

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

Plaintiff

v.

Civil Action No. 2:07-0329

DAILY GAZETTE COMPANY and
MEDIA NEWS GROUP, INC.

Defendants

MEMORANDUM OPINION AND ORDER

Pending is defendants' motion for a stay in advance of a ruling on their motion to dismiss, filed September 20, 2007.

I.

In this civil action, the government alleges that the defendants have violated federal antitrust laws. In seeking a stay, defendants contend they should not be put to the burden and expense of discovery in an antitrust action absent a complaint that has previously been found to conclusively state a claim.

The government opposes a stay, asserting (1) the public interest in antitrust enforcement weighs in favor of allowing

prompt preparation for trial, (2) defendants have not shown good cause to support a stay, (3) a stay is not necessary to protect defendants from unduly burdensome discovery, (4) there is no basis to conclude defendants' dispositive motion will be granted, and (5) consumers aggrieved by the defendants' alleged misconduct will continue to be harmed during the pendency of the litigation.

In reply, defendants note (1) the amendment of the joint operating arrangement that is the subject of this action occurred in May 2004, but the government did not institute this action until three years later, and (2) the government has already enjoyed substantial pre-filing discovery, including the production of thousands of pages of documents and the depositions of defendants' officers and management employees.

II.

Federal Rule of Civil Procedure 26(c) provides
pertinently as follows:

Upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from . . . undue burden or expense, including one or more of the following: (1) that the . . . discovery not be had . . . [or] (2) that the disclosure or discovery may be had only on specified terms and conditions

Fed. R. Civ. P. 26(c).

The Rule vests the court with discretion to stay discovery in advance of deciding a pending dispositive motion. See Thigpen v. United States, 800 F.2d 393, 396-97 (4th Cir. 1986) ("Nor did the court err by granting the government's motion under Fed.R.Civ.P. 26(c) to stay discovery pending disposition of the 12(b)(1) motion. . . . Trial courts . . . are given wide discretion to control this discovery process"); Landry v. Air Line Pilots Ass'n Intern. AFL-CIO, 901 F.2d 404, 436 (5th Cir. 1990) ("The protective order suspended activity until a decision could be made on the summary judgment motion. The trial court sought to resolve an issue that might preclude the need for the discovery altogether thus saving time and expense."); Westminster Investing Corp. v. G. C. Murphy Co., 434 F.2d 521 (D.C. Cir. 1970); Baron Financial Corp. v. Natanzon, 240 F.R.D. 200, 202-03 (D. Md. 2006); Tilley v. United States, 270 F. Supp. 2d 731, 734 (M.D.N.C.2003); Chavous v. District of Columbia Financial Resp. and Mgmt. Asst. Auth., 201 F.R.D. 1, 2 (D.D.C. 2001); Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988); 2 Discovery Proceedings in Federal Court § 20:4 (3d ed. 2007) (citations omitted).

As noted by one court, "such a procedure is an eminently logical means to prevent wasting the time and effort of

all concerned, and to make the most efficient use of judicial resources." Coastal States Gas Corp. v. Department of Energy, 84 F.R.D. 278, 282 (D.C. Del. 1979). The decision concerning a stay request is guided by a number of factors as follows:

In considering whether a stay of all discovery pending the outcome of a dispositive motion is warranted, a case-by-case analysis is required, since such an inquiry is necessarily fact-specific and depends on the particular circumstances and posture of each case. To assist in this determination, the Court is guided by the following factors, none of which is singly dispositive: the type of motion and whether it is a challenge as a "matter of law" or to the "sufficiency" of the allegations; the nature and complexity of the action; whether counterclaims and/or cross-claims have been interposed; whether some or all of the defendants join in the request for a stay; the posture or stage of the litigation; the expected extent of discovery in light of the number of parties and complexity of the issues in the case; and any other relevant circumstances.

Hachette Distribution, Inc. v. Hudson County News Co., Inc., 136 F.R.D. 356, 358 (E.D.N.Y. 1991); see also 10A Federal Procedure § 26:335 (2007).

Regarding the type of motion, it is undisputed that defendants seek dismissal as a matter of law based upon their assertions that (1) the pre-2004 joint operating arrangement had already eliminated commercial competition between the defendants, and (2) the 2004 amendment to the joint operating arrangement is exempt from this enforcement action based upon the Newspaper

Preservation Act, 15 U.S.C. § 1801 et seq.

Regarding the nature and complexity of the action, the complaint alleges multiple antitrust violations preceded by 32 paragraphs of fact pleading. Further, the government's memorandum in opposition to the motion to dismiss spans 38 pages. Additionally, the government concedes that "[a]ll of the arguments . . . [defendants] raise in their 12(b)(6) motion are issues of first impression in this Circuit." (Govt.'s Resp. to Stay Mot. at 6).

Regarding the remaining factors, (1) no counterclaims or cross-claims pend, (2) each defendant joins in the stay request, (3) the action is in its infancy from a procedural standpoint, and, (4) if the voluminous pre-filing factual development of the case is an acceptable gauge, one would similarly anticipate significant time and expense to be devoted to the discovery process. See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (noting the need to be mindful "that proceeding to antitrust discovery can be expensive.").

The government's arguments opposing the requested stay are not without merit. The court has considered in particular the harm to the public in permitting an unabated violation of

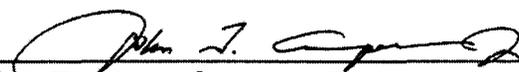
federal antitrust laws. Balanced against this noteworthy concern, however, is the fact that a ruling favorable to the defendants would effectively result in a finding that they did not contravene federal law. Should that conclusion come after significant time and expense has been devoted to unnecessary discovery, economic harm would redound to defendants and, perhaps, increased costs would ultimately be experienced by their significant customer base.

On balance, the better course is to stay further action in this case pending final briefing and a decision on the pending dispositive motion. The court, accordingly, ORDERS as follows:

1. That defendants' motion for a stay pending resolution of their motion to dismiss be, and it hereby is, granted; and
2. That this civil action be, and it hereby is, stayed pending a ruling on the motion.

The Clerk is directed to forward copies of this written opinion and order to all counsel of record.

DATED: October 18, 2007



John T. Copenhaver, Jr.
United States District Judge