[FILED 4/17/95]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

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 IN LIMINE
TO PRECLUDE ADMISSION OF "BENEVOLENT MONOPOLIST" EVIDENCE

Pursuant to Federal Rules of Evidence 401 and 402, the United States moves *in limine* to preclude the admission of evidence that defendants intend to operate the commonly-owned newspapers in a pro-competitive manner. Such evidence, offered by way of defense to this antitrust action, is inadmissible because it is irrelevant. The Clayton Act prohibits **attaining** market power by acquisition -- whether or not that market power ever actually is exercised, and regardless of the resulting monopolist's supposed benevolent intentions. Accordingly, evidence regarding the Stephens family's claimed intention to run the two newspapers as though they were separate competitors is irrelevant, speculative, and inadmissible.

The sole issue presented by this motion is whether defendants may defend against the Government's claims by introducing evidence that, despite the acquisition of market power through this transaction, defendants will prevent themselves from exercising that power by maintaining a separate management structure for each newspaper. This issue is purely a question of law, the resolution of which will reduce the length of the trial.

This motion does not seek to exclude evidence relating to the fact issue of whether the ownership structure contemplated in this case constitutes common ownership and control of the two newspapers. Rather, by way of this motion, the United States merely seeks a preliminary ruling on the legal irrelevancy of a defense based on defendants' promise to preserve and encourage competition between the newspapers, common ownership and control notwithstanding.

A. BACKGROUND

Defendants apparently intend to present evidence that they will maintain different managements, one for each newspaper. During the Preliminary Injunction hearing, Scott Ford, assistant to Jackson T. Stephens, chairman of Stephens Group, Inc., and president of NAT L.C., testified that he views the *Northwest Arkansas Times* (the *"Times"*) and the *Morning News of Northwest Arkansas* (the *"Morning News"*) to be competitors. (Tr. at 33, 37, 43).[1/] Moreover, Ford testified that he intends to operate the

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[1] *Citations to "Tr." refer to the transcript of the Preliminary Injunction hearing conducted February 7-8, 1995.*

Times as an independent competitor to the *Morning News*. (Tr. at 34, 43, 86, 87, 88, 89). Also during the Preliminary Injunction hearing, Tom Stallbaumer, publisher of the *Morning News*, testified that the two papers have competed in the past (Tr. 204, 215, 221) and will compete in the future, despite common ownership and control. (Tr. 204). In short, according to defendants, the separation of management will ensure competition between the two newspapers and obviate any anticompetitive concerns. Defendants apparently intend, for example, to offer witnesses who work in various Stephens-owned businesses (other than newspapers) to discuss the Stephens' alleged non-interference in day-to-day management.

While there may be dispute at trial regarding the issue of common ownership and control, for purposes of this motion, and in keeping with the Court's Memorandum Opinion denying Donrey's motion to dismiss,[2/] we will assume that the newspapers are both controlled by Stephens family interests. Additionally, we will assume that the defendants will, at least initially, establish separate managements for the papers. For the reasons set forth hereinafter, the defendants should be precluded from offering any evidence, by way of defense to this action, relating to their intention to operate the papers competitively, or their intention to refrain

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[2] *In denying Donrey's motion to dismiss, the Court determined that "[t]his case presents a perfect example of the fluidity of corporate forms and the potential dangers they present. Donrey and NAT essentially share a common genetic imprint, i.e., ownership by various Stephens family trusts." (Civil No. 95-5026, Memorandum Opinion at 5).*

from the exercise of market power.

B. EVIDENCE OF DEFENDANTS' BENEVOLENT INTENTIONS IS IRRELEVANT AND SPECULATIVE, AND THEREFORE SHOULD NOT BE ADMITTED

It is well established that defendants' intent to maintain the acquired firm as a separate entity does not constitute a permissible defense under Section 7 -- indeed, such a defense is based on an erroneous view of the wrong sought to be prevented under Section 7.[3/]

Section 7 prohibits the acquisition of market power (the power to raise prices or reduce quality or services) through a merger or acquisition. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362-63 (1963). Under Section 7, the Government need not prove defendants will **exercise** market power through increased prices or reduced quality or services -- all that need be proved is that defendants will **acquire** market power. Id.; Hospital Corp. of Am. v. F.T.C., 807 F.2d 1381, 1389 (7th Cir. 1986) ("Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger can create an appreciable danger of such consequences in the future.").[4/]

United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 556 (N.D. Ill. 1968) ([T]he argument that the acquired company will be kept separate ... is inconsistent with Section 7's aim to prevent the creation of long run market power by acquisition.").

Once the Government demonstrates that defendants have acquired market power, the court may examine evidence tending to show structural forces in the market (e.g., low barriers to entry, presence of competitive alternatives, high elasticy of demand) that demonstrably would negate any "appreciable danger" that the power to raise prices can be exercised. Hospital Corp. of Am., 807 F.2d

There is no precedent allowing a defense to an otherwise illegal merger based on a supposed "promise" by the owners to the effect that they will voluntarily refrain from the exercise of market power. Even the most benevolent of intentions are irrelevant. In fact, it has been held that even a defendant's intention subsequently to reduce its market power, by divesting a subsidiary of the company the defendant seeks to acquire, is irrelevant in a Section 7 case.[5/] Thus, similar "good intentions" evidence regarding defendants' promise to manage separately the two newspapers should be excluded as irrelevant under Rule 402.[6/]

There are three reasons why the defendants' benevolent intentions are invalid as a defense, and thus irrelevant.

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at 1389. The United States does not seek to preclude the admission of any such market structure evidence.

In United States v. Jos. Schlitz Brewing Co., Schlitz sought to acquire Labatt. A Labatt subsidiary, General Brewing, was found to be a competitor of Schlitz, and thus the acquisition would result in Schlitz acquiring market power. The court held that Schlitz's argument that it would divest General Brewing was "irrelevant to the issue of whether Schiltz' acquisition of Labatt and General Brewing violated Section 7 of the Clayton Act." United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129, 147 (N.D. Cal.) aff'd per curiam, 385 U.S. 37 (1966).

See generally, 4 Areeda and Turner Antitrust Law para. 938b ("[E]vidence that a firm sought merger for reasons other than contemplated anticompetitive effects is quite irrelevant unless it bears on issues raised by recognized defenses."); Julian O. von Kalinowski, 16B Antitrust Laws & Trade Regulation S 26.02 (1994) ("[t]he Supreme Court and other courts have frequently held as irrelevant evidence that ... the defendants had innocent intentions.").

First, permitting this acquisition even in part on the basis of defendants' representation that the two newspapers will continue to compete ignores the fact that the defendants nonetheless retain the authority to reorganize the corporate entities or to eliminate the promised competition. See United States v. Wilson Sporting Goods Co., 288 F. Supp. 543, 556 (N.D. Ill. 1968) (although proxy statement obligated Wilson to segregate acquired company, Nissen, the court recognized that it "would no longer have control of the situation, and many unforeseen factors could result in Nissen's complete integration with Wilson in the long run."). In short, the promise of separate managements does not preclude an eventual instruction to both managements to raise prices, or to cut expenses in a way that reduces quality or services.

Second, allowing such a "benevolent monopolist" defense would turn a merger trial into an extended examination of the personal "bona fides" of the owners. Courts have expressly said that such an inquiry is not material. F.T.C. v. University Health, 938 F.2d 1206, at 1223-24 (11th Cir. 1991) ("[t]o hold otherwise would permit a defendant to overcome a presumption of illegality based solely on speculative, self-serving assertions" which, even if believed, "would not eliminate altogether the risk that it might act anticompetitively" in the future); Philadelphia Nat'l Bank, 374 U.S. at 366-67 (once a prima facie case is shown, the merger must be presumed to be anticompetitive and the district court's reliance on the "testimony of bank officers to the effect that competition

among banks in Philadelphia was vigorous after the merger" was "misplaced.").

Third, courts have recognized that a change in corporate form "does not change human nature." Hospital Corp. of America, 807 F.2d at 1390-91.[7/] As this Court observed in its ruling granting the preliminary injunction, it is not sensible to conclude that businesses responsible to the same boss will compete against each other. (Tr. at 319).

In essence, defendants' separate management contention comes down to the proposition that, although defendants will possess market power, they promise to set up a management structure by which they will choose not to exercise that power. Regardless of defendants' benevolent intentions, the Clayton Act will not allow the only two newspapers in town to have common ownership. Acquiring market power through acquisition is illegal under Section 7, which is why courts have not and should not entertain the contention that "I promise not to use my market power" or, as here,

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See United States v. Pennzoil Co., 252 F. Supp. 962, 984 (W.D. Pa. 1965) ("It has been stated in evidence that if [the] acquisition is permitted, Pennzoil intends to maintain Kendall as a separate entity and permit it to continue to function in the future as it has been doing heretofore. Under the factual circumstances as they exist, we cannot believe that where one corporation acquires the assets of another corporation and has absolute control over who shall be the officials of the acquired corporation, that human tendency will not constrain the acquiring corporation to favor retention of officials in the subsidiary corporation, who are most compliant and acquiescent to the wishes of those who control them. There can be little, if any, reliance upon the statement in the face of well-known tendencies of human conduct.") (emphasis added).

"I promise to set up a management structure that will not use my market power."

C. CONCLUSION

Pursuant to Fed. Rs. Evid. 401 and 402, the United States requests a ruling excluding all evidence offered by way of defense to this action relating to the defendants' intention to operate the *Times* and the *Morning News* as competing newspapers.

Respectfully submitted,

/S/_____
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Dated: _____

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ORDER

The Court is in receipt of Plaintiff's motion *in limine* to exclude all evidence offered by way of defense to this action relating to the defendants' intention to operate the *Times* and the *Morning News* as competing newspapers. 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.

_____
UNITED STATES DISTRICT JUDGE

_____
DATE