**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFF'S MOTION TO ENTER SCHEDULING AND CASE MANAGEMENT ORDER AND MEMORANDUM IN SUPPORT**

Plaintiff United States respectfully moves this Court to enter the Proposed Scheduling and Case Management Order attached as Exhibit A.[1] The United States proposes a schedule that will rapidly move this important matter to trial and that ensures sufficient time for discovery of Parties, third parties, and experts, as well as for pretrial preparation, with the goal of efficiently presenting the Court with the evidence needed to decide this case.

**BACKGROUND**

AT&T's proposed $108 billion acquisition of Time Warner is a huge deal, not just in dollars, but also in the number of consumers affected and the potential impact on the present and future of the media and communications industries. At trial, the United States will demonstrate that the proposed merger would allow AT&T to use control of Time Warner's valuable and popular networks to hinder its rivals by forcing them to pay hundreds of millions of dollars more

[1] Plaintiff and Defendants have met and conferred regarding the subject of this motion.

per year for the right to distribute those networks, resulting in higher bills for American consumers. The merged firm would also be able to use its increased power to slow the industry's transition to new video distribution models that provide greater choice for consumers. Given what is at stake, the United States' allegations deserve to be litigated based on facts fully developed through discovery and pretrial preparation.

The United States wants to move these cases to trial expeditiously—its aggressive schedule contemplates only three months for fact discovery and less than two months for expert discovery and pre-trial motions. But the United States objects to Defendants' attempts to rush to a trial without a full and fair opportunity for the United States to present its case and test Defendants' defenses. Such a schedule would also prejudice the Court by depriving it of a fully developed record presented in the most efficient manner.

In contrast, Defendants would shortchange the United States and the Court of the full benefit of discovery to meet the self-imposed option date from Defendants' merger agreement. On that date, April 22, 2018, Time Warner currently has an option to walk away from its merger agreement; it could collect a $500 million break-up fee from AT&T. But this date is one that was set by Defendants, and they can change it with the stroke of a pen. Or they can simply leave the merger agreement unaltered pending the Court's decision.

As Judge Brown observed in *Whole Foods*, in merger cases the district court should take "whatever time it need[s]" to fully consider the evidence. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1041 (D.C. Cir. 2008). The United States proposes a responsible schedule that would afford sufficient time to develop a record on which this Court can base its decision. The United States proposes a trial-ready date of May 7, 2018, with trial starting as soon thereafter as

permitted by the Court's schedule. This schedule is both workable and justified by the importance of this case.

## I. DISCOVERY AND PRETRIAL PREPARTION ARE NEEDED.

By their nature, antitrust cases involve complex legal, factual, and economic questions. All of this is focused on the ultimate, forward-looking question: whether the effect of Defendants' proposed merger "may be substantially to lessen competition." 15 U.S.C. § 18. To answer this question, Plaintiff needs discovery from Defendants, Defendants' third-party customers, suppliers, and competitors.

While much work was done during the investigation phase, much remains to be done. For example,

- Defendants claim that this merger will bring efficiencies and synergies, but have provided no recent evidence relevant to this assertion during the prelitigation investigation. Discovery is necessary of Defendants' ongoing efforts in this regard.
- In addition, Defendants have announced that if the merger is closed they will restructure the business in a way that could require additional discovery on any effect on the anticompetitive impact of the merger. No discovery to date has occurred on these plans.
- Defendants have reassigned employees since the United States' investigation began, requiring additional depositions to be taken regarding Defendants' plans and current operations. Document production by the Defendants during the Investigation under the Second Request effectively finished at the end of March. Accordingly, a "refresh" production as to the current competitive activities of Defendants and non-parties is necessary.

- During the investigation, Defendants withheld or redacted over 400,000 documents on the basis of privilege. Plaintiffs raised concerns about Defendants' privilege claims in several letters, and it remains to be seen whether judicial intervention will be necessary to resolve these issues. But the sheer volume of privilege claims during the investigation suggests additional privilege disputes are both likely and potentially time-consuming.
- Finally, as in other merger cases, expert testimony is expected to feature prominently. Plaintiff's proposed schedule affords sufficient time to fully develop and to explore the opinions of proffered experts on economics and Defendants' alleged efficiencies and synergies.

Both parties anticipate utilizing the full complement of discovery tools—depositions, document discovery, interrogatories, requests for admission, and expert discovery—and provide timeframes for the completion of each. It is revealing that as to almost all of these information-gathering tools, Defendants propose more discovery than Plaintiffs (e.g., 20 interrogatories rather than 15; 15 requests for admission rather than 10)—but propose less time in which to do the discovery.

An overly-short schedule gives a tactical advantage to (1) the party that has information that the other side needs to be able to prove its case and (2) the party that does not have the ultimate burden of persuasion. On both counts, Defendants' overly-short schedule gives a tactical advantage to Defendants.

Numerous issues likely will be before the Court, including the definition of the relevant product and geographic markets, the likelihood of competitive harm in those markets, and the assessment of any alleged merger-specific efficiencies that Defendants may assert are relevant.

The United States needs time to conduct appropriate discovery and develop admissible evidence on each of these issues, including party, third-party, and expert discovery.

It is true that this merger, like most mergers that end up in litigation, has been the subject of a prelitigation investigation that followed a notification required by statute. *See* 15 U.S.C. § 18a. It is this prelitigation investigation that makes it possible for the United States to propose an aggressive schedule. But an investigation to decide whether to bring a case is not the same as the discovery and pretrial procedures that enable full and fair presentation of a case for decision by the Court.

## II. THE MUTUAL EXCHANGE OF INVESTIGATION MATERIALS WILL FACILITATE FAIR AND EFFICIENT DISCOVERY.

Both Plaintiff and Defendants have been active in the prelitigation period. Plaintiff is prepared for a prompt, mutual exchange of non-privileged "Investigation Materials," (pursuant to a protective order) in lieu of Rule 26(a) disclosure. But Defendants seek a one-way street and would exempt themselves from a parallel disclosure.

Plaintiff's proposal of a mutual exchange of Investigation Materials is consistent with the protective and case management orders adopted in several prior merger cases in this Court. *See United States v. Aetna*, No. 16-cv-01494, Dkt. No. 132 (D.D.C. Sept. 20, 2016); *United States v. Anthem*, No. 16-cv-01493, Dkt. No. 74 (D.D.C. Aug. 15, 2016); *United States v. AB Electrolux*, No. 15-cv-01039, Dkt. No. 28 (D.D.C. July 16, 2015); *United States v. AT&T*, No. 11-cv-01560, Dkt. No. 33 (D.D.C. Sept. 23, 2011).

AT&T CEO Randall Stephenson has been quoted as stating that: "Since the day this deal was announced, we have been preparing for litigation." Riker Declaration, Exhibit C. Defendants have almost certainly gathered materials relevant to the litigation during that time. As Plaintiff will disclose the non-privileged materials it obtained during the investigation,

Defendants should, in fairness, likewise disclose any non-privileged materials they have obtained.

A reciprocal exchange of investigation materials will also facilitate efficient discovery, especially when the exchange is in lieu of making disclosures under FRCP rule 26(a)(1). Both parties need to craft discovery plans, identify documents and other materials they need from each other and from third parties, determine who they may need to depose, and decide what kinds of information may be needed for any potential experts. These tasks fall on Plaintiff just as they fall on Defendants.

Defendants have offered no compelling reason to diverge from the standard practice in these cases, and the Court should therefore impose the mutual obligation requested by the United States.

## III. UNITED STATES' PROPOSED SCHEDULE IS REASONABLE.

The United States' proposed schedule outlines the necessary steps for the Parties to be trial-ready as quickly as possible. Its proposal attempts to put both parties in the position intended by the Federal Rules of Civil Procedure: each side has "the fullest possible knowledge of the issues and facts before trial" *Societe Internationale Pour Participations Industrielles et Commercials S.A. v. Brownell*, 225 F.2d 532, 541 (D.C. Cir. 1955) (citing *Hickman v. Taylor*, 329 U.S. 495, 501–502 (1947)).

In the United States' experience with complex merger cases such as this, the Parties can more efficiently manage the time before trial if they know what is required up front. Defendants' proposed schedule does not allow enough time for Plaintiff to fully develop a factual record to present to the court to review. Plaintiff discusses below the main points of dispute between the

parties on the proposed case management order but also submits a more detailed Appendix (Exhibit B) setting forth differences between the parties' proposals.

**A. The United States recommends a fast-paced, but realistic, pretrial schedule.**

The United States is prepared to move quickly to be trial-ready by May 7, 2018. The United States' proposed schedule was built from the ground up, that is, figuring out what needs to be done to bring the case efficiently to trial, and then putting those elements together into a proposed schedule. By contrast, Defendants' proposed schedule appears to focus exclusively on achieving a pre-determined decision date but does not suggest a workable process for getting there.

The United States' proposed schedule allows for three months of fact discovery and less than two months of expert discovery concurrent with pretrial processes. Proceeding any faster would require a significant narrowing of the issues in dispute. And yet, Defendants appear to contest virtually every material substantive issue in their Answer, and have added new issues. Even if the United States issues discovery requests on Defendants' affirmative defenses the day that fact discovery opens, (November 30, per Defendants' proposed order), Defendants would not be obligated to start rolling the production until Tuesday, January 2, 2018, under Defendants' proposed procedure for requests for production. January 2 is the same day that Defendants would have Plaintiff deliver its final witness list and only three days before Plaintiff's initial expert reports would be due. Defendants' proposed schedule would not work even if the United States could immediately process and digest these materials. But it cannot; additional time is required for these steps. By contrast, Defendants would be in a more favorable position under their proposal. They would have until January 22 to submit expert reports and would have received Plaintiff's Investigation Materials by mid-December with no reciprocal obligation to produce.

Here, Defendants' actions speak louder than words. During the pre-complaint investigation, Defendants took approximately four months (113 days) to comply with the United States' document request. That is the pace Defendants established when timing was in their control. Now, Defendants propose to complete all pretrial process in less time than they took to comply with document requests.

Producing documents, while an essential component of civil discovery, is not the end of the process. The United States' proposed schedule builds in enough time for the parties to subpoena documents and use them in depositions of parties and third parties. Defendants' schedule, by contrast, is unrealistic because it does not permit time for these critical litigation preparation tasks.

Much work is required of all Parties to prepare a case of this size and complexity for trial. The United States understands this reality and, in its proposed schedule, attempts to set forth interim deadlines to move the case efficiently along and hope to avoid difficulties on the eve of trial. For example, early direction on confidentiality designations in documents and depositions would allow the Parties to address those issues earlier and reduce the number of requests to seal the courtroom during trial. By setting out these dates early in the process, the United States believes that it will promote more efficient trial preparation by both sides. Comparatively, Defendants' proposed schedule give the appearance of being streamlined. But this is because they collapse all of Plaintiffs' specific interim deadlines one date—a January 19 requirement that the Parties file proposed pre-trial orders—but the Parties will not be in a better position to answer these questions a month and a half from now. The United States' schedule does not require the parties or the court to do more work; we just believe early clarity will allow both Parties to act more efficiently and avoid undue surprise.

**B. The United States' proposed schedule provides sufficient time for expert discovery.**

In putting together its proposed schedule for expert discovery, the United States thought carefully about the amount of time needed after the close of fact discovery for the experts to finalize their opinions based on the complete body of evidence. The United States' proposed schedule would have all parties submit the first round of expert reports only three days after the close of fact discovery. For each expert report exchanged in the initial round, the other side will have 23 days (March 5 to 28) to draft its rebuttal, followed by the initial party's opportunity to respond 23 days later (March 28 to April 20). Following the final exchange of expert reports, the parties would have ten days (April 20 to 30) to conduct depositions.

Defendants' nominal attempt at staggered exchanges of expert reports reveals the shortcomings of Defendants' proposed schedule. For example, Defendants want to delay Defendants' Expert Reports until less than one month before trial (January 22). In the United States' prior litigation to block AT&T's proposed merger with T-Mobile, AT&T lamented that "waiting to file opening expert reports until six weeks before trial . . . d[oes] not provide Defendants that opportunity" to put on their case. Memo in Support of Defendants' Proposed Schedule, 11-cv-1560, Dkt. No. 31 (D.D.C. Sept. 23, 2011). The United States agrees.

Under Defendants' proposed schedule, Defendants may produce multiple expert reports—each hundreds of pages and potentially utilizing new calculations and backup data—29 days before Defendants' proposed trial date of February 20, 2018. And yet Defendants propose only one week for the United States to prepare its rebuttal reports—barely enough time to load data that might be provided with that report, let alone meaningfully respond. Given the complexity of this matter, and the likely prominence of expert reports and testimony, the United

States respectfully submits that the Court would benefit from a schedule that allows the Parties full development of the issues before trial. Defendants' proposal effectively prevents it.

Notwithstanding the best of intentions, Defendants in merger cases sometimes are unable to meet overly ambitious schedules, resulting in inefficient trial preparation. For example, in the United States' litigation last year to block the Anthem-Cigna merger, Defendants promised the Court to "tamp down" discovery and the subsequent Case Management Order required the parties to exchange initial expert reports three weeks before the close of fact discovery. Transcript, *United States v. Anthem*, 16-cv-1493, Dkt. No. 71, at 39:17–21 (D.D.C. Aug. 12, 2016); *Id.*, Dkt. No. 74 (D.D.C. Aug. 15, 2016). Despite those promises, approximately 60 depositions occurred *after* the initial exchange of expert reports. The United States' proposed schedule minimizes the risk of a similar logjam in this matter.

### C. The United States' proposed schedule is consistent with common practice for trials on the merits in merger cases.

The vertical nature of this case adds another layer of complexity to an already complex merger litigation. But even compared to horizontal merger litigations, the United States' proposed schedule—which is further detailed in the Appendix—is consistent with recent cases involving a trial on the merits in this and other districts. The table below shows the scheduled time to trial in merger cases brought by the United States Department of Justice over the last ten years:

| Case Name | Complaint Filed Date | Scheduled Time to Trial |
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| Parker-Hannifin (D. Del.) | September 26, 2017 | [unscheduled as of 11/28] [2] |
| EnergySolutions (D. Del.) | November 16, 2016 | 139 days[3] |

[2] Consummated merger.

[3] Trial placed in "ready pool" for 4/4/17; trial began on 4/24/17.

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| Anthem, Inc. (D.D.C.) | July 21, 2016 | 123 days |
| Aetna (D.D.C.) | July 21, 2016 | 137 days |
| Deere (N.D. Ill.) | August 31, 2016 | 144 days |
| AB Electrolux (D.D.C) | July 1, 2015 | 124 days |
| US Airways (D.D.C.) | August 13, 2013 | 104 days |
| Bazaarvoice (N.D. Cal.) | Jan. 10, 2013 | 243 days[2] |
| AT&T (D.D.C.) | Aug. 31, 2011 | 166 days |
| H&R Block (D.D.C.) | May 23, 2011 | 106 days |
| Dean Foods (E.D. Wisc.) | Jan. 22, 2010 | 545 days[2] |
| Microsemi Corp. (E.D. Va.) | Dec. 18, 2008 | 621 days[2] |
| JBS (N.D. Ill.) | Oct. 20, 2008 | 214 days |

When judged against these benchmarks, and taking into consideration the size and complexity of this action, the United States' proposed schedule of 163 days from the filing of the Complaint to the final pretrial conference is sensible and appropriate.[4] To the extent this schedule

[4] *See, e.g.*, Case Mgmt. & Pretrial Order for Court Trial, *United States v. Bazaarvoice, Inc.*, No. 13-0133 (N.D. Cal. Feb. 19, 2013), ECF No. 29 (over five months of fact discovery, over one month of expert discovery, and three weeks for pretrial motions); Stipulated Scheduling & Case Mgmt. Order, *United States v. AT&T, Inc.*, No. 11-01560 (D.D.C. Sept. 23, 2011), ECF No. 33 (over three months of fact discovery, one month of expert discovery, and nearly three weeks for pretrial motions); Scheduling & Case Mgmt. Order, *United States v. JBS S.A.*, No. 08-5992 (N.D. Ill. Nov. 25, 2008), ECF No. 68 (nearly four months of fact discovery, two months of expert discovery, and five weeks for pretrial motions).

is slightly longer than the most recent cases, the United States has taken into account that this case is a vertical merger and that some of the period for fact discovery will fall during the winter holidays, which may make it harder to communicate with and take depositions of third parties. This schedule is reasonable given the large number of depositions and the interests of third parties in this case. By contrast, Defendants propose a schedule that would be significantly shorter that any of the Department of Justice merger cases in the last ten years.

The schedule in the United States' most recent litigated merger enforcement action against AT&T, *United States v. AT&T Inc. et al.*, No. 11-cv-01560 (D.D.C., filed Aug. 31, 2011), is worth noting. In that horizontal case, the United States alleged harm in a national market and in several local markets across the country. Judge Huvelle scheduled trial for 166 days after the filing of the complaint.

To the extent that Defendants point to the schedules of preliminary injunction proceedings such as *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004)—which began 88 days after the FTC filed its complaint—those proceedings are inapposite. First, preliminary injunction proceedings under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), are inherently different than actions involving a trial on the merits because "the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Whole Foods*, 548 F.3d at 1042 (Tatel, J., concurring) (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)). In preliminary injunction hearings, "[t]he FTC 'is not required to prove, nor is the court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act.'" *Arch Coal*, 329 F. Supp. 2d at 115-16 (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997)).[1] Here, that is exactly the task faced by the United States and the Court.

## IV. DEFENDANTS' JUSTIFICATIONS FOR RUSHING ARE WITHOUT MERIT

### A. Option dates in Defendants' merger agreements should not control the timing of these trials.

Defendants are asking for a trial in three months because of the April 22 "option" date in their merger agreement. But this date is within Defendants' control; they created it, and they can extend it. *Cf. FTC v. Heinz H.J. Co.*, No. 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) ("[A]lthough the appellees state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. . . . [And] even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the appellees urge could not be reclaimed by a renewed transaction following success on appeal." (emphasis in original)). In fact, both Defendants have already exercised their right under their merger agreement to unilaterally extend the termination date to April 22, 2018.[5]

Defendants assert that this merger would be beneficial to their companies and their shareholders. If that is true, they will find a way to extend their contract so they can consummate the transaction if this Court, after a full and fair trial, denies the United States' request for an injunction. Also, it is important to note that this is not a horizontal merger, where the Defendants are competitors whose commercial interests (aside from the merger itself) diverge. Defendants can keep doing business as usual without undue hardship to either of the merging parties. The Court should not allow Defendants' contract to unilaterally limit the time that the Court believes is necessary to consider the evidence and issue a ruling. *Cf. Whole Foods*, 548 F.3d at 1041 (opinion of Judge Brown) ("I appreciate that the district court expedited the [preliminary-

[5] AT&T Inc., Current Report (Form 8-K) (Nov. 28, 2017); Time Warner Inc., Current Report (Form 8-K) (Nov. 28, 2017).

injunction] proceeding as a courtesy to the defendants, who wanted to consummate their merger just thirty days after the hearing . . . , but the court should have taken whatever time it needed to consider the FTC's evidence fully.").

**B. A government investigation is no substitute for civil discovery and does not warrant an unreasonably expedited schedule.**

Courts have long recognized that a government agency's pre-complaint investigation is not a substitute for, nor should it limit, post-complaint discovery. *See, e.g.*, *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("Here, even though the [agency] had already conducted a pre-filing investigation, . . . 'there is no authority which suggests that it is appropriate to limit the [agency]'s right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990))); *Saul*, 133 F.R.D. at 118–19 ("[T]he Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial. . . . Once the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind."); *United States v. GAF Corp.*, 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." (quoting H. R. REP. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvements Act of 1976)). Investigations are focused on deciding whether to bring an enforcement action and, if so, the scope of the lawsuit. That is what happened here. The prelitigation investigation has been sufficient to state well-informed allegations, but more work is required to prepare for this significant trial.

The United States needs a reasonable amount of time and additional, targeted discovery to prepare its case for trial. Defendants appear to contest virtually every issue in their Answer, and have added new issues. Defendants' unwillingness to narrow the scope of this litigation is at odds with their request for an accelerated schedule.

This merger threatens to harm millions of consumers across the country, starkly changing the cable and entertainment industries. That threat should be carefully evaluated, as should any benefits Defendants may argue would flow from the mergers. Purely private commercial concerns—particularly those that are wholly within the control of the merging parties—should not surpass the public's interest in effective antitrust enforcement or deprive the Court of the evidence and time it needs to evaluate the important issues presented by these cases.

**CONCLUSION**

Both Parties agree that they need discovery. That requires time for the Parties to respond to discovery requests, to obtain information from third parties, to analyze the facts gathered, to work with experts, and to organize evidence for efficient presentation to the Court.

For the reasons stated above and in Exhibit B, the United States respectfully requests that the Court enter the attached Scheduling and Case Management Order.

Dated: November 28, 2017

Respectfully submitted,

/s/ Craig Conrath

Craig Conrath
Eric D. Welsh (D.C. Bar #998618)
Alvin Chu
Lauren G.S. Riker
U.S. Dept. of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Phone: (202) 598-8916
Email: craig.conrath@usdoj.gov

*Attorneys for United States of America*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2017, I caused a true and correct copy of the foregoing document to be served upon the parties of record via the Court's CM/ECF system.

/s/ Craig Conrath
Craig Conrath
U.S. Dept. of Justice, Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Phone: (202) 598-8916
Email: craig.conrath@usdoj.gov

*Attorney for United States of America*