

**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.

**PLAINTIFF VALASSIS COMMUNICATIONS, INC.'S CROSS MOTION TO ADD
WITNESSES**

Valassis moves this Court pursuant to Federal Rule of Civil Procedure 26 and Local Rule 16.2 to add Julia Cooke as an additional witness to its trial witness list, to deem John Thompson and Henri Lellouche as previously identified, and to permit Valassis to call Professor Einer Elhauge in rebuttal if necessary. As set forth more fully in Valassis' accompanying brief in support, this Court should rule in Valassis' favor because none of these witnesses will prejudice News.

Valassis has met and conferred with News as required by Local Rule 7.1, but such concurrence was rejected.

WHEREFORE Valassis respectfully requests that this Court:

- 1) add Julia Cooke to the trial witness list;
- 2) deem John Thompson and Henri Lellouche previously identified; and
- 3) allow Valassis to call Professor Einer Elhauge.

Respectfully submitted,

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Dated: January 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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IN-STORE SERVICES, LLC,

Defendants.

**PLAINTIFF VALASSIS COMMUNICATIONS, INC.'S MEMORANDUM IN SUPPORT
OF CROSS MOTION AND OPPOSITION TO DEFENDANTS'
EMERGENCY MOTION TO STRIKE WITNESSES**

TABLE OF CONTENTS

	Page
CONCISE STATEMENT OF THE ISSUES PRESENTED.....	1
CONTROLLING OR MOST APPROPRIATE AUTHORITIES	2
I. BACKGROUND	3
II. NEWS FAILED TO PROPERLY MEET AND CONFER.....	5
III. VALASSIS HAS PROPERLY ADDED NEW WITNESSES.....	6
A. Mr. Murphy.....	6
B. Ms. Hall.....	7
IV. VALASSIS SHOULD BE PERMITTED TO CALL MS. COOKE, MR. LELLOUCHE, MR. THOMPSON AND PROFESSOR ELHAUGE.....	8
A. Valassis Should Be Permitted To Call Ms. Cooke	9
B. Valassis Should Be Permitted To Call Mr. Lellouche and Mr. Thompson	10
C. Valassis Should Be Permitted To Call Professor Elhauge.....	13

INDEX OF AUTHORITIES

CASES	Page(s)
<i>Adalman v. Baker, Watts & Co.</i> , 807 F.2d 359 (4th Cir. 1986)	8
<i>Feulufai v. Pacific Princess Partnership Ltd.</i> , No. 2:07-cv-00808, 2009 WL 3789668 (D. Nev. Sept. 10, 2009).....	14
<i>Hurley v. Atlantic City Police Dep't</i> , 174 F.3d 95 (3d Cir. 1999).....	9
<i>Meyers v. Pennypack Woods Home Ownership Ass'n</i> , 559 F.2d 894 (3d Cir. 1977).....	9
<i>Newman v. GHS Osteopathic</i> , 60 F.3d 153 (3d Cir. 1995).....	9
<i>United States v. \$9,041,598.68</i> , 163 F.3d 238 (5th Cir. 1998)	9
<i>Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.</i> , 170 F.3d 985 (10th Cir. 1999)	8

CONCISE STATEMENT OF THE ISSUES PRESENTED

Should Valassis be permitted to call one additional witness (Julia Cooke) whose addition will not prejudice News and who will offer compelling testimony; to call two witnesses (Henri Lellouche and John Thompson) who were previously fully deposed during discovery and whose appearance will not prejudice News; and to offer an additional expert witness (Professor Einer Elhauge) to respond to arguments newly presented by News?

Valassis answers: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Federal Rule of Civil Procedure 26

Local Rule 16.2

Judge Tarnow's Standing Scheduling Order

Judge Morgan's December 11, 2009 Order

I. BACKGROUND

Pursuant to the Scheduling Order issued in this case on August 20, 2008, the parties exchanged witness lists on October 1, 2008. In the year since that witness list exchange, the parties tried a related case in Wayne County Circuit Court, captioned *Valassis Communications, Inc v. News America Incorporated, et al.*, Case No. 07-7066450-CZ ("Wayne County Action") during which Defendants (collectively "News") introduced new legal and factual arguments that they had not previously disclosed, and presented additional, previously undisclosed witnesses that Valassis could not have anticipated, prior to the last exchange of disclosures.

On December 2, 2009, Valassis filed its Motion for Expedited Status Conference, in which it requested, among other things, that the Court set a deadline for the parties to exchange amended witness lists. Judge Morgan heard Valassis' Motion on December 11, 2009, and entered an order. News Ex. 1. With respect to amended witness lists, the Court ordered as follows:

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.

Id. at ¶ 9.

Valassis exchanged its Amended List on December 21, 2009. In addition to identifying two individuals that had not been listed in its 2008 witness list – Ms. Christine Hall (who was added to the witness list by court-ordered amendment prior to trial in Wayne County) and Mr. Michael Murphy – Valassis identified Ms. Julia Cooke as an additional witness. In a footnote in its Amended Witness List, and later by email, Valassis asked counsel for News to meet and confer regarding adding Ms. Cooke and offered to make Ms. Cooke available for deposition prior to trial. *See* News Ex. 10 at 2 n. 1. Valassis also included in its Amended List Mr. John

Thompson and Mr. Henri Lellouche, two witnesses who had previously been deposed in this case. Valassis also disclosed Professor Einer Elhauge as an expert in its Supplemental Rule 26 disclosures, exchanged on the same day.

In its Amended Witness List, News identified twelve new witnesses that it had not identified in its October 1, 2008 witness list – seven members of Valassis' Board of Directors, Mr. Dave Biery, Ms. Shelby Coakley, and its three expert witnesses. Upon receipt of News' Amended Witness List, Valassis again invited News' counsel to meet and confer regarding the additional witnesses identified by the parties. Ex. 1 (Curtner email of 12/22/09 at 7:52 AM). Counsel for News refused. News' counsel wrote that the seven members of Valassis' Board of Directors were a "mistake" and could be deleted. *Id.* (Stone email of 12/22/09 at 12:25 PM). Rather than engaging in a meet and confer on the issue, counsel for News simply wrote "we do not agree to additional witnesses." *Id.* (Stone email of 12/22/09 at 12:07 PM).

On December 21, 2009, the parties exchanged supplemental expert reports. News filed a total of four supplemental reports: one from Professor Blattberg, News' proposed marketing expert; one from Professor Murphy, News' proposed liability expert; one from Professor Topel, News' proposed damages expert; and an additional, "joint" report from Professors Murphy and Topel on the issue of causation. News' supplemental expert reports are replete with new arguments and "analyses" that could, and should, have been included in the expert reports that News filed last year.¹ Indeed, much of News' expert "supplementation" consists of nothing more than its experts providing new analyses of evidence that has been available to News for years,

¹ For example Professor Topel's supplemental report contains, for the first time, an alternative to Dr. Bamberger's damages calculation (previously, Topel – and News – had claimed that the only possible number that could be placed on Valassis' damages was \$0). *See* Ex. 3, Topel Supp. Report at ¶¶ 14-18. Professor Topel and News could have provided this analysis a year ago; they simply chose not to do so. Similarly, Professors Topel and Murphy have submitted a lengthy report that supposedly "proves" – for the first time – that Valassis' damages were not caused by News' illegal behavior. *See* Ex. 4, Topel and Murphy Joint Supp. Report. Again, News and its experts could have provided this analysis a year ago; they simply chose not to do so.

rather than an attempt to address evidence or issues that have arisen since the last exchange of expert reports. Valassis had no more notice – and will have no greater time to respond – to these new analyses from News' "old" experts than News will have to respond to Professor Elhauge's report.²

Despite the fact that News' supplemental expert reports contained substantially more new analyses than anything contained in Professor Elhauge's report – and without any further communications to Valassis – News filed an "emergency motion" on December 28, 2009 to strike Ms. Cooke, Mr. Lellouche, and Mr. Thompson from Valassis' witness list, and to summarily bar Valassis from calling Professor Elhauge as an expert witness and to strike Professor Elhauge's expert report.

Thus, Valassis is left to seek this Court's assistance, and requests that it be permitted to add Ms. Julia Cooke as a trial witness in this matter for good cause shown; that the Court deem Mr. Thompson and Mr. Lellouche as having been previously identified; and that the Court permit Valassis to call Professor Elhauge in response and rebuttal to the substantial new work of News' three experts.

II. NEWS FAILED TO PROPERLY MEET AND CONFER

News is required under Local Rule 7.1(a)(1) to meet and confer with Valassis before filing a motion. While News claims that "News America communicated with Valassis on December 22, 2009, explained the legal basis for striking the witnesses and report, and sought its concurrence in the relief sought by this motion," News Mot. at 1-2, the parties' actual communications prove otherwise.

² In fact, News had more notice of the Elhauge analysis than Valassis has been given of the new Murphy, Topel and Blattberg analyses, since Valassis has been citing Professor Elhauge's article, first in draft form and now published in the Harvard Law Review, in its briefs for the better part of the last year.

News did not "explain the legal basis" for this motion, or even inform Valassis that it intended to file such a motion. News merely asked Valassis "what is your basis for attempting to add [Professor Elhauge]?" Ex. 2 (Stone email of 12/22/09 at 12:44 PM). Valassis responded that "[w]e can call Elhauge as rebuttal and could have held him until then, but decided to err on the side of early disclosure." *Id.* (Curtner email of 12/22/09 at 3:12 PM). Valassis invited News to "[l]et me know if you wish to discuss this further," *id.*, but heard nothing from News until it filed its motion on December 28, 2009.³ Nowhere did News raise any issue with, or attempt to discuss, Ms. Cooke, Mr. Lellouche or Mr. Thompson.

III. VALASSIS HAS PROPERLY ADDED NEW WITNESSES

Valassis has added new witnesses as permitted by Judge Morgan's December 11, 2009 order: Mr. Michael Murphy and Ms. Christine Hall. While Mr. Murphy is a truly new witness – Valassis was not even aware of his potential testimony until after the December 11, 2009 status conference – Ms. Hall is not.

A. Mr. Murphy

Valassis has designated Mr. Murphy as one of its two fact new witnesses under Judge Morgan's December 11, 2009 order. However, when Judge Morgan suggested during the December 11, 2009 hearing that the parties be permitted to identify two new witnesses, counsel for Valassis had been unable to reach Mr. Murphy and did not expect that he would be a potential witness. Valassis' experience has been that News uses intimidation and confidentiality agreements to prevent former employees or customers, like Mr. Murphy, from testifying, but Valassis' recent win in the Wayne County action has emboldened some previously reluctant

³ It was Valassis, not News, who initiated the December 22, 2009 conversation to discuss Valassis' request to add Ms. Cooke as a witness. Ex. 1 (Curtner email of 12/22/09 at 7:52 AM). It was also Valassis, not News, who pointed out that News had added seven individual members of Valassis' Board of Directors to its own witness list. *Id.*; compare News Br. at 3 n. 1 ("Nine (sic) 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.").

witnesses to come forward. Had Valassis been aware of Mr. Murphy's knowledge and willingness to testify, it would have asked to add three new fact witnesses – Mr. Murphy, Ms. Hall and Ms. Cooke – on December 11. But it was not until Friday, December 18, 2009 that Valassis was able to confirm that it would list Mr. Murphy as a potential witness.

B. Ms. Hall

Although Valassis designated Ms. Hall as a witness, she is far from "new" to this case. Unlike Mr. Murphy, who Valassis confirmed as a potential witness on December 18, 2009, and unlike News' two new witnesses, who were sprung on Valassis in the midst of the Wayne County action without a proper motion to add, Ms. Hall was disclosed to News nearly a year ago, was the subject of Valassis' proper motion to amend the pretrial order in the Wayne County action to include her, and was fully deposed by News on April 14, 2009.

Ms. Hall was not listed in Valassis' October 1, 2008 witness list simply because Valassis was not aware she was a potential witness until February 10, 2009. Two days later, on February 12, 2009, Valassis disclosed Ms. Hall to News and issued a notice of taking Ms. Hall's trial testimony in the Wayne County Action. Valassis took Ms. Hall's trial testimony on February 23, 2009. On March 2, 2009, Valassis filed a motion to add Ms. Hall to the pretrial order in Wayne County. Judge Sapala granted Valassis' motion, and permitted News to take a second deposition. News took an extensive deposition of Ms. Hall on April 14, 2009, well before the beginning of trial on May 27, and excerpts of her testimony from both depositions were played to the jury in the Wayne County trial.

News undoubtedly will try and argue, as they did before Judge Morgan on December 11, 2009, that Ms. Hall should be treated the same as News' two new witnesses. In fact, Ms. Hall is distinctly different from News' new witnesses. News' new witnesses were sprung on Valassis on the eve of the Wayne County trial, were originally stricken by Judge Sapala, but were ultimately

allowed to testify.⁴ As Judge Morgan recognized during the December 11, 2009 hearing, although News' new witnesses were deposed, those depositions were taken in the midst of the Wayne County trial, and were necessarily focused on issues relating to the Wayne County action: "But I have to tell you there's no way, given the timing of that in the state case, that they would have reasonably expected to take questions specific to the federal case." Ex. 5, 51:21-24 The same can not be said for Ms. Hall, who was disclosed nearly a year ago and was deposed on April 14, 2009, six weeks before the Wayne County trial, and after Valassis had properly moved to add her as a witness.

IV. VALASSIS SHOULD BE PERMITTED TO CALL MS. COOKE, MR. LELLOUCHE, MR. THOMPSON AND PROFESSOR ELHAUGE

In addition to the two "new" witnesses – one of whom has already been fully deposed by the parties – Valassis should also be permitted to call Ms. Cooke, a former employee of News; Mr. Lellouche and Mr. Thompson, both of whom were previously deposed during the normal course of discovery in this case; and Professor Elhauge.

A trial court has great discretion in permitting a party to call a witness. Even when a witness was not disclosed in accordance with Rule 26(a) – which is not the case here, as Rule 26(a) witness disclosures were not due until January 4, 2010 – a party may be permitted to call a new witness. In exercising that discretion, a district court is guided by the following factors: (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party's failure to name the witness before trial; and (5) the importance of the testimony. *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 369 (4th Cir. 1986); *see also Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999)

⁴ News first disclosed its two new witnesses on May 14, 2009, less than two weeks before the Wayne County trial began. Both were deposed during the Wayne County trial, Mr. Biery on June 4, 2009 and Ms. Coakley on July 6, 2009.

(listing similar factors to be considered by trial court under Rule 37(c)(1)); *United States v. \$9,041,598.68*, 163 F.3d 238, 252 (5th Cir. 1998) (same). Sanctions should not be imposed if substantial justification exists for the failure to disclose, or if the failure to disclose was harmless. *Newman v. GHS Osteopathic*, 60 F.3d 153, 156 (3d Cir. 1995). Trial courts are afforded wide discretion in making rulings on the admissibility of evidence. *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 110 (3d Cir. 1999). The "exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904 (3d Cir. 1977).

A. Valassis Should Be Permitted To Call Ms. Cooke

News will suffer no prejudice or surprise if Valassis is permitted to call Ms. Cooke at trial. She was identified within the time period set in Judge Morgan's Order and well before the time for pretrial disclosures set by Rule 26(a)(3)(B), which provides that pretrial witness disclosures shall be made 30 days before trial. In addition, News is obviously aware of Ms. Cooke, as she is a former employee of News.⁵ Valassis has already offered to make her available for deposition prior to trial, and her testimony will not disrupt trial in any way.

Finally, Ms. Cooke will offer compelling testimony relating to the tactics she saw News employ while she was employed there between 1998 and 2002. Ms. Cooke saw first hand how News' culture, competitive strategy, and sales tactics changed dramatically, when it began to focus its efforts on trying to drive Valassis out of the FSI business, by among other things, illegally tying and leveraging its in-store products to its FSI. She also will be able to testify that

⁵ While it was Valassis who asked the Court to close the general category loophole regarding the witness lists, had it not done so, Ms. Cooke would have fallen within two separate category identifiers. No. 104 lists "All past and present personnel employed by Defendants who had direct or indirect contact with any issues in this litigation." Also, as a current employee of Valassis, Ms. Cooke also falls within witness No. 51 on Valassis' October 2008 witness list ("All past and present Valassis personnel who had direct or indirect contact with any of the issues in this litigation."). News Ex. 3.

during this time, News terminated or re-assigned employees who were not viewed as aggressive enough to carry out News' new plan of attack, and as a former employee she can now do so without fear of employment-related reprisals.

Ms. Cooke's knowledge and testimony relates to facts that News has been relatively successful in keeping from Valassis – the full story of the change in culture and strategy that occurred at News in 2000 and 2001. Valassis has finally been able to uncover evidence relating to these issues, after it secured 856,568 documents that News produced in a similar antitrust lawsuit brought against it by Insignia Systems in U.S. District Court in Minnesota. Although News tried mightily to prevent Valassis from getting these documents, on September 15, 2008, News' motion for a protective order was denied by Discovery Master Sankbeil and Valassis was permitted to obtain that information pursuant to a subpoena issued to Insignia. Having only received documents from Insignia in the last few months, Valassis is still in the process of reviewing and searching those documents, but has found significant evidence relating to the change at News in 2000 and 2001, and the tactics News began to employ in an effort to drive Valassis out of the FSI business. Ms. Cooke's testimony relates directly to these issues.

B. Valassis Should Be Permitted To Call Mr. Lellouche and Mr. Thompson

Likewise, News will suffer no prejudice or surprise if Valassis is permitted to call Mr. Lellouche or Mr. Thompson. In fact, Valassis was surprised to see that News even challenged the inclusion of Mr. Lellouche and Mr. Thompson. Both witnesses were not only identified within the time period set in Judge Morgan's Order and well before the time for pretrial disclosures set by Rule 26(a)(3)(B), but were *actually deposed in this case during discovery*, as opposed to the hastily scheduled depositions of News' two last minute additions during the Wayne County trial. The Court's standing order permits a party to call witnesses who were previously deposed. Ex. 6 at 6.

Valassis did not, as News claims, "oppose[] an exception for previously deposed witnesses." News Br. at 6. It opposed treating News' surprise witnesses who had been deposed during the Wayne County trial on issues specific to the Wayne County claims as if they had been deposed in the federal action. *See* Ex. 5, 45:3-46:8, 47:18-48:7, 55:22-25. And Judge Morgan agreed with Valassis on this point, finding that "there's no way, given the timing of that in the state case, that [Valassis] would have reasonably expected to take questions specific to the federal case. I mean, each side only had a limited time period." *Id.* at 51:21-25.

News also misrepresents Judge Morgan's ruling on this issue by taking her statements out of context and twisting them to suggest that the Court did not care whether witnesses had previously been deposed. News Br. at 3 (quoting Judge Morgan: "I don't care whether they were deposed before or not."). The full exchange is as follows:

[THE COURT:] 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.

MR. MENDELSON: Okay.

MR. ETTINGER: I assume, Your Honor, we have the right to depose those people if they have not been deposed?

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

Ex. 5 at 57:14-58:3. Judge Morgan's statement was therefore meant to communicate that each party's two new witnesses could be deposed – regardless of whether they had been deposed before. Judge Morgan did not, in Valassis' view, intend to overturn Judge Tarnow's standing scheduling order, which permits a party to call a witness who was either "included on a witness list submitted under a prior order or has been deposed." Ex. 6 at 6.

Mr. Lellouche, a current News employee, was deposed on October 8, 2008. Ex. 7. As for Mr. Thompson, News took his deposition on November 10, 2008. Ex. 8. At the time of the

October 1, 2008 witness list, Valassis had no intention of calling Mr. Thompson and thus did not include him. It was only after News' deposition of Mr. Thompson that Valassis realized that Mr. Thompson actually supported Valassis' position, not News'.

Both Mr. Lellouche's and Mr. Thompson's depositions were full discovery depositions. This distinguishes them from News' newly named witnesses, both of whom were disclosed by News on the eve of the Wayne County Trial, Ex. 9 (listing Ms. Coakley, No. 5, and Mr. Biery, No. 23), and were both deposed in the middle of the Wayne County Trial.⁶

Having previously had the opportunity to depose both Mr. Lellouche, an employee of News, and Mr. Thompson, whose deposition News itself noticed, News cannot now claim prejudice or surprise. Neither witness's testimony will disrupt trial in any way, and each will give important testimony.

Mr. Lellouche is an executive at News who works with the SmartSource Direct loyalty marketing service. In deposition, Mr. Lellouche testified about memos in which he complained of "illegal tying" and bundling by an in-store competitor, the same type of conduct that News has engaged in. He also wrote about how News should leverage its products to get more business and testified that News' lower prices for exclusive contracts on some products were not related to any actual cost savings and that News was targeting Valassis' direct mail accounts. All of these topics are directly relevant to Valassis' claims.

Mr. Thompson is an executive vice president at Unicous, an in-store marketing service company that sells an at-the-shelf coupon advertising product called EZ-PIC to consumer packaged good companies. News repeatedly claimed that Unicous was a viable competitor for News in the in-store market. Mr. Thompson's testimony, however, was that News' exclusive

⁶ To further distinguish News' new witnesses from Mr. Lellouche and Mr. Thompson, the depositions of News' new witnesses were only noticed in Wayne County Circuit Court, not in the Eastern District of Michigan. Mr. Lellouche's and Mr. Thompson's depositions were noticed in this Court.

contracts with retailers have blocked Unicous' access to retailers, that News has written to retailers to tell them not to do business with Unicous, and that it is necessary to have a "critical mass" of retailers in order to compete in the in-store market. Mr. Thompson's testimony will help to demonstrate News' monopoly power in the in-store market and to show that News' attempt to portray every in-store provider as a viable competitor is a distortion of the real in-store market.

All of this testimony is important, and Valassis should be permitted to call Mr. Lellouche and Mr. Thompson as witnesses. If this Court rules that Valassis may not call them, then Valassis will simply play each witness's prior testimony as part of its expert witness presentation.

C. Valassis Should Be Permitted To Call Professor Elhauge

Finally, Valassis should be permitted to call Professor Elhauge, either in its case-in-chief or as a rebuttal witness. Professor Elhauge's testimony will be responsive to the new arguments that News raised at the motion for summary judgment hearing and during the Wayne County trial, and has included – for the first time in this case – in the supplemental expert reports that News filed on December 21, 2009. Valassis' argument on this point is discussed more fully in the accompanying Motion to Allow Responsive Expert Testimony From Professor Einer Elhauge.

Valassis should also be permitted to use Professor Elhauge as a rebuttal witness. Judge Tarnow's standing scheduling order follows Local Rule 16.2 and states that "only listed witnesses will be permitted to testify at trial, except for rebuttal witnesses whose testimony could not be reasonably anticipated before trial, or except for good cause shown." Ex. 6. Valassis disclosed Professor Elhauge in an abundance of caution. Indeed, Valassis hopes that it will not have to call Professor Elhauge in rebuttal, and it will not if News' experts are limited to proper expert testimony. However, given Valassis' experience with News' experts in the Wayne County

action and their fondness for making policy pronouncements about the application of the law to economic issues, Valassis is concerned that News' experts may again give improper testimony and that Valassis will need to call an expert in rebuttal.⁷ As Valassis should not be required to "reasonably anticipate" improper expert testimony, Professor Elhauge should be considered a potential rebuttal witness.⁸ Valassis was not required to disclose him at all but thought it was best to do so, in order to prevent any later claims of surprise from News. *Feulufai v. Pacific Princess Partnership Ltd.*, No. 2:07-cv-00808, 2009 WL 3789668, at *1 (D. Nev. Sept. 10, 2009) (allowing expert not disclosed in initial Rule 26(a) report to testify as a rebuttal witness).⁹

This is especially true in light of News' own behavior with respect to expert disclosures in this case. As Judge Morgan will recall, News deliberately flouted this Court's original expert deadlines by submitting an initial "report" from Dr. Topel that was nothing more than an obvious, and inappropriate, "placeholder" for his real report (which News concealed until well after the disclosure deadline). Ex. 11 at 24:19-23. Judge Morgan agreed that News' behavior was inappropriate, but nonetheless allowed News a full opportunity to designate testimony from Dr. Topel. *Id.* at 30:9-12, 33:11-12. Similarly, the "supplemental" reports that News filed on December 21, 2009 go far beyond true supplementation in response to new evidence or argument, and instead are attempts by News and its experts for a "do-over" of expert testimony that proved less than persuasive to the Wayne County jury. In light of the multiple opportunities to file expert disclosures that News has been given in this case (and taken for itself even when

⁷ See, for example, Ex. 10, July 16, 2009 Wayne County Trial Transcript, 110:8-111:4 (Professor Murphy arguing law and policy regarding how to analyze bundling).

⁸ It is only the unusual fact that the parties have already tried an eight week jury trial that allows Valassis a clearer view of what News may attempt during the upcoming trial that informs Valassis of the potential need for Professor Elhauge's testimony. While Valassis could have waited to disclose Professor Elhauge, it chose not to, given this increased visibility, in order to afford News ample opportunity to adequately prepare.

⁹ Additionally, Ms. Cooke, Mr. Lellouche and Mr. Thompson may properly be called as rebuttal witnesses.

not given), it would be extremely unfair to preclude Valassis from calling Professor Elhauge in response.¹⁰

Respectfully submitted,

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Inc.

Dated: January 4, 2010

¹⁰ If News chooses to be hypertechnical about expert witnesses, this Court should rule that News has failed to properly name any expert witnesses. Judge Cox's Scheduling Order stated that "[a]ll witnesses to be called at trial shall be listed by: OCTOBER 1, 2008." Ex. 12. Judge Morgan's order states that "[t]he 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." News Ex. 1, ¶ 9. The order and the statements by Judge Morgan and both parties at the December 11, 2009 hearing make clear that the "witness list" referred to is the October 1, 2008 witness list. News' October 1, 2008 witness list does not list any of its expert witnesses. News Ex. 2. Valassis' October 1, 2008 witness list lists three of Valassis' experts by name: Professor MacKie-Mason, Professor Farris and Dr. Bamberger. News Ex. 3 at ¶¶ 39, 40, 41. Therefore, taking News' hypertechnical view, Valassis should be permitted to present its three experts, and News should be permitted to present none.

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

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