

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

INSIGNIA SYSTEMS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
NEWS AMERICA MARKETING IN- STORE, INC.)	
)	
Defendant.)	Civil No. 04-4213 (JRT/AJB)
)	
<hr style="width: 50%; margin-left: 0;"/>		
)	INSIGNIA SYSTEMS, INC.’S
NEWS AMERICA MARKETING IN- STORE, INC.,)	SUPPLEMENTAL
)	MEMORANDUM IN
Counterclaim Plaintiff,)	SUPPORT OF ITS MOTION
)	TO COMPEL PRODUCTION
)	OF MATERIALS FOR USE
v.)	AT TRIAL
)	
INSIGNIA SYSTEMS, INC., and SCOTT DRILL,)	
)	
Counterclaim Defendants.)	
)	

In repeated representations to this court, News America Marketing In-Store, Inc. (“NAM”), has characterized as “undisputed” its position that NAM’s prices for in-store media have declined over time, that an Insignia price increase explains the harm that Insignia suffered, that NAM’s actions cannot explain Insignia’s losses, and that Insignia’s harm cannot be measured. NAM recently offered strikingly similar arguments before a jury in another case involving allegations by a competitor that NAM had engaged in unfair competition and tortuous interference. After hearing testimony and seeing evidence that NAM has refused to produce to Insignia, on July 23, 2009 that jury rejected

these arguments and awarded NAM's competitor, Valassis Communications, Inc. ("Valassis"), \$300 million in damages. *See* Exhibit 1 attached hereto, July 23, 2009 Transcript in the matter of *Valassis Communications, Inc. v. News America, Inc.*, Case No. 07-706645-Z (Circuit Court for the County of Wayne, Michigan) (reading of the jury verdict).

In light of the developments in the *Valassis* case relevant to the instant Motion to Compel Production Of Materials For Use At Trial ("Motion To Compel"), which is currently pending before this Court, Plaintiff Insignia Systems, Inc. ("Insignia") hereby files this supplement to its pending Motion. NAM cannot justify withholding the evidence Insignia seeks to use at the trial of this case.

On April 24, 2009, Insignia filed its Motion To Compel seeking an Order requiring Defendant NAM to produce the back-up data file prepared by its expert Dr. Kevin Murphy, and the expert report of Dr. Robert Topel, upon which Dr. Murphy relied, in related cases brought against NAM by Valassis Communications, Inc. ("Valassis"). *See* Motion To Compel, Docket No. 542. NAM disclosed Dr. Murphy as its expert both in the *Valassis* case and in the instant case. NAM refuses to provide Insignia with Dr. Murphy's back-up file for his work in the *Valassis* litigation.¹ NAM further refuses to produce Dr. Topel's expert report, despite Dr. Murphy's admission that he relied upon Dr. Topel's report in forming his own conclusions.

¹ NAM had previously provided Insignia with redacted versions of Dr. Murphy's expert report and deposition transcript from the *Valassis* litigation. Insignia notes further that its Motion to Compel is currently under advisement before this Court and has not been fully briefed as yet. Accordingly NAM should not be prejudiced in any respect by the filing of this Supplemental Memorandum.

In its Motion To Compel, Insignia argued that “Insignia anticipates that the backup materials that Dr. Murphy produced in the *Valassis* litigation contain data showing pricing or discounts NAM gave to customers for in-store products. Pricing information is directly relevant to the analysis of whether NAM has exercised monopoly power. *See Minnesota Mining and Manufacturing Co. v. Appleton Papers, Inc.*, 35 F. Supp.2d 1138, 1146 (D. Minn. 1999) (monopoly power shown by defendant’s intent to control prices).” *Memorandum of Law in Support of Motion To Compel*, Docket No. 544, at ¶ 3.

At oral argument on NAM’s Motion for Summary Judgment in the instant case, held on May 11, 2009, NAM asserted that NAM’s pricing for in-store products has declined and that this suggests a lack of market power.

In fact, Your Honor, what the undisputed evidence demonstrates is that News America's pricing has gone down by almost 35 percent on average during the relevant time period.

May 11, 2009 Summary Judgment Hearing Transcript, at p. 18, attached hereto as Exhibit 2.

But, in the *Valassis* trial, Dr. Murphy testified that NAM was discounting in-store prices in order to win FSI business. *See, e.g.* July 16, 2009 Transcript at pp.118-19 (direct testimony). attached hereto as Exhibit 3.

A. Let's say News didn't do a bundle. So they have say a 4.50 FSI billed rate and they originally say we will give you a signing bonus or we will give you some other form of discount on the FSI side, that say is, you know, \$1.25 giving us a net price of 3.25 on the FSI and they were competing for the business. And then what if they were to say, well, rather

than give you -- write you a check, just write you some money -- this would be unbundled offer. I am going to compete with 3.25 on bundle –

Q. You are saying all that is just FSI?

A. All this is FSI, giving you benefits on the FSI. Well, let's instead let's take it all, let's take this \$1.25 and I will give it to you as an in-store discount. We are going to lower your in-store prices. Now in terms of competing for the FSI the customer says, yeah, okay, I am still getting my discount but News gets an additional benefit now. They are going to get to sell more in-store. . .

Dr. Murphy's analysis from the *Valassis* case, the underlying supporting material for which NAM has refused to produce to Insignia, explains price discounts on in-store advertisements as inducements to win FSI business. In contrast, Dr. Murphy's testimony in the instant case attributes declining prices in-store to NAM's lack of market power in the store. NAM's reliance upon revenues and profits from in-store sales to induce more FSI sales was a critical part of Valassis's proof, which persuaded a jury to find that NAM had engaged in unfair competition against Valassis. That same evidence reveals market power that NAM exercises in the store. Accordingly, Insignia should be entitled to obtain the data and materials on which Dr. Murphy relied in support of the opinions he offered in the *Valassis* case.

With the testimony of Dr. Topel, NAM tried to offer the *Valassis* jury the same explanation that NAM and Dr. Murphy have offered in the instant case, that Insignia is itself to blame for its losses. At bar, NAM claims the following:

“[T]he undisputed evidence demonstrates that Insignia incurred many losses during the relevant time period that were not the result of News America conduct and that in fact was the result of its own conduct. . .

Now, there are other reasons why, Your Honor, other undisputed facts that demonstrate that there should have been losses disaggregated from the Overstreet and management estimates of damages models. First of all, Insignia at the end of 2003 increased its prices on POPS signs, its in-store promotional device.

May 11, 2009 Summary Judgment Hearing Transcript, at pp. 8-13, attached hereto as Exhibit 4.

Similarly, Dr. Topel testified that Valassis's price increase in June 2001 was the reason Valassis lost business. Thus, Dr. Topel concluded, NAM's conduct did not cause the loss in Valassis's market share:

Q: How does [Valassis price increase] relate to the opinion you have offered about Dr. Bamberger's market share damages?

A. It's consistent. It says that they announced this, how do they call it here, **we announced a price increase, and they are sticking to it. It requires this willingness to sacrifice short term market shares.** So this document. . .is saying that we are giving up -- we are losing market share because of the strategy that was implemented in June.

Q. Now you said a few minutes ago, let me just ask you one more thing on this. So **was there any indication here that the loss of market share is due to News America bundling?**

A. **No, I don't see anything....
(emphasis added)**

July 15, 2009 Transcript, at pp. 125-126 (direct testimony), attached hereto as Exhibit 5.

Dr. Topel's arguments were rejected by the Michigan jury, which returned a verdict for Valassis on all counts. As NAM has made it abundantly clear that it intends to offer in the case at bar the same arguments advanced by Dr. Topel, that the jury rejected in the *Valassis* case, Insignia should be permitted to discover that analysis. NAM should

therefore provide Dr. Topel's report and deposition testimony so that Insignia can fully analyze the contentions and testimony therein.

WHEREFORE, Insignia respectfully requests that this court enter an order requiring NAM to produce the backup data file for Dr. Kevin Murphy produced in the Valassis litigation and the report of Dr. Robert Topel from the Valassis litigation. Insignia also requests that this Court order NAM to make a complete showing of its efforts to comply with the Court's Order of September 15, 2008.

Respectfully submitted,

Dated: July 31, 2009

/s Stephen A. Wood

Stephen A. Wood
Kelley Drye & Warren LLP
333 West Wacker Drive
Suite 2600
Chicago, Illinois 60606
(312) 857-2311

Attorney for Plaintiff and Counterclaim-
Defendant INSIGNIA SYSTEMS, INC.
and Counterclaim-Defendant
SCOTT DRILL