U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 Fifth Street, NW
Washington, DC 20530

August 11, 2009

BY ELECTRONIC FILING

The Honorable John T. Copenhaver, Jr.
United States District Judge
United States District Court for the Southern District of West Virginia
6009 Robert C. Byrd United States Courthouse
300 Virginia Street East
Charleston, WV 25301

Re: *U.S. v. Daily Gazette Co. and MediaNews Group, Inc.*
Civil Case No. 2:07-0329 (S.D. West Virginia)

Dear Judge Copenhaver:

The United States respectfully submits this letter brief in response to the Court's direction to the parties to brief the sequence of expert witness disclosures in the above-referenced litigation. This responds to the letter brief filed on behalf of defendants Daily Gazette Co. ("Daily Gazette") and MediaNews Group, Inc. ("MediaNews") dated August 6, 2009 ("Defendants' Letter Brief").

Summary of Argument

Defendants concede that they bear the burden of establishing any procompetitive justifications that support Daily Gazette's acquisition of the *Daily Mail* from MediaNews. As a result, if defendants choose to file an expert report on that issue, the Federal Rules of Civil Procedure and Local Rules of this Court require them to file that report on the date that this Court sets for initial expert reports, and not, as they argue, on the date for expert reports of the party not bearing the burden of proof.

Defendants' argument that the sequence of the burden-shifting analysis dictates the sequence of the Rule 26 expert disclosure obligations is without merit. It mistakenly conflates the Federal Rule 26 sequential expert disclosure process with the burden-shifting evidentiary framework courts use to resolve antitrust claims on the merits. The United States does not dispute that in performing the evidentiary analysis under the Rule of Reason, a court typically considers a plaintiff's evidence of the effect a restraint or transaction has on competition before it turns to a defendant's evidence of its procompetitive justifications. But Rule 26 contains no such evidentiary requirement, framework, or sequence, and defendants have cited no case that imposes one. Rule 26 simply does not speak to the framework of evidentiary burdens that may occur at summary judgment or trial.

Rather, Rule 26 is concerned solely with discovery. And, with respect to the subject of expert discovery, Rule 26 (a)(2)(C), as well as Local Rule 26.1,[1] sets out an unambiguous sequence: if the party that bears the burden of proof on an issue decides to file an expert report on that issue, whether that party is a plaintiff or defendant, that report must be filed at the initial deadline, and the opposing party then has the right to file at a later date an expert report responding to the initial report. This sequence is designed to provide all parties with adequate opportunities to prepare for cross-examination, summary judgment and trial, and to engage rebuttal experts and present testimony refuting the initial expert's opinions. Therefore, if a party bears the burden of proof on an issue, like defendants do with regard to the issue of procompetitive justifications, that party must file any expert reports on that issue on the date that this Court sets for initial expert reports.[2]

The Framework of the Federal Rules of Civil Procedure

Rule 26 of the Federal Rules of Civil Procedure provides a specific sequence for the filing of expert reports.

Initial reports are filed first: Rule 26(a)(2)(B) requires the parties to disclose their expert witnesses and provide to the opponent a written report that contains a complete statement of all opinions that the expert intends to express at trial and the basis and reasons for those opinions.[3] The Advisory Committee Notes to the 1993 Amendments to Rule 26 expressly state that "the party with the **burden of proof** on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue." (emphasis added.) Importantly, Rule 26 applies equally to plaintiffs and defendants. *See, e.g., Mabrey v. U.S.*, No. 2:05-CV-00051, 2006 WL 1891127 (D. Nev. July 7, 2006) (holding that because defendant elected only to disclose its experts on the rebuttal expert witness disclosure date, "defendant's expert witnesses will not be permitted to testify to any expert opinion regarding an issue on which defendant has the burden of proof").

Reports responsive to the initial reports are filed 30 days later: Rule 26(a)(2)(C) states "if the

---

[1] Local Rule of Civil Procedure 26.1(b) mirrors the sequential process set forth in Fed.R.Civ.P. 26 by requiring a party "bearing the burden of proof on an issue" to disclose expert testimony **prior to** "the party not bearing the burden of proof on an issue." The Court's July 3, 2008 Scheduling Order incorporated the language of the Local Rule.

[2] Defendants also bear the burden of proof on their affirmative defense that the Newspaper Preservation Act immunizes Daily Gazette's acquisition of the *Daily Mail*. *See U.S. v. Daily Gazette Co.*, 567 F. Supp.2d 859, 872 (S.D.W.Va. 2008) (holding that NPA immunity is an affirmative defense). Consequently, any expert testimony that defendants intend to provide on NPA immunity should be disclosed on the due date for initial expert reports.

[3] Fed.R.Civ.P. 37(c)(1) incents a party to comply fully and completely with Rule 26: a party is not permitted to use at trial any information, including expert opinions, not properly disclosed to its opponent pursuant to Rule 26.

evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), the disclosure must be made within 30 days after the disclosure made by the other party."

The purpose behind the Rule 26 sequence for filing expert reports is to "disclose information regarding expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses" on rebuttal. Fed.R.Civ.P. 26 Advisory Committee's Notes, 1993 Amendments, Subdivision (a).

Argument

Defendants argue that they are not required to make expert disclosures on the issue of procompetitive justifications for the May 2004 transaction at the initial disclosure deadline because such evidence will be considered by the Court only after the United States "presents prima facie proof that the May 2004 transactions had anticompetitive effects." Defendants' Letter Brief at 2. To support their argument, defendants cite various cases that set out the evidentiary burden shifting framework that courts use in deciding antitrust cases. *See* Defendants' Letter Brief at 2-4. Defendants concede that they have the burden of establishing any procompetitive justifications. The very cases they cite expressly state that this burden rests with the defendant. *Id.* (citing *Capital Imaging*, 996 F.2d at 543; *Law*, 134 F.3d at 1019; *NHL Players Ass'n.*, 325 F.3d at 718; *Microsoft*, 253 F.3d at 58-59). These cases reflect the consensus among courts and commentators that "[i]n the usual Sherman Act §1 case, the defendant bears the burden of establishing a procompetitive justification." *California Dental Ass'n v. FTC*, 526 U.S. 756, 788 (1999) (Breyer, J, dissenting) (collecting authorities); *accord Dickson v. Microsoft Corp.*, 309 F.3d 193, 207 n.16 (4th Cir. 2002) (citing *U.S. v. Microsoft* for proposition that under Rule of Reason analysis "the burden shifts to the defendant to proffer a procompetitive justification for its conduct"); P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 1502 ("the burden passes to the defendant to offer evidence that a legitimate objective is served by the challenged behavior"). It makes sense to place this burden on the defendant because, as Areeda suggests, "we look to the defendant, with its knowledge of its own situation, to identify possible justifications for its conduct." Areeda & Hovenkamp, ¶ 1504a. Accordingly, because the burden rests with the defendants here, the discovery rules require them to disclose any expert opinions with respect to procompetitive justifications simultaneously with the United States' initial expert disclosures.[4]

---

[4] Defendants also argue that courts "use imprecise language referring to shifting burdens of proof." Defendants' Letter Brief at 2 n.1. However, the authorities cited above expressly describe the burden as "shifting" to the defendants with respect to procompetitive justifications. If the defendants do not offer sufficient proof, the burden will not shift back to the plaintiff. Courts applying the Rule of Reason have made clear precisely what defendants are required to prove. For example, in *Law*, the Court of Appeals stated that the defendant had the "burden of showing that the pro-competitive justifications for a restraint on trade outweigh its anticompetitive effects." *Law*, 134 F.3d at 1024. Under the Supreme Court caselaw, it is the defendant that "shoulders that burden." *Id.* (citing *NCAA v. Board of Regents of the Univ. of*

Defendants' arguments incorrectly conflate the analysis on liability with the discovery obligations imposed by the Federal Rules. They argue that because the court will, after trial, consider whether the United States has made out a prima facie case before turning to the defendants' evidence on possible justifications, this should relieve them of their obligation during the discovery phase of the case to make expert disclosures until after the United States has made all of its disclosures. However, Rule 26 and Local Rule 26.1 require a party – whether plaintiff or defendant – that has the burden to produce evidence on an issue to file an initial report, after which its opponent is permitted to file a responsive report. This obligation under Rule 26 is in no way dependent on the order in which courts ultimately consider the evidence when deciding liability. The expert disclosure obligation exists under the Federal Rules even if the court never actually considers the evidence when resolving the case on the merits. For example, a court could grant a motion for directed verdict before a defendant puts on any evidence. That possibility, however, would not relieve the defendant of its Rule 26 obligations during the discovery phase of the case.

None of the cases that defendants cite – not one – discusses or even addresses Rule 26 expert disclosure requirements, let alone holds that the sequence of the liability analysis should dictate the sequence of the expert reports. Nor does the plain language of Rule 26 support such a reading because it is concerned solely with discovery, not with whether any party has evidence sufficient to support a claim, or will ultimately prevail on summary judgment or at trial. In short, the sequential Rule 26 discovery process is separate and apart from the evidentiary burden-shifting process that courts typically use to decide antitrust cases on the merits.

As a purely practical matter, there is no reason why defendants should not have to make disclosures at the initial deadline, as their rationale for why the instant transaction was beneficial to consumers is uniquely within their knowledge, and is in no way contingent upon any opinions of the United States' expert. On the other hand, the United States would be disadvantaged if defendants were allowed to disclose opinions on issues on which they bear the burden of proof only after the United States has disclosed its expert's opinions. The Rule 26 expert disclosure sequence is designed to provide opposing parties with a "reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Sherrod v. Lingle*, 223 F.3d 605, 613 (7th Cir. 2000) (quoting Fed.R.Civ.P. 26(a)(2) advisory committee note); *Thibeault v. Square D. Co.*, 960 F.2d 239, 244 (1st Cir. 1992); *Continental Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:04-CV-1866-D, 2006 WL 2506957 (N.D. Tex. Aug. 15, 2006). The process "makes a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Requiring defendants to offer any expert

---

Okla., 468 U.S. 85, 104 (1984)). The Court of Appeals held that the defendant "failed to provide sufficient evidence to carry its burden in this case." *Id.* at 1024 & n. 16. Likewise, in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003), the Court of Appeals upheld a judgment for the government because the defendants did not meet their evidentiary burden with respect to procompetitive justifications: "defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits."

report on procompetitive justifications for this transaction, on the date that this Court sets for initial expert reports, preserves Rule 26's orderly disclosure process and allows both sides the full opportunity to respond to the other's expert testimony.

Conclusion

For this reason, the United States respectfully requests this Court require defendants to file any expert reports on issues to which they bear the burden of proof, including the subject of procompetitive justifications, on the date that this Court sets for initial expert reports.

Respectfully Submitted,

Charles T. Miller
United States Attorney

/s/
By Stephen M. Horn
Assistant United States Attorney
Attorney for the United States

[REDACTED TEXT]

/s/
Bennett J. Matelson
William H. Jones, II
Mark A. Merva
Deborah Roy
Matthew J. Bester
Attorneys for the United States
U.S. Department of Justice
Antitrust Division
[REDACTED TEXT]

cc: Counsel of Record