UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

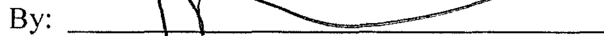
UNITED STATES OF AMERICA, *Plaintiff,* v. AT&T INC., DIRECTV GROUP HOLDINGS, LLC, and TIME WARNER INC., *Defendants.*	)	Case No. 1:17-cv-02511-RJL

DEFENDANTS' MOTION TO SET TRIAL DATE

Defendants AT&T Inc., DIRECTV Group Holdings, LLC, and Time Warner Inc. respectfully move this Court to set a trial date on or about February 20, 2018. Defendants have conferred with Plaintiff, and Plaintiff opposes the relief requested here. *See* Local Civil Rule 7(m). The reasons for this motion are set forth in the accompanying memorandum of points and authorities and attached exhibits. A proposed order is attached.

Respectfully submitted,

November 28, 2017

By: 

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO SET TRIAL DATE

On October 22, 2016, Defendants AT&T Inc. and Time Warner Inc. entered into an agreement to merge their two companies. The agreement established a merger deadline one year later, which has now been extended 6 months to April 22, 2018, for a total of a year and a half, the maximum time provided in the agreement. Exercising its powers under the Hart-Scott-Rodino Act, *see* 15 U.S.C. § 18a, the Department of Justice, with AT&T's and Time Warner's cooperation, spent more than one year investigating the transaction. On November 20, 2017, the Government filed a complaint alleging that the merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and seeking to enjoin Defendants from closing the transaction.

Upon receipt of the complaint, Defendants promptly notified the Government that they wished to discuss an expeditious schedule to afford the Court sufficient time to consider the matter and issue a decision prior to the expiration of the parties' merger agreement on April 22, 2018. *See* Letter from Daniel M. Petrocelli to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div. (Nov. 21, 2017) (Ex. A). Each side then exchanged initial case

management proposals. Defendants proposed asking the Court to commence trial on February 20, 2018 (within 92 days of the filing of the complaint). The Government, however, proposed that trial commence on May 7, 2018 (a 168-day schedule), *after* the April 22 merger expiration date. This exchange was followed by a telephonic conference, a second round of drafts, and a second telephonic conference. Despite these efforts, the parties remain at an impasse on the proposed trial date.

Subject to the Court's schedule and views, Defendants hereby request that the Court set a trial date of February 20, 2018. Defendants estimate that trial will require 10 court days and would conclude on or about March 5. That would leave approximately 45 days before expiration of the merger agreement on April 22, 2018. Once a trial date is set, the parties can further meet and confer and resolve all or substantially all remaining pretrial scheduling issues and submit a joint proposal to the Court. The attached case management schedule proposed by Defendants (Ex. B) demonstrates there is sufficient time to conduct discovery and prepare the case for trial on February 20.

Defendants' proposed schedule will not prejudice the Government, which has had ample time already to investigate its case. Further delay is unwarranted and unfair to the Defendants, their shareholders, and their customers. As the attached chronology demonstrates, the Government has already obtained substantial discovery from the parties and, indeed, has had much of it since earlier this year. *See* Ex. C. Throughout this process, Defendants have cooperated fully, both substantively and in meeting the Government's timing requests, and certified substantial compliance on March 31, 2017. Defendants produced to the Government nearly 25 million pages of documents from more than 100 different custodians, and the Government deposed 17 AT&T and Time Warner witnesses over 19 days. The Government has

also had the opportunity to obtain documents and testimony from numerous third parties using its broad authority to issue civil investigative demands. Defendants have not had access to any of this discovery. Nonetheless, because a prompt trial is essential to this merger, Defendants are willing to shoulder the disproportionate burden the schedule places on them in order to obtain timely adjudication of this case.

ARGUMENT

I. Establishing a Prompt Trial Date, Before Any Merger Deadline Expires, Is Standard Procedure in Government Challenges to Mergers

Merger challenges are inherently time-sensitive. The very purpose of the Hart-Scott-Rodino Act is to "facilitate the expeditious and effective enforcement of the antitrust laws." *Pharmaceutical Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 199 (D.C. Cir. 2015). Consistent with that purpose, district courts strive to set prompt schedules for trial in merger challenges, recognizing the time-sensitive nature of these proceedings. *See, e.g.*, *United States v. US Airways Grp., Inc.*, 979 F. Supp. 2d 33, 35 (D.D.C. 2013) (denying government request for stay of schedule that set trial 102 days after complaint filing).

The 92-day schedule proposed by Defendants is fully in line with schedules set by courts in other merger cases.[1] These decisions recognize that deadlines in merger agreements create a

[1] Indeed, the median time from complaint to trial in government merger challenges filed since 2000 that went to trial is less than 75 days. The cases included in the calculation are as follows: *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, (D.D.C. 2001); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007); *FTC v. ProMedica Health Sys., Inc.*, No. 3:11 CV 47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *FTC v. H.J. Heinz Co*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Phoebe Putney Health Sys. Inc.*, 793 F. Supp. 2d 1356 (M.D. Ga. 2011), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *rev'd*, 133 S. Ct. 1003 (2013); *United States v. UPM-Kymmene Oyj*, No. 03 C 2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007), *rev'd*, 533 F.3d 869 (D.C. Cir. 2008); *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025 (W.D. Wis. 2000); *FTC v. Lab. Corp.*

"need for expedition" that should be "accommodate[d] . . . to the extent reasonable." *United States v. Anthem, Inc.*, No. 16-1493 (D.D.C. Aug. 5, 2016), ECF No. 40, at 2. Courts have expressly noted that consumers, shareholders, and employees all "have a vested interest in the adjudication of this case without delay." *US Airways Grp.*, 979 F. Supp. at 35.

A prompt trial date is particularly important in this case. Under the merger agreement, Defendants must begin closing the transaction by April 22, 2018.[2] *See* Time Warner, Proxy Statement (Schedule 14A), Annex A, §§ 8.2, 8.5 (Jan. 9, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1105705/000119312517005295/d249981ddefm14a.htm#rom255304_30. After that date, either party may terminate the merger agreement unilaterally. Under the Government's proposed schedule, the merger agreement would *expire* before this case would even be tried. The Government could effectively run out the clock on this merger without ever having to prove its case. The Government's contention that the parties can simply extend the merger deadline unjustifiably disregards the risks and uncertainty inherent in

of Am., No. SACV 10-1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962 (N.D. Ohio 2015); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *United States v. Oracle*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. 2016); *FTC v. Advocate Health Care*, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016), *rev'd*, 841 F.3d 460 (7th Cir. 2016); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 44 (D.D.C. 2011); *FTC v. Penn State Hershey Med. Ctr.*, 185 F. Supp. 3d 552 (M.D. Pa.), *rev'd*, 838 F.3d 327 (3d Cir. 2016); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017); *United States v. Energy Sols., Inc.*, No. CV 16-1056-SLR, 2017 WL 2991799 (D. Del. July 13, 2017).

[2] The merger agreement contained an initial termination date of October 22, 2017, but it allowed either party unilaterally to extend that date up to April 22, 2018. *See* Time Warner, Proxy Statement (Schedule 14A), Annex A, § 8.2 (Jan. 9, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1105705/000119312517005295/d249981ddefm14a.htm#rom255304_30. AT&T and Time Warner both exercised that right when it became clear that the Government's investigation would not be completed in time. No further unilateral extension right is granted in the merger agreement.

any renegotiation of a complex agreement affecting numerous stakeholders. It is not reasonable for the Government to subject the merger to these risks merely because it would prefer—despite its enormous head start—more time to litigate and try this case. The Government's complaint lists 37 attorneys, demonstrating that it has more than sufficient resources and personnel familiar with this matter to proceed on a timely basis.

This Court has "extraordinarily broad discretion to determine the manner in which [it] will conduct trials." *United States v. Microsoft Corp.*, 253 F.3d 34, 100 (D.C. Cir. 2001) (upholding expedited trial schedule). We respectfully request that the Court exercise that discretion to permit this case to be concluded before the merger expiration date.

II. Defendants' Proposed Trial Date Will Not Prejudice the Government

The Government cannot plausibly claim it will be prejudiced by Defendants' proposed trial date. It has been investigating, gathering evidence, and preparing for this litigation for one year. The Government has known that April 22, 2018, was the final date for closing under the merger agreement since it accepted AT&T's initial Hart-Scott-Rodino filing more than a year ago, on November 8, 2016. After issuing Second Requests on December 8, 2016, the Government repeatedly extended its investigation, each time with the full cooperation of Defendants, purportedly to ensure that it had all of the information it needed to assess the competitive effects of the proposed merger.

In response to the Government's multiple document requests, Defendants produced nearly 6 *million* documents comprising nearly 25 million pages from more than 100 different custodians. Defendants provided more than 200 pages of written responses to interrogatories from the Government. The Government has also already deposed 17 of the companies' witnesses over 19 days—including senior executives at both companies. Defendants have met

more than a dozen times with the staff from the Antitrust Division, answered their questions, submitted detailed letters and white papers, presented economic analyses, provided further responsive information, and cooperated in every way with the investigation.

Pursuant to its investigative powers, the Government issued civil investigative demands to nonparties. *See* 15 U.S.C. § 1312. Because the nature and content of that discovery is confidential, Defendants do not know how extensive that nonparty discovery process has been. But there is no reason to believe that, after a year-long investigation, the Government needs substantially more discovery to prepare for trial. Indeed, the Government has already obtained *at least* as much discovery as would ordinarily be available under the Federal Rules of Civil Procedure. *See*, *e.g.*, Fed. R. Civ. P. 30(a)(2), (d)(1) (court order required to take more than ten depositions or depose a witness for more than one day). After such an extensive investigation, the Government cannot reasonably claim that it will be unable to prepare for trial by the date Defendants have proposed.

The Government nonetheless has contended in discussions that Defendants' proposed schedule is unreasonable and that the Government's own proposal reflects the time necessary to resolve this matter. Defendants disagree, and, as the attached proposed case management order reflects, we believe the case can be properly prepared for trial more efficiently and sooner than the Government suggests.

For example, the Government's proposed discovery schedule is unnecessarily prolonged and protracted. The Government seeks up to *300* hours of deposition testimony from *just party witnesses*, despite all the party depositions it already has taken. This is in addition to the substantial third party discovery and expert discovery. The Government insists on exchanges of expert reports by all parties in three separate rounds of reports, with each side serving expert

reports in initial disclosures, rebuttal disclosures, and reply reports, spanning nearly two months. This discovery can be conducted on more promptly, especially since Defendants have already provided a substantial amount of their own expert economic analysis to the Government through expert presentations to Division staff, along with backup data and numerous white papers. The Government's proposals are not consistent with past merger cases, where, for example, expert discovery has typically lasted about one month. *United States v. Anthem, Inc.*, No. 16-1493, (D.D.C. Aug. 15, 2016), ECF No. 74 (33 days between expert reports and close of expert discovery); *United States v. Aetna, Inc.*, No. 16-1494 (D.D.C. Aug. 12, 2016), ECF No. 55 (33 days); *United States v. AT&T Inc.*, No. 11-1560, (D.D.C. Sept. 23, 2011), ECF No. 33 (28 days).

CONCLUSION

Defendants respectfully request that the Court set a trial date on or about February 20, 2018, or at the earliest available time consistent with the Court's schedule. The parties can then jointly work backwards from that date to agree on and submit a proposed case management order for the Court's consideration.

Respectfully submitted,

November 28, 2017

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CERTIFICATE OF SERVICE

I certify that on November 28, 2017, I caused the foregoing to be electronically filed with the Clerk of Court using CM/ECF system, which will send notification of such filing to the registered participants.

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