IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Crim. No. CR-2-93-46
HAYTER OIL COMPANY, INC. OF GREENEVILLE, TENNESSEE d/b/a MARSH PETROLEUM COMPANY and SONNY WAYNE MARSH,	)	
	)	
Defendants.	)	

RESPONSE OF THE UNITED STATES OPPOSING DEFENDANTS HAYTER OIL COMPANY AND SONNY WAYNE MARSH'S MOTIONS FOR A JUROR QUESTIONNAIRE

Defendants Hayter Oil Company, Inc. of Greeneville, Tennessee d/b/a Marsh Petroleum Company ("Marsh Petroleum") and Sonny Wayne Marsh move for an order authorizing them to (i) compile a juror questionnaire, (ii) submit it to the jury venire through the clerk's office, and (iii) obtain the responses for defense counsel's review "as soon as possible". Defendants claim their motions are justified by "the nature of the case, involving high profile defendants, extensive long term pretrial publicity, and the anticipation of a lengthy, complex trial."

This case, however, is no different than any other criminal conspiracy case filed in this district. The United States does not anticipate a lengthy trial, as defendants contend, but anticipates it may easily be tried in one week. What little pretrial publicity that has accompanied this case has been

neither extensive nor widespread, and with all due respect, the defendants are no more "high profile" than other criminal defendants in this district and should be treated no differently. For these reasons, defendants' motions are without merit and should be denied.

A.

On July 21, 1993, a grand jury sitting in the Eastern District of Tennessee returned an indictment against defendant Marsh Petroleum and its president and owner, Sonny Wayne Marsh. The indictment charged them with conspiring to fix retail gasoline prices in the Greeneville, Tennessee area, in violation of the Sherman Antitrust Act. 15 U.S.C. § 1. Trial was set for October 4, 1993, but postponed until November 15, 1993, to allow the defense sufficient time to prepare.

The defendants' motions resemble those filed in the case of United States v. Appalachian Oil, et al., CR 2-91-78 (E.D. Tenn.)("Appalachian Oil"), which was tried in Knoxville in November 1992. The United States did not oppose the defendants' motions for a juror questionnaire in that case. But as developed below, this case includes none of the unusual and demanding circumstances that the defendants cited as grounds for a questionnaire in the Appalachian Oil trial. Moreover, the Court's and parties' experiences in that trial compel the conclusion that the questionnaire was nothing more than an

exercise in futility and frustration. For these reasons, defendants' motions in this case should be denied.

The Appalachian Oil case involved the prosecution of six individual and corporate defendants with divergent interests. The pretrial publicity was substantial and widespread, and focused on both the charges in the case and one oil jobber's threats to harm the prosecutors in that case. In addition, the parties expected that trial to last at least six weeks, and perhaps as long as three months. Under those unusual and demanding circumstances, the government did not oppose using a questionnaire to assess juror qualifications and bias.

This case, however, is much more like the typical fraud case filed in this district. For example, defendant Marsh and his company are the only two defendants in this trial, and their interests cannot be characterized as adverse. To the contrary, defendant Marsh is the one-hundred-percent owner of Marsh Petroleum and has assembled a unified defense team, albeit with separate attorneys for the company and himself. In sharp contrast, the Appalachian Oil case was litigated by five defense attorneys whose legal positions and theories often conflicted with one another. This case has no such divergent interests.

Defendants Sonny Wayne Marsh and Marsh Petroleum cannot be characterized as "high profile defendants," nor has the pretrial publicity been extensive or widespread. Mr. Marsh, as the president of the Phillips gasoline distributor in Greeneville, is charged with fixing retail gasoline prices with his competitors

in the Greeneville market. In this respect, he is in the same position as any other businessman charged with committing fraud or other, similar nonviolent felony. Thus, the defendants have no grounds to claim that the "magnitude of the charge" will overwhelm the veniremen at the outset of this trial or that a juror questionnaire will resolve this alleged problem.

Regarding publicity, the government is aware that the Greeneville Sun newspaper has published approximately one dozen stories on this case, several in which defense counsel has explained defendant Marsh's position to the press and public. Additionally, a significantly smaller number of articles on the case have been published in the newspapers in Knoxville, where the case is to be tried. Under these facts, a questionnaire will not be necessary to determine whether the panel has suffered "the negative effects of extensive, long-term media coverage" (as defendants contend), because what little coverage it has received has not been extensive or long-term. To the contrary, possible bias arising from the media coverage can be disclosed with a single question during voir dire. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021 (1910); and United States v. Blanton, 700 F.2d 298 rev'd en banc, 719 F.2d 815 (6th Cir. 1983), cert. denied, 465 U.S. 1099 (1984). In short, and contrary to defendants' claims, this case does not pose any "special problems" that exacerbate the difficulty of obtaining information during voir dire.

Defendants' position that this case involves "sensitive issues" is equally without merit. This case involves two defendants charged with agreeing with their competitors on the timing and size of increases in the price of gasoline they sold at their outlets in Greeneville. The only "sensitive issue" to be determined in this case is that of the defendants' guilt. Again, contrary to defendants' claims, the presence of this issue in the case does not justify their motions and, therefore, they should be denied.

B.

Defendants' motions should also be denied because the method by which they propose to administer their questionnaire is inappropriate. Specifically, defendants move to draft the questionnaire themselves and administer it through the clerk's office, without regard to the position of the United States. Defendants' proposed procedure is nothing like the practice the District Court approved in the Appalachian Oil case, wherein all of the parties agreed that a questionnaire would be useful, and then both sides reached a consensus on the questions that the questionnaire would pose. This entire process, of course, was executed subject to the scrutiny of the District Court.

In this case, however, the defendants seek unfettered freedom to submit what amounts to an ex parte questionnaire to the venire panel. Such a procedure is inappropriate and has no place in this or any other case in this Court.

Furthermore, the results of using the questionnaire in the Appalachian Oil trial compel the conclusion that the Court should not burden itself or the jurors by permitting interrogation by questionnaire in this case. In addition to enduring the usual amount of voir dire in open court by each of the attorneys, the potential jurors were forced to respond to a fifteen-page questionnaire on their own time in the Appalachian Oil case. The parties -- both the government and the defendants -- collated the questionnaire responses, and then questioned the jurors individually about the details of each of their responses or, conversely, queried about why they failed to respond to certain questions. As the District Court witnessed, the result of the alleged time-saving questionnaire was that every potential juror was subjected to fifteen pages of interrogatories, which were followed by the usual voir dire in open court and additional follow-up questions based on the interrogatories.

Rather than facilitate voir dire, the questionnaires became the subject of additional controversy, while they imposed an additional administrative burden on the Court. Before the veniremen were summoned for appearance on the first day of trial, the parties had to agree on the contents of the questionnaires, assemble them, gain the Court's approval of them, and then have them prepared by the clerk, submitted to the venire panel, completed by the veniremen, returned to the clerk, photocopied for each of the parties, and forwarded to each of the attorneys for the parties.

The Court was then burdened with tracking over one hundred questionnaires. During the course of reviewing the questionnaires, and prior to oral voir dire, the Court allowed both sides to submit challenges for cause to any members of the "questionnaire panel". Approximately twenty potential jurors were then ordered struck from the panel. As additional questionnaires were submitted by the veniremen, additional challenges were made against the questionnaire panel for cause. After several rounds of arguments of challenges for cause against the questionnaire panel, twelve members of the venire panel were seated in the box.

But after approximately an hour of oral voir dire of the panel, it was discovered that several of the potential jurors then sitting in the jury box had previously been stricken for cause by the Court. This necessitated a recess while the Court, Deputy Courtroom Clerk, and all attorneys, met once again to decide what group of potential jurors from the questionnaire panel should be subjected to additional oral voir dire. Although the parties managed to strike a jury in one day, it could not be disputed that the questionnaires encumbered the process, rather than facilitated it.

This case is much simpler than the Appalachian Oil case, and, accordingly, the trial should be more streamlined and much simpler. The number of defendants in this case is much smaller and, as explained above, they have identical interests. Moreover, the alleged conspiracy period is shorter in this case,

and the market is much smaller. Perhaps as a consequence of these differences, this case has not received the extensive, widespread attention of the news media that the Appalachian Oil case drew. Contrary to defendants' ambiguous claims, this case does not involve any "sensitive issues," but is similar to a typical fraud case brought in the Eastern District of Tennessee. Under these facts, the Court, clerk and jurors should not be burdened with a juror questionnaire that, as the Court's experience shows, will only encumber jury selection. For these reasons, the defendants' motions to administer a juror questionnaire should be denied.

DATED: October ___, 1993

Respectfully submitted,

William D. Dillon

William G. Traynor

Attorneys
Antitrust Division
U.S. Department of Justice
Suite 1176
75 Spring St., S.W.
Atlanta, GA 30303
404/331-7100

CERTIFICATE OF SERVICE

This is to certify that on October , 1993 the Response Of The United States Opposing Defendants Hayter Oil Company and Sonny Wayne Marsh's Motions For Juror Questionnaire was served on the following counsel by sending photocopies of the response to them via United States mail to the following addresses:

John T. Milburn Rogers, Esquire
Counsel for Sonny Wayne Marsh
100 South Main Street
Greeneville, TN 37743
(615) 639-5183

Frank Johnstone, Esquire
Counsel for Hayter Oil
Company, Inc.
Wilson, Worley, Gamble,
& Ward P.C.
110 East Center Street
P.O. Box 1007
Kingsport, TN 37662-1007
(615) 246-8181

Roger W. Dickson, Esquire
Counsel for Hayter Oil
Company, Inc.
Miller & Martin
Volunteer Building, Suite 1000
832 Georgia Avenue
Chattanooga, TN 37402
(615) 756-6600

William D. Dillon
Attorney
Antitrust Division
U.S. Department of Justice
75 Spring Street, S.W., Suite 1176
Atlanta, Georgia 30303
(404) 331-7100