UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. QUAD/GRAPHICS, INC., QLC MERGER SUB, INC., and LSC COMMUNICATIONS, INC. *Defendants*.	Civil Action No. 1:19-cv-04153 Hon. Charles R. Norgle, Sr.

UNITED STATES' MEMORANDUM IN
OPPOSITION TO MOTION TO SET EVIDENTIARY HEARING DATES

In this action, the United States seeks to enjoin the proposed merger of the two largest printing companies in the country; companies that readily acknowledge that they are each other's "#1 competitor" for customers who need printing of magazines, catalogs, and books. This is a multi-billion-dollar industry, and businesses throughout the country rely on competition between the merging companies to deliver competitive prices and services that they need in order to provide those printed products to American consumers.

Defendants' premature motion seeking a five-day "evidentiary hearing" attempts to create a hybrid "mini trial" that is neither a preliminary injunction hearing nor a trial on the merits, and it accordingly should be rejected. Defendants' approach tries to sidestep well-established procedures in order to solve a problem of their own making: their self-imposed October option date in their merger agreement. Parties to merger agreements, when confronted with rare merger challenges by the United States (such as this), often agree to forego a

preliminary hearing as unnecessary and adjust their merger deadlines to proceed directly to a trial on the merits. Defendants' proposal to short-circuit the ordinary judicial process and rush to a "mini trial" to accommodate their preferred schedule would deprive the United States, the Court, and the American public of a full and fair presentation of the factual and economic evidence, which will demonstrate that the proposed merger eliminates important competition.

The United States is confident that the standards for a preliminary injunction would be readily established, and is willing to do so on reasonable schedule, which Defendants themselves agreed to in the Timing Agreement.[1] A traditional preliminary injunction, which could be decided on the papers or with a short single-day hearing, would maintain the status quo long enough for the United States to prove at trial that this acquisition likely would lessen competition substantially, and therefore harm the publishers and consumers who rely on these companies. A trial in early December, with appropriate interim deadlines as proposed by the United States (Attachment A), represents a reasonable schedule because it would allow the development of a full record and a thorough presentation of the issues without prejudice to the United States, and the American public, or create an unnecessary burden on the Court.

The United States understands and respects Defendants' desire to move quickly toward a resolution that determines whether they can proceed with their merger, but the standard procedural mechanisms (an initial preliminary injunction hearing if necessary, followed by an evidentiary trial on the merits) are the time-tested methods for balancing the need for expedition with the need to ensure a fair determination whether the proposed transaction likely would lessen competition substantially and harm American consumers.

[1] Timing Agreement ("During this period, the Division and the Parties will use best efforts to agree on a reasonable schedule for a preliminary injunction hearing, including a schedule for the filing of papers in support and opposition to a preliminary injunction."); *see also* Mot. at 4.

The United States therefore respectfully requests that the Court proceed either (a) to conduct a standard hearing on a motion for a preliminary injunction, or (b) schedule a trial on the merits, giving the United States sufficient time to prepare fact and expert evidence as in any other merger trial.

I. Background

Defendants Quad/Graphics, Inc. ("Quad") and LSC Communications, Inc. ("LSC") are the two largest providers of magazine, catalog, and book printing services in the United States. On Thursday, June 20, 2019, the United States filed a complaint to enjoin Quad's acquisition of LSC. The United States was in the midst of negotiating with Defendants a joint case schedule, including a proposal for a preliminary injunction hearing prior to the October 30 closing date, when Defendants filed their Motion to Set Evidentiary Hearing Dates. While the United States remains open to negotiating with Defendants on both the preliminary injunction and the trial date, we are compelled to submit this memorandum in opposition to Defendants' motion.

The United States sued to enjoin the proposed merger because it would combine the only two significant providers of magazine, catalog, and book printing services, denying publishers, retailers, and ultimately consumers, throughout the country the benefits of competition that has spurred lower prices, improved quality, and greater printing output. Because of the scale and scope of their offerings, Quad and LSC are each other's primary, and often only, competitor for magazine, catalog, and book printing services.[2] Customers rely on the fierce competition between the two for better prices, higher quality, and innovative offerings. The merger would

[2] *See* Compl. ¶¶15–19. For example, a senior Quad executive remarked of LSC, "We've been in a price war with them for some time. Don't see that changing." Compl. ¶15. LSC, in turn, has been concerned about customers going back into the market and it "get[ing] into a blood bath with Quad." Compl. ¶16. Customers have benefitted from this competition. In one episode, a customer notified Quad of its loss to LSC and added that it was "pleased with the outcome from a pricing standpoint." Compl. ¶17. In another instance, an executive of one Defendant lamented how a publisher was "exploiting the fact that LSC [and] Quad['s] CEO's want to beat each other into oblivion." Compl. ¶18.

leave many customers facing a single firm with the incentive and ability to increase the prices of its printing services.[3]

Defendants attempt to justify their Motion, and the merger itself, with the growth of digital delivery of information, but that attempt is unfounded and irrelevant. *See* Mot. at 2. Contrary to Defendants' claims, digital platforms, like Facebook and Google, are not a reasonable substitute for the printing services that Quad and LSC provide. Defendants cannot justify their anticompetitive merger because some customers may sometimes elect to use a different product in some circumstances. Defendants cannot ignore that printed magazines, catalogs, and books will continue to be important to many publishers and American consumers in the future. Indeed, the demand for book printing is actually increasing, despite industry expectations a few years ago that electronic books would largely supplant printed books. Defendants' concern over the growth of digital delivery does not eliminate the competitive harm likely to result from this merger for those publishers and consumers that rely on printing services. In any event, the existence of digital platforms certainly does not justify Defendants' motion to short-circuit the traditional judicial process for analyzing antitrust mergers.

II. Artificial Deadlines under Defendants' Control Should Not Dictate the Trial Schedule

Defendants' bold pronouncement that they "*require* prompt adjudication . . . within the time contemplated by [their] merger agreement" deserves no deference. Mot. at 3 (emphasis

[3] See Compl. ¶28. The Defendants themselves have claimed that a merger would enable them to achieve "pricing stability." Compl. ¶10.

added). Merging companies frequently include an "option date" in their merger agreement that gives one or both merging parties the option to walk away.[4]

Numerous courts have recognized that these dates are entirely within defendants' control and that a court need not acquiesce in defendants' self-selected option dates, even while setting appropriately aggressive schedules. For example, in the *Aetna/Humana* merger case, the court set a schedule that produced a decision after defendants' option date. Transcript of Status Conference at 69:13–17, *United States v. Aetna*, No. 16-1494 (D.D.C. Aug. 10, 2016) ("THE COURT: . . . But given everything that I've heard, both with respect to the concerns from a more compressed schedule and because I haven't heard that much that gives legitimacy, if you will, to the December 31st cutoff date, I've decided to try this case beginning in early December . . . .") (Attachment B). Defendants accordingly extended their agreement.

Similarly, in the *AT&T/Time Warner* merger case—an example Defendants themselves highlight in their Motion—the court instructed the merging companies to extend the "drop-dead" date and then imposed a schedule that produced a decision after the merging parties' original option date. Transcript of Status Conference at 10:4–13, *United States v. AT&T*, No. 17-2511 (D.D.C. Dec. 7, 2017) ("THE COURT: . . . Getting an opinion out on April 22nd is not happening. It can't be done. . . . So the defendants are going to have to talk to their clients about this drop-dead date. Extend it 60 days, maybe 90, whatever. But build some time into this so that I can do my job post trial . . . .") (Attachment C).

Defendants here similarly have the option to extend their walk-away option date to enable orderly litigation to proceed. If the proposed transaction stands to benefit their shareholders, as Defendants claim, they will find a way to extend their contract so they can

[4] Although Defendants' Motion claims that Defendants "will suffer substantial harm unless an evidentiary hearing is scheduled soon," Mot. at 8, they notably have submitted nothing to support those conclusory assertions by counsel.

consummate their transaction if this Court, after full and fair trial, denies the United States' request for injunction.

Notably, the United States' proposed December trial date would require Defendants to delay their self-imposed closing date only by about two months. A trial in September, in contrast, would significantly prejudice the interest of the United States, and the public, in a full and fair evidentiary hearing to demonstrate why this merger would substantially lessen competition.

III. The United States' Proposed Schedule for a Full Trial Would Allow for Orderly Litigation and Avoid Prejudice

Defendants' proposed schedule would impose unreasonably tight timeframes on the United States and the Court. In contrast, the schedule the United States proposes is fast by the standards of ordinary civil litigation, and reasonable in light of the issues in this case. Adopting the United States' proposed schedule would enable the Parties to present the Court the detailed factual and economic evidence necessary for it to decide the issues in this case, while still proceeding in an expedited manner. Tellingly, Defendants simply propose a hearing date and gloss over many time-consuming and intermediate steps that go into preparing for an efficient trial.

Of course, the United States, like any other plaintiff, has the burden of proving that the merger violates the antitrust laws. The United States is confident that it will be able to prove that the merger of the two largest and most significant competitors in the magazine, catalog, and book printing services likely would lessen competition in the relevant markets. Building a case for trial, however, takes time and resources. This is particularly true in antitrust merger cases that involve extensive facts and economic evidence, and especially here where there are four different relevant markets at issue, each with different customers, facts, and data. The United

States, and the American public who will harmed if this merger goes through, deserve a full and fair opportunity to develop the case for the Court.

Adequate Discovery. The United States proposes a reasonable schedule that would enable the parties to develop and prepare evidence in four different markets, each with largely different customers, competitors, facts, and data. Discovery about customers who will likely suffer as a result of the proposed acquisition, and about smaller printers that will not be able to effectively compete against a merged firm, will play an important role in preparing for trial. Courts have long recognized that a government agency's pre-complaint investigation is not a substitute for, nor should it limit, post-complaint discovery.[5] Investigations are not the same as preparing a case for trial. Investigations are focused on deciding *whether* to bring an enforcement action and, if so, the scope of the lawsuit. That is what happened here. Any suggestion by Defendants that the United States investigated the proposed merger, and therefore has prepared for this trial such that the United States would not be prejudiced by limiting additional discovery is incorrect and contrary to law.

Sufficient Development and Disclosure of Economic Evidence. Expert economic testimony usually plays a vital role in merger litigation, and any schedule should allow sufficient time to develop and test economic evidence through expert discovery. Proceeding without sufficient time to prepare and respond to expert reports risks severely impairing the United

[5] *See, e.g.*, *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("Here, even though the [agency] had already conducted a pre-filing investigation, . . . 'there is no authority which suggests that it is appropriate to limit the [agency]'s right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990))); *Saul*, 133 F.R.D. at 118–19 ("[T]he Court finds considerable merit in the [agency]'s contention that once it has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial. . . . Once the complaint has been filed and the defendants have answered, the issues requiring resolution have been clarified, and all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind."); *United States v. GAF Corp.*, 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." (quoting H. R. Rep. No. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvements Act of 1976)).

States' ability to present its case. While the United States' proposed schedule provides for accelerated expert discovery, that schedule still would allow both sides the time to prepare the expert evidence necessary for their cases. This is especially important for the United States because it bears the burden of proof.

Specifically, the United States' proposed schedule would provide for the exchange of initial expert reports on September 27—a week after the close of fact discovery. This would grant the experts the benefit of drawing from a nearly complete factual record on which to base their opinions.[6] Moreover, the United States' proposed schedule would allow 17 days from the initial expert reports to rebuttals, and 16 days from rebuttal expert reports to replies. Though compressed, this time will give the experts time to review, analyze, replicate, and critique the economic work offered by the other side. Sufficient time to analyze and respond to critiques is necessary for the United States' expert to provide a thorough opinion to the Court. Under the United States' proposed schedule, expert discovery would end approximately three weeks before trial.[7]

Appropriate and Efficient Pre-Trial Procedures. The United States' proposed schedule would enable many necessary procedural functions to occur on a set schedule prior to trial, allowing for an orderly process to resolve disputes that would otherwise burden the Court under a more compressed schedule. The proposed schedule would therefore allow the Court and the parties to focus on the key issues at stake in the trial.

[6] The United States' proposed schedule would allow for supplemental fact discovery to end on the same day as the initial expert reports are due. The United States' schedule contemplates that supplemental fact discovery will be limited to discovery related to witnesses added to the final witness list who did not appear on the initial witness list.
[7] We note that Defendants' latest proposed schedule sets one expert report deadline for each side, with the United States' deadline falling on July 29—a month before Defendants' proposed end of fact discovery. This would deprive the United States' experts of the benefits of a full factual record on which to base their opinions.

For example, the United States' proposed schedule includes pre-trial deadlines for the parties to work together to tee-up any disputes on confidentiality and admissibility of trial exhibits for resolution by the Court at the final pre-trial conference. Resolving such issues early would avoid unnecessary disruptions during the trial to deal with the issues on a case-by-case basis as they arise.[8]

Defendants' Motion only offers the Court the September 18, 2019 "evidentiary hearing" date without any interim dates or process. Once interim dates are added to Defendants' proposed schedule, it would quickly be revealed as unworkable and chaotic. Although the parties could attempt to negotiate trial procedures and interim dates, it is just as likely Defendants' proposal simply kicks the can down the road and will require the Court to intervene later, as the current Motion illustrates. Resolving how these issues will be handled in the litigation from the outset provides the Court and the parties with an orderly and efficient litigation and process.

IV. The United States' Proposed Schedule for a Full Trial is Consistent with Other Merger Cases

The United States' proposed schedule aligns with the schedules in other recent merger cases in this District. Under the United States' proposed schedule, the time from complaint to the start of trial would be 165 days.[9] This contemplates going to trial faster than the schedule entered in the most recent merger case that the United States brought in this district, *United States v. Deere*, No. 1:16-cv-8515. In that case, before Judge Chang, the schedule called for trial

[8] Defendants' proposed schedule simply requires the parties to meet and confer in good faith to attempt come up with a proposed trial procedures order to address such issues. This approach masks the important interim steps necessary prior to trial. Moreover, it threatens to short-change the rights of third parties—many of whom are unfamiliar with this process—who provide confidential and competitively sensitive information and may desire to seek additional protection from the Court.

[9] The December date was chosen to avoid stating the trial, pausing over Thanksgiving, and then resuming the trial after the holiday. The United States also is willing to negotiate alternative dates with Defendants depending on the Court's availability, as long as it has sufficient and reasonable time for preparation. A trial before the October 30th closing date, however, would prejudice the United States and the American public for the reasons explained above.

to begin 180 days after the complaint was filed, before a medical issue affecting defense counsel required a delay. Similarly, in *United States v. JBS, S.A.*, No. 1:08-cv-5992, Judge Bucklo denied Defendants' motion for expedited litigation and adopted a schedule that contemplated a trial starting more than 200 days after the complaint was filed.

V. Conclusion

The Court should deny Defendants' Motion to Set Evidentiary Hearing Dates and (a) schedule a standard hearing on a motion for a preliminary injunction, which can be decided on the papers or, if necessary, with a short hearing (if Defendants refuse to maintain the status quo until trial); and (b) schedule a full trial on the merits in December 2019, which would give the United States sufficient time to prepare fact and expert witnesses as in any other merger trial. Alternatively, the Court could direct the parties to submit competing full schedules and a draft Case Management Order highlighting any differences in their proposals.

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Respectfully submitted,

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