

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

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TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAILY GAZETTE COMPANY,

and

MEDIANEWS GROUP, INC.

Defendants.

Civil Action No. 2:07-0329

Filed:

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable and other relief to prevent and restrain defendants Daily Gazette Company ("Gazette Company") and MediaNews Group, Inc. ("MediaNews Group") from continuing to violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, as amended. The United States complains and alleges as follows:

I. NATURE OF THE ACTION

1. This lawsuit challenges a series of transactions in 2004 that extinguished competition between Charleston's two daily newspapers by combining *The Charleston Gazette* and the *Charleston Daily Mail* under the common ownership of Gazette Company as part of a

plan to terminate the publication of the *Charleston Daily Mail* and leave Charleston with a single daily newspaper.

2. For over 100 years, the citizens of Charleston have enjoyed the benefits of two local daily newspapers. Between 1958 and May 7, 2004, the owners of the *Charleston Gazette* and the *Charleston Daily Mail* eliminated some – but not all – elements of competition between the two newspaper owners by forming a joint operating agreement (“JOA”), referred to as Charleston Newspapers. Under the agreement, the two newspapers coordinated certain financial and operational aspects of producing the two newspapers – principally, the printing, distribution, and sales of subscriptions and advertisements. Importantly, however, the two newspapers did not combine all of their operations or ownership. Until May 2004, the Gazette Company maintained separate ownership of and independently made decisions regarding the content and style of the *Charleston Gazette* that determined the attractiveness and worth of the paper to readers. Similarly, MediaNews Group and its predecessors maintained separate ownership of the *Charleston Daily Mail* and independently made all decisions regarding the content and style of the *Charleston Daily Mail* that determined the attractiveness and worth of the paper to readers in the Charleston area. The attractiveness to readers of each paper directly affected the value of the separate ownership interest of each company.

3. On May 7, 2004, Gazette Company, the *Charleston Gazette*’s owner, acquired all of the assets of the *Charleston Daily Mail*, its only competitor, from MediaNews Group. On that same day, Gazette Company and MediaNews Group also entered into a new arrangement that gave MediaNews Group nominal responsibility for the news and editorial content of the *Charleston Daily Mail*, but gave Gazette Company ultimate control over the budgets,

management, and news gathering and reporting of both newspapers, as well as the right to receive all the profits of both newspapers. The arrangement also gave Gazette Company the unilateral right to shut down the *Charleston Daily Mail*.

4. The May 2004 transactions eliminated all remaining competition between the owners of the papers by consolidating the two papers under the ownership and control of Gazette Company as part of a plan by the Gazette Company to terminate publication of the *Charleston Daily Mail* and thereby force upon consumers in Charleston a single newspaper. Gazette Company's plan was to use that control to weaken the *Daily Mail* to the point where it would fail and could be eliminated as a competitor to the *Charleston Gazette*, and Gazette Company acted quickly to carry out that plan – until the Department's investigation interrupted those efforts.

5. Because the May 2004 transactions were part of a plan to terminate the publication of one of the two newspapers, the transactions eliminated any claim that the arrangement is immune from antitrust scrutiny under the Newspaper Preservation Act ("NPA"), 15 U.S.C. § 1801, *et seq.* The NPA permits JOAs to be used to coordinate many of the commercial activities of otherwise independent newspapers, including the prices the newspapers charge for subscriptions and advertising, but only if the participants meet the Act's requirements by, *inter alia*, preserving the existence of two newspapers with independent editorial and reportorial operations. The May 2004 transactions invalidated any claim by Charleston Newspapers to antitrust immunity under the NPA because they were part of a plan to terminate publication of the *Charleston Daily Mail*, leaving only one daily newspaper in the Charleston area.

6. Without the benefit of antitrust immunity, the arrangement and the May 2004 transactions violated the antitrust laws. The *Charleston Gazette* and the *Charleston Daily Mail* are the only two daily newspapers in the Charleston area, so elimination of competition between them unreasonably restrains competition in two distinct respects. First, by consolidating ownership of the two newspapers under Gazette Company, the transactions eliminated the economic incentives that previously had existed for each owner to increase the attractiveness of its newspaper to readers in the Charleston area. This reduction in competition violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18. Second, the arrangement eliminated competition between the two newspapers in the sale of subscriptions and advertising. Because the two newspapers did not enjoy antitrust immunity under the NPA at least as of May 7, 2004, and because, as of May 2004, neither of the two papers qualified as a failing firm within the meaning of the antitrust laws, such an elimination of competition violated Sections 1 and 2 of the Sherman Act.

7. Consequently, as discussed more fully herein, the United States seeks, *inter alia*, an order: (a) rescinding the May 7 transactions; and (b) requiring Gazette Company and MediaNews Group to restore the *Charleston Daily Mail's* competitiveness to the level that existed prior to the May 7 transactions.

II. JURISDICTION AND VENUE

8. Both Gazette Company and MediaNews Group are engaged in, and their activities substantially affect, interstate commerce. Through subsidiaries and partnerships it controls, Gazette Company sells advertising, which is published in the *Charleston Gazette* and the *Charleston Daily Mail*, to national advertisers located throughout the United States. In addition,

Gazette Company and Media News Group regularly publish news, syndicated material, and other information in the *Charleston Gazette* and the *Charleston Daily Mail* that is gathered from other states and nations. In turn, they communicate to newspapers outside West Virginia the news and information that their staffs gather.

9. The Court has subject matter jurisdiction under 15 U.S.C. §§ 4 and 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345, to prevent and restrain the Defendants from continuing to violate 15 U.S.C. §§ 1, 2 and 18.

10. The defendants maintain offices, transact business, and are found in Charleston, West Virginia. A substantial part of the events giving rise to the violations alleged herein occurred in Charleston, West Virginia. Accordingly, this Court has personal jurisdiction over the Defendants and venue is proper in this judicial district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391.

III. DEFENDANTS

11. Defendant Gazette Company, the owner and publisher of the *Charleston Gazette* and, since May 2004, the owner of the *Charleston Daily Mail*, is a privately-held corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in Charleston, West Virginia. Through its subsidiaries, Daily Gazette Publishing Company LLC and Daily Gazette Holding Company LLC, and in its capacity as General Partner of Charleston Newspapers Holdings Limited Partnership, Gazette Company owns all the assets and controls all the business operations of Charleston Newspapers. Charleston Newspapers is responsible for printing, circulating, promoting and marketing both the *Charleston Gazette* and the *Charleston Daily Mail*.

12. Defendant MediaNews Group, the owner and publisher of the *Charleston Daily Mail* from about September 1998 until May 2004, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Denver, Colorado. MediaNews Group owns and publishes several dozen daily newspapers in various markets throughout the United States. On or about May 7, 2004, MediaNews Group sold the *Charleston Daily Mail* and related assets to Gazette Company. Today, MediaNews Group purports to provide "management and supervision" services for the *Charleston Daily Mail* in return for a fixed fee paid by Gazette Company. In reality, however, the news and editorial assets and resources of the *Charleston Daily Mail* are under the ownership and control of Gazette Company.

IV. BACKGROUND

A. Competition Between the Two Newspaper Owners

13. For many years, the *Charleston Gazette*, founded in 1873, and the *Charleston Daily Mail*, founded in 1880, operated completely independently. In 1958, the then-owners of the two newspapers entered into a JOA, which combined the two newspapers' printing, advertising, subscription sales, and distribution functions under a single management. Congress, in 1970, seeking to preserve the ability of independent newspapers to reduce operating expenses through JOAs, gave JOA arrangements then in effect explicit, but limited, antitrust immunity when it passed the Newspaper Preservation Act, 15 U.S.C. § 1801, *et seq.*, as long as they met certain requirements. To receive that immunity, Congress required, *inter alia*, that the newspapers in a JOA be separately owned or controlled, that they maintain separate newsroom staffs, that their editorial policies be "independently determined," and that at the time the JOA

was entered, no more than one newspaper in the JOA “was likely to remain or become a financially sound publication” *Id.*

14. Until May 7, 2004, the Gazette Company and MediaNews Group were equal partners in the JOA, with each company separately owning its respective newspaper. In addition, each company appointed half of the representatives to a JOA committee that approved all significant decisions, including each newspaper’s budget and its advertising and subscription rates. That committee also selected a General Manager who was responsible for the Charleston JOA’s day-to-day operations.

15. Within the Charleston JOA, each company shared profits and losses equally. However, each company had an independent economic incentive to increase the value of its respective newspaper ownership interest by attracting readers to that newspaper. The number of newspapers circulated or sold is an important yardstick for measuring the franchise or sales value of a newspaper asset. In general, a newspaper that invests in increasing its quality and its appeal will attract more readers and advertisers, will have a longer lifespan, and will have an increased market value. Maintaining or increasing the value of a newspaper within a JOA can affect the outcome of, among other things, renegotiations of the terms or renewal of a JOA, negotiations over one or both JOA newspapers operating outside a JOA, and the identity and viability of the newspapers following the expiration or termination of a JOA. Thus, the owners of the Charleston newspapers had a variety of long and short-term economic incentives to compete to attract readers to their respective newspapers.

16. The owners of the *Charleston Gazette* and the *Charleston Daily Mail* competed vigorously against each other for readers prior to the May 7 transactions. They did so in various

ways, such as seeking to generate original news and other content of interest to readers; trying to cover local news with greater depth, breadth and accuracy; breaking stories first; and offering the most attractive mix of news, features and editorials to readers. All of these decisions were outside the cooperation authorized under the JOA. This head to-head competition between the owners of the *Charleston Gazette* and the *Charleston Daily Mail* benefitted readers by giving them a choice between two daily newspapers with unique news and other content.

17. The *Charleston Gazette* and the *Charleston Daily Mail* remained consistently profitable through May 2004. Neither newspaper was in danger of failing in the near future.

B. Prelude to the May 7 Transactions

18. In late 2003, MediaNews Group negotiated to sell the *Charleston Daily Mail* along with MediaNews Group's 50 percent stake in the Charleston JOA to an experienced third-party newspaper company. On December 18, 2003, that company signed a Letter of Intent to purchase the *Charleston Daily Mail* and MediaNews Group's share of the Charleston JOA for \$55 million. MediaNews Group, pursuant to a Right of First Refusal provision included in the Charleston JOA, was required to notify Gazette Company of the Letter of Intent and give Gazette Company the opportunity to match the terms offered by the third party.

19. Gazette Company sought to eliminate competition from the *Charleston Daily Mail*, rather than have a new owner continue that competition. Gazette Company achieved that goal by matching the third party's \$55 million offer to acquire all of the ownership interest in the *Charleston Daily Mail*. During this time, Gazette Company developed a plan to shut down the *Charleston Daily Mail* and thus become the publisher of the sole remaining daily newspaper in Charleston. This plan, formulated with the advice of an outside consultant and shared with

Gazette Company's lenders, called for the rapid reduction of the *Charleston Daily Mail's* circulation to a level at which the newspaper would no longer be economically viable (projected to be achieved within two or three years). Gazette Company believed it could then successfully argue to the Department of Justice that it should not oppose the termination of the JOA because the *Charleston Daily Mail* would be a "failing company." Over the years, the Department of Justice has elected not to challenge the decision of several newspaper companies to stop publishing one of the newspapers in a JOA based on a demonstration that circulation for the newspaper had shrunk to the point where the paper was not economically viable and no buyer could be found.

C. The May 7 Transactions

20. On May 7, 2004, Gazette Company and MediaNews Group entered into two simultaneous transactions that had the purpose and effect of lessening competition between the *Charleston Gazette* and the *Charleston Daily Mail*, with the ultimate goal of creating a monopoly. First, Gazette Company acquired from MediaNews Group control of the *Charleston Daily Mail's* assets and MediaNews Group's 50 percent ownership interest in the Charleston JOA, for a purchase price of approximately \$55 million. Second, the parties entered into a new contract that preserved the appearance that the *Charleston Daily Mail* was still being published by MediaNews Group but, in fact, gave Gazette Company control over Charleston Newspapers, which is now owned 100 percent by Gazette Company. Under the new arrangement, MediaNews Group no longer shares in the profits or losses of the two newspapers nor contributes to the capital costs of the business. The arrangement allows Gazette Company unfettered discretion to

set the news and editorial budget for the *Charleston Daily Mail* and gives Gazette Company the sole power to terminate publication of the *Charleston Daily Mail* when it sees fit.

21. The May 7 transactions ended the prior JOA and created an entirely new arrangement between Gazette Company and MediaNews Group that does not meet the statutory definition of a JOA under Newspaper Preservation Act. The arrangement created by the May 7 transactions does not qualify for the limited antitrust immunity under the Newspaper Preservation Act for several reasons, including that it has not been approved by the Attorney General and that it was part of a plan to terminate one of the two daily newspapers.

22. The May 7 transactions gave Gazette Company, acting through its control of Charleston Newspapers, the unilateral right to take immediate and deliberate steps to implement its plan to shut down the *Charleston Daily Mail* by 2007. Shortly after the May 7 transactions were consummated, Gazette Company stopped all promotions and discounts for the *Charleston Daily Mail*; it stopped soliciting new readers for the *Charleston Daily Mail*; it stopped delivering the *Charleston Daily Mail* to thousands of customers; it attempted to convert existing *Charleston Daily Mail* home delivery subscribers to *Charleston Gazette* subscriptions; it stopped publishing a Saturday edition of the *Charleston Daily Mail*; it allowed almost half of the *Charleston Daily Mail*'s reporters to leave the newspaper without permitting replacements, thus crippling the ability of the *Charleston Daily Mail* to cover the news; and it cut the *Charleston Daily Mail*'s newsroom budget substantially in both 2004 and 2005, which forced the *Charleston Daily Mail* to continue reducing the breadth and depth of its news coverage.

23. As a result of Gazette Company's actions following the May 7 transactions, the *Charleston Daily Mail*'s circulation dropped from 35,076 in February 2004 to 23,985 in January

2005. This decline in circulation matched almost precisely the projections that Gazette Company and its consultants made as part of Gazette Company's pre-acquisition plan to shut down the *Charleston Daily Mail* by 2007. During that same February 2004 to January 2005 time period, the *Charleston Gazette's* circulation increased slightly, peaking at over 52,000. Only after learning in or about December 2004 that the Antitrust Division of the Department of Justice was investigating the May 7 transactions did defendant Gazette Company take any steps to limit further damage to the *Charleston Daily Mail* caused by the actions described above. These steps, however, failed to restore the competitive conditions that had existed prior to the May 7 transactions.

V. RELEVANT MARKETS

A. The Relevant Product Markets

24. Local daily newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, provide a unique package of attributes for their readers. They provide national, state, and local news in a timely manner and in a convenient, hardcopy format. The news stories featured in such newspapers are more detailed, when compared to the news reported by radio or television, and they cover a wide range of topics of interest to local readers, not just major news highlights. Newspapers, such as the *Charleston Gazette* and the *Charleston Daily Mail*, are portable and allow the reader to read the news, advertisements, and other information at his or her own convenience. Readers also value other features of local daily newspapers, such as calendars of local events, movie and TV listings, classified advertisements, commercial advertisements, legal notices, comics, syndicated columns, and obituaries. Most readers of local daily newspapers in the Charleston area do not consider weekly newspapers, radio news,

television news, Internet news, or any other media to be adequate substitutes for the two local daily newspapers serving the Charleston area. Thus, in the event of a small but significant increase in the price of local daily newspapers, the number of readers who would switch to other sources of local news and information, and would stop buying any daily local newspaper, would not be sufficient to make such a price increase unprofitable.

25. Advertising in the *Charleston Gazette* and the *Charleston Daily Mail* allows advertisers to reach a broad cross-section of consumers in the Charleston metropolitan area with a detailed message in a timely manner. A substantial portion of advertisers seeking to reach Charleston area consumers do not consider other types of advertising, such as that in weekly newspapers, on radio, on television, or on the Internet to be adequate substitutes for advertising in a local daily newspaper. Thus, in the event of a small but significant increase in the price of daily newspaper local advertising, the number of advertisers seeking to reach Charleston area consumers that would substitute these other types of advertising for advertising in a local daily newspaper, or would reduce their purchase of advertising in a local daily newspaper, would not be sufficient to make such a price increase unprofitable.

26. Accordingly, the sale of local daily newspapers to readers, and the sale of access to those readers to advertisers in those newspapers, each constitutes a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act and for purposes of Sections 1 and 2 of the Sherman Act.

B. The Relevant Geographic Market

27. The *Charleston Gazette* and the *Charleston Daily Mail* are both produced, published, and distributed to readers in the Charleston, West Virginia area (primarily Kanawha

and Putnam Counties). Both newspapers provide news relating to the Charleston area in addition to state and national news.

28. Local daily newspapers that serve areas outside of the Charleston area do not regularly provide local news specific to the Charleston area. From a reader's standpoint, local daily newspapers serving areas outside of the Charleston area are not acceptable substitutes for the *Charleston Gazette* and the *Charleston Daily Mail*. For this reason, local daily newspapers outside of the Charleston area do not have any significant circulation or sales in Charleston. In the event of a small but significant increase in the price of local daily newspapers in Charleston, the number of readers who would substitute local daily newspapers outside of the Charleston area, and would stop buying any daily local newspaper, would not be sufficient to make such a price increase unprofitable.

29. The *Charleston Gazette* and the *Charleston Daily Mail* allow advertisers to target readers in the Charleston area. From the standpoint of an advertiser selling goods or services in the Charleston area, advertising in local daily newspapers serving areas outside of the Charleston area is not an acceptable substitute for advertising in the *Charleston Gazette* and the *Charleston Daily Mail*. In the event of a small but significant increase in the price of advertisements in local daily newspapers serving the Charleston area, the number of advertisers that would substitute local daily newspapers outside of the Charleston area, and would reduce their purchase of advertising in a local daily newspaper, would not be sufficient to make such a price increase unprofitable.

30. Accordingly, the Charleston, West Virginia area is a section of the country and a relevant geographic market within the meaning of Section 7 of the Clayton Act and for purposes of Sections 1 and 2 of the Sherman Act.

VI. ANTICOMPETITIVE EFFECTS

31. The May 7 transactions have and will continue to substantially lessen competition in the local daily newspaper market in the Charleston, West Virginia area by giving Gazette Company a monopoly in the Charleston local daily newspaper market. These transactions gave Gazette Company control over and the power to weaken or eliminate the *Charleston Daily Mail* and have already had, and will continue to have, among others, the following adverse effects on competition:

- (a) reduced output (both quantity and quality) of newspapers; and
- (b) increased prices to readers and advertisers.

VII. ENTRY

32. Entry by local daily newspapers into the Charleston, West Virginia, area is time-consuming and difficult, and is not likely to prevent the anticompetitive effects of the May 7 transactions by constraining Gazette Company's market power in the foreseeable future. Local daily newspapers incur significant fixed costs, many of which are sunk. Examples of these sunk costs include building or gaining access to a printing facility, establishing a distribution network, hiring reporters and editors, news gathering, and marketing the very existence of the new paper, all of which take substantial time. These costs often are termed "first copy" costs because they are costs that newspaper companies must incur before they print the first copies of their newspapers. In the event that the entrant fails or exits the newspaper industry, it cannot recover

all of these costs, making entry risky and likely unprofitable. As a result, entry into Charleston daily newspaper market would not be timely, likely, or sufficient to prevent the harm to competition resulting from the May 7 transactions. Since May 7, 2004 there have been no attempts to enter the local daily newspaper market in the Charleston area.

VIII. VIOLATIONS

COUNT ONE

(Violation of Section 7 of the Clayton Act)

33. Each and every allegation in paragraphs 1 through 32 of this Complaint is here realleged with the same force and effect as though said paragraphs were here set forth in full.

34. Gazette Company and MediaNews Group are hereby named as defendants on Count One of this Complaint.

35. The May 7 transactions constitute an acquisition of assets by Gazette Company from MediaNews Group, the effect of which has been and is likely to continue to be to lessen competition substantially and to tend to create a monopoly in interstate trade and commerce in the sale of local daily newspapers and advertising in those newspapers in the Charleston, West Virginia area, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

36. The May 7 transactions, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, have had the substantial anticompetitive effects set forth in ¶ 31 above, and, unless rescinded and restrained, those effects likely will continue.

COUNT TWO

(Violation of Section 1 of the Sherman Act)

37. Each and every allegation in paragraphs 1 through 32 of this Complaint is here realleged with the same force and effect as though said paragraphs were here set forth in full.

38. Gazette Company and MediaNews Group are hereby named as defendants on Count Two of this Complaint.

39. The May 7 transactions have eliminated the incentives and ability for MediaNews Group to compete effectively with Gazette Company in Charleston and have given Gazette Company the power to control and, ultimately, eliminate the *Charleston Daily Mail*. The arrangement created by the May 7 transactions is not immune under the Newspaper Preservation Act. For the above reasons, the May 7 transactions constitute a contract, combination or conspiracy by and among defendants that has unreasonably restrained trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

40. The May 7 transactions have had and will continue to have anticompetitive effects in the relevant market, including among others, those set forth in ¶ 31, above.

41. The above violation is continuing and will continue unless the relief requested hereinafter is granted.

COUNT THREE

(Violation of Section 2 of the Sherman Act)

42. Each and every allegation in paragraphs 1 through 32 of this Complaint is here realleged with the same force and effect as though said paragraphs were here set forth in full.

43. Gazette Company is hereby named as the defendant on Count Three of this Complaint.

44. Through the anticompetitive conduct described herein, Gazette Company has monopolized the Charleston, West Virginia, local daily newspaper market. As a result of defendants' actions, Gazette Company now possesses substantial monopoly power in the sale of local daily newspapers in the Charleston area. Gazette Company has willfully maintained, and unless restrained by the Court will continue to willfully maintain, this unlawful monopoly power through anticompetitive and unreasonably exclusionary conduct. Defendants' actions and practices constitute unlawful monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

IX. REQUESTED RELIEF

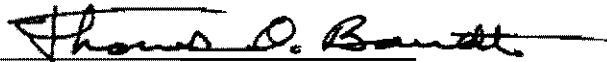
45. The United States requests that the Court:

- (a) adjudge and decree that the May 7, 2004, transactions are illegal, and their effects may be substantially to lessen competition, or to tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;
- (b) adjudge and decree that the May 7 transactions constitute an illegal restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;
- (c) adjudge and decree that Gazette Company has unlawfully monopolized the Charleston daily newspaper market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;
- (d) rescind the May 7 transactions;

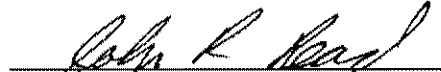
- (e) direct the defendants to restore the *Charleston Daily Mail* to its pre-May 7, 2004 competitive condition;
- (f) award the United States such other and further relief as the Court may deem just and proper to redress and prevent recurrence of the above violations, to dissipate their anticompetitive effects, and to restore effective competition in the Charleston daily newspaper market; and
- (g) award the United States the costs of this action.

DATED: May 22, 2007

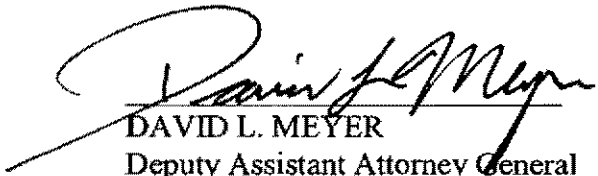
FOR PLAINTIFF UNITED STATES OF AMERICA



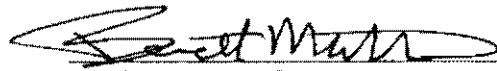
THOMAS O. BARNETT
Assistant Attorney General
Antitrust Division



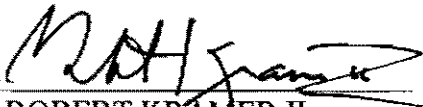
JOHN R. READ
Chief, Litigation III
NINA B. HALE
Assistant Chief, Litigation III



DAVID L. MEYER
Deputy Assistant Attorney General
Antitrust Division



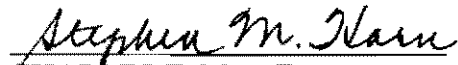
THOMAS J. HORTON
BENNETT J. MATELSON
WILLIAM H. JONES II
MARK A. MERVA
MATTHEW J. BESTER
JENNIFER A. WAMSLEY



J. ROBERT KRAMER II
Director of Operations



BERNARD M. HOLLANDER
Senior Trial Attorney



CHARLES T. MILLER
United States Attorney
Southern District of West Virginia
by Stephen M. Horn *cd*
Assistant United States Attorney
WV State Bar Number 1788
P.O. Box 1713, Charleston, WV 25326
Phone: 304-345-2200 Fax: 304-347-5443
E-mail: steve.horn@usdoj.gov

Attorneys for the United States
United States Department of Justice
Antitrust Division, Litigation III Section
325 7th Street, N.W., Suite 300
Washington, DC 20530
Phone: 202-616-5871 Fax: 202-514-7308
Email: Thomas.Horton@usdoj.gov
Bennett.Matelson@usdoj.gov