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**ORIGINAL**

Before the **FCC MAIL SECTION**  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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41695

In re Applications of )  
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SCRIPPS HOWARD BROADCASTING COMPANY )  
 )  
For Renewal of License of Station WMAR-TV )  
Baltimore, Maryland )  
 )  
and )  
 )  
FOUR JACKS BROADCASTING, INC. )  
 )  
File No. BRCT-910603KX  
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 )  
For a Construction Permit for a New )  
Television Facility on Channel 2 )  
at Baltimore, Maryland )  
 )  
File No. BPCT-910903KE

**MEMORANDUM OPINION AND ORDER**

Issued: April 28, 1994 ; Released: May 02, 1994

**Background**

1. This is a ruling on a Motion For The Production Of Documents that was filed on March 28, 1994, by Scripps Howard Broadcasting Company ("Scripps Howard"). An Opposition To Motion For Production Of Documents was filed on April 7, 1994, by Four Jacks Broadcasting, Inc. ("Four Jacks"). On April 14, 1994, Scripps Howard filed a Motion To Compel Production under §1.325(a)(2).

2. Scripps Howard has served a comprehensive Motion For The Production Of Documents which is intended to obtain objective evidence that is related to ascertaining the precise nature of the integration pledge of Four Jacks that committed the three active principals of Four Jacks to full-time involvement in the operation of Channel 2's business. The documents sought include those pertaining to taxes, loans, bonus programs, pension and retirement programs, insurance for officers and directors, compensation, credit applications, employment reports, and the organizational structure of Sinclair Broadcast Group, Inc. ("Sinclair"), the holding company of the applicant Four Jacks. There also are requests for drafts of registration statements in connections with filings at the U.S. Securities & Exchange Commission ("SEC") by Sinclair. The ultimate issues of fact are questions of states of mind, motives and intentions at the time of the filing of Four Jack's application and at the time integration statements and sworn testimony were exchanged.

3. In opposing the scope of the Motion, Four Jacks continues to argue that the issues never should have been added. Four Jacks states<sup>1</sup> that the "evidence on which the issues were added comes nowhere close to establishing

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<sup>1</sup> There is now pending before the Presiding Judge a Motion For Partial Reconsideration and/Or Clarification that Four Jacks filed on April 18, 1994.

that David, Robert, or Frederick Smith misrepresented facts or lacked candor concerning their integration pledges in connection with four Jacks' proposed Channel 2 station -- let alone that they did so wilfully." That argument appears to overlook the fact that there has been no determination made of the merits of the issues. There only has been a determination by the Presiding Judge that there are triable issues of fact with respect to the integration pledges of the three principals of Four Jacks in light of representations that they made to the SEC. The issues of misrepresentation and lack of candor were added after a close examination of such disclosure in light of testimony in Phase I and after the consideration of all of that universe of reliable evidence in light of the disclosures of integration that Four Jacks made to the Commission at the time of application, when integration statements were filed, and when written testimony was exchanged.<sup>2</sup>

4. Four Jacks also argues that all of the documents which are needed to resolve the issues are now in the record and that "they say what they say." Four Jacks will concede that a relevant inquiry (and according to Four Jacks the only one that is relevant) "would be one of state of mind -- whether David, Robert or Frederick Smith, in making the statements in question, intended to misrepresent or conceal facts about their integration commitments." But relevant documents are needed to determine that substantial question of fact in view of Four Jacks' position that the three principals were bosses and not employees of Sinclair. In general, the documents that are sought by Scripps Howard are relevant for discovery under that inquiry.

5. Scripps Howard is correct in arguing that circumstantial evidence and inconsistent statements can support findings and conclusions of misrepresentation or lack of candor. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 668, 109 S. Ct. 2678, 2686 (1989) (where there is an issue of actual malice a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence). See also Herbert v. Lando, 441 U.S. 153, 160, 99 S. Ct. 1635, 1640 (1979) (proof of necessary state of mind could be objective circumstances from which the ultimate fact could be inferred). The discovery permitted must, however, not be so intrusive as to detract materially from the proper conduct of the proceeding or to cause annoyance, expense, embarrassment, or oppression. Cf. 47 C.F.R. §1.313.<sup>3</sup> Therefore, as a

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<sup>2</sup> The evidence considered by the Presiding Judge met the standard applied by the courts for adding issues. See Citizens for Jazz on WRVR, Inc. v F.C.C., 775 F.2d 392, 395 (D.C. Cir. 1985) (the totality of the facts raise such a sufficient doubt that further inquiry is called for). The added issues only move the inquiry forward to resolve the doubt one way or the other. There has been no determination on the merits of the issues. This added issue is merely at the discovery stage.

<sup>3</sup> Scripps Howard recognizes that it is seeking documents that are of a confidential and proprietary nature and that there may be protection ordered to limit its use to this case. The Presiding Judge will expand that protection to providing that only trial counsel for Scripps Howard, and their assistants from Baker & Hostetler or a retained consultant who is not an employee of Scripps Howard, may have access to the documents. Scripps Howard

general limitation, dollar amounts of employment compensation and dollar amounts of benefits need not be disclosed. Also, the data need not predate January 1991. The documents that are discoverable are the following:

Rulings

Request No. 1.

6. Information must be provided for the tax years 1991, 1992 and 1993. The tax information that must be produced is limited to items of identification that show the status of the principals as employees or non-employees of Sinclair. The amounts of money are irrelevant unless the amount of salary is used defensively by Four Jacks to disprove that there was an employee relationship with Sinclair. Counsel shall confer and report in writing to the Presiding Judge by May 5, 1994, on procedures for providing tax information for the evidentiary needs as limited herein.

Request No. 2.

7. All information sought relating to loans to the principals from 1991 to date, except the dollar amounts, must be disclosed to Scripps Howard's trial attorneys.

Request No. 3.

8. All information sought relating to bonuses of the principals, except the dollar amounts, received since January 1, 1991, must be disclosed to Scripps Howards' trial attorneys.

Request No. 4.

9. All information sought relating to each retirement and/or pension benefit plan provided by Sinclair to the principals must be disclosed to Scripps Howards' trial attorneys. However, dollar amounts need not be disclosed.

Request No. 5.

10. All information sought relating to health, life, disability, or other insurance provided by Sinclair to the principals must be disclosed to Scripps Howard's trial attorneys. Counsel should agree to the least burdensome manner for the discovery of this information. There should be no need to copy and deliver extensive insurance policies.<sup>4</sup>

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also is agreeable to a mutually acceptable procedure for the redaction of information that is irrelevant. Counsel are required to pursue diligently that procedure.

<sup>4</sup> Insurance and health policies may be inspected at the offices of Four Jacks' counsel and stipulated data extracted from that inspection may be used to depose the witnesses and to introduce relevant data into evidence at the

Request No. 6.

11. Four Jacks is required to produce reliable documents that will unequivocally identify and show the nature of all compensation received by all of the principals from Sinclair since January 1, 1991, that was not disclosed under Requests 2, 3, 4, or 5 above. The amounts of money may be redacted unless Four Jacks intends to use that information defensively. Scripps Howard has not shown a need for "all documents" that would disclose that information.

Request No. 7.

12. Four Jacks is required to produce applications since January 1, 1990, of each of the principals that were used in connection with applying for credit which Sinclair arranged or was the creditor, or where Sinclair was used as a reference or a guarantor, or where Sinclair was in any way connected with the granting of credit.

Request No. 8.

13. The discovery of the principals' documents that reflect income tax withholding are subject to the same limitations as prescribed for Request No. 1 above. The information disclosed will be limited to the tax years 1991, 1992 and 1993. Copies of the unredacted documents (Forms W2 and W4 and comparable state documents) will be made available to Scripps Howards' trial attorneys for inspection at the offices of counsel for Four Jacks upon reasonable notice.

Request No. 9

14. Four Jacks need not disclose all employee bonus plans for Sinclair. But if there are employee bonus programs which differ from the bonus programs of Sinclair requested in Request No. 3, copies of each such different bonus program, with personal identities and amounts redacted, must be provided to Scripps Howard's trial attorneys. Unredacted copies of these bonus programs of other employees must be made available for inspection at the offices of counsel for Four Jacks upon reasonable notice.

Request No. 10

15. Four Jacks need not disclose all documents relating to loan programs provided by Sinclair to employees. But if there are loan programs which differ from loan programs of Sinclair requested under Request No. 2, copies of such different loan programs, with personal identities and amounts redacted, must be provided to Scripps Howard's trial attorneys. Unredacted copies of these loan programs of other employees must be made available for inspection at the offices of counsel for Four Jacks upon reasonable notice.

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hearing. Such pruning at discovery will also hasten the hearing and will lessen the size of the record.

Request No.11

16. Four Jacks need not disclose all documents relating to pension benefit or retirement programs for Sinclair's officers, directors and employees. But if there are pension benefit or retirement programs which differ from the programs of Sinclair requested under Request No. 4, copies of such different pension benefit or loan programs, with personal identities and amounts redacted, must be provided to Scripps Howard's trial attorneys. Unredacted copies of such programs must be made available for inspection at the offices of counsel for Four Jacks upon reasonable notice.

Request No.12.

17. Four Jacks need not disclose all documents that relate to any health, life, disability or other insurance provided by Sinclair to its employees, officers, or directors. But if there are health, life, disability or other insurance policies which differ from the policies requested under Request No.5, copies of those policies, with personal identities redacted, must be provided to Scripps Howard's trial attorneys. Unredacted copies of such insurance programs must be made available for inspection at the offices of counsel for Four Jacks upon reasonable notice.

Request No.13.

18. Four Jacks need not disclose any and all documents that relate to any form of compensation that is paid to any of the principals by Sinclair solely due to the principals' interests in Sinclair. But Four Jacks must produce to Scripps Howard's trial attorneys documents which will establish the payment of such compensation in 1991, 1992 and 1993 if in fact there has been such compensation paid by Sinclair.

Request No.14.

19. Four Jacks is required to produce documents that will unequivocally show the nature of all compensation received by all officers, directors and employees of Sinclair since January 1, 1991, that was not disclosed under Requests Nos. 9, 10, 11, 12, or 13 above. The amounts of money may be redacted unless Four Jacks intends to use the amounts defensively. Scripps Howard has not shown a need for "all documents" that would disclose that information.

Request No.15.

20. Only documents that report or that relate directly to the principals need be disclosed. Such documents would include reports filed with any state, federal or municipal agency. Reporting documents that relate to Sinclair's employees that are on file with the FCC or the EEOC or with INS may include public documents which Four Jacks will not be required to produce for Scripps Howard. If such documents were filed with the agencies as non-public filings or are subject to the Privacy Act, then Scripps Howard must show a need for such documents before they will be ordered produced. Nor will Four

Jacks be required to produce all documents that relate to Sinclair's employees that were prepared by Sinclair in accordance with the reporting requirements of any state, federal or municipal agency because there has been no showing of a need for such documents and it would be unduly burdensome to require their production.

Request No.16.

21. Four Jacks must produce all organizational charts of Sinclair that were used in the business of Sinclair for each of the years 1991, 1992, 1993, and 1994. There must also be provided to Scripps Howard's trial attorneys sufficient business records used in the course of Sinclair's business that disclose each employee and each officer of Sinclair and the position(s) that each such person held and holds at Sinclair in years 1991, 1992, 1993 and 1994.

Request No.17.

22. Scripps Howard can learn the identities of the filing attorneys from SEC disclosures. Four Jacks is not required to produce documents that identify any persons who were involved in the drafting of Sinclair's registration statement that was filed with the SEC. That is a burdensome and oppressive request and there is presently no need shown for such discovery.<sup>5</sup>

Request No.18.

23. Scripps Howard seeks the disclosure of persons who were involved in the drafting of Four Jacks' direct case sworn testimony that were filed in support of the application. It is determined that such disclosure would intrude on the attorney-client privilege. And to the extent that the attorney work-product exemption applies there has not been a sufficient showing of a substantial need to require the disclosure. This request is denied as speculative and oppressive.

Request No.19.

24. Scripps Howard seeks the production of all documents or correspondence that relates to any Sinclair registration statement. That request is too broad. Compliance would involve the disclosure of documents that are subject to the attorney-client privilege. Also, the work product

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<sup>5</sup> The Presiding Judge has limited any discovery of attorneys to the attorney who prepared the SEC filings. But there must be a show of substantial need for such discovery because it would be time-consuming and expensive. There should be sufficient discovery as permitted above to meet Scripps Howards' needs for evidence. While there have been depositions noticed of attorneys involved in the SEC disclosure and who are not the litigation counsel, there is no conclusion reached in this ruling that such discovery is necessary.

exemption may apply and there has been no showing of a substantial need. And compliance with the request would be oppressive. This request is denied.

Request No.20.

25. Scripps Howard seeks to discover all drafts of any Sinclair registration statement that was filed with the SEC. For the reasons stated with respect to the denial of Request No. 19, this request also is denied as oppressive.

Request No.21.

26. Scripps Howard seeks to discover all drafts of the principals' direct case statements. For the reasons stated with respect to the denial of Request No. 18, this request also is denied as oppressive.

Order

IT IS ORDERED that Four Jacks shall comply with the above rulings by 4:00 p.m. on May 10, 1994.<sup>6</sup>

IT IS FURTHER ORDERED that until received in evidence, documents produced by Four Jacks under this ruling shall be seen only by Scripps Howard's litigation counsel at Baker & Hostetler and their assistants and by consultants retained for trial preparation or expert testimony.

IT IS FURTHER ORDERED that where documents that are ordered herein to be produced are withheld by Four Jacks because they are considered to be privileged, the procedures established under the Prehearing Conference Order (FCC 93M-146) shall be utilized.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>6</sup> Copies of this ruling were made available to counsel on the date of issuance.