

possible, and only because of the need to respond to the newly disclosed defense strategy; that his testimony and deposition would be short and narrowly focused on that issue; and that the United States was willing to discuss with defense counsel ways to minimize any inconvenience caused by his designation. Instead, however, defendants filed their motion seeking to exclude altogether Mr. Douglas' testimony from trial.

I. The United States Designated Mr. Douglas As A Witness As Quickly As Possible After It Learned of Defendants' Intention To Make Past Events In Little Rock A Major Issue In This Case

The United States has been aware since before it filed its Complaint that defendants' intended to argue generally that the *Democrat-Gazette* and its publisher, Walter Hussman, might be a potential entrant into Northwest Arkansas, through some form of hypothetical zoned edition of its statewide, non-local newspaper. However, defendants' have now significantly expanded their strategy by going well beyond the *Democrat-Gazette's* potential plans, if any, in Northwest Arkansas, and instead focusing on diverting attention to Mr. Hussman himself, and to the details of the *Democrat's* battle with the *Gazette* in Little Rock over three years ago. Defendants apparently intend to argue that Mr. Hussman "is no ordinary competitor,"^{1/} that he has a "historically demonstrated ability to wage economic war . . . ,"^{2/} and that the details of the

¹ *Brief In Support of Defendants' Motion for Summary Judgment at 8-9.*

² *Brief In Support of Defendants' Motion for Summary Judgment at 5.*

"market strategies"^{3/} he employed in Little Rock suggest he will expand into Northwest Arkansas in spite of a clear, post-acquisition market structure that would make such expansion unprofitable and economically irrational. The United States first discovered this new defense approach when it received defendants' Motion for Summary Judgment at the end of the day on Wednesday, April 12.

Within only three business days, the United States identified Mr. Douglas, met with him for the first time, and placed him on our witness list in our Amended Pretrial Conference Information Sheet. The next day, Tuesday, April 18, we advised defense counsel by letter and telephone that Mr. Douglas would be an expert for the government on past events in Little Rock.^{4/} The United States could not have located a witness to respond to defendants' new argument, determined his or her availability, and notified defendants any sooner; we moved as quickly as possible in reacting to defendants' new evidence.

Defendants seek to have the Court exclude this important witness' response to their eleventh-hour change in strategy on three erroneous grounds: (1) that they do not have sufficient time to prepare for his testimony, (2) that they do not have sufficient time to "prepare an additional expert to rebut" his testimony^{5/} and

³ *Brief In Support of Defendants' Motion for Summary Judgment at 47, & Confidential Appendix I to Brief at 14 & 14 n.38.*

⁴ *See letter, from Craig Conrath, to Jerry Jones (April 18, 1995), attached as Exhibit 1.*

⁵ *Defendants Brief in Support of Motion to Exclude at 2.*

(3) that the United States has failed to identify the issues about which he has been retained to testify.

II. Defendants Have Sufficient Time To Prepare For Mr. Douglas' Testimony

First, defendants have more than adequate time to prepare for Mr. Douglas's testimony. Mr. Douglas's testimony is being offered for a specific, narrow purpose -- to respond to defendants' new arguments about Mr. Hussman and the Little Rock newspaper war -- and will have a correspondingly limited scope. In fact, defendants no doubt have already substantially prepared for Mr. Douglas's testimony and deposition, given that they have crafted and advanced their argument that the *Democrat's* success in Little Rock three years ago, under significantly different market conditions, suggests whether Mr. Hussman might enter the market in Northwest Arkansas in the face of one owner controlling a very large percentage of the market. Thus, defendants should require no significant, additional time to prepare to depose or respond to a witness who will testify about an issue they have already formulated and articulated.

III. Defendants Do Not Need To Prepare An Additional Expert To Rebut Mr. Douglas's Testimony

For similar reasons, defendants have no need to prepare an additional expert to rebut Mr. Douglas's testimony, since his only purpose is to respond to and rebut defendants' recently articulated argument. Presumably, defendants would not have

advanced their arguments about the significance of Mr. Hussman's involvement in the *Democrat-Gazette* battle if they were not already prepared (or at least preparing) to present and support those arguments with evidence at trial. Thus, their argument here that they need time to retain and prepare an expert to address their own issue is disingenuous.

IV. The Issues About Which Mr. Douglas Will Testify Are Specific, Narrow, And Have Been Identified To The Defense

The Government has clearly "indentif[ied] the issues about which Mr Douglas has been retained to testify." In both its April 18th and April 19th letters to defense counsel, the United States clearly explained that Mr. Douglas would testify in response to their newly raised issue: the past events in Little Rock and what, if any, significance those events have to the question of expansion into Northwest Arkansas.^{6/} Thus, the scope of Mr. Douglas's testimony is narrow, focused, and has been timely disclosed to the defendants.

V. The Timing Of Mr. Douglas's Deposition Is Reasonable And Will Not Prejudice Defendants

Finally, defendants complain that Mr. Douglas's deposition is not scheduled to take place until six days prior to the beginning of trial. However, as noted in the government's April 19 letter to Mr. Jones, the reason the deposition could not be scheduled for

⁶ See letter from Craig Conrath, to Jerry Jones, (dated April 18, 1995). Exhibit 3.

this week is that, at defendants insistence, the government's and defendants' economic experts were being deposed for the second time in Washington, D.C. See Exhibit 3. Moreover, the United States had suggested that Mr. Douglas be deposed on April 26, but is willing to defend Mr. Douglas's deposition at anytime convenient to defendants, subject to Mr. Douglas's schedule.

In addition, of course, both preparation for and taking of Mr. Douglas's deposition should not take much time. Mr. Douglas's deposition should be focused only on the defendants' new issue. Given that defendants should have already formulated their arguments regarding this issue, the deposition of Mr. Douglas in this time frame is not untimely. ^{7/}

⁷ *In addition, defendants' argument that six days before trial is simply too late to conduct a simple deposition is contradicted by the fact that major, complicated depositions of the parties two primary economic experts were conducted, at defendants' insistence, on April 20 and 21, only ten and eleven days before trial.*

For the foregoing reasons, the United States respectfully requests that this Court deny defendants' motion.

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Respectfully submitted,

/s/ _____
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