

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

VALASSIS COMMUNICATIONS, INC.,

Plaintiff,

Case No. 2:06-cv-10240

v.

Hon. Arthur J. Tarnow  
Hon. Virginia M. Morgan

NEWS AMERICA INCORPORATED, a/k/a NEWS  
AMERICA MARKETING GROUP, NEWS AMERICA  
MARKETING FSI, INC. a/k/a NEWS AMERICA  
MARKETING FSI, LLC and NEWS AMERICA  
MARKETING IN-STORE SERVICES, INC.  
a/k/a NEWS AMERICA MARKETING  
IN-STORE SERVICES, LLC,

Defendants.

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**BRIEF IN SUPPORT OF DEFENDANTS'  
EMERGENCY MOTION TO STRIKE WITNESSES**

**IMMEDIATE CONSIDERATION REQUESTED**

**CONCISE STATEMENT OF ISSUE PRESENTED**

1. Whether Plaintiff Valassis Communications, Inc. (“Valassis”) violated this Court’s scheduling orders by identifying on December 21, 2009, five previously undisclosed fact witnesses and a new expert witness instead of limiting itself to the two new witnesses and supplemental reports of existing experts allowed by the Court’s December 11, 2009, order?

Defendants (collectively, “News America”) answer: Yes.

**CONTROLLING OR MOST APPROPRIATE AUTHORITY**

Fed. R. Civ. P. 16, 26, 37

The Court's August 20, 2008, Scheduling Order

The Court's December 11, 2009, Scheduling Order

## I. INTRODUCTION

This emergency motion is being filed because Valassis directly violated this Court's order and added more witnesses than the Court permitted with barely over a month to go before trial. This Court could not have been more clear: "The amended witness list may contain no more than two (2) individuals who were not listed by name in the witness list filed in this case in 2008." Order Setting Certain Pretrial Cutoff Dates (Dkt. No. 278) at 2 (Ex. 1). In so ruling, this Court rejected Valassis' request to add five new witnesses. Valassis, however, ignored the Court's clear directive and identified five new fact witnesses who were not listed by name in a prior witness list. Additionally, Valassis identified a new expert and submitted a report from that expert, thereby violating the Court's order limiting new witnesses and allowing only *supplemental* expert reports (as requested by Valassis). The Court should strike three of the new fact witnesses as well as the new expert witness and bar Valassis from calling any of them at trial.

News America seeks immediate consideration of this motion because of the urgency created by the imminent trial and pending deadlines. The pretrial order in this case is due January 15, 2010, and substantial discovery will be necessary regarding any additional witnesses. Moreover, News America may need to add witnesses to respond to the unauthorized fact and expert witnesses disclosed by Valassis. News America requests an immediate decision on its motion so that it can appropriately plan for, and take necessary discovery relating to, the February 2, 2010, trial.

## II. BACKGROUND

On August 20, 2008, the Court entered a scheduling order setting forth deadlines for, *inter alia*, the exchange of fact witness lists and expert witness lists. Both parties exchanged their respective fact witness lists on October 1, 2008, and their respective expert witness lists on November 3, 2008. *See* Defendants' Witness List (Dkt. No. 103) (Ex. 2); Plaintiff Valassis Communication, Inc.'s Trial Witness List (Dkt. No. 104) (Ex. 3); Defendants' Expert Witness List (Dkt. No. 114) (Ex. 4); Plaintiff Valassis Communication, Inc.'s Expert Witness List (Dkt. No. 115) (Ex. 5).

The Court set a trial date of February 2, 2010. Valassis recently moved this Court for an expedited pretrial status conference, seeking, among other things, permission to add five new witnesses to its witness list. *See* Valassis' Proposed Order Setting Certain Pretrial Cutoff Dates ¶9 (Ex. 6). The Court held a hearing on the motion on December 11, 2009. News America opposed Valassis' request for five new witnesses, arguing that the addition of witnesses at this late date would impose unreasonable burdens on the discovery and trial preparation process so close to a two-month trial in this substantial case. Hrg. Tr. (Dec. 11, 2009) at 44-45 (Ex. 7). News America also argued that the only witnesses who should be added were witnesses who had previously been deposed. *Id.* at 46-47; *see also* Defendants' Response to Plaintiff's Motion for Expedited Status Conference ¶3.C (Dkt. No. 269) (Ex. 8). Valassis opposed any exception based on the taking of past depositions. Hrg. Tr. (Dec. 11, 2009) at 47-57 (Ex. 7).

During the hearing, the Court specifically rejected News America's position that additional witnesses could be added only if they had previously been deposed:

THE COURT: I think this is insane when you already have 134 witnesses.

Here, **you can have no more than two individuals that were not listed by name on the witness list filed in this case in 2008.** I don't care if you call them or don't call them. **I don't care if they're rebuttal or not rebuttal.** You can each have two names and that's it.

\* \* \*

THE COURT: Depositions -- **I don't care whether they were deposed before or not.** The two new names may be taken at times mutually agreed upon pretrial. Okay? You've got to take these depositions before the trial.

*Id.* at 57-58 (emphasis added).

The Court issued a scheduling order immediately after the hearing. It reached a compromise on the issue of new witnesses, setting forth the following restrictions and deadlines:

9. Amended witness lists shall be exchanged on or before December 21, 2009 and shall include all individuals identified by name that each party may call at trial. The amended witness list may contain **no more than two (2) individuals** who were not listed **by name** in the witness list filed in this case in 2008. Counsel may take depositions of these new witnesses before trial at times, places, and dates mutually agreed upon by the parties.

10. Supplemental Rule 26 disclosures shall be filed on or before December 21, 2009.

Order Setting Certain Pretrial Cutoff Dates (Dkt. No. 278) at 2 (Ex. 1) (emphasis added).

In response to the Court's scheduling order, the parties exchanged a number of documents on December 21, 2009, including amended trial witness lists and supplemental expert reports. News America followed the Court's order and identified only two witnesses that were not previously listed on a party's 2008 witness list in this case.<sup>1</sup> *Compare* Defendants' Amended Trial Witness List (Ex. 9) *with* Defendants' Witness List (Dkt. No. 103) (Ex. 2); Plaintiff

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<sup>1</sup> Nine board members of Valassis were mistakenly included on News America's witness list. News America informed Valassis of the oversight and those members have been removed from the list.

Valassis Communication, Inc.'s Trial Witness List (Dkt. No. 104) (Ex. 3). However, rather than likewise confine itself to the Court's order, Valassis listed five individuals as fact witnesses who were not listed on a prior witness list: Julia Cooke; Chris Hall; Henri Lellouche; Mike Murphy; and John Thompson. *Compare* Plaintiff Valassis Communication, Inc.'s Amended Trial Witness List at 2-5 (Ex. 10) *with* Defendants' Witness List (Dkt. No. 103) (Ex. 2); Plaintiff Valassis Communication, Inc.'s Trial Witness List (Dkt. No. 104) (Ex. 3). Valassis clearly identified Hall and Murphy in bold as two individuals who were not previously listed on a witness list but who Valassis intended to call at trial. *See* Plaintiff Valassis Communication, Inc.'s Amended Trial Witness List at 3-4 (Ex. 10). As to Cooke, Valassis indicated in a footnote that it might file a motion to add her as a witness, *see id.* at 2 n.1, and as to Lellouche and Thompson, Valassis simply added a parenthetical to each name that they had been deposed during discovery, without any indication that they were not listed on a 2008 witness list, *see id.* at 4-5.

Valassis also submitted a purported expert report by Dr. Einar Elhauge even though Valassis had never listed him by name (or even by category) on any prior witness list, nor otherwise previously disclosed him as an expert in this lawsuit. *Compare* Expert Report of Professor Einer R. Elhauge (Ex. 11) *with* Plaintiff Valassis Communication, Inc.'s Trial Witness List (Dkt. No. 104) (Ex. 3); Plaintiff Valassis Communication, Inc.'s Expert Witness List (Dkt. No. 115) (Ex. 5). Though Valassis did not list Dr. Elhauge on its amended witness list, it did list him as a "witness" in its December 21, 2009 supplemental Rule 26(a) disclosures. *See* Plaintiff Valassis Communications, Inc. Supplemental Rule 26(a) Disclosures at 10 (Ex. 12). Thus, Valassis clearly indicated its intent to call Dr. Elhauge as a trial witness to present his conclusions, regardless of its omission of his name from its amended witness list.

News America immediately communicated with Valassis regarding its violations of the Court order and asked it to strike the additional witnesses and the report of Dr. Elhauge. Valassis refused to do so, necessitating this emergency motion.

### III. DISCUSSION

#### A. Previously Unidentified Witnesses

There is no question that Valassis violated this Court's scheduling order. During the hearing on Valassis' motion for an expedited status conference, the Court held that each side's amended witness list could include no more than two individuals not previously identified by name on a prior witness list, regardless of whether the individual was previously deposed or the proffering party believed the individual to be a "rebuttal" witness. In so doing, the Court rejected Valassis' request to submit five new witnesses, as well as the argument (opposed by Valassis) that an exception should exist for previously deposed witnesses. In response to the Court's order, Valassis listed two new permitted fact witnesses (Hall and Murphy)—and then three *more* fact witnesses (Cooke, Lellouche and Thompson) *and* an expert witness (Dr. Elhauge), none of whom were listed on a prior witness list. Valassis, in essence, responded to the Court's denial of its request to add five witnesses by adding six. A more blatant violation of this Court's order is hard to imagine.

Even more egregiously, Valassis used four different ways to identify the previously unlisted witnesses, possibly in an effort to camouflage its violation. Valassis identified Hall and Murphy in bold to indicate that those two individuals were not previously listed and were being listed now, apparently in conformity with the Court's order. With Cooke, however, Valassis

used bold, but added a footnote indicating that it may file (yet another) motion to add her as a witness. For Lellouche and Thompson, Valassis dropped the use of bold altogether and instead simply added a parenthetical that they had been deposed during discovery, without any disclosure that they were *not* listed on a 2008 witness list in this case. Finally, Valassis did not even include Dr. Elhauge on its amended witness list, but it did include him as a “witness” on its supplemental disclosure list and submitted his report.

Valassis cannot justify these multiple violations of the Court’s order. Valassis sought more witnesses, which the Court rejected. It then added them anyhow. Valassis opposed an exception for previously deposed witnesses and never suggested to the Court that its order should include such an exception. It then tried to justify two of its witnesses based on prior depositions. Valassis sought only supplemental expert reports from this Court. It then submitted a new expert report from a new expert.

There is no possible excuse for these actions. Valassis did not seek relief from this Court’s order. Moreover, Valassis can hardly claim that it learned new information in the ten days between the December 11th hearing and the December 21st submission date that required it to change its position and add additional witnesses. Lellouche and Thompson were known to Valassis well in advance of the most recent exchange of lists as both were deposed during discovery. There is no indication that Valassis did not know of Cooke or Dr. Elhauge during discovery. Therefore, Valassis cannot show good cause or substantial justification for its tardiness. *Rose v. Saginaw County*, 353 F. Supp. 2d 900, 927 (E.D. Mich. 2005) (rejecting the plaintiffs’ request to add new witnesses because there was “no evidence that the plaintiffs could not meet the deadlines despite their exercise of diligence”). Nor can Valassis prove that its

actions were harmless, given the imminent trial and the substantial burden opposed on News America by the addition of these witnesses.

Valassis' suggestion that it may move to add Cooke as a witness is equally improper. There is no basis for reconsideration of this Court's order on new witnesses, especially given the Court's very recent ruling. Moreover, Valassis ought not to be permitted to delay a decision as to whether it seeks to add Cooke and thereby make it even more difficult for News America to prepare for trial given the uncertainty about what Valassis will do.

**B. Dr. Elhauge**

Valassis' action with regard to Dr. Elhauge violate not only the Court's order, but also the rules regarding expert disclosure. Federal Rule of Civil Procedure 26(a)(2)(A) requires a party to disclose the identity of any witness it may use at trial to present evidence under Fed. R. Evid. 702, 703, or 705. These disclosures must be supplemented when required under Rule 26(e). "The purpose of the supplementation rule is to avoid ambush at trial and to assure that all material information has been disclosed in the expert reports." *Potluri v. Yalamanchili*, No. 06-cv-13517, 2008 WL 5060574, at \*2 (E.D. Mich. Nov. 24, 2008) (unpublished) (citations omitted).

Valassis submitted a report by Dr. Elhauge and listed him for the first time in its supplemental Rule 26(a) disclosures exchanged on December 21, 2009. This was too late by more than a year. As noted above, the Court set a date in 2008 for the parties to disclose their expert witnesses—Dr. Elhauge was never identified. The parties exchanged expert reports—Dr. Elhauge never submitted a report. Each party deposed the other party's disclosed experts—Dr.

Elhauge was never offered for deposition. The parties exchanged rebuttal expert reports—Dr. Elhauge never submitted a rebuttal report. Simply put, prior to December 21, 2009, News America had never received any indication from Valassis that Dr. Elhauge was going to be used as an expert in this lawsuit. To wait to do so until a month before trial in a case of this magnitude is beyond the pale and should not be permitted. *See* Fed. R. Civ. P. 37(b), (c); *In re Delphi Corp. Sec., Derivative & ERISA Litig.*, 602 F. Supp. 2d 810, 829 n.10 (E.D. Mich. 2009) (striking expert declaration “as untimely as it was filed in violation of the Court’s Order regarding expert witness reports and discovery”).

Nor can Valassis argue that it somehow just learned of the alleged relevance of Dr. Elhauge’s views and could not have identified him earlier as an expert witness. In fact, Valassis has known of his views and relied upon them for months. Dr. Elhauge’s five-page report does little more than identify a law review article he wrote. Valassis referenced the article in a brief opposing News America’s motion for summary judgment and argued from that article during the September 3, 2009, hearing. *See* Valassis’ Response to Defendants’ Additional Brief in Support of Motion for Summary Judgment at 7 n.5 (Dkt. No. 265) (Ex. 13). Yet, Valassis waited until the end of 2009 to identify him as a testifying expert witness. Even assuming Valassis was permitted to add new expert witnesses after the original disclosure date (which it was not), and further assuming that Dr. Elhauge was identified as one of only two permitted witnesses that Valassis would add to its witness list (which he was not), these facts would disqualify any effort to add him as an expert witness at the eleventh hour.

Valassis cannot use the Court’s order setting forth a deadline for exchanging supplemental expert reports as a way to bootstrap a new testifying expert. Valassis identified Dr.

Elhauge as a supplemental witness in its most recent Rule 26 disclosures; yet, as explained above, Dr. Elhauge never submitted a report prior to December 21, 2009. An initial report from an expert cannot, in any legitimate meaning of the term, be called “supplemental.” This would be the case even if Valassis had timely identified Dr. Elhauge as an expert. As recognized recently in *Potluri*, “supplementation may not be used by a party to ignore court deadlines, reopen discovery, find new facts, and generate new expert reports.” 2008 WL 5060574, at \*2 (citations omitted).

Indeed, the basis for striking Dr. Elhauge is even clearer. Simply, Valassis did not include him even now on its witness list. No individual, expert or otherwise, can testify without being included on a witness list. Therefore, there is no basis for allowing Dr. Elhauge to testify.

#### **IV. CONCLUSION**

For these reasons, Valassis should be allowed to call as witnesses only the two individuals who it clearly identified as not being listed on a party’s 2008 witness list, Hall and Murphy. The remaining three fact witnesses, Cooke, Lellouche and Thompson, and the proposed new expert, Dr. Elhauge, should be stricken from Valassis’ witness list. Likewise, Dr. Elhauge’s report should be stricken.

Respectfully submitted,

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Dated: December 28, 2009

### CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2009, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

- A. Michael Palizzi
- Anthony J. Rusciano
- Carl H. von Ende
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- Kimberly L. Scott
- Lara Fetsco Phillip
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I also certify that I have served the foregoing document by first-class mail upon the following non-ECF participant(s):

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