

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

[FILED 4/24/95]

UNITED STATES OF AMERICA; Plaintiff

v. Civil No.: 95-5048

NAT, L.C. AND D.R. PARTNERS
d/b/a DONREY MEDIA GROUP; Defendants

COMMUNITY PUBLISHERS, INC.; and
SHEARIN INC., d/b/a SHEARIN & COMPANY REALTORS; Plaintiffs

v. Civil No.: 95-5026

DONREY CORP. d/b/a DONREY MEDIA GROUP,
NAT, L.C.; THOMSON NEWSPAPERS, INC., and
THE NORTHWEST ARKANSAS TIMES; Defendants

MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES
TO COMPEL DEFENDANT NAT, L.C. TO PRODUCE ALL STUDIES,
MATERIALS, AND EXHIBITS ON WHICH ITS ECONOMIC EXPERT WILL
RELY AND TO MAKE THE EXPERT AVAILABLE FOR DEPOSITION

The United States moves this Court to order defendant NAT, L.C., to produce by Wednesday, April 26, all studies and exhibits on which its economic expert will rely, and to make its economic expert available for examination on his final opinions.

At the urging of defendant NAT, L.C., United States reluctantly agreed to two separate depositions of its economic expert, conditioned on parallel depositions of defendant's economic expert. The second depositions were scheduled for April 20 and 21, dates selected with the understanding that the experts would have finished their work and thus be available for questioning about the opinions that they intended to offer at trial. The United States fulfilled its

obligations under this arrangement by producing its expert who testified about the opinions he expects to offer at trial. Defendant NAT, L.C., however, proffered its expert who, after working since mid-February and after three depositions, still had not completed his work and was not able to offer his final opinions on some critical issues, even though this was ten days before trial. Accordingly, the United States has no choice but to bring this motion for relief in order adequately to prepare for trial.

Defendant's expert did not have final opinions on a number of critical issues at his April 20 deposition.

As noted above, the United States and defendant NAT, L.C., scheduled the experts' April 20 and 21 depositions at a time when both experts could have completed their work and be prepared to offer their final opinions. The United States' expert did so testify. NAT, L.C.'s expert, however, continued to maintain uncertainty about his final opinions (emphasis added):

Q. How would you count them [weeklies] and attribute shares to them?

A. Well, **I'm still working on that.** . . . Exactly how I'm going to measure this, **I'm still struggling with that, frankly.**

Deposition of Thomas R. Overstreet, Jr., (hereinafter "Overstreet Tr.") at 14, ll. 16-18; 15, ll. 12-13 (April 20, 1995).

Q. When do you expect to reach a final decision on that [weeklies]?

A. Well, **I was hoping to have done so by now** so we could put an end to this process.

. . . .

Well, **I'm continuing to look for that** and **I'm going to do what I can between now and the time trial starts.** . . . I intend to sit through the trial. And I'm going to listen to what takes place there and I'll take that into account as well but that's about the best I can do right now.

Overstreet Tr. at 16, ll. 20-22; 17, ll. 1, 6-8, 13-16 (April 20, 1995).

I'm searching through the data that we have gotten and we have been doing some empirical analysis of that data to try to get a handle on the degree of substitutability between the [daily] papers.

I'm still working on that.

Overstreet Tr. at 21, ll. 13-18 (April 20, 1995).

Q. While I'm close to the subject of charts and exhibits and whatnot, are there other charts or exhibits that you expect to use or to sponsor in your testimony?

A. Well, **I think there are.**

I don't -- **there is nothing that I've got right now that's in final form.** But I do have in mind putting some exhibits together. You have seen, I think, sort of precursors of the kind of stuff I have in mind.

....

MR. CONRATH: Any other charts or graphs or exhibits?

THE WITNESS: Well, **I'm still thinking about it.** I'm sure there will be. That would be basically things that would be used to illustrate the testimony.

Q. Would you be thinking of producing charts of market shares?

A. Yes, I think so. **I'm thinking about it.**

Overstreet Tr. at 58, ll. 14-22; 59, ll. 11-21 (April 20, 1995).

I don't have an answer to this but I do have in mind possibly constructing some exhibit that would involve a map and would involve some way on a map of showing where the two markets are separated from each other. . . . I don't at this point, **I'm not sure if I'm going to do this** but I am thinking about it.

Overstreet Tr. at 63, ll. 4-13 (April 20, 1995).

So, **I'm still struggling with this issue** about where you draw lines [for geographic market definition for the Times].

Overstreet Tr. at 70, ll. 5-6 (April 20, 1995).

I don't at this point really have an answer for that. [geographic market definition for the Morning News]

Overstreet Tr. at 86, ll. 20-21 (April 20, 1995).

Q. All right. Would you conclude, based -- well, **is this** [what competing products to include in the market with the Morning News] **another subject, then, on which you're not finally sure?**

A. **It is. It is**, I think that that's right. **I mean I do have in mind here taking a look at this in a couple of different ways.** One is the one we just talked about. I think there is some judgment involved in how you pick a point on which you draw a line and **I'm still working on that.**

Overstreet Tr. at 97-98, ll. 17-22, 1-5 (April 20, 1995).

Q. So, when you say you would include them [broadcast media] to some degree, how would you do that?

A. Well, **I'm still struggling with that. . . . I'm still wrestling with that** because of the state of the evidence we have.

Q. What are the state of the options in how you might, say, take a fraction of broadcast TV advertising revenue and include it in the market?

A. **I'm not sure right now.**

Overstreet Tr. at 105-06, ll. 16-18, 7-13 (April 20, 1995).

Q. Have you made any efforts to imagine or to develop a share to assign to them in the case of a hypothetical entry by the Democrat Gazette?

A. Yes, I have thought about it. . . . **So, I have thought about doing it. I don't have a final answer on what that would be. . .**

Overstreet Tr. at 109-10, ll. 5-9, 1-2 (April 20, 1995).

4 Q. When we talked and scheduled these
5 depositions, it was with the expectation that you
6 would be ready to express an opinion.
7 Can you tell me what it was or has
8 been that has prevented you from being able to
9 finalize your views on some of the questions we've
10 talked about this morning?

11 A. Well, I think I've really answered
12 that in the earlier questions.

13 The lack of evidence of
14 substitutability and cross elasticity of demand
15 makes it difficult to be real precise about how

16 you aggregate these shares and attribute them in
17 the sense of the imports and so forth.
18 **So, I'm still wrestling with what I**
19 **think is a reasonable way to present evidence**
20 about where I would draw boundaries around the
21 markets and in effect explain to the judge why I'm
22 doing what I'm doing.

1 **So, I'm still wrestling with that.**
2 I'm pretty confident that that general view of the
3 world is going to be the view that I express at
4 trial.

5 And what we're really talking about is
6 the details and the method of presentation which
7 is **still being formulated in my mind.**

8 Q. So you're pretty sure that your final
9 conclusion is that this transaction is not
10 anti-competitive?

11 A. Yes.

12 Q. But you're in doubt about some of the
13 reasons for that?

14 A. Well, I wouldn't say I'm in doubt
15 about the reasons for it. But I'm in doubt
16 about some of the details of how I'm going to put
17 together the market structural data.

18 Q. Okay. You're in doubt, for example,
19 about the extent to which broadcast media
20 compete?

21 A. Well, **really all the things we talked**
22 **about.**

Overstreet Tr. at 133-34 (April 20, 1995).

In addition, NAT, L.C., has yet to produce any market share charts on which its expert will rely, for the very simple reason that its expert has yet to define the markets about which he will testify. The United States offered to exchange final exhibits on Tuesday, April 25, but NAT, L.C. counsel refused and offered to produce them on Friday, April 28. In order for the defendants to have an opportunity to examine the government's expert, the United States then

produced the final portions of its information on Friday, April 21, at the beginning of its expert's deposition^{1/} (other information had been produced previously).

If the United States is to be able fairly to cross-examine the defendant's economic expert, it must have an opportunity to review his opinions and an opportunity to test them in deposition. Otherwise, material that should have been covered in deposition will have to be covered at trial, wasting valuable time.

¹ The documents in question are charts of market shares, calculated in various ways and with various assumptions. The charts, as explained to NAT, L.C. counsel at that time, are subject to final checking, and the figures in them may be presented in another form, e.g., in pie charts, but their substance is essentially complete.

Defendant's expert may do last-minute econometric analysis.

On March 27, and again over two weeks ago, at his April 10 deposition, Dr. Overstreet described his plan to do some econometric analysis that he believed relevant:

Q. When you testified before [at the March 27 deposition, Tr. at 62-65], you talked about **a plan to consider running some regression analysis**. Have you done some of that?

A. No, I have not run any. What I am doing is I've asked some people who are -- have a comparative advantage in econometrics to assess the data for me and determine whether or not it is possible to do the kinds of things I would like to do.

To be a little bit more specific about it, I have been exploring the idea of whether one could estimate residual demand curves. In order to do that you have certain kinds of data requirements. You need to be able to identify cost data that is specific enough to the firms or firm -- or firms of interest, to trace out a demand curve. And you have to identify either firm- or industry-specific costs.

And that's in consideration -- it is not clear to me at this point whether it's going to be possible to do that; whether the data even exists. So that's one thing that I'm having people look at and assess for me whether they think -- there are two issues, A, whether it is feasible to do it and, B, if it is feasible to do it, can it be done competently in a short amount of time?

And then the other thing is we have a bunch of price and quantity data and it maybe possible and I'm considering the possibly, of estimating some more direct just demand cost elasticities with that information.

Again, the same basic answer: A, is the data adequate to allow one to do that, and then -- for which I'm beginning to have some doubts, and then -- but if we can identify, then **the question is can we get it done between now and the time of trial**.

Q. I hope the question is can you get it done between now and the 20th.

A. Well, fair enough. It's harder because that's closer.

MS. STEWART: 21st.

THE WITNESS: Let me say this, **if I don't think that I can have something done between now and, say, the 21st, then it seem its[sic] me that**

it's pretty unlikely that I would attempt to do something between the 21st and the trial date. Does that help you?

BY MR. CONRATH:

Q. That's reassuring.

Overstreet Tr. at 238-40 (April 10, 1995). Despite Dr. Overstreet's plan to have this econometric analysis completed by the second depositions on April 20-21, Dr. Overstreet testified on April 20 that:

... **we're in the process now** of attempting to estimate a set of demand equations for the two newspapers and to try to calculate measures of cross elasticity of demand.

....

I have not actually seen any written results of these things but late last night I was given an update on what has been done and what the results are to date.

Q. Now, how many variations of these regressions did your people run?

A. **I don't know that right now. I'm not sure.**

....

Q. Now, is it your plan to testify about some of these results?

A. I think it depends on how good I think they are.

....

Q. And when do you expect to have completed all the work on this analysis that you plan to do?

A. Well, **I was hoping it would be done now.** Same answer as before. **I really don't know.**

Overstreet Tr. at 45, ll. 11-14; 51, ll.10-13; 53, ll. 13-16; 56, ll. 2-5; 57, ll. 3-8 (April 21, 1995) (emphasis added). Dr. Overstreet had planned at least as early as a March 22 meeting with Assistant Attorney General Bingaman to do this econometric analysis. Id. at 207-08, ll. 15-22, 1-5.

If the United States is to have a fair opportunity to cross-examine Dr. Overstreet about any econometric analysis that he intends to use at trial, it is essential that he provide it very quickly and that the United States have an opportunity to depose him about that subject.

In addition, the United States should be entitled to question during this deposition about Dr. Overstreet's interviews of witnesses in Northwest Arkansas. The parties had agreed to exchange lists of persons interviewed by the experts and notes of those interviews. Due to a misunderstanding, Dr. Overstreet testified, he thought that he was to turn over his list and notes of such interviews **after** his deposition.^{2/} As a result, the United States had no opportunity to

² MR. CONRATH: Jerry, do you have the list that we talked about of people that Tom talked to? I've got for you a list of people --

THE WITNESS: Let me answer that, okay?

What happened is I got a call from Amy Stewart yesterday, who left me a phone message on her way to Florida, I believe.

The message that I got asked me to put this stuff together for exchange with you tomorrow.

And I didn't know until I got here this morning that that was not right. Jerry tells me that subsequently or maybe Amy just misunderstood that you were to get it today.

I think that is in my office at my home and I'll have to bring it in here and give it to you tomorrow.

I have the stuff but I don't have it here.

MR. CONRATH: Okay, I'm not going to be cute about it.

You can take this copy, Jerry.

MR. JONES: Thank you.

MR. CONRATH: Obviously, I don't, therefore, have an opportunity to ask you questions about that. I don't know if there will be another opportunity or not.

THE WITNESS: It was a misunderstanding. I understood that this was going to take place tomorrow. I'm sorry about that.

MR. CONRATH: Okay.

We [You] have copies of the notes of your interviews.

THE WITNESS: At home, I do, yes and I'll bring them in and copy them for you.

Sorry.

MR. CONRATH: Here are copies of Ken [Baseman]'s notes of his interviews.

Overstreet Tr. at 135-37.

examine Dr. Overstreet about these notes. The United States still has not received any separate list of Dr. Overstreet's interviewees. By contrast, counsel for NAT, L.C., examined the government's expert about his notes and interviews.

* * *

For the foregoing reasons, the United States asks that defendant NAT, L.C. be ordered to produce by Wednesday, April 26, all studies, materials, and exhibits on which its economic expert will rely and to make the expert available for deposition shortly thereafter.

Respectfully submitted,

/S/ _____
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Dated: April 24, 1995

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MOTION OF THE UNITED STATES
TO COMPEL DEFENDANT NAT, L.C. TO PRODUCE ALL STUDIES,
MATERIALS, AND EXHIBITS ON WHICH ITS ECONOMIC EXPERT WILL
RELY AND TO MAKE THE EXPERT AVAILABLE FOR DEPOSITION

Pursuant to Rule 37 of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying memorandum, the United States moves compel defendant NAT, L.C. to produce by Wednesday, April 26, all studies, materials, and exhibits on which its economic expert will rely and to make the expert available for deposition. Counsel for the United States has discussed this matter with counsel for NAT, L.C., and has been unable to resolve the matter (counsel the United States had informed counsel for NAT, L.C. on Friday, April 21

during the deposition that the government might have to seek relief, and when counsel spoke on Monday, April 24, counsel for NAT, L.C. had stated that he would check again on that day with their expert, but had not responded by the time it became essential to file this motion, given the very limited time available before any relief becomes moot).

Respectfully submitted,

/S/ _____
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ORDER

The Court is in receipt of the motion of plaintiff United States to compel defendant NAT, L.C. to produce all studies, materials, and exhibits on which its economic expert will rely and to make the expert available for deposition.

Deeming it proper so to do and upon consideration of the response to the instant

motion, it is ADJUDGED and ORDERED that Plaintiff's motion be and the same is hereby GRANTED. Defendant NAT, L.C. is directed to turn over to plaintiffs by Wednesday, April 26, all studies, materials, and exhibits on which its economic expert will rely and to make the expert available shortly thereafter for deposition on those studies, materials and exhibits, as well as on his interviews and notes thereon.

UNITED STATES DISTRICT JUDGE

DATE