IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ASSA ABLOY AB, *et al.*, *Defendants.*	Civil No. 1:22-cv-02791-ABJ

JOINT MOTION FOR ENTRY OF
JOINT PROPOSED SCHEDULING AND CASE MANAGEMENT ORDER

Pursuant to Federal Rules of Civil Procedure 7(b), 16(b), and 26(f), Plaintiff United States of America and Defendants ASSA ABLOY AB and Spectrum Brands Holdings, Inc. (collectively, the "Parties") respectfully move this Court for the entry of a proposed Scheduling and Case Management Order (CMO), which is attached as Exhibit 1. The Parties have met and conferred under Local Rule 16.3 and agreed to submit Exhibit 1.

The Parties have reached agreement on the entirety of the proposed case schedule which includes a proposed trial date of April 17, 2023 (*See* Ex. 1 at ¶1). After engaging in numerous meet and confers over the past several weeks, including near daily phone conferences and exchanging multiple drafts, the Parties have reached agreement on all substantive provisions of the proposed CMO with one limited exception. The Parties have reached an impasse as it relates to one paragraph related to fact discovery deposition limits. (*See* Ex. 1 at ¶ 15). The Parties have submitted their respective positions on the disputed provisions below and request the Court's assistance to resolve this narrow dispute.

Finally, in response to the Court's October 6 minute order directing the parties to "explore whether they can come to an agreement" regarding Defendants' request to seal portions of the Complaint (Dkt. No. 19), the Parties engaged in further discussions but have been unable to resolve their disagreement. We therefore jointly renew our request for the Court's assistance in resolving the dispute.

The Parties appreciate the Court's assistance with the pending disputes and stand ready to provide additional information on any of the open items upon request.

PLAINTIFF'S POSITION STATEMENT

I. Plaintiff's Proposed Deposition Limits are Reasonable and Necessary Due to Disputed Factual Issues and Defendants' Undisclosed Affirmative Defenses

The United States has proposed a mutual deposition limit of 25 fact witnesses per side, as well as potentially two additional 30(b)(6) depositions focused on topics related Defendants' anticipated – but currently undisclosed – affirmative defenses. Defendants already have complete information about their own business operations and affirmative defenses, and therefore have no need to take party depositions. Due to these asymmetries, Defendants' proposal of only 20 fact depositions would be prejudicial to the United States. Plaintiff requires the requested number of depositions in order to depose (1) employees from both merging parties, (2) third-party market participants, and (3) an unknown number of witnesses related to Defendants' undisclosed affirmative defenses including a hypothetical divestiture remedy with an unknown number of bidders or buyers. Each of these critical categories of witnesses is briefly addressed below.

First, Plaintiff needs to depose executives and employees of the two merging parties. Defendants control all employee witnesses and therefore have no similar need for this entire category of depositions. Plaintiff, by contrast, must depose executives from the two separate

Defendants about a wide range of factual issues including: Defendants' development, manufacturing, marketing, and sale of the relevant products; competition in the industry; rationale for the proposed transaction; relevant documents produced during discovery; and other substantive matters. During the meet and confer process, the United States offered to reduce deposition limits if Defendants would agree to stipulate to certain factual issues (i.e. product market definition). Defendants declined that invitation. As a result, additional party depositions are necessary.

Second, the United States intends to discover testimony from third-party market participants who will assist the Court to understand the door hardware industry, the relevant products, market participants, as well as the problems with the proposed merger. Once again, Defendants have no need or interest in deposing such witnesses and can largely rely on their own employees.

Finally, as a further example of the information asymmetry here, Defendants have stated they are working on a future divestiture or asset sale that they intend to offer to this Court as an affirmative defense to their anticompetitive merger. The United States has not received any detailed information about this hypothetical transaction, and in fact, Defendants have firmly held that they cannot produce a final sale agreement or identify any ultimate divestiture buyer (or buyers) until December 1, at the earliest.[1] The United States does not know today, and will not know until at least December 1, numerous key elements of Defendants' affirmative defense such as the size and scope of divested assets, or the identities of the bidders, buyers, brokers, and consultants.

[1] Paragraph 24 of the proposed CMO details Defendants' production obligations related to the proposed divestiture including a December 1 production deadline. If Defendants do not meet their obligations under this paragraph, a day-for-day automatic penalty may require delay of the proposed schedule.

Defendants object to the concept of multiple 30(b)(6) depositions focused on their affirmative defenses; however, Rule 30 does not contain any express limit on such depositions. Further, a separate 30(b)(6) on Defendants' undisclosed affirmative defenses is appropriate due to the fact that Defendants will not even produce any final divestiture agreement until December 1 and questions related to such an agreement will easily consume a full day of deposition testimony due to its oversized importance to Defendants' defense in this case. If Defendants affirmative defenses are not asserted, then these additional 30(b)(6) depositions will never occur.

Defendants are in sole possession of such information and have a vested interest in limiting Plaintiff's ability to conduct discovery on their affirmative defenses including a hypothetical divestiture proposal. Plaintiff cannot accept narrow deposition limits that hinder its ability to conduct full and complete discovery of any efficiencies defense or forthcoming remedy proposal.

Moreover, Defendants' refusal to permit the use of Party CID depositions at trial "in the same manner as depositions taken pursuant to the Federal Rules of Civil Procedure" is based on a faulty premise and would only create the need to take even more Party depositions during discovery. Defense counsel openly asserted over 150 objections during the CID depositions, and in any event, Plaintiff's proposed treatment of CID depositions preserves Defendants ability to assert additional objections before such evidence would be admitted at trial.

For these reasons, the United States respectfully requests the Court accept Plaintiff's proposed deposition and 30(b)(6) limits within paragraph 15 of the proposed CMO. [2]

[2] Defendants attempt to argue below that 25 depositions are not necessary because Plaintiff has not specifically identified the witnesses that need to be deposed. Plaintiff has very clearly identified the categories of witnesses that are required. Defendants' argument deliberately ignores that the Parties agreed to exchange potential witness lists on November 15 (See Ex. 1 at ¶ 1), and therefore attempts to argue an obligation that does not yet exist - for either side.

II. Defendants' Termination Date is Optional

Defendants attempt to overstate the importance of obtaining a decision from this Court on or before their own contractually agreed upon "termination" date of June 30, 2023. This is an entirely optional date that Defendants can move at any time or simply ignore. In fact, the Defendants have already moved the date multiple times on their own, and as a result, it should not constrain or limit any proposed date in the proposed CMO, including but not limited to this Court's future decision.

Defendants' asset and stock purchase agreement currently provides that the agreement "may be terminated" if the transaction does not close by June 30, 2023. The agreement does not automatically terminate, nor does it require either Defendant to terminate the agreement. Therefore, any termination after June 30 or any other future date would be at Defendants' option. This optional termination date was originally June 8, 2022, and has already been extended twice. In June 2022, it was extended to December 8, 2022, and in July 2022 Defendants agreed to extend it further to June 30, 2023. In July 2022, Defendant Spectrum publicly stated that the most recent extension was "to provide [Defendants] with additional time . . . to satisfy the conditions related to receipt of government clearances" for the proposed transaction. Spectrum Brands Holdings, Inc., Report of Unscheduled Material Events or Corporate Event at 1 (Form 8-K) (July 14, 2022), https://investor.spectrumbrands.com/static-files/671d42ec-9293-4a43-94aa-78f446ff7840. That same rationale would apply to any further extensions needed to facilitate the orderly resolution of this enforcement action.

While the Parties have agreed upon the proposed schedule as submitted here, Plaintiff submits that the Court should not be constrained by Defendants' optional termination date in the

event that any revisions or modifications are necessary due to the Court's own schedule or any other reason.

DEFENDANTS' POSITION STATEMENT

I. The Proposed Case Schedule is Necessary to Avoid Potential Termination of the Merger.

The asset and stock purchase agreement entered into between ASSA ABLOY, AB and Spectrum Brand Holdings, Inc. provides that the agreement may be terminated if the transaction does not close by June 30, 2023. The date is not "optional." Rather, it is a date dictated in a binding contract between the parties. Moreover, in an agreement entered into with Plaintiff regarding the timing of its 11-month investigation, the Plaintiff insisted upon Defendants agreeing not to close the proposed transaction until 10 calendar days after a final judgment from the Court. Therefore, the Parties may be unable to complete the transaction if there is no final judgment in this matter prior to June 20, 2023.

Sensitive to the demands placed on the Court's schedule and resources, Defendants have accordingly insisted in negotiations with Plaintiff that the Parties propose that trial begin no later than April 17, 2023 to allow as much time as possible for the Court to enter a judgment, with the goal of resolving the matter no later than June 20, 2023 so that the asset and stock purchase agreement will not terminate and prevent the transaction from closing. If the Court is unable to schedule trial beginning on or before April 17, 2023, the Parties have agreed to meet and confer in good faith on a revised schedule that accommodates the schedule or resource constraints of the Court.

II. There Is No Good Cause to Expand the Number of Depositions Allowed to Each Side.

Plaintiff is seeking a minimum of 27 depositions in this matter, including 25 depositions of fact witnesses plus additional expert depositions and multiple separate 30(b)(6) depositions "focused on issues of remedy or efficiencies" that will not be included in the deposition limit. Ex. 1, ¶ 15. The Federal Rules of Civil Procedure limit the number of depositions to 10 per side Fed. R. Civ. P. 30(a)(2)(A)(i). A total of 50 depositions (plus additional expert and 30(b)(6) depositions) are entirely unnecessary in this matter. Plaintiff has not even identified more than 10 individuals who they seek to depose. To the extent there are any information asymmetries in this matter, it is Defendants who are at a disadvantage. Plaintiff conducted a lengthy 11-month investigation and could use its subpoena power to obtain documents and testimony from numerous party and third-party witnesses. Yet Plaintiff took only six total party depositions during its pre-complaint investigation (despite being entitled to take up to 16 per the Parties' agreement), and has not identified any reason why it would require more party depositions now than it did in the investigation phase.

Nevertheless, in the interest of compromise, Defendants have agreed to an upper limit of 20 depositions per side, inclusive of 30(b)(6) depositions. Defendants are willing to meet and confer with Plaintiff should they require additional depositions as discovery proceeds, as Rule 30 contemplates. However, Plaintiff has not shown good cause to triple the number of depositions contemplated by the Federal Rules at this time. Any party also may request additional depositions with leave of court. Fed. R. Civ. P. 30(a)(2). In the unlikely event that the Parties are unable to agree on the need for more than 40 depositions in this matter, Plaintiff may seek leave of Court to take additional depositions at that time. *See Mannina v. District of Columbia*, 2022 WL 971205 at *4 (D.D.C. Mar. 31, 2022) (in part denying motion for some additional depositions where party

has not "articulated a reason to believe that [the deponents] would provide any new information that could not have been gleaned from previous depositions").

Forty depositions is more than sufficient in this matter. Because Plaintiff has not identified any need for additional depositions at this time, its request is premature and should be denied. *See Donohue v. Bonneville Int'l Corp*., 602 F. Supp. 29, (D.D.C. 2009) (overruling objection and affirming magistrate ruling that party could not increase the number of depositions permitted under the scheduling order prematurely without identifying proposed deponents and before a single deposition had been taken in the case). Plaintiff asserts that it does not yet know how many depositions it might need, but that is exactly why its present request should be denied. Defendants respectfully request that the Court adopt a limit of 20 depositions per side at this time.

Finally, Plaintiff seeks to include language in the order permitting them to use party deposition transcripts from the investigation in the same manner as depositions taken pursuant to the Federal Rules of Civil Procedure. However, Plaintiff sought to inappropriately deny counsel for Defendants the right to make evidentiary objections on the record in certain party depositions during the investigation phase as Defendants would be permitted to do under the Federal Rules. While Defendants anticipate that the parties will be able to resolve any objections to admissibility in advance of trial, this issue should not be resolved prematurely at this time before Defendants have even seen the depositions at issue, and should not be included in the order.

III. The Scheduling Order Should Not Preordain Rule 30(b)(6) Deposition Topics.

Plaintiff's proposed language is also unprecedented in that it would require multiple Rule 30(b)(6) depositions of each Defendant, including:

- "one deposition pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure of each Defendant";

- "one additional Rule 30(b)(6) deposition of Defendants collectively limited to Defendants' claimed facts and quantification of the merger's cost savings and synergies (if any),"; and
- "one additional Rule 30(b)(6) deposition of Defendants collectively limited to Defendants' effort to address or remedy the antitrust violation alleged by the United States regarding the Proposed Transaction." Ex. 1, ¶ 15.

Plaintiff proposes that the second and third categories of 30(b)(6) depositions will not count toward its proposed deposition limit, therefore potentially increasing the number of depositions, which is already excessive for the reasons discussed above. Moreover, Plaintiff's proposal would effectively preordain certain topics and witnesses for Rule 30(b)(6) depositions in contravention of the normal procedure under the Federal Rules. Rule 30(b)(6) permits parties to issue a deposition notice to a corporation and "describe with reasonable particularity the matters for examination." The recipient of the notice then "must designate one or more … persons who consent to testify on its behalf" and "set out the matters on which each person designated will testify." Should Plaintiff choose to notice a Rule 30(b)(6) deposition in this matter, Defendants will comply with Rule 30(b)(6) and may designate "one or more" persons to testify regarding the noticed topics. It is inappropriate for Plaintiff to both preordain those topics in a scheduling order and to specify the number of witnesses (and hence number of depositions) that Defendants must offer on those topics. Rule 30(b)(6) leaves that decision to the recipient of the notice. Defendants therefore request that the Court reject Plaintiff's proposed bracketed language regarding 30(b)(6) depositions.

Dated: October 14, 2022

Respectfully submitted

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