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. Magistrate Judge: Hon. Jeffrey T. Gilbert

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO ENTER SCHEDULING AND CASE MANAGEMENT ORDER

The United States brings this *Motion to Enter Scheduling and Case Management Order* to enter the Proposed Scheduling and Case Management Order attached hereto as Attachment A. The United States proposes a schedule that will rapidly move this important matter to trial while simultaneously ensuring sufficient time for trial preparation, including *inter alia*, discovery of customers and competitors, depositions of party witnesses, exchanges of interrogatories, document requests, deposition designations and trial exhibits, expert reports and expert depositions, resolution of confidentiality issues, and the preparation of pretrial briefing. The United States' proposed schedule provides the minimum amount of time reasonably necessary for each of these critical elements of trial preparation with the ultimate goal of efficiently presenting the Court with the evidence needed to decide this case.

BACKGROUND

The United States filed its complaint in this matter on June 20, 2019. The parties immediately began negotiations over scheduling, with the United States providing defendants with a proposed schedule and case management order the next day. Defendants initially proposed proceeding with a preliminary injunction hearing in September; however, the format envisioned by defendants was akin to a "mini-trial" complete with factual and expert discovery. The United States objected, and on June 28th, the parties appeared before the Court on defendants' motion to schedule an evidentiary hearing for September 18, 2019. The Court denied defendants' motion, and instead directed the parties to engage in additional discussions with the aim of developing a mutually agreeable schedule for a full trial on the merits.

During the parties' negotiations, defendants have repeatedly taken the position that any resolution of this matter must occur before a self-imposed option to terminate their agreement on October 30, 2019. But defendants' option to walk away from their merger agreement on October 30th is exactly that—an option. Inaction by the parties would simply extend the merger agreement with no modifications necessary. Nonetheless, cognizant of defendants' desire for some resolution prior to their option date, the United States proposed two expeditious paths forward. First, a full trial on the merits beginning November 12, 2019, with aggressively truncated fact and expert discovery and pre- and post-trial briefing schedules. Subject to potential limitations in the Court's schedule and disruptions caused by the end-of-year holidays, the United States' proposal aims to resolve this matter by the close of the year, requiring only a short two-month extension of the defendants' option date. The United States proposed this accelerated schedule as a compromise from its earlier proposal of a December 2nd trial schedule. The United States proposed going straight to a trial beginning November 12 to minimize the amount of time defendants would need

to extend their option date, while still enabling the United States to prepare its case. Alternatively, the United States offered to move for a true preliminary injunction on July 25 that would be decided either on the papers or, if the Court determined a hearing was necessary, after a one-day hearing on August 8 or as soon thereafter as permitted by the Court's schedule. The preliminary injunction proceeding would then be followed by a full trial on the merits beginning December 9, 2019.[1]

Despite satisfying both their demands for a preliminary injunction and some form of resolution prior to their option date, defendants rejected the United States' proposals.[2] Instead, defendants insist that a full trial on the merits must result in a decision by the Court prior to their October 30th option date. Furthermore, defendants have refused to refrain from consummating their merger prior to resolution of this litigation by the Court, pledging at this time only to refrain from closing only until September 3rd. Moreover, defendants hold open the possibility they will introduce evidence of a proposed remedy to their merger—effectively a different transaction than the one the United States investigated—if the schedule would not result in a decision by their option date.

The parties have reached an impasse. For the reasons set forth more fully in this memorandum, the United States respectfully requests that the Court enter the proposed scheduling and case management order attached hereto as Attachment A, with a trial date to commence November 12, 2019, or as soon thereafter as permitted by the Court's schedule.

[1] *See* Letter from William H. Jones, U.S. Department of Justice, to Jim McKeown and Steven L. Holley, Counsel for Defendants (July 2, 2019), Exhibit 1 to Attachment C.
[2] *See* Letter from Craig D. Minerva, U.S. Department of Justice, to Jim McKeown and Steven L. Holley, Counsel for Defendants (July 8, 2019), Exhibit 2 to Attachment C.

I. THE UNITED STATES' PROPOSED SCHEDULE IS REASONABLE

A. The United States Recommends a Fast-Paced, but Realistic, Trial Schedule

By their nature, antitrust cases involve complex legal, factual, and economic questions. Numerous issues likely will be before the Court, including the definition of the relevant product markets, the likelihood of competitive harm in those markets, and the assessment of any alleged merger-specific efficiencies that defendants may assert are relevant. The United States needs time to conduct appropriate discovery and develop admissible evidence on each of these issues, including party, third-party, and expert discovery.

Despite the breadth of issues requiring resolution in this matter, the United States is prepared to move quickly to be trial-ready by November 12, a mere four and a half months after the filing of its complaint. The United States' proposed schedule allows for just over two months of fact discovery, six weeks of expert discovery, and one month for pretrial processes.[3] This proposed schedule was built from the ground up—i.e., by determining what needs to be done to bring the case efficiently to trial, and then putting those elements together in a reasonable—but still highly truncated—schedule.

By contrast, defendants' proposed schedule appears to focus exclusively on achieving a pre-determined decision date without suggesting a workable process for getting there.[4] For example, defendants would have the parties exchange final trial witness lists by August 5—only twenty-five days after the Court's scheduling conference. Fact discovery itself would last only

[3] In order to make this aggressive schedule tenable, the United States' proposal focuses the trial on issues of liability and bifurcates to a subsequent proceeding consideration of any proposed remedy that defendants may argue would counteract the merger's prima facie anticompetitive effects.

[4] Attachment B, attached hereto, highlights some key differences between the case management orders proposed by the United States and defendants.

seven weeks. Further highlighting the unworkability of defendants' schedule is their proposal for expert discovery: four rounds of expert briefing to occur over the course of just 19 days.

B. Defendants' Proposed Trial Structure Would Prejudice the United States

Much of the speed in defendants' schedule stems from restrictions on the parties' ability to present evidence at trial—restrictions that would severely hamper the United States' ability to present its case. For example, defendants have proposed various mechanisms to "streamline" the trial process, such as the submission of written directs, without providing any additional time in their proposed schedule for the parties to prepare these time- and resource-intensive materials. The United States does not object if defendants wish to use written directs in lieu of live testimony for defendants' examination of witnesses that they control. The use of written directs for all witnesses, however, would prejudice the United States. Unlike defendants, with the exception of any experts it might call, the United States does not control its witnesses; instead, it must rely almost entirely on third-party and adverse witnesses to present its case. Developing written directs for third-parties, who will generally be unable to prioritize this litigation in the same manner as defendants' employees and executives and who may or may not be represented by separate counsel (but regardless are not represented by counsel for the United States), is a complicated and time-consuming process that is ill-suited to the expedited pre-trial schedules contemplated here.

Defendants' timetable for expert discovery illustrates that their schedule is untenable. Defendants' proposal compresses four rounds of expert reports to be exchanged in the span of only 19 days. Though defendants' initial expert report would be due seven days following the United States' initial expert report, it would not be limited to information intended solely to contradict or rebut evidence in the United States' expert's report. Then, United States' expert would have only seven calendar days, including Labor Day, to prepare a response to defendants' initial expert

report. Additionally, defendants' proposal for four rounds of expert reports concluding with a report by defendants' expert—compared to the traditional structure of initial, responsive, and rebuttal reports—is not justified where the United States carries the burden of proof. Lastly, defendants' proposal to close fact discovery on the same day that the United States' initial expert report is due would prejudice the United States' ability to incorporate all relevant discovery into its expert report.

Defendants would also limit the entire hearing in this matter to only thirty-six hours, with each side allocated just fifteen hours for presentation of its evidence (in addition to one hour for opening and two hours for closing for reach side). But limiting total trial time to a collective thirty-six hours would deny the United States—and by extension, the companies that buy printing services from defendants—a full and fair opportunity to present its case before the Court. A full trial on the merits, as contemplated by both parties, requires the United States to bear the burden of proving harm in four separate markets, each largely with its own unique customers, facts, and data. While the United States is confident that it will be able to prove that the merger of the two most significant competitors for magazine, catalog, and book printing services likely would substantially lessen competition in the relevant markets, doing so will take significantly more than fifteen hours.

The United States estimates that it will need between seven and ten full trial days to fully and effectively present its case to the Court. This length of time is appropriate given the number of relevant markets and the many factual, legal, and economic allegations at issue in this litigation. Defendants have indicated they intend to challenge each element of the United States' case, and have refused to take off the table the possibility of presenting evidence of a proposed remedy at trial on any reasonable trial schedule. The United States' proposed trial length further aligns with

the time allocated for trials in other recent merger cases. For example, in *United States v. Deere*, No. 1:16-cv-08515, Judge Chang entered a scheduling order allotting 17 days for trial time.[5] Recent merger cases in other districts have followed similar time tables: *United States v. Aetna* (13 days)[6] and *United States v. Anthem* (18 days).[7]

C. The United States' Proposal Affords Time for Reasonable Discovery and Orderly Pretrial Preparation

The United States' proposal affords time for reasonable discovery and orderly pretrial preparation, as pre-complaint investigation is no substitute for appropriate civil discovery. Courts have long recognized that a government agency's pre-complaint investigation is not a substitute for, nor should it limit, post-complaint discovery.[8] Investigations are focused on deciding whether to bring an enforcement action and, if so, the scope of the lawsuit. That is what happened here.

The United States needs a reasonable amount of time and additional discovery to prepare its case for trial. The United States had only a few months to review millions of documents, prepare for and take investigative depositions, engage in substantive discussions with defendants, and make an enforcement decision. That process was sufficient to state well-informed allegations,

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[5] Revised Scheduling and Case Management Order at 3, *United States v. Deere*, No. 1:16-cv-08515 (N.D. Ill. Jan. 1, 2017), ECF No. 171.

[6] Scheduling and Case Management Order at 2, *United States v. Aetna*, No. 1:16:-cv-01494 (D.D.C. Aug. 12, 2016), ECF No. 55.

[7] Order at 2, *United States v. Anthem*, No. 1:16-cv-01493 (D.D.C. Aug. 12, 2016), ECF No. 68.

[8] *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 (1976) (House Committee on the Judiciary reporting favorably on Hart-Scott-Rodino Antitrust Improvements Act of 1976))).

but more time is needed to prepare for a significant trial in which defendants appear unwilling to narrow the issues. In addition, while defendants have yet to file an answer, they appear likely to raise new defenses.[9]

The merger threatens to harm businesses that rely on defendants for cost-effective and quality printing services, as well as millions of consumers across the country. That threat should be carefully evaluated, as should any benefits defendants may argue would flow from the mergers. Purely private commercial concerns—particularly those that are wholly within the control of the merging parties—should not surpass the public's interest in effective antitrust enforcement or deprive the Court of the evidence and time it needs to evaluate the important issues presented by these cases.

At the same time, the United States offers reasonable limits on discovery in its proposal allowing for a fast-paced trial schedule. The United States' proposal limits discovery from the United States to each defendant as follows: 25 requests for production, 5 interrogatories, and 10 requests for admission.

D. The United States' Proposed Schedule is Consistent with Recent Merger Practice for Trials on the Merits

The United States' proposed schedule—which is further detailed in Attachment A—is fast by the standards of both ordinary civil litigation and recent merger litigation involving a trial on the merits in this district. Under the United States' proposed schedule, the time from complaint to the start of trial would be 145 days. This is significantly faster than the schedules entered in the two most recent merger cases brought by the United States in this district. In *United States v. Deere*, No. 1:16-cv-08515, before a medical issue affecting defense counsel resulted in additional

[9] *See, e.g.*, Transcript of Proceedings at 11:8–10 (June 28, 2019) ("Mr. McKeown: "[T]he market for print has deteriorated even more rapidly than the parties anticipated when they signed the deal last October.").

delay, Judge Chang entered a schedule calling for trial to begin 180 days after the complaint was filed.[10] Similarly, in *United States v. JBS, S.A.*, No. 1:08-cv-05992, 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.[11] By contrast, defendants' proposed October 1 trial date is only 102 days after the complaint was filed in this matter.

II. DEFENDANTS' JUSTIFICATION FOR RUSHING IS WITHOUT MERIT

Defendants are asking for a trial in three months because of the October 30 "option" date in their merger agreement. But this date is entirely within defendants' control: they created it, and they can extend it. Notably, defendants' merger does not dissolve automatically on the option date; indeed, inaction on defendants' part extends the agreement indefinitely. The option date simply gives one or both defendants a choice: do nothing and extend the agreement, agree to extend on modified terms, or terminate. The choice is entirely up to defendants. And despite their insistence that this matter be resolved before the option date, defendants have failed to state whether they intend to extend or terminate their agreement beyond October 30. *Cf. FTC v. Heinz H.J. Co.*, No. 00-5362, 2000 WL 1741320, at *2 (D.C. Cir. Nov. 8, 2000) ("[A]lthough the [defendants] state that if an injunction pending appeal is granted they *may* abandon the merger, they do not unequivocally state that they *will* do so. . . . [And] even if the current merger plans were abandoned, the evidence does not establish that the efficiencies the [defendants] urge could not be reclaimed by a renewed transaction following success on appeal." (emphasis in original)).

[10] Revised Scheduling and Case Management Order at 2, *United States v. Deere*, No. 1:16-cv-08515 (N.D. Ill. Jan. 1, 2017), ECF No. 171.

[11] *See* Minute Entry, *United States v. JBS, S.A.*, No. 1:08-cv-05992 (N.D. Ill. Oct. 30, 2008), ECF No. 39 (denying defendants' motion for expedited treatment); Agreed Scheduling and Case Management Order at 7, *United States v. JBS, S.A.*, No. 1:08-cv-05992 (N.D. Ill. Nov. 25, 2008), ECF No. 68 (ordering parties to file a joint pretrial order 200 days after the complaint was filed, and not yet setting a trial date).

In light of the illusory nature of the merger defendants' "deadline," courts frequently decline to defer to defendants' option date when scheduling merger cases for trial. *See, e.g.*, Transcript of Status Conference at 69:13–17, *United States v. Aetna*, No. 16-01494 (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 . . . ."); Transcript of Status Conference at 10:4–13, *United States v. AT&T*, No. 17-02511 (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 . . . .").[12]

Defendants assert that this merger would be beneficial to their companies and their shareholders. If that is true, they will find a way to extend their contract so they can consummate the transaction if this Court, after a full and fair trial, denies the United States' request for an injunction. The Court should not allow defendants' contract to unilaterally limit the time that the Court believes is necessary to consider the evidence and issue a ruling.

III. CONCLUSION

The United States has proposed an aggressive schedule that would require only a modest two-month extension of defendants' option date while providing the United States, and the American public, an opportunity for a full and a fair hearing to demonstrate why this merger would substantially lessen competition. The United States therefore respectfully requests that the Court

[12] Relevant excerpts of these transcripts were attached to *United States' Memorandum in Opposition to Motion to Set Evidentiary Hearing Dates* (Dkt. No. 25) as Attachments B and C.

order this matter for trial on November 12, 2019, and enter the proposed scheduling and case management order attached hereto as Attachment A.

Dated: July 9, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019, I caused a true and correct copy of the foregoing document and its exhibits to be served upon the parties of record via ECF.

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