

the ultimate issue, the record more than amply supports David, Robert and Frederick Smiths' perception of themselves as far different from normal "employees" of Sinclair.<sup>24/</sup>

**D. Four Jacks' Integrated Principals Have Been Consistent in Their Testimony and Filings Concerning This Issue**

67. The remainder of Scripps Howard's Findings is devoted to attacking Four Jacks and its integrated principals for alleged inconsistencies in their testimony and filings in this proceeding. Obviously, lacking any coherent proof that David, Robert or Frederick Smith lied to the Commission with respect to their intentions regarding Sinclair, Scripps Howard is attempting to marshal every perceived discrepancy it can find and attempt to inflate it into a disqualifying case of misrepresentation. There is no merit, however, to any of Scripps Howard's assertions.

68. First, Scripps Howard asserts inconsistencies in the fact that Four Jacks' FCC filings and its principals' testimony prior to the Judge's February 1994 addition of the pending issue sometimes referred to David, Robert and Frederick Smith as being "employed" by Sinclair. As these principals each stated in their Phase II direct case testimony, they had thought their intentions

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<sup>24/</sup> Scripps Howard also contends that the fact that the Smiths consider themselves "owners and bosses" of Sinclair rather than traditional "employees" is undermined by the fact that, as officers of Sinclair, they can be removed by the board of directors. Scripps Howard Findings at 102, para. 258. What Scripps Howard ignores, however, is that (i) David, Robert and Frederick Smith occupy three of five seats on Sinclair's board of directors, with a fourth brother occupying another seat; and (ii) the four Smith brothers are Sinclair's controlling stockholders, who as a matter of hornbook corporate law control the board of directors.

to remain at Sinclair had been made abundantly clear. (Four Jacks Ex. 26 at 4; Four Jacks Ex. 27 at 4; Four Jacks Ex. 28 at 4).<sup>25/</sup> In these circumstances, it was not unnatural for David, Robert and Frederick Smith sometimes to refer to themselves as being "employed" by Sinclair, as managing Sinclair is what they do every day.

69. In this regard, it is critically important to note that in the November 1993 Phase I hearing -- which occurred prior to the time that Sinclair, at the SEC's request, added language to its SEC Registration Statement to clarify David, Robert and Frederick Smiths' intentions with respect to Sinclair -- Scripps Howard cross-examined Four Jacks' integrated principals at length concerning the amount of time they spent on Sinclair and their other business interests. Scripps Howard surely would not have taken the trouble to do this had it believed that David, Robert and Frederick Smith were going to resign from Sinclair. Purely and simply, Scripps Howard has always known full well that David, Robert and Frederick Smith intend to remain with Sinclair. Their

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<sup>25/</sup> Scripps Howard does not challenge this fact, but only argues that "there is no instance in the record where Four Jacks disclosed the Smiths' intention to remain at Sinclair until the relevant representation of this fact to the SEC was discovered by opposing counsel." Scripps Howard Findings at 105, para. 266. As discussed supra, however, as a matter of law Four Jacks' integrated principals were not required to affirmatively set forth the outside interests they proposed to retain. The total lack of any specific pledge by David, Robert or Frederick Smith to relinquish their positions as owners and executive officers of Sinclair -- as well as their direct case testimony stating their ability to manage the Channel 2 station "notwithstanding [Sinclair's] other media interests" -- made clear those principals' intentions to remain in those positions. Indeed, as addressed above, Scripps Howard's Phase I cross-examination of David, Robert and Frederick Smith is a clear indication that Scripps Howard in fact knew the brothers intended to stay on at Sinclair.

professions throughout the Phase II proceeding of somehow being fooled by the Smiths' integration pledges are transparent nonsense, designed to divert the Judge's attention from its own palpable and demonstrable misconduct in this case.<sup>26/</sup>

70. In any event, once it became apparent that the Presiding Judge had questions as to whether their pledge to resign "then-current employment" did in fact encompass a promise to resign from Sinclair, David, Robert and Frederick Smith proceeded to explain, in attempting to address the issue, that this was not the case. Scripps Howard's attempt to find sinister motivations in this is just so much makeweight pleading. Indeed, given the wildly inconsistent post-hoc rationalizations it has given for its concealment of relevant renewal expectancy evidence, Scripps Howard hardly is qualified to complain about explanations offered to meet a pending issue.

71. Nor were David, Robert and Frederick Smiths' explanations in any way inconsistent. The record establishes that the purpose of their pledge to resign "then-current employment" was two-fold: (i) to indicate that the Smiths would resign any future employment commitments that might be in effect at the time of a Four Jacks grant; and (ii) to make clear, in accordance with Four Jacks' divestiture pledge, that they would give up all responsibilities with respect to Sinclair's present Baltimore television station, WBFF(TV). (Four Jacks Ex. 26 at 2-3; Four Jacks Ex. 27 at 2-3; Four Jacks Ex. 28 at 2-3; Scripps

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<sup>26/</sup> Four Jacks continues to believe that the filing of Scripps Howard's original petition to enlarge issues against Four Jacks very shortly after Four Jacks filed its petition to enlarge against Scripps Howard is more than just coincidence.

Howard Ex. 45 at 3; Scripps Howard Ex. 35 at 2). These purposes are not inconsistent, as Scripps Howard would argue; both are amply supported by the evidence.

72. First, it was entirely reasonable for David, Robert and Frederick Smith to set forth language in their integration proposals to indicate that should they subsequently enter into employment which was still occurring at the time of a Four Jacks grant, they would resign it.<sup>27/</sup> Moreover, contrary to Scripps Howard's assertion that such a pledge was not sufficiently "clear and unambiguous" (Scripps Howard Findings at 101, para. 256), the use of the term "then-current employment" (emphasis added) -- coupled with the fact that no specific employment positions are set forth in connection therewith (since any such employment was by definition unknown) -- plainly conveyed the message that David, Robert and Frederick Smith intended to resign any future employment that they might have at the time of a Four Jacks grant.<sup>28/</sup> Finally, while Scripps Howard speculates that David,

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<sup>27/</sup> Scripps Howard argues that the Presiding Judge's Prehearing Conference Order of April 6, 1993 required pledges to resign current, and not future, employment. Scripps Howard Findings at 100-01, para. 255. But that Order did not preclude pledges to resign any future employment -- indeed, it requested "full, complete and definitive" statements of integration proposals. See id. at 40, para. 103 (quoting Prehearing Conference Order). As any future employment in which David, Robert and Frederick Smith might be engaged at the time of a Four Jacks grant clearly would have a bearing on their integration proposals, it was in fact incumbent on them to address any such future employment.

<sup>28/</sup> Scripps Howard alleges that the examples of such possible future employment that the three principals cited at hearing are "unrealistic." Scripps Howard Findings at 101 n.46. Aside from the fact that there is no support in the record for this claim (indeed, there is evidence in the record showing David Smith's expertise in the television/film industry, as well as the fact that Frederick Smith is

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Robert and Frederick Smith have no intention of leaving Sinclair for any reason (*id.*), nowhere does the record show that any of the three are bound to Sinclair for all time.<sup>29/</sup>

73. There similarly is no merit to Scripps Howard's attacks on David, Robert and Frederick Smith's consistent explanation that the "then-current employment" pledge also was intended to make clear that they would give up their responsibilities with regard to WBFF(TV). While Scripps Howard points to David and Robert Smith's testimony that they were not "employed" or did not have a "position" at Sinclair, neither their declarations in support of Four Jacks' motion for summary decision nor their direct case testimony stated that they were "employed" or had a "position" there. Indeed, David Smith testified that the phrase "full time presence" at WBFF(TV), as used in his summary decision declaration (Scripps Howard Ex. 45), was intended simply to convey the fact that Sinclair is physically located in the same building as WBFF(TV) (Tr. 2006), and in that sense, David, Robert and Frederick Smith clearly have a "presence" there. Putting aside Scripps Howard's quibbling over the phraseology "full time presence" as opposed to "responsibilities" (the word used in their direct case testimony), the point is that David, Robert and Frederick Smith intended to make it clear -- in accordance with Four Jacks' pledge to divest the station -- that they would no longer have anything to do with WBFF(TV) in the event of a Four

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<sup>28/</sup>(...continued)

involved with corporate aircraft), David, Robert and Frederick Smith were plainly giving hypothetical examples.

<sup>29/</sup> Indeed, none of the brothers has an employment contract with Sinclair. (Scripps Howard Ex. 40, Tab 18, p. 22).

Jacks grant.<sup>30/</sup>

74. The rest of Scripps Howard's alleged "inconsistencies" are simply nitpicking. For instance, according to Scripps Howard, Four Jacks has "claim[ed]" that David, Robert and Frederick Smith's integration pledges were "inartfully worded." Scripps Howard Findings at 98-99, para. 250. But Four Jacks has never raised this as a "claim" at all! Scripps Howard is referring to what is simply a prefatory phrase to a single sentence in David, Robert and Frederick Smith's direct case testimony: "However inartfully worded, I intended to make clear that I would give up all responsibilities with respect to WBFF(TV), since I understood that my brothers and I would be required to divest WBFF(TV) before Four Jacks' Channel 2 station could commence program tests." (Four Jacks Ex. 26 at 2-3; Four Jacks Ex. 27 at 2-3; Four Jacks Ex. 28 at 2-3). Clearly, this is not an assertion that the pledge was inartfully worded, but simply a preface to testimony that attempts to clarify what one of the purposes of the "then-current employment" pledge was: to make clear that David, Robert and Frederick Smith would give up WBFF(TV).<sup>31/</sup> Scripps Howard is making much ado about nothing.

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<sup>30/</sup> Scripps Howard is simply wrong in arguing (at p. 97 of its Findings, para. 249) that Four Jacks "retreated from the position taken in the declarations offered in support of Summary Decision." However phrased, both those declarations and the principals' direct case testimony explained that one purpose of the "then-current employment" language was to make clear that David, Robert and Frederick Smith would give up all involvement with WBFF(TV). (Four Jacks Ex. 26 at 2-3; Four Jacks Ex. 27 at 2-3; Four Jacks Ex. 28 at 2-3; Scripps Howard Ex. 45 at 3; Scripps Howard Ex. 35 at 2).

<sup>31/</sup> Since this was their intent, yet questions were raised concerning the meaning of the pledge, it was entirely reasonable for the three principals to recognize that the

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75. The same is true of Scripps Howard's attacks on David, Robert and Frederick Smiths' use of the term "true employees" in their direct case testimony (Scripps Howard Findings at 103, paras. 260-62) and on Robert Smith's description of himself as "self-employed" (id. at 77, paras. 201-02). These terms obviously were not intended as technical terms of art; they are simply various ways in which the three principals attempted to characterize their perception of themselves as being different from conventional "employees" of Sinclair -- a perception which is easily supported by the record. (See, e.g., Tr. 2012 (Robert Smith "consider[s]" himself self-employed) (emphasis added)).<sup>32/</sup>

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31/(...continued)

pledge may not have been drafted as clearly as they had thought.

32/ Some of Scripps Howard's other attacks on the testimony of David, Robert and Frederick Smith plainly have no other purpose than to take up space in a pleading. For instance, Scripps Howard makes much of Frederick Smith's deposition statement that Sinclair had no employees, and his subsequent correction of that testimony at hearing. See Scripps Howard Findings at 103-04, para. 263. There is nothing nefarious about this; Frederick Smith candidly admitted that after a post-deposition check, he discovered that he had been wrong in originally stating that Sinclair had no employees. (Tr. 2136-37). Scripps Howard also cries hysterically about David Smith's alleged "concession" that "an employee of a company receives a W-2 form while a non-employee does not," arguing that this undermines his direct case testimony stating his understanding that he and his brothers are required to receive W-2 forms from Sinclair. Scripps Howard Findings at 104, para. 265. What David Smith was in fact "conceding" was that an accountant employed by Arthur Anderson, an outside public accounting firm, was not "employed" by Sinclair and thus would not get a W-2 from that company. (Tr. 1823-25).

Scripps Howard is even so desperate as to take individual minor portions of Robert and Frederick Smiths' testimony, and attempt to elevate them into some sort of "admissions." Scripps Howard does this with Frederick Smith's statement (in the course of explaining why he does not consider himself a Sinclair "employee") that "the average person . . .  
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**E. David, Robert and Frederick Smith Intend to Carry Out Their Respective Channel 2 Managerial Positions on a Full-Time Basis; They Have Not Lacked Candor Concerning How Four Jacks' Proposed Station Will Be Run**

76. Lastly, there is not a scintilla of evidence in the record to indicate that David, Robert and Frederick Smith will not serve in the specific managerial positions they each have proposed to fill.<sup>33/</sup> Nonetheless, Scripps Howard attempts to argue that Four Jacks' integrated principals told inconsistent "stories" on this point.

77. Again, Scripps Howard is wrong. First, Four Jacks' FCC Form 301 application states unequivocally that David, Robert and

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32/(...continued)

. might say hey, that guy is an employee because he has a W-2, he has retirement, and he has health insurance," as well as with Robert Smith's remark, in the course of explaining in detail why he and his brothers David and Frederick can manage Four Jacks' station full-time while remaining executives of Sinclair, that "I know it's very hard to understand and believe." Scripps Howard Findings at 77-78, paras. 203-204. Again, there is nothing damaging about these statements. They are merely recognitions -- by Frederick Smith, that he and his brothers might be considered to have some of the attributes of "employment" by virtue of the fact that they receive W-2 forms and participate in company benefits, and by Robert Smith that the Judge (who was asking the questions at that point) may have had difficulty comprehending the extent to which Sinclair's stations operate autonomously without the brothers' involvement.

The fact that Scripps Howard must resort to dredging up such isolated and immaterial pieces of testimony as these pointedly illustrates the incredible weakness of its case.

33/ The only "evidence" Scripps Howard offers to rebut this point is Phase I testimony by David and Robert Smith that the brothers had not specifically discussed a "management committee" approach to operating the Channel 2 station. See Scripps Howard Findings at 107, para. 272. How this fact leads to Scripps Howard's leap-of-faith conclusion that "they simply intended to run Channel 2 via an extension of Sinclair's management by committee approach" is beyond comprehension.

Frederick Smith will carry out their proposed positions as General Manager, Station Manager, and Operations Manager, respectively, on a full-time basis. Moreover, while David, Robert and Frederick Smith did testify as to the consensus approach the Smith brothers use in running the Sinclair holding company (see Scripps Howard Findings at 81-82, para. 211), at no point did they state that that approach was the one they would use in running the day-to-day operations of Channel 2.

78. While Scripps Howard tries to prove otherwise, its findings merely mischaracterize the principals' testimony. For instance, Scripps Howard cites Frederick Smith's testimony at Tr. 2204-05 as establishing that "the three Smiths will run Channel 2 just like they run Sinclair." Id. at 106, para. 269. But the deposition testimony being read on these pages is simply Frederick Smith's description of how the brothers operated Sinclair.<sup>34/</sup> Indeed, after reading the deposition testimony, counsel for Scripps Howard asked Frederick Smith: "Now we were talking, were we not, or if I'm mistaken, that this is what you would do with Channel 2 if you were successful?" He responded: "No, you're mistaken" (emphasis added), and proceeded to explain in detail the distinction between the brothers' consensus approach for running the Sinclair holding company and the "management committee" of department heads (including David, Robert and Frederick in their respective titles) that will run

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<sup>34/</sup> The same is true of Tr. 1152, the other transcript page cited in support of Scripps Howard's allegation. That testimony pertained to how Four Jacks was presently run as a business (at present, "running" Four Jacks' business amounts to little more than corporate formalities, since it operates no television station), not how the Channel 2 station will be operated.

Channel 2. (Tr. 2205-07, 2209-10). See also Four Jacks Findings at 58-59, paras. 103-04.

79. In short, the record is clear and consistent that David, Robert and Frederick Smith intend to carry out their specific proposed managerial roles on a full-time basis if Four Jacks is awarded the Channel 2 construction permit. Scripps Howard's attempt to concoct some sort of inconsistency based on its own muddled cross-examination is unavailing.

### Conclusion

Scripps Howard's Findings depict a picture of the facts that hardly could be more at odds with the record of this proceeding. While ignoring its own obvious motive to deceive the Commission, as well as critical facts that make Scripps Howard's misconduct painfully obvious, Scripps Howard simultaneously stretches to the most desperate of lengths to attempt to build a case against Four Jacks that simply does not exist. The reason is simple: Scripps Howard's motive to conceal crucial renewal expectancy documents is clear, and its intentional lies and concealment before and after their "discovery" are easily proven. By contrast, notwithstanding Scripps Howard's semantic games and flawed nitpicking, the record plainly establishes that Four Jacks' integrated principals had neither any motive nor any intent to mislead the Commission into thinking they would give up their executive and ownership positions at Sinclair Broadcast Group,

Inc. Scripps Howard should be disqualified, and Four Jacks should be found to be the only qualified applicant in this case.

Respectfully submitted,

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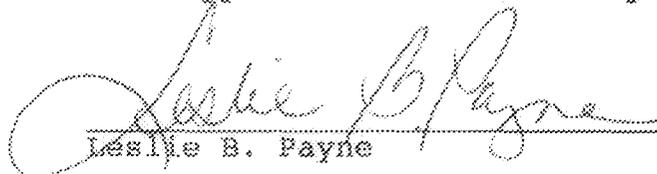
CERTIFICATE OF SERVICE

I, Leslie B. Payne, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing "REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF FOUR JACKS BROADCASTING, INC. ON ISSUES ADDED FEBRUARY 1, 1994" were sent this 1st day of February, 1995, by first class United States mail, postage prepaid, to the following:

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