

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

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.

DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT

Defendants 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 (collectively “News America”) hereby move to enforce the settlement agreement placed upon the record in this matter.

On January 29, 2010, News America and Valassis entered into a binding settlement agreement, the essential terms of which, were placed upon the record. The agreement placed on the record provided, among other provisions, that: (1) News America would pay Valassis \$500,000,000; (2) the settlement would resolve all pending legal actions between the parties; (3) the court would enter an injunction that would be intended to create an even playing field between News America and Valassis and would prohibit *either* party from engaging in unlawful tying or bundling; (4) assessment of the mutual injunction, including any disputes, by a three member panel of recognized antitrust scholars; and (5) the parties would enter into a distribution agreement for the sale by Valassis of shared mail services to News America on specified terms.

The parties were then directed by the Court to draft and execute a written settlement agreement incorporating the terms set forth on the record. Valassis is now refusing to include in the settlement agreement two of the agreed upon terms: (1) that the injunction be mutual and (2) that the injunction establish a panel of three recognized antitrust experts to assess its terms, including any disputes relating thereto.

Accordingly, News America seeks an order of the Court enforcing the terms of the settlement agreed upon by the parties on the record and ordering Valassis to execute a settlement agreement incorporating those terms.

Counsel for News America sought concurrence in the relief sought by this motion, but such concurrence was denied.

WHEREFORE, News America respectfully requests that the Court enter an order requiring Valassis to execute a settlement agreement that: (1) conforms with the essential terms set forth on the record; (2) incorporates a mutual injunction to be entered by the Court to be assessed by a panel of recognized antitrust experts; and (3) provides for injunction remedies according to applicable law.

Dated: February 2, 2010

Respectfully Submitted,

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VALASSIS COMMUNICATIONS, INC.,

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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.

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT
AGREEMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF CONTROLLING AND MOST RELEVANT AUTHORITY ii

CONCISE STATEMENT OF ISSUE PRESENTED..... iii

I. INTRODUCTION1

II. STATEMENT OF FACTS 1

III. THE SETTLEMENT AGREEMENT PLACED ON THE RECORD IS BINDING AND SHOULD BE ENFORCED2

IV. ANY SETTLEMENT AGREEMENT SHOULD INCORPORATE AN INJUNCTION THAT PROVIDES FOR MUTUALITY AND ESTABLISHES A PANEL OF EXPERTS TO RESOLVE DISPUTES.....4

V. ANY PROVISION FOR DAMAGES FOR VIOLATION OF THE INJUNCTION CAN NOT BE PUNITIVE.....4

VI. CONCLUSION.....5

TABLE OF CONTROLLING AND MOST RELEVANT AUTHORITY

CASES

Aro Corp. v. Allied Witan Co.,
531 F.2d 1368 (6th Cir. 1976)3

Bostick Foundry Co. v. Lindberg, a Div. of Sola Basic Industries, Inc.,
797 F.2d 280 (6th Cir. 1986)3

Brock v. Scheuner Corp.
841 F.2d 151 (6th Cir. 1988)3

In the Matter of Grand Jury Investigation,
748 F. Supp. 1188 (E.D. Mich. 1990).....5

Mikonczyk v. Detroit Newspapers, Inc.,
238 Mich. App. 347; 650 N.W.2d 360 (1999).....3

Re/Max Int'l, Inc. v. Realty One, Inc.,
217 F.3d 633 (6th Cir. 2001)3

CONCISE STATEMENT OF ISSUE PRESENTED

1. Where the parties have agreed to the essential terms of a settlement agreement and those terms have been placed on the record, should the Court enforce the settlement agreement between the parties?

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

I. INTRODUCTION

The Defendants (collectively, “News America”) offer this brief in support of their Motion to Enforce Settlement Agreement. After placing a binding settlement agreement under oath on the record before the Court on Friday, January 29, 2010, and after issuing a press release announcing that settlement, Valassis is now refusing to execute two critical terms of the settlement agreement that it specifically agreed to on the record. Accordingly, News America seeks an order enforcing these two terms of the settlement, and ordering Valassis to execute a settlement agreement incorporating those terms.

II. STATEMENT OF FACTS

After many days of negotiating the terms of a settlement, the parties reached a settlement agreement and placed the essential terms of that settlement on the record before the Court on January 29, 2010. The tape-recorded agreement placed on the record provided, among other provisions, that: (1) News America would pay Valassis \$500,000,000; (2) the settlement would resolve all pending legal actions between the parties; (3) the court would enter an injunction that would be intended to create an even playing field between News America and Valassis and would prohibit *either* party from engaging in unlawful tying or bundling; (4) the aforementioned mutual injunction, including any disputes relating thereto, would be assessed by a three member panel of recognized antitrust scholars; and (5) the parties would enter into a distribution agreement for the sale by Valassis of shared mail services to News America on specified terms.¹ The parties were then directed by the Court to draft and execute a written settlement agreement incorporating the terms set forth on the record.

¹ This followed a statement by News America that it was critical to the company and a “deal-breaker” that any injunction must be mutual.

The very next day each party issued press releases announcing the settlement to the public. See Valassis' January 30, 2010 Press Release attached hereto as Exhibit A; News America's January 30, 2010 Press Release attached hereto as Exhibit B. In its press release, Valassis specifically stated that "it has reached an agreement to settle its outstanding lawsuits against News America Marketing", and that, as part of the settlement, News America would "enter into a 10-year shared mail distribution agreement with Valassis Direct Mail" and "the judge will issue a permanent injunction related to certain business practices at issue in the lawsuits."

The parties have prepared and exchanged drafts of a written settlement agreement, the language of which is largely agreed upon by the parties. The parties are also making good progress on the language of the distribution agreement. Valassis, however, contradicting its agreement on the record, is now taking the position that any injunction issued by the Court must only apply to News America, and is denying that it agreed to an injunction against both parties. Valassis has also refused to include any provision for the injunction to be reviewed by a panel of three recognized antitrust experts, as was agreed upon on the record. In addition, Valassis has proposed that the injunction provide that it is entitled to damages for any violation by News America of the voluntary injunction of six times News America's revenues, a term which was not provided for on the record and for which there is no basis in the law.

III. THE SETTLEMENT AGREEMENT PLACED ON THE RECORD IS BINDING AND SHOULD BE ENFORCED

As we believe both parties agree, the settlement agreement that was placed on the record is binding and should be enforced.

The Sixth Circuit “has long recognized the broad, inherent authority and equitable power of a district court to enforce an agreement in settlement of litigation pending before it, even where that agreement has not been reduced to writing.” *Bostick Foundry Co. v. Lindberg, a Div. of Sola Basic Industries, Inc.*, 797 F.2d 280, 282 -283 (6th Cir. 1986) (citing *Bowater North America Corp. v. Murray Machinery, Inc.*, 773 F.2d 71, 76-77 (6th Cir. 1985)). This conforms with the Sixth Circuit’s enunciated belief that “public strongly favors settlement of disputes without litigation.” *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976). “Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out...Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit.” *Id.* 1372.

In fact, “[w]here all the essential terms [have] been agreed upon in open court” the court should summarily enforce the settlement without any need for an evidentiary hearing. *Brock v. Scheuner Corp.* 841 F.2d 151 (6th Cir. 1988).

Michigan law further holds that “a settlement agreement is binding when it is made in open court.” *Mikonczyk v. Detroit Newspapers, Inc.*, 238 Mich. App. 347, 349; 650 N.W.2d 360 (1999); MCR 2.507(H) (“[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court....”).

News America and Valassis agreed to the essential terms of the settlement on the record in open court. Further, the parties’ press releases announcing the settlement further demonstrate that an agreement on the essential terms had been reached. (See *Re/Max Int’l, Inc. v. Realty*

One, Inc., 217 F.3d 633 (6th Cir. 2001) (noting that defendant's act of issuing newsletter to its employees that a settlement had been reached was an objective act constituting an expression of assent and reflected that an agreement had been reached). For all of the reasons set forth above, the agreement placed on the record constitutes a binding agreement between the parties and should be enforced.

IV. ANY SETTLEMENT AGREEMENT SHOULD INCORPORATE AN INJUNCTION THAT PROVIDES FOR MUTUALITY AND ESTABLISHES A PANEL OF EXPERTS TO RESOLVE DISPUTES

Valassis' insistence that any injunction not provide for mutuality and not include a provision for review by a panel of three recognized antitrust experts is in direct violation of the terms agreed upon on the record. The parties reached agreement on the specific terms that the injunction apply to both parties and that it be assessed by an expert panel. That agreement was placed on the record and taped in a proceeding before the Court that concluded at 6:05 p.m. Friday, January 29, 2010. If there is any doubt as to the terms agreed upon and set forth on the record, the tape of that proceeding should be immediately transcribed. The parties must be held bound to the terms agreed upon on the record and required to execute a settlement agreement that conforms with those terms.

V. ANY PROVISION FOR DAMAGES FOR VIOLATION OF THE INJUNCTION CAN NOT BE PUNITIVE

Valassis has proposed that the injunction to be entered by the Court should include a provision that Valassis be entitled, as a measure of damages for any violation by News America of the injunction, to an amount equal to six times the revenue earned by News America on any transaction found to have violated the terms of the injunction. Such a provision was not included among the terms of the settlement set forth on the record, is clearly punitive, and has no basis in

the law on contempt for violations of injunctions, which provides for damages to compensate for the actual loss suffered. *See In re Computer Comms.*, 824 F.2d 725, 731 (9th Cir. 1987); *CFTC v. Premex, Inc.*, 655 F.2d 779, 785 (7th Cir. 1981). See also *In the Matter of Grand Jury Investigation*, 748 F. Supp. 1188, 1199 (E.D. Mich. 1990) (holding that the purpose of civil contempt is compensatory and remedial, not punitive). An award of damages in the amount of six times News America's revenues could easily be 30 times greater than any actual damages measured in terms of lost profits, and thus would clearly be punitive and unlawful.² It is particularly preposterous given that the injunction is consensual as part of a settlement of a lawsuit. There is no reason to provide for any specific remedy for violation of the injunction, other than those provided by law.

VI. CONCLUSION

For the reasons set forth above, News America requests that the Court order Valassis to execute a settlement agreement that includes an injunction that provides for mutuality; establishes a panel of recognized antitrust experts who can assess the injunction and any disputes relating thereto; and provides for injunction remedies according to the applicable law.

Respectfully submitted,

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Dated: February 2, 2010

² This would be true if, for example, lost profits were 20% of revenues.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2010, 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: Dari C. Bargy, Kerin E. Coughlin, Gregory L. Curtner, Lara Fetsco Phillip, Julie A. Shepard, Richard L. Stone, Raymond C. Fay, Herschel P. Fink, Julie L. Kosovec, David S. Mendelson, A. Michael Palizzi, Marcy L. Rosen, Anthony J. Rusciano, Kimberly L. Scott, Jeffrey I. Shinder, Robert J. Wierenga, and Carl H. von Ende.

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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