CAUSE NO. 98 CI-15356

GORDON WEINER	§	IN THE DISTRICT COURT
Plaintiff	§	
vs.	§	73rd JUDICIAL DISTRICT
BRIAN WEINER	§	
Defendant	§	BEXAR COUNTY, TEXAS

MOTION OF THE UNITED STATES OF AMERICA FOR PROTECTIVE ORDER

COMES NOW the United States of America, by and through its undersigned counsel, and files this Motion for Protective Order, pursuant to Rule 192.6 of the Texas Rules of Civil Procedure, and in support of said Motion would show unto the Court as follows:

I
BACKGROUND

1. Plaintiff GORDON WEINER alleges in the above-referenced lawsuit that Defendant BRIAN WEINER breached his fiduciary duty as principal shareholder of PMG Delaware, Inc. ("PMG"). PMG, formerly a wholesale distributor of magazines in the State of Texas and elsewhere in the United States, sold its domestic wholesale operations in or about late 1995 and early 1996. Rack Shop, Inc. ("Rack Shop") is the successor company to PMG. Defendant BRIAN WEINER was the majority owner of PMG, and he is the majority owner of Rack Shop.

2. The United States Department of Justice, Antitrust Division, is conducting an ongoing criminal investigation into violations of the Sherman Act, 15 U.S.C. § 1, and other related federal offenses in the magazine distribution industry. The government's investigation is

national in scope. To date, evidence has been presented to a federal grand jury sitting in the Northern District of Texas, Dallas Division. Defendant BRIAN WEINER is a material cooperating witness in the government's ongoing criminal investigation.

3. The United States recently learned that Plaintiff GORDON WEINER noticed Defendant BRIAN WEINER for a deposition scheduled to commence on March 23, 2000. Plaintiff GORDON WEINER has requested that Defendant BRIAN WEINER produce at the deposition, among other things, (1) "all 'target letters' received from any government agency or department" (Plaintiff's First Request for Production, paragraph 32); and (2) "all correspondence with the United States Department of Justice or any United States Attorney regarding business of The Company" (Plaintiff's First Request for Production, paragraph 55). For purposes of Plaintiff GORDON WEINER'S document request, "The Company" refers to PMG.

4. On or about February 23, 2000, Defendant BRIAN WEINER filed a Motion for Protective Order Relative to the Deposition of Defendant BRIAN WEINER, seeking an order quashing Defendant BRIAN WEINER's deposition until Plaintiff GORDON WEINER files an amended petition that pleads a fraud cause of action. Separately, Defendant BRIAN WEINER seeks to limit Defendant BRIAN WEINER's deposition to the elements of a fraud cause of action. Furthermore, the motion requests that the Court quash the Plaintiff's Requests for Production on the grounds that none relate to a fraud cause of action. This motion is set for hearing on the March 9, 2000, at 8:30 a.m.

II

BASIS FOR REQUESTED PROTECTIVE RELIEF

5. The United States asserts that, unless a protective order is entered, the deposition of Defendant BRIAN WEINER and the production of certain documents requested by Plaintiff GORDON WEINER, as described above, will severely prejudice its ongoing grand jury proceedings and criminal investigation. Under Fed. R. Crim. P. 6(e), the scope of grand jury secrecy is broad, encompassing "not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal 'the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberation or questions of the jurors, and the like.'" United States v. Marks, 949 S.W. 2d 320, 324 (Tex. 1997), quoting Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981) (quoting S.E.C. v. Dresser Indus., Inc., 628 F.2d 1368, 1382 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 (1980)).

6. The United States is concerned about allowing the deposition of Defendant BRIAN WEINER to go forward on March 22, 2000, without any limitation being imposed as to the subject matter and areas of inquiry of said deposition. In short, the United States has an interest in protecting the secrecy and integrity of its ongoing grand jury investigation into whether magazine wholesalers have engaged in illegal collusive conspiracies (*e.g.*, agreements to allocate customers or territories) in violation of the Sherman Act and related federal offenses. The grand jury investigation being conducted by the United States is national in scope. Pursuant to the plea agreement involving Rack Shop and Island Periodicals, Defendant BRIAN WEINER is obliged to cooperate in the government's ongoing grand jury investigation. If Plaintiff GORDON WEINER is permitted in his deposition to ask Defendant BRIAN WEINER about

BRIAN WEINER's or PMG's involvement in collusion with other magazine wholesalers, then the secrecy of the grand jury proceedings and ongoing criminal investigation will be severely jeopardized. Specifically, an unlimited deposition of Defendant BRIAN WEINER into areas concerning BRIAN WEINER's or PMG's participation in, or knowledge of, collusion in the magazine distribution industry would result in the disclosure of (1) the identities of government witnesses, (2) the identities of targets, potential targets and subjects of the investigation, (3) the substance of testimony before the grand jury, and (4) the strategy and direction of the grand jury investigation. In United States v. Marks, supra, the Texas Supreme Court held that all such information is privileged from disclosure under Fed. R. Crim. P. 6(e). The United States further asserts that an unlimited civil deposition of Defendant BRIAN WEINER may also jeopardize the government's investigative and work product privileges.

7. Here, the United States' concern about grand jury secrecy is heightened in that Plaintiff GORDON WEINER's law firm (Matthews & Branscomb, P.C.) also represents subjects and potential targets of the grand jury's investigation. Given this overlap, it is unacceptable to allow that law firm's lawyers in a deposition of Defendant BRIAN WEINER to have unfettered access to inquire about matters that directly impact the grand jury investigation and other clients that Matthews & Branscomb, P.C., represents. Defendant BRIAN WEINER is a key cooperating witness. The more limited discovery rules of the Federal Rules of Criminal Procedure simply do not allow lawyers representing subjects and potential targets of a grand jury to use the liberal rules of civil discovery to obtain pre-indictment the kind of information that inevitably will be sought from Defendant BRIAN WEINER here. In balancing the interests of an individual's ability to pursue civil discovery with those of the United States and the public in

protecting grand jury secrecy, civil discovery is routinely limited -- or sometimes postponed altogether -- pursuant to protective orders where such civil discovery may be used by targets, potential targets or subjects of an investigation to circumvent the limited scope of discovery rules under the Federal Rules of Criminal Procedure. See, e.g., Founding Church of Scientology, Etc., v. Kelley, 77 F.R.D. 378 n.4 (D.D.C. 1977); Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). Based on a review of the document request served upon Defendant BRIAN WEINER, as well as statements made to government counsel during a conference on March 6, 2000, with one of Plaintiff GORDON WEINER's lawyers (John D. Fisch of Matthew & Branscomb, P.C.), it appears that there is substantial overlap between the subject matter of Plaintiff GORDON WEINER's fraud case and the subject matter of the government's grand jury investigation.

8. Accordingly, the United States respectfully requests that the Court enter an order prohibiting Plaintiff GORDON WEINER's counsel in the deposition of Defendant BRIAN WEINER from inquiring into any matter(s) relating to the grand jury's investigation into collusion in the magazine distribution industry. Such matters include, but are not limited to, questions about Defendant BRIAN WEINER'S involvement in, or knowledge of: (1) any collusion, combination or conspiracy engaged in by BRIAN WEINER under the antitrust laws and/or related federal statutes; (2) any collusion, combination or conspiracy engaged in by PMG (including any predecessor, successor, subsidiary, division or affiliate thereof) under the antitrust laws and/or related federal statutes; or (3) any collusion, combination or conspiracy engaged in by any other person or entity in the magazine distribution industry. Separately, the United States respectfully requests that Plaintiff GORDON WEINER's counsel be prohibited from inquiring

into the nature and substance of Defendant BRIAN WEINER's cooperation with the government pursuant to Federal Rule of Criminal Procedure 11. Such prohibited inquiries would include questions concerning Defendant BRIAN WEINER's discussions with attorneys for the government and questions concerning any and all documents and correspondence exchanged between Defendant BRIAN WEINER and the United States.

9. In addition, the United States also is concerned about Plaintiff GORDON WEINER'S request that Defendant BRIAN WEINER (or PMG) produce certain categories of documents: (1) "all 'target letters' received from any government agency or department" (Plaintiff's First Request for Production, paragraph 32); and (2) "all correspondence with the United States Department of Justice or any United States Attorney regarding business of [PMG]" (plaintiff's First Request for Production, paragraph 55). Plaintiff GORDON WEINER's request for certain documents is too broad, in that his request includes documents produced to the United States pursuant to any subpoena duces tecum issued by the grand jury, as well as documents produced to the United States pursuant to plea discussions covered under Fed. R. Crim. P. 11.

10. Accordingly, the United States requests that the court quash Plaintiff GORDON WEINER's Requests for Production of (1) "all 'target letters' received from any government agency or department" and (2) "all correspondence with the United States Department of Justice or any United States Attorney regarding business of The Company."

III
CERTIFICATE OF CONFERENCE

11. Pursuant to Local Rule 3.8, a conference was held on March 6, 2000, with John D. Fisch, attorney for the opposing party, on the substance of this motion. On March 7, Richard T. Hamilton, Jr., counsel for the United States, faxed to Mr. Fisch a draft of the government's

proposed order for purposes of furthering our discussions. Mr. Hamilton requested that Mr. Fisch call him no later than 4:00 p.m. (EST) to give government counsel sufficient time to try to resolve issues before filing this Motion. Mr. Hamilton did not receive a call from Mr. Fisch. Thus, we were not able to agree; therefore, the matter is presented to this court for determination.

IV
PRAYER

WHEREFORE PREMISES CONSIDERED, the United States respectfully requests that the Court grant this Motion for Protective Order and to enter a protective order prohibiting Plaintiff GORDON WEINER's counsel in the deposition of Defendant BRIAN WEINER from inquiring into any matter(s) relating to the grand jury's investigation into collusion in the magazine distribution industry. Such matters include, but are not limited to, questions about Defendant BRIAN WEINER'S involvement in, or knowledge of: (1) any collusion, combination or conspiracy engaged in by BRIAN WEINER relating to the antitrust laws and/or related federal statutes; (2) any collusion, combination or conspiracy engaged in by PMG (including any predecessor, successor, subsidiary, division or affiliate thereof) relating to the antitrust laws and/or related federal statutes; or (3) any collusion, combination or conspiracy engaged in by any other person or entity in the magazine distribution industry.

Separately, the United States respectfully requests that this court enter a protective order prohibiting Plaintiff GORDON WEINER's counsel in a deposition of Defendant BRIAN WEINER from inquiring into the nature and substance of Defendant BRIAN WEINER's cooperation with the United States pursuant to Fed. R. Crim. P. 11 and/or PMG's (including any predecessor, successor, subsidiary, division or affiliate thereof) compliance with any subpoena

duces tecum issued by the grand jury. Such prohibited inquiries would include, but are not limited to, questions concerning Defendant BRIAN WEINER's discussions with attorneys for the United States and questions concerning any and all documents and correspondence exchanged between the Defendant BRIAN WEINER and the United States.

Finally, the United States respectfully requests that this court quash Plaintiff GORDON WEINER's requests for (1) "all 'target letters' received from any government agency or department" and (2) "all correspondence with the United States Department of Justice or any United States Attorney regarding business of The Company."

REQUEST FOR HEARING

The undersigned counsel is unable to appear at the hearing set for March 9, 2000, because of a prior commitment involving proceedings before a federal grand jury concerning the government's ongoing investigation into collusion in the magazine distribution industry. In the event that the court denies Defendant BRIAN WEINER's Motion for Protective Order Relative to the Deposition of BRIAN WEINER, or grants relief inconsistent with this Motion of the United States of America for Protective Order, the United States requests a hearing on its Motion for Protective Order. The interests of the United States in protecting the secrecy and

integrity of the ongoing grand jury investigation are distinct and separate from those of the Plaintiff and Defendant in the above-referenced lawsuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was sent via Federal Express to the Clerk of Courts, Bexar County, Texas, and to all counsel of record on this 7th day of March, 2000, as follows:

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