UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. DAILY GAZETTE COMPANY, and MEDIANEWS GROUP, INC. *Defendants.*	Civil Action No. 2:07-0329 Filed: May 22, 2007 Judge Copenhaver Magistrate Judge Stanley

THE UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO ALLOW THE PARTIES TO TAKE ADDITIONAL DEPOSITIONS PURSUANT TO LOCAL RULE 26.1(c) AND FEDERAL RULE OF CIVIL PROCEDURE 30(a)(2)(A)

The United States respectfully submits this Memorandum in Support of Its Motion to allow each side to take twenty-five depositions. This antitrust case, like many others, involves numerous facts from wide-ranging sources concerning relevant markets, issues of entry and immunity, and competitive effects. The requested additional depositions will allow both sides to present adequately to the Court the facts that underlie their claims. As this Court observed in its June 19, 2008 Memorandum Opinion and Order, "[t]he importance of a fully developed record is [] particularly significant here in view of the distinctive media combination involved." Mem. Op. and Order at 16. It would be unfair and inconsistent with the Court's fact-finding duties to

limit the United States to ten depositions in an antitrust case that the Defendants have conceded "raises complicated factual issues that would require *substantial* discovery." Def's Mot. For Stay Pending Resolution of Mot. to Dismiss, at 3 (emphasis added).

Both sides already have disclosed to each other more than twenty-five individuals who are likely to have discoverable information that a party may use to support its claims or defenses. These potential witnesses include a number of employees of Defendants and several non-party witnesses that have material information, including advertisers, lenders, former employees, consultants, and other media executives in and out of Charleston. Unlike private antitrust litigants, the United States must rely fully on the testimony of outside sources to prove its claims. Many of these witnesses are likely to be hostile to the United States. Therefore, the modest number of additional depositions are fair and necessary to satisfy this Court's objective of "a fully developed [evidentiary] record." June 19, 2008 Mem. Op. and Order at 16, 18.

ARGUMENT

A party wishing to take more than ten depositions must obtain leave of court to do so. Fed. R. Civ. P. 30(a)(2). The Court must permit more than ten depositions when it is "consistent with Rule 26(b)(2)." *Id.* Rule 26 provides that additional discovery should be allowed unless the Court determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the moving party has had ample opportunity to obtain the information by discovery in the action; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, in light of the factors listed in the Rule. Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

In interpreting these discovery rules, the Supreme Court has long held that they should be

entitled to "broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Courts routinely have expanded deposition limits where they have determined that the concerns underlying Rule 26(b)(2)(C) are not implicated. *See, e.g., Alexander v. FBI*, 192 F.R.D. 20 (D.D.C. 2000); *Strode v. City of Venice*, 2007 WL 1595559 (S.D.Ill. 2007); *Mitchell v. Nat'l R.R. Passenger Corp.* 208 F.R.D. 455 (D.D.C. 2002). Because the United States' request for additional depositions falls squarely within the boundaries of Rule 26, the motion should be granted.

1. The Depositions Sought By the United States are Not Unreasonably Cumulative or Duplicative

The depositions the United States seeks are not "unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2). As the Defendants concede, this case "raises complicated factual issues that would require substantial discovery." Def's Mot. For Stay Pending Resolution of Mot. to Dismiss, at 3. The United States has moved for leave to exceed the discovery limits by only the number of depositions necessary to gather sufficient evidence to prove its claims with "the benefit of a developed evidentiary record." June 19, 2008 Mem. Op. and Order at 18.

Three key facts specific to this case necessitate the United States' motion. First, this antitrust case involves three separate claims against two Defendants. Each claim will require the United States to prove such fact-intensive elements as product market, geographic market, and likely competitive effects.

Second, in their Answers, the Defendants have denied a number of key factual allegations in the Complaint that will require the United States to obtain extensive evidence through deposition testimony. Among these issues are (1) whether the Gazette Company had a "plan" to

use its control over Charleston Newspapers "to weaken the *Daily Mail* to the point where it would fail and could be eliminated as a competitor to the *Charleston Gazette*," (Compl. ¶ 4); (2) whether "the news and editorial assets and resources of the Charleston Daily Mail are under the ownership and control of Gazette Company," (*Id.* at ¶ 12); (3) whether the Defendants had "a variety of long and short-term economic incentives to compete to attract readers to their respective newspapers," (*Id.* at ¶ 15); (4) whether the two newspapers "remained consistently profitable through 2004" and neither one "was in danger of failing in the near future," (*Id.* at ¶ 17); (5) whether any of the actions taken by Daily Gazette Company after May 7, 2004 were intended to "implement its plan to shut down the *Charleston Daily Mail* by 2007," (*Id.* at ¶ 22); (6) whether readers and advertisers view any other media as "adequate substitutes" for the two Charleston daily newspapers, (*Id.* at ¶¶ 24-25); (7) whether the May 7 transactions are likely to lead to "reduced output" or "increased prices to readers and advertisers," (*Id.* at ¶ 31); and (8) whether entry into the Charleston market by another newspaper is "not likely to prevent the anticompetitive effects of the May 7 transactions," (*Id.* at ¶ 32). All of these fact-intensive questions are important to the United States' case.

Third, in our Rule 26(a) Initial Disclosures, we identified 34 individuals we currently believe have discoverable information that might support our claims. This of course does not include any other witnesses the United States may learn of during discovery. The Defendants have listed a number of other witnesses with relevant information in their Initial Disclosures, including "[v]arious actual and potential advertisers whose identities are not currently known." Daily Gazette Company's Initial Disclosures at 3.

To give the Court a sense of the scope of this complex antitrust case, and illustrate that

the extra requested depositions are fair and necessary, the potential witnesses can be grouped into several categories. Individuals from each of these categories were identified in our Initial Disclosures.

(1) Current employees of the Defendants: The United States believes it will take the depositions of many, if not all, of the twelve employees of the Defendants listed in our Initial Disclosures. The United States also needs to depose the several additional employees listed by Defendants in their Disclosures. These witnesses are likely to have information directly relevant to the United States' claims, including facts that will assist the Court in analyzing the relevant product markets, the relevant geographic market, entry into these markets, and the likely competitive effects of the May 7, 2004 transactions. These witnesses also are likely to have unique knowledge of the negotiations and terms of the transactions and the subsequent actions taken by Daily Gazette Company and Charleston Newspapers that the United States alleges were part of a plan to eliminate the *Daily Mail*. A number of these witnesses may be hostile to the United States.

(2) Advertisers: In its Initial Disclosures, Daily Gazette Company listed as potentially knowledgeable witnesses, "[v]arious actual and potential advertisers whose identities are not currently known." Daily Gazette Company's Initial Disclosures at 3. The United States will need to depose several of Defendants' key advertisers once their identities are revealed regarding the extent to which they view other media as adequate substitutes for the two daily newspapers.

(3) Lenders: In order to purchase the assets of the *Daily Mail* and end competition, Daily Gazette Company borrowed $55 million from two financial institutions. In paragraph 19 of

the Complaint, the United States alleges that Daily Gazette Company shared its plan to eliminate competition with its lenders. The Defendants deny that Daily Gazette Company planned to shut down the *Daily Mail*. The United States needs to depose several current and former employees of those lenders to develop proof that Daily Gazette Company planned to shut down the newspaper.

(4) Potential Purchasers of the *Daily Mail*: MediaNews Group negotiated with third party purchasers to buy the *Daily Mail*, but ultimately sold the newspaper to Daily Gazette Company on May 7, 2004. The United States plans to depose multiple witnesses with knowledge of negotiations of the past attempts by third parties to buy the *Daily Mail*. Such witnesses will shed light on Defendants' claims that the Daily Gazette Company's takeover of the *Daily Mail* was necessary to protect the economic health of the newspapers.

(5) Newspaper Industry Consultants: The Daily Gazette Company retained consultants to value the *Daily Mail*'s assets and develop business strategies upon purchasing the newspaper. The United States alleges that some of these people were aware of the Daily Gazette Company's plan to use its control of the newspaper "to weaken the *Daily Mail* to the point where it would fail and could be eliminated as a competitor to the *Charleston Gazette*." *See* Compl. ¶ 4. The United States needs to take several depositions of witnesses in this category.

(6) Former employees of the Defendants: The United States needs to depose a substantial number of former employees of the Defendants and/or Charleston Newspapers, such as reporters, editors, and publishers. Many of the witnesses in this category are likely to have relevant knowledge of the "head-to-head competition" that existed between the two newspapers before May 7, 2004, as well as the post-transaction efforts to extinguish competition. *See* Compl.

¶ 16.

(7) Other Non-party witnesses: The United States also will call other non-party witnesses to help prove the relevant product markets, the geographic market, and the likely competitive effects of the agreements to eliminate the *Daily Mail*. These may include entities that benefitted from the competition between the *Charleston Gazette* and the *Daily Mail*, and others with knowledge of the competitive dynamics of the newspaper industry.

Even if the Court grants this motion, the United States will be forced to make difficult choices about which depositions to take. Given the nature of this complex antitrust case, the United States' request to take fifteen extra fact depositions is neither unreasonably cumulative nor duplicative.

2. The United States Has Not Had A Sufficient Opportunity to Obtain the Information By Discovery In The Action.

Rule 26 protects against depositions sought in bad faith or in an effort to abuse the discovery process or harass the defendant. *See e.g., Vica Coal Co., Inc. v. Crosby,* 212 F.R.D. 498, 504 (S.D.W.Va. 2003); *Strode v. City of Venice*, 2007 WL 1595559, *1 (S.D.Ill. June 1, 2007). Typically, courts have applied Rule 26(b)(2)(C)(ii) when parties have been dilatory or negligent about seeking timely discovery (*see, e.g., Mallas v. United States*, 54 F.3d 773 (4th Cir. 1995)), or when they have sought to circumvent discovery limits by serving new requests at or after the applicable deadline. *See, e.g., Martin v. Armstrong World Indus., Inc.*, 2007 WL 758073, *2 (D.N.J. Mar. 8, 2007); *Bamberg v. Lernout*, 225 F.R.D. 64, 65-66 (D. Mass. 2004); *Berry v. Rite Aid Corp.*, 2001 WL 527815, *1 (E.D. Pa. May 16, 2001). No such abuse is present

here.

The United States needs a full and fair opportunity under the Federal Rules of Civil Procedure to gather the facts and testimony necessary to prove the elements of its claims. This is not a case where the United States already has had "ample opportunity to obtain the information by discovery in the action," as discovery has just opened. Fed. R. Civ. P. 26(b)(2)(C)(ii).

Defendants are likely to argue that "the government does have the advantage of extensive pre-complaint discovery through the Antitrust Civil Process Act." July 3, 2008 Hr'g Tr., at 6. However, while the United States took several investigative depositions of party employees prior to filing the Complaint, those depositions pursuant to the Antitrust Civil Process Act ("ACPA") were taken for a different purpose and with different rules. *See* 15 U.S.C. §§ 1311-1314. They are not interchangeable with depositions taken under Rule 30.[2] As the Second Circuit noted, "'the Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint.'" *See U.S. v. GAF Corp.*, 596 F.2d 10, 14 (2d. Cir. 1979), (*quoting* H.Rep. 94-1343, at 26).[3] Indeed, "'there is no authority which suggests that it is appropriate to limit [an enforcement agency's] right to take discovery based upon the extent of its previous investigation into the facts underlying its

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[2] For instance, these pre-complaint depositions may not be attended by anyone other than the witness and his counsel, and counsel's ability to object to questioning is limited. 15 U.S.C. § 1312(i).

[3] There is nothing in the ACPA to support the idea that Congress intended to limit the Antitrust Division's right to take the full scope of discovery provided under the Federal Rules. Counting these confidential depositions against the number of Rule 30 depositions would discourage the Antitrust Division from using the very investigative procedures Congress intended by forcing the Division to predict with certainty not only which antitrust investigations will result in filed lawsuits, but which deponents from those investigations will testify. *See SEC v. Softpoint Inc.*, 958 F.Supp. 846, 857 (S.D.N.Y. 1997).

case.'" *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) (*quoting SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990)).

The United States has no other meaningful way to obtain the information necessary to create "a fully developed [evidentiary] record." June 19, 2008 Mem. Op. and Order at 15. Several witnesses appearing on both the United States' and Defendants' Initial Disclosures are represented by Defendants' counsel, making it highly unlikely that they will talk with attorneys for the United States without compulsory process.

3. The Benefits of the Requested Depositions Outweigh the Potential Burdens.

In weighing the burden and expense of the requested depositions against their benefit, it is clear that the extra depositions are merited. Fed. R. Civ. P. 26(b)(2). To prove liability in cases under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act requires addressing relevant product and geographic markets, jurisdictional issues, likelihood of competitive entry, and competitive effects. *See e.g., California v. American Stores Co.*, 495 U.S. 271 (1990); *Dickson v. Microsoft Corp.* 309 F.3d. 193 (4th Cir. 2002); and *Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176 (4th Cir. 2002).

The Supreme Court has recognized that in order to resolve antitrust cases, courts must focus on "particular facts disclosed by the record." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 466-67 (1992) (*quoting Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579 (1925)). The Supreme Court held in its seminal case *Brown Shoe Co. v. U.S.*, that "Congress prescribed a pragmatic, *factual* approach" in defining relevant markets. 370 U.S. 294, 336 (1962) (emphasis added).

In its Opinion denying the Motion to Dismiss, this Court discussed the important role that discovery will play in resolving many of the central legal issues in this case. For example, one of the Defendants' key arguments is that the degree of integration between the companies legalizes the joint arrangement under *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). In denying the Motion to Dismiss, the Court wrote that the issue of integration "is a fact-based one that will be aided by discovery." Mem. Op. and Order at 15. Likewise, disputed questions about which entity controls the editorial content of the newspapers, and "the continued viability of reportorial competition" between them will require a more "developed factual record." *Id.* at 18. Finally, with respect to the affirmative defense of immunity under the Newspaper Preservation Act, the Court recognized that it is a mixed question of fact and law that must "await[] development of the evidentiary record." *Id.* at 29.

As the Court has recognized, it is critically important to understand the market dynamics underlying all of these issues. The requested discovery will introduce the Court to these facts, and provide a more complete understanding for its decision on summary judgment and at trial. Thus, the "needs of the case," the "importance of the issues at stake in the action," and "the importance of the discovery in resolving the issues" all counsel in favor of modestly expanding the deposition limit to twenty-five. Fed. R. Civ. P. 26(b)(2)(C)(iii).

In contrast, the burden of allowing a reasonable number of additional depositions in a complex antitrust case like this one is not high. The "parties' resources" are clearly adequate to handle the requested discovery. *Id.* Five attorneys already have appeared in this matter on behalf of the Daily Gazette Company, and four have appeared on behalf of MediaNews. This number excludes any other attorneys available to the Defendants at those firms who have worked on this

matter, but have not yet made an appearance. This group of at least nine experienced attorneys is well-equipped to defend the fifteen additional single-day fact depositions the United States seeks.

For the foregoing reasons, the United States respectfully moves the Court to grant its motion permitting each side fifteen additional fact depositions, excluding expert depositions.

Respectfully submitted,

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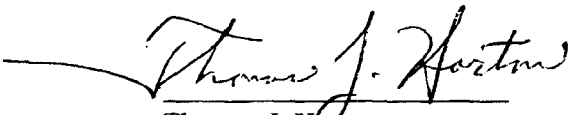

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September 15, 2008

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UNITED STATES OF AMERICA, Plaintiff, v. DAILY GAZETTE COMPANY, and MEDIANEWS GROUP, INC. Defendants.	Civil Action No. 2:07-0329 Judge Copenhaver Magistrate Judge Stanley

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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