

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

[FILED 4/26/95]

UNITED STATES OF AMERICA; Plaintiff

v. Civil No.: 95-5048

NAT, L.C. and D.R. PARTNERS
d/b/a DONREY MEDIA GROUP; Defendants

COMMUNITY PUBLISHERS, INC.; and
SHEARIN INC., d/b/a SHEARIN & COMPANY REALTORS; Plaintiffs

v. Civil No.: 95-5026

DONREY CORP. d/b/a DONREY MEDIA GROUP,
NAT, L.C.; THOMSON NEWSPAPERS, INC., and
THE NORTHWEST ARKANSAS TIMES; Defendants

BRIEF OF THE UNITED STATES
IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT
AND MOTION TO DISMISS

I. INTRODUCTION

The *Times* and the *Morning News* are "nose to nose" competitors. Testimony of George Smith, Preliminary Injunction Hearing, transcript ("Tr."), at 243-44. They have competed in almost every aspect of their business -- in time of publication, in the days of publication, in local news coverage, in sports coverage, in advertising, in special sections, in use of color.

Competition in this market place is intense. That is good for the papers, the staff members, the readers. The competition between the *News* and the *Times* provides better reading for everyone in this area.

George Smith (publisher of the *Times*) Government Exhibit 35 at DMG 07-00004. They reported this competition extensively in documents

that they wrote at the time -- long before they contemplated any litigation. The record of this competition continued until the eve of this lawsuit.

Today, however, they attempt to divert the Court's attention from this strong evidence and instead argue that their newspapers do not compete because they are in separate markets. Today, defendants maintain that the two newspapers exist and have existed in virtual geographic isolation from one another. Defendants go so far as to allege a complete absence of substitutability as between the two papers. Def. Brief at 20. Defendants' own testimony before this Court in the preliminary injunction hearing cannot be reconciled with their present position. On February 7, 1995, Tom Stallbaumer, publisher of the *Morning News*, boasted of an aggressive and successful telemarketing campaign to sell *Morning News* subscriptions in Fayetteville. Tr. 215, 218.¹ Stallbaumer concluded as follows:

Q: The short of it is, you have been competing for circulation and you have been competing aggressively and very successfully with the *Northwest Arkansas Times*.

A: Yes, sir.

Tr. at 221.

Today, defendants seek to inflate the product market to include all forms of media supplying news and advertising opportunities to northwest Arkansas. However, in defendants' own internal records each newspaper routinely and repeatedly refers to the other local daily newspaper as its primary and aggressive competitor. Competition between the *Times* and the *Morning News*

reached such a pitch that, in 1994, the *Times* referred to competition between the two newspapers as "The Second Battle of Northwest Arkansas," and labeled the *Morning News* "the enemy . . . from the north." Government Exhibit 1 at NAT01-00277.^{1/} At the preliminary injunction hearing, Scott Ford, president of NAT, L.C. and assistant to Jackson Stephens, characterized the *Morning News* as the *Times*' "direct competitor." Tr. at 37. In their documents, Donrey officials consistently discussed, and memorialized in writing, meeting "the competition of the *Northwest Arkansas Times*," Government Exhibit 7 at DMG01-00015, and proposed "actions to be taken in northwest Arkansas to meet the competition of the *Times*." Government Exhibit 8 at DMG01-00019.

In short, defendants now seek to avoid one unavoidable conclusion: Both the *Times* and the *Morning News* define themselves, their coverage, their circulation, and their advertisers against the other newspaper. Understandably, defendants want the Court to ignore this fact, as well as the volumes of their own internal records documenting the intensity of their competition with one another.

Now, on the eve of trial, in place of competition of their own making, defendants offer the hypothetical prospect of future competition from Walter Hussman. Defendants ask this Court to overlook their own real, existing, and proven competition in favor of a highly speculative event -- the entry of a zoned edition of

¹ Exhibits are contained in the Appendix by exhibit number.

the *Arkansas Democrat-Gazette*. Defendants urge this despite Mr. Hussman's unambiguous and economically sound testimony that he will not enter northwest Arkansas with a zoned edition of his *Arkansas Democrat-Gazette* and the substantial corroboration of that testimony. Even if this entry were to occur at some point, defendants fail to acknowledge both the highly speculative nature of the success of such entry, especially in the face of the acquisition at issue in this case, and the strong likelihood that the "zoned edition" form of entry would, nonetheless, be very different from the existing, competing daily newspaper, and thus, unlikely to provide the competitive constraint that the two papers now provide for each other.

For these and the other reasons that follow, defendants' motion for summary judgment and motion to dismiss should be denied.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is not appropriate when there are genuine issues of material fact. The party moving for summary judgment bears the burden of demonstrating there are no genuine issues of material fact. Roberts v. Browning, 610 F.2d 528, 531 (8th Cir. 1979). In a section 7 case, a question of material fact is raised where there are contradictory assertions regarding the effect of a merger on competition and defendants fail to present sufficient evidence to meet their burden of showing there is no issue of material fact regarding the anticompetitive impact of the proposed

transaction. United States v. First Nat'l Bank of Sunbury, 311 F. Supp. 374, 378 (M.D. Pa. 1970).

Summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial. Ripplemeyer v. Nat'l Grape Co-op Ass'n., 807 F. Supp. 1439, 1447 (W.D. Ark. 1992). In a section 7 case, courts should not engage in making a "choice of inferences . . . from the subsidiary facts contained in the . . . exhibits." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). In fact, the court must view the evidence most favorably to the nonmovant, granting all reasonable inferences in the nonmovant's favor. Fischer v. NWA, Inc., 883 F.2d 594, 598 (8th Cir. 1989).^{2/}

III. SECTION 7 STANDARDS

Under section 7 of the Clayton Act, a transaction is presumed illegal if: (i) the market is sufficiently concentrated; and (ii) the combined entity would have a significant market share. Philadelphia Nat'l Bank, 374 U.S. at 364; University Health, 938

² See also Matsushita Electric Industrial Company v. Zenith Radio, 475 U.S. 574, 587-88 (1986); Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682, 685 (8th Cir. 1993) (court must "view the evidence most favorably to the nonmovant, granting all reasonable inferences in the nonmovant's favor as well."); Jeffers v. Tucker, 839 F. Supp. 612, 615 (E.D. Ark. 1993) ("[T]he facts, and inferences drawn from them, 'must be viewed in the light most favorable to the party opposing' the summary-judgment motion.") (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1490 (8th Cir. 1992) ("on summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion."), cert. denied, 113 S. Ct. 1048 (1993). (citations omitted)

F.2d at 1218. In Philadelphia Nat'l Bank,, the Supreme Court held presumptively illegal a merger resulting in a single firm controlling 30% of a market in which four firms had 78% of the sales. Accord, PPG, 798 F. 2d at 1503. In Times Mirror, the court found a prima facie violation of the Clayton Act where the acquiring newspaper's share of total weekday circulation climbed from 10.6% to 54.8%. Times Mirror, 274 F. Supp. at 622.^{3/}

Even if all the daily newspapers with circulation in the Fayetteville metropolitan area are included in the market, the combined *Morning News* and *Times* would possess about 80-84% of the market -- absent these other dailies, the combination would have 100%. Under either measure, this is an extremely concentrated market, with the combination commanding a monopoly position under the law, and giving rise to the presumption that the combination is illegal.

Likewise, this transaction would substantially increase the Herfindahl-Hirschman Index ("HHI"), another often-used measure of market concentration. An HHI above 1800 indicates a concentrated market. Rockford, 717 F. Supp. at 1279; Illinois Cereal Meals, 691 F. Supp. at 1137.

Even if the *Democrat-Gazette* were included in the relevant market, and the government contends that it should not be, substantially common ownership and control of the *Morning News* and

³ *The United States detailed the relevant legal standards under Section 7 of the Clayton Act and Section 1 of the Sherman Antitrust Act in its trial brief. Without repeating that discussion in detail, we incorporate it into this reply.*

Times will raise the HHI in the Fayetteville metropolitan area for daily circulation by 3753 to 7893. For Sunday circulation, common ownership of the *Morning News* and *Times* will raise the HHI by 3275 to 7252. For advertising, the HHI (using advertising lineage in local daily newspapers for the year ending September 30, 1990) would increase by 4918 to 10,000; in other words, an increase to a total monopoly.^{4/} These HHI levels exceed those found in many other cases declaring mergers illegal.^{5/} Given the market share evidence, there is no doubt that this combination deserves the Clayton Act's presumption of illegality.

IV. MARKET DEFINITION

The evidence that the *Times* and the *Morning News* are in the same relevant market consists largely of their own documents and statements. If they were not in the same relevant market, they would not have reported so extensively, and in such wealth of detail, on the "newspaper war" in which they saw themselves engaged. G. Smith Dep., vol. II, at 20, l. 13-17 (Mar. 20, 1995).^{6/}

⁴ Even if the advertising lineage in the *Star Shopper* is included, the HHI increased by 3997 to 8224.

⁵ *PPG*, 798 F.2d at 1502-03 (post-merger HHI of 3295; increase of 1352); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1069-70 (D. Del. 1991) (post merger HHI of 4640; increase of 700); *Rockford*, 717 F. Supp. at 1280 (post-merger HHI of 4603 to 5647; increase of 2048 to 2621); *Illinois Cereal Meals*, 691 F. Supp. at 1137 (post merger HHI of 2606; increase of 480).

⁶ Excerpts of deposition transcripts are contained in the Appendix by witness name and volume or date.

Contrary to the Defendants' claim that there are only a "dozen or two pages" of documents "cherry picked" by the government that suggest that the two papers are rivals, Def. Brief at 4, the documents of the *Morning News* and the *Times* are replete with recent examples of the vigorous competition that exists between the two newspapers, and quite significantly, a great many of these documents are authored by the publishers of the two newspapers. This vigorous competition is discussed more fully in the next section.

Because the defendants' main argument is that the *Times* and the *Morning News* are in separate geographic markets, we will address geographic market first, then product market.

V. RELEVANT GEOGRAPHIC MARKET

A. Material issues of fact regarding geographic market preclude summary judgment

The Court need only compare defendants' testimony at the preliminary hearing and defendants' claims in the instant motion, or their business documents (e.g., "As a quick reminder, the three newspapers [the *Times* and the two *Morning News* papers] serve **one basic market in Northwest Arkansas.**" Government Exhibit 237 at TC 003794 (letter from Steve Summer, head of Thomson Southern Newspaper Group to Dick Harrington, Thomson CEO) (emphasis added)) and that motion, to find ample genuine issues of material fact regarding the geographic market for readers and advertisers. In any event, between any one of defendants' claimed geographic

markets and the Fayetteville metropolitan area market asserted by the Government, there exist material fact issues to be resolved by this Court.^{7/}

In the Brief in support of their motion, defendants attempt to define a geographic market for advertising and circulation for the *Times* that includes Fayetteville but stops at the border of Springdale; a market for advertising and circulation of the *News* that includes Springdale but excludes Fayetteville; and an "advertising market" for both local dailies that apparently includes Little Rock.^{8/} This is only the latest in a string of materially differing assertions by defendants as to the relevant geographic market -- the "area to which consumers can practically turn for alternative sources of the product and in which antitrust defendants face competition." Morgenstern v. Wilson, 29 F. 3d 1291, 1296 (8th Cir. 1994). The Government has produced ample

⁷ On three different dates, defendants appear to have provided no fewer than four different geographic markets for *Morning News*. On February 7, 1995, Tom Stallbaumer, publisher of the *Morning News*, provided two definitions of the *Morning News*' geographic market: the Benton-Washington County area (Tr. at 222); and Benton County, Carroll County, Madison County, Washington County (Tr. at 226). However, in his deposition taken after the preliminary hearing on March 2, 1995, Stallbaumer stated that the *Morning News* is "a Rogers and Springdale newspaper, primarily." Stallbaumer Dep. at 26. Finally, defendants now submit that "[o]f course, the *Morning News* distributes mostly in southern Benton and northern Washington Counties ..." Dep. Brief at 19.

⁸ "Numerous businesses located in Fayetteville and Springdale already advertise in the Democrat's Little Rock edition, such as Dillard's, the Toggery, Red Lobster, K-Mart, National Home Center, Kid. Co and the soon-to-be-built Brandon House." (Def. Brief at 47).

evidence to support its allegation that the relevant geographic market for circulation and advertising competition is "the Fayetteville metropolitan area,^{9/} which consists of the cities of Fayetteville and Springdale." Complaint ¶ 9. In support of this market, the United States offers:

1. Internal documents of the *Times* and the *Morning News* that demonstrate competition for readers and advertisers in the Fayetteville metropolitan area;
2. Testimony by defendants acknowledging on competition in the Fayetteville metropolitan area;
3. Testimony of the government's expert witness on constraints that the *Times* and the *News* place on each other;
4. The content of both papers, each of which covers community news and activities in both Springdale and Fayetteville;

The geographic market defines the area in which the effects of the acquisition are likely to be direct and immediate. Philadelphia Nat'l Bank v. United States, 374 U.S. at 357 (1963). "The purpose in determining the appropriate geographic market is to identify the relevant competitors who constrain the merging firms from exercising market power." United States v. Rockford Mem. Hosp., 717 F. Supp. 1251, at 1261 (N.D. Ill. 1989), aff'd, 898 F.2d 1278 (7th Cir.), cert. denied, 498 U.S. 920 (1990). It is clear in

⁹ Four zip codes which cover Fayetteville and almost all of Springdale (as well as some outlying areas) are the best measure of circulation in the Fayetteville metropolitan area. Complaint ¶ 14. For purposes of the geographic market for circulation, the Fayetteville metropolitan area is coextensive with these zip codes: 72701 and 72703 in Fayetteville, and 72762 and 72764 in Springdale.

this case that the primary constraints on the *Times* and the *Morning News* are each other.

The Government agrees with defendants' statement that the geographic market must be drawn to reflect the "commercial realities" of the market. FTC v. R.R. Donnelly & Sons Co., 1990-2 Trade Cas. (CCH) ¶ 69,239 at 64,853 (D.D.C. 1990). A reliable definition of "commercial realities" can be found in the internal documents of the *News* and the *Times*, prepared in the ordinary course of business by people with an economic incentive to perceive the competitive landscape accurately.

Not surprisingly, in the face of scores of internal documents from both newspapers that focus on competition for subscribers and advertisers in the Fayetteville metropolitan area, defendants seek to persuade the Court that the papers' own views on their highly competitive relationship should be ignored. Def. Brief at 20-21 n.12. Defendants' attempt to divert attention away from their admissions of competition is both factually disingenuous and unsupported by law.

In support of their argument to dismiss documentary evidence suggesting that the *Morning News* and the *Times* compete in the Fayetteville metropolitan area, the defendants cite Flegel v. Christian Hosp., Northeast-Northwest, 4 F.3d 682 (8th Cir. 1993), and Morgenstern v. Wilson, 29 F.3d 1291 (8th Cir. 1994), and erroneously claim that these cases support the notion that when defining a market, competitors' views of the market must be

ignored. Neither case stands for this proposition.^{10/} It is true that consumers' preferences are key to defining markets; but statements of business people trying to affect those customers is some of the best evidence of those preferences. See Baseman Dep., vol. II at 289 ("in the 20 years I've been doing this, I can't remember any situation where someone identified as the closest competitor for the products they're selling today would not also have been the closest competitor in the guidelines question sense.")

Indeed, courts have found competitors' perspective on the market to be useful in defining a market.^{11/} In Tasty Baking Co. v.

¹⁰ In Flegel, 4 F.3d 682, 690 n. 7 (8th Cir. 1993), the court disregarded the plaintiffs' product market definition because it was so narrowly drawn that it merely served to protect the plaintiff from harm resulting from healthy competition. The Flegel court noted that the antitrust laws were designed to promote competition and not to protect individual competitors. Protection of the healthy competition that existed between the Morning News and the Times is precisely the Government's intention in this case.

Although holding that the geographic market definition must address where consumers of the product can practicably turn for products, the court in Morgenstern, 29 F.3d 1291, 1296 (8th Cir. 1994), did not broadly state that competitors' views on where they compete should be ignored when defining markets. In fact, the Morgenstern court held that the geographic market is "the area to which consumers can practically turn for alternative sources of the product and in which antitrust defendants face competition." Morgenstern, 29 F.3d at 1296 (emphasis added).

¹¹ Defendants have also ignored the fact that courts also routinely consider the geographic boundaries of advertisers' trading area when defining a relevant product market. Citizens Publishing, 280 F. Supp. at 992; Buffalo Courier-Express, 441 F. Supp. at 635 (where geographic market was determined from the Audit Bureau of Circulation and the Retail Trading Zone, which was the greater Buffalo area).

Ralston Purina, Inc., the court relied significantly upon the defendant's pre-litigation business records which were inconsistent with the defendant's definition of the market at trial. 653 F. Supp. 1250, 1259 (E.D. Pa. 1987) ("Defendants own documents provide the best reasons not to expansively define the relevant submarket."). Similarly, in Laidlaw Acquisition Corp. v. Mayflower Group, Inc., 636 F. Supp 1513, 1518 (S.D. Ind. 1986), the court defined the market by relying on information contained in documents of the acquiring company. Those documents revealed that the acquiror competed with companies like the acquired company. See United States v. Times Mirror, 274 F. Supp. at 618 (in defining the geographic market, the court considered the fact that the two newspapers in question had recognized the area as a daily newspaper market and regularly reported circulation figures and retail sales for advertisers on the basis of the alleged geographic market), aff'd per curiam, 370 U.S. 712 (1968); United States v. Citizens Publishing, 280 F. Supp. 978, 992 (considering competitor's promotional material which stressed coverage of the alleged geographic market), aff'd, 394 U.S., 131 (1969). Indeed, defendants' own expert routinely relies on business documents in understanding a market. Overstreet Dep., vol. IV, at 214. This conclusion is consistent with common sense.

Documentary evidence from the business records of both newspapers demonstrates that their competition for readers and advertisers is vigorous and ongoing in the geographic area defined by the government as the Fayetteville metropolitan area.

Defendants' assertion that "neither paper has, in the last two to three years prior to NAT's acquisition, found it productive to target the other's market for subscribers"^{12/} is flatly contradicted by the prior testimony of *Times* and *Morning News* employees, and simply irreconcilable with business documents of both papers from the early 1990s until the present. The defendants' own testimonial and documentary evidence demonstrates recent vigorous competition for the metropolitan market of Fayetteville and Springdale.

In September 1993, David Smith, newspaper group publisher at the *Times'* parent company Thomson Newspapers, wrote a memorandum to R. Michael Sheppard at Thomson Newspapers about the *Times'* intent "to dominate **the Fayetteville/Springdale market.**" (Government Exhibit 29 at TC004672) (emphasis added).

Defendants may claim that the *Times'* abandoned its past efforts to expand beyond the Fayetteville metropolitan area. Within the last year, however, defendants have documented and testified to direct competition and substitutability between the *Morning News* and the *Times*.

In a report to David Smith dated September 9, 1994, publisher George Smith described the *Times'* "long-term commitment to increasing circulation, opening up new territory for ad sales and increasing effectiveness of paper **in Northwest Arkansas.**" (Government Exhibit 50 at NAT 01-00401). At a managers' meeting to plan the *Times'* response to the merger of Donrey's Springdale

¹² *Def. Brief at 26.*

and Rogers papers, which had been rumored but not announced, the managers agreed that the new name of the merged paper, which would probably mention "Northwest Arkansas," would give the Donrey paper "that regional appeal the *Times* already has." Government Exhibit 50 at NAT 01-00402. One of the goals set forth in the *Times* 1995 Marketing/Financial Plan is to "Cover Springdale/Rogers events thoroughly." Government Exhibit 83 at NAT 01-00083.

At the same time, the *Morning News* was stepping up its sales presence in the Fayetteville metropolitan area. In November 1994, only six months ago, after Donrey had merged its Rogers and Springdale papers into the *Morning News of Northwest Arkansas*, the consolidated *Morning News* added another advertising sales representative to Fayetteville. Eikenberry Dep. at 34. Ken Eikenberry, retail and national manager of the *Morning News*, explained that his decision to add another *Morning News* advertising sales representative to Fayetteville -- and not to any other town -- was a result of the fact that Fayetteville has more retail business and growth than other communities in Northwest Arkansas, Eikenberry Dep. at 32, 34.

The *Morning News* was also soliciting new subscribers in Fayetteville at the time of the merger of its Springdale and Rogers sections. At the preliminary hearing before this Court, Tom Stallbaumer, publisher of the *Morning News*, testified about the *Morning News*' aggressive campaign to sell subscriptions in Fayetteville:

Q: Now in addition to combining these papers [the Springdale and Rogers papers], you started to sell subscriptions in Fayetteville, didn't you?

A: Give me a time frame on that.

Q: Okay. November 1, 1994, to pick a date.

A: We had aggressively sold subscriptions in Fayetteville prior to that date.

Q: How did you sell them?

A: We have full-time -- well, we have a telemarketing crew that works five days a week, I believe.

Tr. at 215.

Mr. Stallbaumer testified to his belief that the *Morning News* has been so successful in its push for subscribers in Fayetteville against the *Times* that a swing of about fifteen hundred subscribers in the city zone of Fayetteville would put the *Morning News'* circulation even with that of the *Times*. Tr. at 220.

As the Government's expert economist, Mr. Baseman, observed,

[T]here are a lot of documents that talk in particular about the quality competition between the *Times* and the *News* for the patronage of subscribers in their home base and subscribers in the neighboring town. Baseman Dep. at 267.

Defendants submit that "there is no evidence that residents of Fayetteville view the *Morning News* as a substitute for the *Times*." Def. Brief at 20. But Rusty Turner, managing editor at the *Morning News*, in a June, 1994, memorandum to Mr. Stallbaumer concerning the merger of the Springdale and Rogers newspapers, wrote,

[W]e are in a very competitive situation. We must keep in mind what our competition is capable of. **Our readers and advertisers, in this market, are not completely**

defenseless. If our product is dissatisfying, they do have local newspaper options.

Government Exhibit 40 at DMG06-00169 (emphasis added).

Similarly, at the preliminary injunction hearing, Scott Ford, president of NAT, L.C. and assistant to Jackson Stephens, was asked about the primary points he discussed with the employees of the *Times* upon NAT, L.C.'s purchase of the paper. Mr. Ford responded as follows:

We would put resources into expanding the circulation, making the paper bigger, stronger, more competitive, and we've talked a good bit about getting the *Morning News* out of Fayetteville."

Tr. 43. The only way the *Times* could "get the *Morning News* out of Fayetteville" is by convincing over four thousand newspaper buyers to substitute the *Times* for the *Morning News*.

Moreover, during his deposition on March 2, 1995, News publisher Tom Stallbaumer said that Fayetteville readers have a "choice" to read the *News* over the *Times*:

Q: Do you compete for Fayetteville readers.

A: As far as on a circulation basis?

Q: Yes.

A: We solicit Fayetteville residents to take our newspaper. **It's their choice.**

Q: So you do compete with the *Northwest Arkansas Times* for readers in Fayetteville?

A: I apologize. Would you ask that again?

Q: So you do compete with the *Northwest Arkansas Times* for readers in Fayetteville? Question mark.

A: **We give Fayetteville residents the option of reading our newspaper.**

Stallbaumer Dep. at 51. (emphasis added). Similarly, George Smith, publisher of the *Times*, testified that "I consider myself trying to put out a much better product than Springdale does every day, I consider myself trying to grow my circulation every day in the same areas as [sic] Springdale and Fayetteville that Springdale is." G. Smith Dep., vol.II, at 20.

As recently as February 1995, *Times* business records report the paper's competitive response to substitution by a Fayetteville metropolitan area advertiser from the *Times* to the *News*. Government Exhibit 137 at NAT 06-01460. In his manager's monthly report to Warren Stephens, *Times* publisher George Smith observed:

Lewis Auto giving more lineage to Springdale. First time in history. Stan has spoken to Tim so **hopefully we can get back our rightful share.** Government Exhibit 137 at NAT 06-01460.

Defendants' own expert, Dr. Overstreet, testified to a degree of substitutability between the two newspapers.

Q: There is a degree of substitutability [between the *Times* and the *Morning News*] at the circulation level?

A: There's some, yeah.

Overstreet Dep., vol. 1, at 37. During his deposition, Mr. Overstreet described in some detail the circulation gains made by the *Morning News* when that paper moved to morning publication and the *Times* did not.

A. . . . I looked to see what happened to the respective circulations of the papers. And what one finds is that the *News* began to pick up subscribers. And at the same period of time, the *Times* lost some subscribers. So that's indicative at a gross level of some possible substitution.

Overstreet Dep., vol. III, at 154.

In short the, "commercial realities" of the market, reflected in defendants' executives' testimony and in pre-litigation documents, show that the *Times* and the *Morning News* constrain each other. See Rockford, 717 F. Supp. at 1261. This raises fact issues that preclude summary judgment as to the geographic market area in which the papers effectively compete.

2. Evidence concerning the "feedback" relationship between circulation and advertising supports the government's geographic market definition

The evidence establishes that the *Morning News* and the *Times* compete aggressively for readers in the Fayetteville metropolitan area. There is no dispute that each paper has a geographic base of circulation; that is, the *Morning News*' stronghold is Springdale, and the *Times*' stronghold is Fayetteville. However, defendants would have the Court believe that the mere fact that each newspaper has its respective "home base" excludes the reality of intense competition in the relevant geographic area encompassing both Springdale and Fayetteville -- the Fayetteville metropolitan area. The government's expert economist, Mr. Baseman, has testified that the partial overlap of these daily newspapers has the effect of constraining advertising prices. See Rockford, 717 F. Supp. at 1261.

So the competition, even without direct head-to-head competition this week, the presence of an overlapping -- of a daily paper with overlapping circulation leads both papers to charge lower prices than they would chose in the absence of such competition. Baseman Dep., vol. II, at 274.

The explanation for this effect is the relationship between circulation and advertising. In short, when newspapers compete for readers today, they are competing for advertisers tomorrow.

As the government's expert economist, Mr. Baseman, testified, two relationships ("feedback links") between circulation competition and advertising competition create a current constraint by the *Morning News* and the *Times* on each other. As the government's Complaint alleges,

A newspaper's ability to attract readers and build its circulation is not only critical to competition for readers; it also directly affects its ability to compete for advertisers. A newspaper that has more readers is more attractive and more valuable to advertisers. Thus, one important reason that the *Morning News* and the *Times* compete for readers is so that they can better compete for advertisers." ¶ 13.

Mr. Baseman testified about this feedback relationship:

Let's move to the first of the feedback links. And that's the link going from circulation to advertising. The way that works is . . . for advertisers who want to reach a particular set of customers, if those customers can be attracted away from one paper to the other by changing their subscribe -- their subscription, then the advertising follows.

And so there is well established in the economics literature and there are several documents, I've seen particular Donrey documents, talking about the gains in advertising that they had made as a result of the increased penetration in Fayetteville.

There's also a general recognition in the depositions that although quantification may be hard to do with precision, a general agreement with the proposition that if I can take your subscribers away, that will increase my ability to sell advertising and decrease your ability to sell advertising. Baseman Dep., vol. II, at 271-72.

The other feedback relationship was also described in the government's

Complaint:

A newspaper's ability to attract advertisers is not only critical to competition for local advertising; it also directly affects its ability to compete for readers. A newspaper that has more advertisers is more attractive and more valuable to readers. Thus, one important reason that the *Morning News* and the *Times* compete for local advertisers is so that they can better compete for readers. ¶ 17.

Mr. Baseman also describes this

advertising-to-circulation feedback effect. . . . An element of quality from the subscribers' perspective is the amount and usefulness to the subscriber of the local advertising in a local daily paper.

There's strong empirical and economical support for that in economics literature. There's documentary support for it, and in particular, one that comes to mind is some market survey information in the Bentonville documents that I was reading last night where a major element -- subscribers-readers or subscribers are basically asked how much do you value local advertising and the answer was we value it a lot.

Well, the fact that local advertising enters into the quality measure for a paper from the reader's perspective implies that a, even a newspaper monopolist must recognize that feedback loop in pricing his advertising, his or her advertising. But the feedback becomes more pronounced, . . . when there is a competing daily paper, because at that point if I raise my advertising price, I know I'm going to lose some subscribers because the quality of my paper has gone down, but when there is a competing daily paper to turn to, subscribers may not just drop me. They may subscribe to the now more-attractive-to-them competing daily paper, because its quality has not changed and my quality has gone down. Baseman Dep., vol. II., at 272-73.

The result of these feedback relationships is a constraint on advertising prices:

And as a result you would expect -- I would expect that in the presence of overlapping daily papers or partially overlapping daily papers, there is, because of that feedback effect you charge a lower advertising price than if a partially overlapping paper was not there. Baseman Dep., at 273-74.

For this reason as well, summary judgment is not appropriate on this issue.

3. The content of both newspapers supports the government's asserted geographic market

According to Defendants, the *Times* and the *News* "cannot be competitors in a 'local' market unless both papers are serving the same local entity, which is not the case here. To suggest that these newspapers could service other towns, as the Government has, is to speculate wildly in the face of evidence to the contrary." Def. Brief at 32-3 (citations omitted) (emphasis in original). Defendants mischaracterize the Government's position. It is a matter of present fact and not future speculation that the *Times* and the *News* do service the communities of both Springdale and Fayetteville.

A glance inside the front page of the *Times* and the *News* reveals what the papers' own documents and overlapping circulation corroborate -- that each paper provides community news and information about the entire Fayetteville metropolitan area. Though each has a "home base" of readers from which it has expanded, each paper has a schedule of community events; Neither paper differentiates between Fayetteville and Springdale in its coverage of scheduled community activities.

Over the course of a week, (February 8-14, 1995) the *Times* reported upon a range of upcoming events in Springdale, from a meeting of the Springdale Duplicate Bridge Club and the Thursday Night Twirlers Dance at the Senior Citizen building in Springdale

(2/5) to the Springdale City Council meeting (2/14); from the Springdale Moose Lodge No. 877 dinner (2/10) to *Coping Without Smoking*, an event at the JTL Education and Fitness Center in Springdale. The *Times* also provided a daily schedule of Fayetteville events. In the same week, the *News* announced the Fayetteville City Council Mobile Tour (2/5), and meetings of the Fayetteville Trails Committee (2/8), the Fayetteville Advertising and Promotion Commission (2/11), and the Fayetteville City Council, while also reporting a small number of public meetings in Springdale. (Government Exhibits 367-380).

* * *

Summary judgment is not warranted on the geographic market issue.

VI. RELEVANT PRODUCT MARKETS

In this case, there are two relevant product markets: (i) the sale of the package of services known as the local daily newspaper; and (ii) the sale of daily newspaper local advertising. Newspapers sell two products to two sets of customers, i.e., they sell newspapers to readers, and they sell access to their readers to advertisers who view local daily newspapers as distinct from other print or electronic media. See Times-Picayune, 345 U.S. at 610 ("every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space").

Defendants argue that the *Morning News* and the *Times* compete with virtually all media sources -- but not with each other. Each of these other media sources identified by defendants is discussed below.

A. The sale of local daily newspapers to readers

The courts have confirmed the intuitive notion that daily newspapers are a distinct product for antitrust analysis. Times Mirror, 274 F. Supp. at 617, (holding that a newspaper acquisition violated Section 7 of the Clayton Act and stating, "The daily newspaper business is a distinct line of commerce and is a product separate and distinct from any other product. It has sufficient peculiar characteristics which make it distinguishable from all other products."); Citizens Publishing, 280 F. Supp. at 984 (finding the "business of publishing a daily newspaper of general circulation" to be the relevant market); See also Bowen v. New York News, Inc., 366 F. Supp. 651, 675 n.56 (finding it was "well settled that the daily newspaper is a distinct line of commerce" and refusing to include other media, like weekly newspapers, magazines, radio and television, in its definition of product market), aff'd in part and rev'd in part, on other grounds, 522 F.2d 1242 (2d Cir. 1975, cert. denied, 425 U.S. 935 (1976)).

Defendants' attack on local daily newspaper as a relevant product market rests on the notion that daily newspapers face competition from other news sources, such as radio and television. While it is true that some services provided by newspapers compete in limited ways with other forms of media -- like radio,

television, and weekly newspapers -- such limited competition does not mean that radio, television and weekly newspapers are adequate substitutes and thus in the same market. In fact, it is a well settled antitrust principle that not every product competing for a customer's dollar should be included in a properly defined market and the Supreme Court has recognized this principle:

For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose 'cross-elasticities of demand' are small.

Times-Picayune, 345 U.S. 594, 612 n.31 (1953).

Not surprisingly, the case law supports the Government's contention that there are no real substitutes for daily newspapers. Paschall, 695 F.2d at 326 n.4 (holding that suburban newspapers, shoppers, handbills, news magazines, television and radio were "sufficiently different in purpose, content, technique and audience appeal [from daily newspapers] to constitute a separate product market");^{13/} citing Times Mirror, 274 F. Supp. at 618 (although

¹³ The Defendants cite Paschall, 727 F.2d 692, 701 (8th Cir.) cert. denied, 469 U.S. 872 (1984), in support of their argument that other media should be included in the product market, but the court, rehearing the case en banc, actually confirmed its earlier affirmation of the district court's holding that the product market was metropolitan daily newspapers. 727 F.2d at 696. Although the court noted that a monopolist newspaper is constrained in some way by other media once it has raised its price to the optimum price for a monopolist, 727 F.2d at 701, this is a different point from the issue of market definition. Of course every monopolist will raise its price to the point where it faces some constraint. See, e.g., P. Areeda & H. Hovenkamp, *Antitrust Law* P518.2C (Supp 1993).

some of the services provided by a newspaper compete with television, radio, weekly newspapers, and magazines, this does not mean that "all competitors of any service provided by a daily newspaper can be lumped together into the same line of commerce").

Indeed, in Sun Newspapers, a case cited by defendants, the court held that the relevant product market was local daily newspapers. Among other findings, the court determined that there was sufficient evidence to conclude that the defendant, a publisher of a local daily newspaper, weekly newspapers and shoppers, improperly used its monopoly power in the local daily newspaper market to gain advantage in a related market -- local advertising. The court noted that "weekly local newspapers, magazines, and other such publications differ significantly from a local daily newspaper." Sun Newspapers Inc.v. Omaha World Herald Co., 1983-2 Trade Cas. (CCH) ¶ 65,522, 68,578 at 68,587, modified, 713 F. 2d 428 (8th Cir 1983).

1. National and regional daily newspapers are not in the product market for readers

Defendants argue that other daily circulation newspapers must be included in the product market.^{14/} Although national and regional daily newspapers have a similar format to local daily

¹⁴ *The Democrat Gazette does not currently publish a zoned edition of its newspaper to target the citizens of the Fayetteville metropolitan area. As a result, it is not considered to be in the relevant product market because it contains little, if any, local news relating to the Fayetteville metropolitan area. Whether the Democrat Gazette will publish a zoned edition of its newspaper to target Fayetteville readers is a separate issue that will be discussed more fully below.*

newspapers, they contain little, if any, local news. In recognition of the reality that regional newspapers are fundamentally different from local daily newspapers, other courts have excluded national and regional newspapers in defining a product market. See Sun Newspapers, ¶ 65,522 at 68,587 (relevant product market was "local daily newspapers"); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 441 F. Supp. 628 (W.D.N.Y. 1977) (including only the daily newspapers circulating in the Buffalo metropolitan area in the product market defined as "daily metropolitan newspapers"), rev'd on other grounds, 601 F.2d 48 (2d Cir. 1979); see generally Paschall, 727 F.2d at 696 (affirming that product market was "metropolitan daily newspapers").

The Defendants cite Knutson v. Daily Review, Inc., 548 F.2d 795, 804 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977), and claim that the government must offer proof relating to the following: the extent to which coverage of national/regional newspapers overlaps with local papers; whether non-community newspapers distributed local editions; extent of penetration of the non-community papers in areas where community papers circulated; and whether there was a significant number of readers who subscribed to both types of newspapers.

The Knutson case is factually distinguishable from the case at hand.^{15/} In any event, the facts will show that news, sports, and

¹⁵ *It is significant to point out that the court in Knutson was*
(continued...)

feature coverage of the *Morning News* and the *Times* is dramatically different from that of the *Democrat*, the *Tulsa World*, and the *Kansas City Star* since none of these papers include significant news or advertising particular to northwest Arkansas. Indeed, Dr. Overstreet, the defendant's own expert, explained that the reason that he would not expect to see readers switch to the *Democrat* in the face of price increase is because it currently does not contain local or regional news or local advertising. Overstreet Dep., vol. III, at 125-26. In addition, the actual circulation and penetration figures for these newspapers in the Fayetteville metropolitan area is small compared to the *Times* and *Morning News*.^{16/} Furthermore, none of these papers currently distribute

(...continued)

*faced with a far more difficult task than the one in the case at hand. The plaintiffs in Knutson claimed that daily community newspapers circulating in the suburbs of San Francisco were sufficiently distinguishable from San Francisco metropolitan newspapers; therefore, these papers were part of a different product market. Presumably, both the community newspapers and the metropolitan newspapers contained news relating to the San Francisco metropolitan area. Unlike the newspapers involved in Knutson, the *Morning News* and the *Times* are the only papers containing any local news relating to the Fayetteville metropolitan area. It is also interesting that the Knutson court did not contend that the plaintiffs were required to make the same showing for national newspapers, thus confirming the rather obvious notion that national newspapers are in no way reasonable substitutes for local newspapers.*

¹⁶ *In a 1993 market analysis, the *Times* reported the circulation and penetration figures for its competitors. The figures for the *Tulsa World* and the *Democrat* were small compared to the penetration figures for the *Morning News* and the *Times*. Significantly, the market study on competition did not even address the market shares of the *Kansas City Star*, thus signifying that it has no real presence in the area. See Government Exhibit 249 at TC 004205.*

localized editions or special sections which contain news relating to the Fayetteville metropolitan area. See Overstreet Dep., vol. III, at 114, 125-26.^{17/}

2. Magazines are not included in the product market for readers

For similar reasons, magazines, even when tailored to a specific geographic area, are not, as the defendants suggest, substitutes for local daily newspapers. By virtue of their infrequency of publication, as compared to *daily* newspapers, the contents of magazines are different than local daily newspapers and unlike daily newspapers, magazines are often targeted at a specialized audience. Sun Newspapers ¶ 65,522 at 68,587; Paschall, 695 F.2d at 326 n.4 (excluding news magazines from a metropolitan daily newspaper market); see also Kansas City Star Co. v. United States, 240 F.2d 643, 660 (8th Cir. 1959) ("magazines are not effective alternatives for the daily newspapers"). Defendants' expert never even mentioned magazines. Magazines are not in the product market.

¹⁷ Citing FTC v. R.R. Donnelly & Sons Co., 1990-2 Trade Cas. (CCH) ¶69,239, at 64,852 (D.D.C 1990), as support, the defendants also claim that consumer preferences are subjective and should therefore be dismissed. In that case, the court admitted that it based its decision on the fact that recent technological advances had made the two products in question virtually indistinguishable from each other. The products involved here are radically different from the products in question in FTC v. R.R. Donnelly & Sons Co. The readers' and advertisers' preferences in this case are reasonably explained by the readily apparent, often obvious, disparities between daily newspapers and other news sources and modes of advertising.

3. Weekly newspapers are not included in the product market for readers

Weeklies offer purely local news, and because they are distributed only weekly, they offer virtually no time-sensitivity.^{18/} Defendants' own witness, the publisher of the *Morning News*, testified at the preliminary injunction hearing as follows:

Q. Now, you don't compete with weeklies for news?

A. No. I would say -- not for breaking news.

Q. You don't compete with weeklies for circulation?

A. To a large extent, no.

Q. It's a different product, isn't it?

A, Yes, it is.

Tr. at 222-23.

Similarly, the defendants' own expert highlighted the differences between weekly newspapers and daily newspapers when testified that he had not made up his mind as to whether weekly newspapers were in the product market:

By virtue of being weekly, they [weeklies] are not out as frequently and so that makes them different. They are not daily. They tend to be smaller, typically, and so they will contain less of, I guess, virtually everything So the weeklies also tend to be more narrowly circulated . . . so the nature of the advertising contained therein would be somewhat different as well.

Overstreet Dep., vol. III, at 110.

¹⁸ This factor was considered in *Sun Newspapers* when the court determined that "the sum of the differences between daily and weekly newspapers makes it clear that they should be grouped in different product markets." *Sun Newspapers*, ¶65,522 at 68,587.

In any event, there are no significant weekly newspapers in the Fayetteville metropolitan area to which readers could switch in the face of a price increase.^{19/} And, there is additional evidence in this case that weekly newspapers are not good substitutes for local daily newspapers.^{20/}

4. Radio and television news are not included in the product market

The defendants' contention that other news sources, such as radio and television, are necessarily included in the product market, is contrary to the apparent position of their expert, Dr. Overstreet. He testified that neither radio nor television is in the relevant product market "for normal antitrust purposes" or "in the [Merger] guidelines sense of markets" for local news. Overstreet Dep., vol. III, at 103, 105, 107. He also testified that "for people that want to read print, I don't think TV offers them a good direct option. And I wouldn't expect to see much substitution on the basis of a small variation in the price of the

¹⁹ One small weekly, the Fayetteville Weekly, circulates regularly in Fayetteville and Springdale. See Government Ex. 130 at NAT07-00038, 42 ([T]he 8-page tab weekly is just one in a long succession of alternative weeklies"). The Fayetteville Begin is a similar publication.

²⁰ A Times' market analysis disparages weeklies by saying that they offered only "chicken dinner" type editorial content. Government Exhibit 83 at NAT01-00110. Also, the vice president and general manager of the Democrat testified that he did not "know of any newspaper in Arkansas where a weekly is a strong competitor with a daily in the same market." P. Smith Dep. at 126.

newspaper." Overstreet Dep., vol. III, at 103.^{21/} Not surprisingly, other courts have recognized the fundamental differences between daily newspapers and radio and television, and have held that daily newspapers are a distinct product from radio and television. Citizens Publishing, 280 F. Supp. at 986-87; see also Sun Newspapers, ¶ 65,522 at 68,587; Paschall, 695 F.2d at 326 n.4; Morning Pioneer Inc. v. Bismarck Tribune Co., 493 F.2d 383, 386 (8th Cir.), cert. denied, 419 U.S. 836 (1974); Bowen, 366 F. Supp. at 675 n.56.

B. Daily newspaper local advertising is a properly defined market

The second relevant product market is daily newspaper local advertising. It is true that some advertisers can use other print media, especially, for some purposes. But many advertisers, and many types of advertisements, require daily newspaper local advertising.

1. Other forms of print advertising are not substitutes for daily newspaper local advertising

In cases involving daily newspapers, courts consistently have held that advertising in other media is not interchangeable for advertising in daily newspapers. Times-Picayune, 345 U.S. at 612 n.31 (the advertising industry and its customers "markedly

²¹ In a subsequent deposition, Dr. Overstreet contended that newspapers face "some degree of competition and it's minor," from television and radio. Over the long run, as defined as a period of five years or longer, radio and television will affect readership and advertising of newspapers. Dr. Overstreet acknowledges that this long run perspective of the market is "beyond the guidelines." Overstreet Dep., Vol. IV at 6-9.

differentiate between advertising in newspapers and in other mass media"); Morning Pioneer, 493 F.2d 383 ("electronic media is not wholly competitive with respect to some types of news and advertising," including "price advertising"); Kansas City Star Co. v. United States, 240 F.2d 643, 659 (8th Cir. 1957) (magazines, specialty publications, and weekly newspapers were not effective alternatives for advertising in daily newspapers). Buffalo Courier-Express, 441 F. Supp. at 635 (including the two daily newspapers in the Buffalo-metropolitan area in the "advertising market"); Citizens Publishing, 280 F. Supp. 978 (holding that the metropolitan newspapers in question had power over price with respect to the sale of advertising in their newspapers despite finding that all major advertising media were in competition with each other); see generally Times Mirror, 274 F. Supp. 606.^{22/}

More recently, in Home Placement Service v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982) cert. denied, 460 U.S. 1028

²² *The Defendants claim that Kansas City Star and Morning Pioneer are only relevant in a § 7 merger case between two newspapers offering the same subscribers to the advertisers. But any time that two newspapers compete for readers, they do not necessarily have the same readers at any moment, because many readers choose to read only one paper. The defendants also argue that older newspaper cases are of little precedential value in light of the changes that have occurred in news and media industries over the years. The courts in these "older" cases, however, based their decisions on the same fact clusters that are present today in the Fayetteville metropolitan area which include the following: advertisers' need to advertise a large number of items at specific prices; advertisers' desires for means in which to advertise time-critical advertisements; and advertisers' needs for lasting, rather than transitory, messages. Additionally, as discussed below, recent cases support the Government's product market definition.*

(1983), the court held that the relevant product market was "daily newspaper rental advertising," and specifically excluded weekly newspapers, radio, television and billboard advertising from its product market definition because they were not "reasonably interchangeable with" or on "substantial parity" with daily newspaper advertising. Home Placement, 682 F.2d at 280.

The defendants have cited cases where courts have defined a more expansive product market, but these cases are distinguishable from and provide little guidance here because the plaintiffs in each of these cases were not publishers of daily newspapers and were therefore arguing for a more expansive product market. As a result, in defining the product market, these courts from the outset focused on the preferences of advertisers who were already inclined to substitute alternate forms of advertising for daily newspapers. These courts, therefore, never faced or adjudicated the issue of a narrower market. See Midwest Radio v. Forum Publishing Co., 942 F.2d 1294, 1297 (8th Cir. 1991) (where the plaintiff, a radio station owner, urged the court to include daily newspapers, radio, and television in its product market definition and admitted that billboards, weekly newspapers, magazines, and direct mail directly competed with radio, television and the daily newspaper); Sun Newspapers, ¶ 65,522 at 68,589 (where the court accepted the plaintiff's product market definition of "local newspaper advertising," which included weeklies and shoppers, but not radio, television, billboards, or directories); Sales & Advertising Promotion, Inc. v. Donrey, Inc., 598 F. Supp. 538, 547

(N.D. Okla. 1984) (where the plaintiff, a publisher of weeklies and shoppers, urged the court to include shoppers and newspapers in its product market definition and the court found that the "probable relevant product market" was "ill-defined" and did not include all forms of advertising, but included local newspaper display advertising, local radio, billboards, and zoned direct mail); Huron Valley Publ. Co v. Booth Newspapers, 336 F. Supp. 659 (E.D. Mich. 1972) (where the plaintiff was the publisher of a weekly newspaper).

Similarly, in Drinkwine v. Federated Publications, Inc., 780 F. 2d 735 (9th Cir. 1985), a case cited by the defendants, the plaintiff was a publisher of 27 shoppers in the Boise, Idaho area. Two of the plaintiff's shoppers were distributed in the local daily newspaper. When the daily newspaper refused to use the plaintiff's shopper because it was not printed by the newspaper company, the plaintiff brought a monopolization suit. Although the court refused to define the product market as the sale and preparation of local display advertising distributed in a daily newspaper, it based its decision on the availability of alternative distribution channels for advertisers who were already inclined to advertise by way of a shopper. And the court, recognizing that defining a product market is by law a factual inquiry, could not ignore the record which contained "clear evidence" that the merchants who advertised in these shoppers inserts were sensitive to costs and would change to alternative sources of advertising. By contrast, the evidence in this case

will demonstrate that many advertisers cannot and will not switch to alternative forms of print advertising in the wake of a price increase.

Many advertisers do not view weekly newspapers as good substitutes for daily newspaper local advertising and weekly newspapers do not reach the number of readers with the same degree of frequency desired by many advertisers who place advertisements in the daily newspapers. They are particularly inappropriate for advertisers who wish to place time-sensitive advertisements, such as for promotions or sales that begin on certain dates. Indeed, Tom Stallbaumer, the publisher of the *Morning News*, testified at the preliminary injunction hearing that some advertisers use weeklies, but also stated:

Q. But you don't compete with them [weeklies] for price-sensitive areas, such as groceries, produce, the --

A. Probably not, no.

Q. -- the -- those items that newspapers sell better than anything else -- large laundry list of grocery items, automobiles, a lot of cars -- television can't deliver that, radio can't deliver that, the weeklies can't deliver it. It has to be delivered by the daily newspapers, doesn't it?

A. I would agree.

Tr. at 222-23.

Many advertisers do not consider shoppers to be an adequate substitute for newspapers. Despite concluding that shoppers are in the market "to some degree," the Defendants' expert testified: "Well, I think that the advertisers don't think of [shoppers] as the same thing as a newspaper. A newspaper has both ads and the

print, if you will, for reading. And people probably pick a newspaper up for different purposes." Overstreet Dep., vol. III, at 66, 68. Shoppers also fail to satisfy merchants whose advertisements are time-critical. In addition, shoppers do not meet the needs of advertisers who wish to convey an elite product image. Then, too, advertisers who place advertisements in shoppers cannot be confident that people actually read shoppers. Overstreet Dep., Vol. III, at 68. Tellingly, the publisher of the *Morning News*, Mr. Stallbaumer, testified that he was "not at all familiar with the shoppers." Stallbaumer Dep. at 27.

For the same reasons that shoppers are not in the market, advertising by direct mail is not in the market. The *Times* and the *Morning News* do not discuss direct mail significantly in their internal documents.^{23/}

2. Radio and television are not substitutes for daily newspaper local advertising

Defendants' expert, Dr. Overstreet testified that for many advertisers, radio and television advertising are not economically adequate substitutes, and that most print advertisers would absorb as much as a 20 percent increase in advertising rates before considering such alternatives. Overstreet Dep., vol. III, at 37, 50-51, 59. He also indicated that he had spoken to a number of

²³ For example, none of the *Times*' monthly manager reports for the period when they contained market share reports, six month period from February 1993 through the end of July 1993, even consider direct mail when computing the market shares of its competitors. See Government Exhibits 85 at NAT08-00142; 88 at NAT08-00137; 89 at NAT08-00132; 91 at NAT08-00126; 94 at NAT08-00118; 96 at NAT08-00110-00111.

advertisers who did not find radio advertising to be effective. Overstreet Dep., vol. III, at 59. Similarly, George Smith, publisher of the *Times*, testified that advertising on radio or television is "not a substitute for reaching the -- reaching the certified households that a daily newspaper can do." G. Smith Dep., vol. II, at 79.

The court in Sun Newspapers, a case cited by defendants, excluded radio and television from the advertising market because of "their inability to convey the same amount of information as print advertising and their inability to be referred to later." Id., ¶ 65,522 at 68,589; see also Citizens Publishing, 280 F. Supp. at 990 (considering the transitory nature of advertising on television and on the radio to be significant in distinguishing broadcast media from daily newspapers).

Advertisers may run advertisements in the daily newspapers simultaneously with, or in addition to, advertisements on the radio or on television, but in doing so, these advertisers simply are seeking to communicate different types of messages; such as conveying "image" through television or radio and detailed sales information through local newspapers. See Overstreet Dep., vol. III, at 36-37. ("more or less image advertising, if you will, are more amenable to the television-type medium"); see also Tr. at 222-23 (Mr. Stallbaumer testifying that radio and television are not appropriate for certain types of advertisers).

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Advertisers do not consider advertising in weekly newspapers, in shoppers, by direct mail, or on the radio or television to be good substitutes for advertising in local daily newspapers. These various means of advertising are viewed by advertisers as complementary advertising modes, at best. A small advertising price increase in the local daily newspaper would not be constrained by competition from such other media. Therefore, advertising in local daily newspapers is a relevant line of commerce and a relevant product market within the meaning of section 7 of the Clayton Act. Summary judgment is inappropriate on the issue of relevant product market.

VII. COMPETITIVE EFFECTS

A. The effects of this acquisition are anticompetitive

As noted above, there is a presumption that this transaction is illegal.

1. The evidence shows that substantial competition will be eliminated

The Defendants mischaracterize the standards of Section 7 when they argue that the government must prove that the common ownership of the *Morning News* and the *Times* "will substantially reduce competition." Defendant's Brief at 13. The government need not prove an actual lessening of competition or that prices will rise -- instead, the government need only show that there is a reasonable probability that this harm might occur. Philadelphia Nat'l Bank, 374 U.S. at 363; Brown Shoe, 370 U.S. 323; FTC v. Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989) (under

Section 7 "[a] certainty, even a high probability, need not be shown"); University Health, 938 F.2d at 1218 ("[a] predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for"); HCA, 807 F.2d at 1389; Rockford, 717 F. Supp. at 1278; Times Mirror, 274 F. Supp at 613. And any doubts are to be resolved against the merger. FTC v. Elders Grain, Inc., 868 F.2d at 905 (citing Philadelphia Nat'l Bank, 374 U.S. at 362-63). Section 7 was designed to arrest anticompetitive tendencies in their "incipiency" and, thus, "'nip monopoly in the bud.'" du Pont, 353 U.S. at 592-93.

It takes neither sophisticated economic theory nor a stretch of the imagination to predict the anticompetitive effects resulting from the combination of the *Morning News* and the *Times*. As discussed at length above, and in the Trial Brief of the United States, the newspapers compete vigorously on quality, service, and price. The combination of the *Morning News* and the *Times* under common ownership and control threatens the end of this vigorous quality, service, and price competition, and threatens to reduce quality and service levels received by readers and advertisers and to increase prices paid by them. See Times Mirror, 274 F. Supp. at 623 ("legal presumption that when one corporation achieves control of another, there is an elimination of competition between them"). See United States v. United Tote Inc., 768 F. Supp. 1064, 1076 (D. Del. 1991) (recognizing that quality competition is significant because "[i]n a truly competitive market, product sellers compete vigorously on both quality and price."). The documents of the

Morning News and the *Times* report numerous examples of the quality improvements that were made to each paper as a result of direct competition between the *Morning News* and the *Times*.^{24/} Similarly, the *Morning News* and the *Times* have constrained one another's advertising prices.^{25/}

In sum, after the acquisition, there will be little or no incentive for the *Morning News* and the *Times* to compete for readers and advertisers on the basis of price, quality, or service. Section 7 was enacted to ensure that firms would not be allowed to acquire their primary competitor and thus reduce or end the consumer benefits that come from precisely the type of competition described above.

²⁴ For example, a late 1994 *Times* document reports that competition with the newly merged *Morning News* will "drive product improvement" for the *Times*." Government Exhibit 249 at TC 004202. See Government Exhibits 26 at TC001961 (On Sept., 4, the *Times* will unveil its newly redesigned Saturday sports package, *Sport Saturday*, which will rattle the *News*' cage.") And, in direct response to the *Times* starting a travel section, the *Morning News* began to publish a travel page. Furthermore, the *Morning News* and the *Times* have both increased their use of color printing in response to competition from one another. These types of quality enhancements were the direct result of competition between the two newspapers.

²⁵ For example, in May 1993, the *Times* learned that the *Donrey* paper in Fort Smith was offering a coupon book of discounts for advertisers. Anticipating that the *Springdale* and *Rogers Morning News* would follow suit, the *Times* offered advertisers a coupon book. Two weeks later, when the *Times* perceived that advertisers preferred the coupon package that the *Morning News* was offering, it redesigned its coupon package. Government Exhibits 28 at TC004788; 184 at NAT 08-00022-23.

B. Defendants cannot successfully rebut the presumption that this transaction is illegal

Once the Government shows substantial concentration and significant market share for a combination of firms, the burden shifts to the defendants to produce evidence to rebut the presumption of illegality and show that the acquisition will not have market power and that the acquisition likely will not threaten competition. Philadelphia Nat'l Bank, 374 U. S. at 363; University Health, 938 F.2d at 1218; Rockford, 717 F. Supp. at 1279. Here, the defendants argue that the combination of the two newspapers will not threaten competition, and that any presumption created in favor of the combination's illegality can successfully be rebutted.

Defendants attempt to rebut the presumption in favor of the illegality of the combination by arguing that newspaper markets are in general concentrated markets and that monopoly newspapers have no incentive to raise prices. Each of these erroneous claims will be discussed in turn below.

1. That newspaper markets are concentrated in general is of little import

The defendants' argument that there are relatively few two newspaper towns and that as a result the combination of the *Morning News* and the *Times* should be permitted is both irrelevant and unpersuasive. That fact is not a green light for two financially healthy newspapers to combine under common ownership and thus eliminate substantial competition between them. Although it is true that the Fayetteville metropolitan area is the area of effective competition between the two newspapers, it is not the

only area where the two papers circulate. Both newspapers are prosperous today at least in part because each paper has a "home base" and serves certain areas of northwest Arkansas that the other newspaper does not serve. If one day, the area becomes a one newspaper town, then the outcome, should not be preordained by the combination of the *Morning News* and the *Times* -- it should be determined by the free market and through intense and unfettered competition that will benefit all readers and advertisers in northwest Arkansas. It is precisely this type of competition that the antitrust laws were designed to protect.

2. Feedback loops will not prevent the substantial reduction in competition that will be created by this combination

The defendants contend that the existence of feedback loops will prevent the anticompetitive effects of this combination, essentially arguing that a newspaper monopolist will have no incentive to raise prices to readers. As explained above, however, this ignores the powerful *current* competition on the *Times* and the *Morning News* that will be eliminated by the acquisition. See Section V. A. 2, *supra*.

To prevail in a section 7 case, the Government need only prove the probability that competition will be *lessened* by the combination. It is of no relevance that the *Morning News* and the *Times* may be constrained in some small way if their combination is permitted. Combinations, such as the one proposed here, do not pass muster under section 7 through a mere showing that the firms in question can be prevented from implementing *unlimited* price

increases. Instead, to prevail under section 7 the government need only show that competition may be substantially *lessened*.^{26/} The powerful incentives currently serving to keep quality high and prices low are the incentives that the government is seeking to protect.

XI. THE ARKANSAS DEMOCRAT-GAZETTE IS OF LITTLE COMPETITIVE SIGNIFICANCE IN THE FAYETTEVILLE METROPOLITAN AREA, EITHER THROUGH ITS CURRENT LIMITED CIRCULATION HERE OR THROUGH ANY HYPOTHETICAL BUT UNLIKELY EXPANSION

The *Democrat-Gazette's* impact on competition for readers and advertisers in the Fayetteville metropolitan area is negligible at best. The current limited circulation of the *Democrat-Gazette* does not provide meaningful competition against the *Morning News* and the *Times*. More importantly, the *Democrat-Gazette* is unlikely to achieve any greater competitive significance in the future. The acquisition of the *Times* has fundamentally altered the structure of the market, drastically undermined the potential profitability of expansion, and all but eliminated any chance that might have existed that the *Democrat-Gazette* would enter.^{27/} In evaluating the possibility of entry, the United States examined not merely the statements of Mr. Hussman, but also looked to corroboration from

²⁶ Hence the approach of the Merger Guidelines which, when defining markets, calls for an inquiry focusing on the effects of small (5 - 10%) price increases.

²⁷ Defendants' brief asserts that the United States "illegitimately disregarded" the possibility of Hussman's entry, Def. Brief at 5, and was determin[ed] to ignore" that possibility. On the contrary, the United States has examined the issue very closely, and submits in this brief substantial, mostly uncontroverted, evidence demonstrating that such entry is unlikely.

documents, other witnesses, the economic literature, and the industry history of little or no entry against established newspapers.

Moreover, even if the *Democrat-Gazette* had managed to introduce a zoned edition of its Little Rock newspaper into this area before the acquisition deterred that possibility, or if it theoretically were able to do so in the future, that paper's competitive effect on the *Morning News* and *Times* would be uncertain at best and minimal at worst. In any event, even if the *Democrat-Gazette* somehow were to enter, the transaction still would violate Section 7 of the Clayton Act, because it would substantially reduce the competition that would have existed but for it.

Finally, the mere "perception" by the *Times* or *Morning News* that there may be some remaining, theoretical possibility of entry by the *Democrat-Gazette* in the future will not be act as any constraint on them or on the anticompetitive effects of the acquisition.

A. Defendants' Arguments Attempt to Shift Attention Away From the Real Issues In This Case

Defendants' brief goes to great lengths to try to shift the focus of this case away from their well-documented (in their own records) vigorous competition with one another, and onto the speculative, now highly unlikely specter of competition from a non-existent regional edition of a Little Rock newspaper. In essence, defendants are asking the Court to sacrifice the real thing -- proven and effective competition today and tomorrow -- for the

prospect that Walter Hussman might someday appear on the scene and somehow, gradually build a zoned regional edition into a competitor equivalent to the *Times* of today. Not only are defendants not entitled to summary judgment on this issue, but virtually all of the evidence in the record soundly refutes their arguments.

Moreover, defendants' attempts to argue that the *Democrat-Gazette* is a substitute for both the *Times* and the *Morning News*, but in the same breath claim that the *Times* and the *Morning News* are not substitutes for each other,^{28/} demonstrate how far afield their focus on Walter Hussman has led from the real issues of this case.

B. The *Democrat-Gazette* is very unlikely to enter the market with a zoned edition

See Confidential Appendix.

C. The fact that Mr. Hussman has taken some steps toward potential entry does not mean that entry barriers are low for any other potential entrant

The unique circumstances of the *Democrat-Gazette* are not indicative of entry in general. Its unique circumstances may have the effect of reducing somewhat the significant entry barriers for the *Democrat-Gazette*. Circumstances may allow a uniquely situated firm to enter a market with relative ease, while entry in general is difficult. In fact, such a situation is a premise for the perceived potential competition theory. See generally Julian O.

²⁸ See Defendants' Brief in Support at 31-33, 42-45 & 45 n. 25.

von Kalinowski, Antitrust Laws And Trade Regulation, §26.02[9]
(1995).

VIII. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment and defendants' motion to dismiss should be denied.

Dated: April __, 1995

Respectfully submitted,

/s/ _____
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1. Excerpts of the preliminary injunction transcript are contained in the Appendix to this memorandum.