.

24 MR. PETROCELLI: I see AT&T logo. I can't make heads  
25 or tails out of this document.

1 THE COURT: So this is an AT&T document that was,  
2 again these are these slide things, that was prepared for who,  
3 for the Board?

4 MR. PETROCELLI: No, this was prepared for an expert  
5 I'm told. One of our experts. Is that right, an expert?

6 THE COURT: Check.

7 MR. PETROCELLI: I'm getting blank stares.

8 THE COURT: I can see that.

9 MR. PETROCELLI: Nobody wants to help me out.

10 THE COURT: You want to take a time out and talk to  
11 your team?

12 MR. PETROCELLI: I think Mr. Welsh helped us out  
13 because he indicated this was a document that was not produced  
14 in the litigation, but was made available to them when we  
15 delivered our expert reports as a document on which one of our  
16 experts --

17 THE COURT: At the bottom of the sheet if you take a  
18 look Mr. Petrocelli, at the bottom of the second page.

19 MR. PETROCELLI: Second page.

20 THE COURT: It says AT&T proprietary restricted for  
21 use in AT&T, TWX merger planning only.

22 MR. PETROCELLI: I see that. It's on all the pages.

23 THE COURT: It seems to be on all of the pages.

24 MR. PETROCELLI: Right, right.

25 THE COURT: Now here's the problem. By the way, this

1 problem is not a problem limited to the business world. I've  
2 seen this problem in the national security arena.

3 MR. PETROCELLI: I know you have, Your Honor.

4 THE COURT: There's a natural desire by the people  
5 who are the designators to paint with a broad brush, everything  
6 is to be confidential, everything is to be protected. And then  
7 the process of clawing back to figuring out what really is  
8 confidential here. What really can be said in public and what  
9 really can't. When will the national security be actually  
10 threatened or not? When will the business interests of the  
11 company be actually threatened or not? It's a difficult pain  
12 staking process in no small part because you have these very  
13 protective counsel who are erring on the side of painting with  
14 a broad bush. There's just no way that all of this stuff  
15 that's in here, just to use this as an example since it's in  
16 front of me. There's no way that all of this should be  
17 confidential.

18 Now if that's true for an AT&T document, I'm sure it's  
19 equally true for some of these third party documents, if not  
20 all of them. Which gets me back to the point that I've been  
21 trying to get your help to discern. Where's the linkage  
22 between what's really confidential and the conclusion that  
23 these witnesses are going to come in here and testify under  
24 oath to. Which is we believe, apparently if this merger goes  
25 through it'll be harmful to our company and It's ability to do

1 business in the future with a merged entity because it will  
2 have less leverage. The other side will have more leverage.  
3 We're going to be at a competitive disadvantage from where we  
4 are now, and is that a judgment conclusion or is it based upon  
5 data that really is confidential, that can't be known in the  
6 public forum, but can be known in a closed courtroom.

7 I'm not an expert on this. You all are. You've been  
8 wrestling with this stuff now for months if not years. So  
9 tonight, that's one of your assignments tonight. Talk to your  
10 folks and then tomorrow we'll revisit this issue more fully.  
11 Because I'm kind of thinking that it might well be we can put  
12 all of these third party people on without using any of these  
13 confidential documents because we don't really need them.  
14 Maybe we can't. Maybe there's a reason why you're going to  
15 have to have them. But the clawback is so painful, it's so  
16 difficult, there's so much. By the way, this is on both sides.  
17 They're going to want to have access to this AT&T and other  
18 documents that you're saying, oh they're all confidential.

19 I think I'm stating the obvious when I say trying cases of  
20 this magnitude in closed courtrooms is inconsistent with the  
21 concept of trials in the United States. We're not into the  
22 secret forum business, you know.

23 Now that's not to say there are some things that protect  
24 the national security, yes; to protect the financial security  
25 and wherewith all companies; yes, we have to keep confidential,

1 but I think we should take a time out for today and I'm going  
2 to take a look at your pared down agenda and I'll leave it to  
3 you all to talk to your third party lawyers and work it out and  
4 figure it out. And we'll talk about it tomorrow morning again.

5 MR. PETROCELLI: Thank you, Your Honor.

6 MR. COVE: Your Honor, I'm sorry, may I be heard?

7 THE COURT: No. Who do you work for?

8 MR. COVE: My name is John Cove. I represent Sony  
9 Interactive. The reason I'm interrupting, Your Honor --

10 THE COURT: Who do you work for?

11 MR. COVE: For Shearman and Sterling for Sony  
12 Interactive.

13 THE COURT: Sherman and Sterling is one of the  
14 largest law firms in the world.

15 Sir, when I talk you stop.

16 MR. COVE: Yes, sir.

17 THE COURT: You've never been in this courtroom  
18 before. My reporters are great, but they can't take us both  
19 down at once. Wait until I'm done. You hear me?

20 MR. COVE: Yes, I hear you, Your Honor.

21 THE COURT: Shearman and Sterling has lots of  
22 lawyers. If you can't be here tomorrow, they've got others who  
23 can.

24 So I've tried to explain nicely. Apparently it didn't  
25 register with you. We're done for today. If you can't be here

1 tomorrow, talk it through with the very able AT&T, excuse me,  
2 government counsel and government counsel will represent your  
3 concerns tomorrow. Good night.

4 MR. COVE: Thank you, Your Honor.

5 THE COURT: Yes, anything else from counsel for the  
6 government or counsel for the defense before we reconvene  
7 tomorrow at 10:30.

8 MR. PETROCELLI: Thank you, Your Honor.

9 THE COURT: We'll go till 5:30 tomorrow, 10:30 to  
10 5:30 with breaks in the morning.

11 MR. PETROCELLI: I mentioned this to Mr. Conrath  
12 earlier. He has no objection. During opening statement if  
13 you, a few of my clients including the chairman and CEOs of  
14 both companies would like to be here.

15 THE COURT: Of course.

16 MR. PETROCELLI: Okay, thank you.

17 THE COURT: They'll have seats.

18 MR. PETROCELLI: Yes, I just wanted to make sure.

19 THE COURT: Well for starters, I don't know how  
20 you're going to do this, but you've got a lot of folks in your  
21 front row. You might have to have, some of them are going to  
22 have to go next door and listen to an audio. Unfortunately  
23 you'll have to figure that out.

24 MR. PETROCELLI: We'll figure that out, Your Honor.

25 THE COURT: You all don't have your laptop person



1 here yet. See they have theirs in the first seat.

2 MR. CONRATH: We didn't need it today, Your Honor,  
3 but --

4 THE COURT: Right, you'll need it Wednesday.

5 MR. CONRATH: -- when the time comes, yes, Your  
6 Honor.

7 THE COURT: Right, so plan accordingly is all I'm  
8 saying. You've got to save room for that person.

9 MR. CONRATH: Yes, you're absolutely right.

10 MR. PETROCELLI: Thank you, Your Honor.

11 THE COURT: Does the government have any other issues  
12 for today?

13 MR. CONRATH: We do not, Your Honor.

14 THE COURT: So do your best to talk to your  
15 respective sides about this confidentiality issue and maybe it  
16 is that we don't have to put anything more in writing. We can  
17 just deal with it on a person by person basis, witness by  
18 witness basis, I should say. Do your best to level Shearman  
19 Sterling's concerns. Stand in recess.

20 (Proceedings adjourned at 4:00 p.m.)

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## CERTIFICATE

1  
2 I certify that the foregoing is a true and correct  
3 transcript, to the best of my ability, of the above pages, of  
4 the stenographic notes provided to me by the United States  
5 District Court, of the proceedings taken on the date and time  
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related  
8 to, nor employed by any of the parties to the action in which  
9 this hearing was taken, and further that I am not financially  
10 nor otherwise interested in the outcome of the action.

11  
12 \_\_\_\_\_  
/s/ Crystal M. Pilgrim, RPR, FCRR

\_\_\_\_\_ Date: March 19, 2018

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