

▶ Sun Newspapers, Inc. v. Omaha World-Herald Co.

United States District Court; D. Nebraska.

Sun Newspapers, Inc.

v.

**Omaha World-Herald Co., Suburban
Newspapers, Inc., and Rapid Printing and
Mailing, Inc.**

No. CV 82-L-627

CV 82-L-627

Dated June 14, 1983

URBOM, Ch. J.

Memorandum and Order on Motion for

Preliminary Injunction

*1 The plaintiff, Sun Newspapers, Inc., has asked for a preliminary injunction to restrain the defendants from engaging in certain alleged anticompetitive conduct in violation of § 2 of the Sherman Act, [15 U. S. C. § 2](#), and § 7 of the Clayton Act, [18 U. S. C. § 18](#). Adequate jurisdictional facts concerning the connection of the parties to interstate commerce were shown in the stipulated facts. Those facts will not be repeated in this memorandum.

I.

[Newspaper Advertising - Acquisitions]

Sun Newspapers, Inc. publishes weekly newspapers circulated in the Omaha, Nebraska, area under seven separate names, as well as five shopper-type advertising papers for distribution in the Omaha area. It also publishes the *Bellevue Leader*, a weekly newspaper circulated in Bellevue, Nebraska, and a weekly newspaper titled *Air Pulse*, printed under contract with the United States Air Force and circulated at Offutt Air Force Base in Sarpy County.

Each of the newspapers bearing the Sun's name and each of the shoppers is circulated in different areas of Douglas and Sarpy counties. The advertising appearing in each of the newspapers and the shoppers is sold separately, enabling potential advertisers to reach a segment of the residents within the area. Advertising in the *Bellevue Leader* and *Air Pulse* is

also sold separately from that in the other Sun papers and the shoppers. The Sun newspapers include items of news and editorial comment common to all and a certain amount of news and editorial comment that is particular to the area in which the paper is circulated. In 1972 Sun Newspapers was awarded a Pulitzer prize for reportorial work.

The *Omaha World-Herald* is a daily newspaper in Omaha, Nebraska, owned by the Omaha World-Herald Company, a Delaware corporation with its principal offices in Omaha, Nebraska. The *World-Herald* newspaper is published in a number of editions each day of the week and is circulated over a wide area, including Douglas and Sarpy counties. In the year preceding March 31, 1981, the average paid circulation of the *Omaha World-Herald* in Douglas and Sarpy counties was in excess of 130,000 for the daily editions and in excess of 140,000 for the Sunday edition. These figures comprise over one-half of the total daily circulation and slightly under one-half of the Sunday circulation. In 1980 the World-Herald Company, through a subsidiary corporation called Suburban Newspapers, Inc., purchased the stock of Papillion Times Printing Co., which published the *Papillion Times/La Vista News*, the *Ralston Recorder/Millard Edition*, *Springfield Monitor*, *Gretna Breeze*, and a shopper known as the *Suburban Signal*. As of the end of November 1982, the circulation of the Papillion papers was around 6,700 copies and the Signal about 11,000 copies a week. Each of the Papillion publications is circulated in a different part of Douglas and Sarpy counties.

In mid-1981 World-Herald Company created a subsidiary called Printers and Mailers, Inc. and with it purchased the stock of Rapid Printers and Lithographers, Inc., merged the two entities, and formed Rapid Printers and Mailers, Inc.; Rapid Printers and Mailers, Inc. is believed by the parties to be the largest printer of newspaper advertising inserts in Nebraska. For several years prior to January 1982, the plaintiff's Step-Saver shoppers were printed by Rapid.

*2 Beginning in September of 1981, Rapid Printers and Mailers embarked on a venture to mail advertising circulars to almost all of the residences in Douglas and Sarpy counties. The circulars involved a

'marriage mailer' concept, whereby the advertising of several advertisers is placed in a single tabloid paper. Rapid prints some but not all of the inserts that are put together to form the mailer, called the Golden Courier.

From March to November of 1982, the World-Herald Company distributed preprinted advertising in a program termed Circulation Plus. The concept of the program was to offer advertisers distribution of preprinted advertising materials to the subscribers of the *Omaha World-Herald* through the regular newspaper distribution channels and to nonsubscribers of the newspaper through mail delivery. Rapid assisted the World-Herald in the preparation of the mailing list for the Circulation Plus program, which was designed to reach most of the homes in Douglas and Sarpy counties.

Suburban offered local advertisers distribution of advertising materials in the areas where the particular publications were circulated.

In February 1981 the stock of Sun Newspapers, Inc. was purchased by Bruce Sagan. Neither the Golden Courier nor the Circulation Plus program was in existence at that time. After his purchase of Sun Newspapers, Sagan purchased the Step-Saver publications and then consolidated the Sun operations with those of the Step-Savers and eliminated a publication called the Bargain Finder that was being published by the Sun organization and was similar to the Step-Savers in advertising content.

When Sagan purchased the Sun, it had been losing money on the newspapers for many months. The losses continued every month through November 1981, when the papers made their first profit, \$4,593.00, but no profit has apparently been made since. Sagan testified that he felt the one month's profit was the result of the reorganization efforts he had undertaken. He also testified that the Golden Courier, Circulation Plus, and Suburban have eroded the profitability of the Sun, because they have taken key advertising accounts from the Sun that would have kept the operation profitable.

In early 1981 Sagan had discussions with Rapid concerning its printing all of the Sun newspapers. At that time Rapid was printing the weekly Step-Savers; the Sun newspapers and *Air Pulse* were being printed at a printing plant in Norfolk, Nebraska. Sagan

wanted to have all of the Sun publications printed at Rapid and on a single day each week, but Rapid was unable to do that. In January 1982 Sagan began printing all of the Sun publications at a printing plant he owns in Chicago, Illinois. He testified that he began printing in Chicago because Rapid was then owned by the World-Herald Company, a competitor, thereby giving it price control over the Sun and competitive information. Sagan felt that the price control was being used to the detriment of the Sun, because the Sun was paying a slightly higher price than would have been necessary.

*3 The *Sun* newspapers are weekly and appear on Wednesday of each week. As previously mentioned, each edition contains news, features, and editorials common to the others and some that appear only in a particular paper. The *Sun* newspapers are circulated in particular zones that cover the majority of Douglas and Sarpy counties; certain portions of the county not covered by regular carrier delivery can receive the *Sun* newspapers by mail. Sagan testified that there is no carrier delivery downtown or in several of the rural areas where there are insufficient people living to justify the service but that mail delivery is adequate to service the subscribers in those areas. The Step-Savers are delivered to residences of those who do not subscribe to the *Sun* newspapers.

The *Sun's* advertising is sold by a regular sales force. An advertiser seeking nonclassified advertising in a single edition of the *Sun* newspaper without purchasing it in another edition or may purchase it in a combination that represents less than all of the papers. Classified advertising must be purchased for the entire set of the *Sun* papers. Advertising space is sold in various sizes ranging from classified to fullpage ads. The *Sun* newspapers also employ seventy-seven full-time and forty-four parttime employees in addition to approximately 150 carriers to deliver the papers.

The *Omaha World-Herald* is a much larger operation. The daily editions are delivered to 75 percent of the homes in Douglas and Sarpy counties and the Sunday editions are delivered to 80 per cent of the homes in the two-county area. The percentage of homes covered by the *World-Herald* diminishes somewhat when the Omaha Standard Metropolitan Statistical Area (SMSA) or the Omaha Retail Trading Zones (RTZ) are used as the basis for determining the percentages. The Omaha SMSA includes the two counties plus one county in Iowa; the daily editions

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are delivered to 67 per cent of the SMSA homes and the Sunday editions to 73 per cent. The RTZ includes a number of counties surrounding the Omaha area; the daily percentage falls to 57 per cent of the RTZ and the Sunday to 65 per cent when this area is used as the base.

The *Omaha World-Herald* sells advertising in a sales force that is separate from that of the Golden Courier or the Suburban. Advertising is offered in a number of varieties, including run-of-the-paper (ROP) and zoned inserts. ROP advertising involves placing an ad that is to appear in every newspaper printed. The inserts are separately printed advertising circulars that are manually inserted into the newspaper. It is possible to buy placement of inserts for less than the full run of the *World-Herald* in a 'zone' within certain portions of the Douglas and Sarpy counties area. John Gottschalk, vice president for general management of the Omaha World-Herald Company, testified that the number of different combinations of zones was limited to four, a limit necessitated by the physical size of the plant in which the *World-Herald* is printed and distributed to carriers. The zoning is limited on Wednesday and Sunday, because frequently the requests for zoning on those days - prime advertising days - exceed the paper's capabilities to zone.

*4 According to Gottschalk, the acquisition of Suburban by World-Herald was made for a number of reasons: the newspapers were in growing communities and thereby represented good investments, and Papillion Publications printed its papers with offset presses, a different type than that used by the World-Herald to print its newspaper and the offset press capability was thought to be a good tool for learning techniques of that type of printing. There was also a concern about how well the World-Herald could manage acquired companies.

The World-Herald began the Circulation Plus program in March 1982 in an effort to provide a total-market-coverage advertising vehicle. Copies of Circulation Plus were inserted in the *Omaha World-Herald* destined for Douglas and Sarpy county subscribers and were mailed to nonsubscribers in the same areas. The endeavor apparently was never a success and was discontinued in November of 1982, because it was unable to attract sufficient advertisers. During the start-up phase of the project, Rapid assisted the World-Herald in preparation of a mailing list. The list needed to be tailored to the Circulation

Plus program, because addresses of subscribers of the *World-Herald* were to be eliminated from the mailing list. Rapid's computer was used to perform this task and the World-Herald was charged for the service.

The Golden Courier was started by Rapid in September 1981, after it had been acquired by the World-Herald Company. According to testimony at the hearing, the concept of the Golden Courier as a 'marriage mailer' was feasible only a short time before September. Prior to that time the United States Postal Service had required separate postage for each different advertiser in a particular mailer. When the Service changed its interpretation of a regulation, several advertisers could have ads in a mailer and postage was charged only for the entire mailer itself. This allowed businesses such as Rapid to assemble advertising from several advertisers and place it in a single tabloid mailer. There was testimony at the hearing that John Brown, one of the co-owners of Rapid before it was acquired by the World-Herald Company, had described a marriage mailer as an idea of his 'that was just waiting to happen' when he was negotiating with Berkshire-Hathaway concerning the sale of Rapid; his statement was made well in advance of the change in the interpretation of the postal service regulation.

The Golden Courier is distributed on Wednesday of each week by mail. There was agreement among those testifying that Wednesday is the most desirable day of the week for a tabloid such as the Golden Courier to reach consumers. Print advertising tends to have a delayed effect upon consumers' behavior, necessitating its reaching them by Wednesday in order to influence buying behavior on Saturday, typically the peak day for retail sales.

Brown testified that not all of the inserts that go into the Golden Courier are printed by Rapid; that soon after World-Herald acquired Rapid it infused substantial amounts of capital into the enterprise to purchase new presses and a building to house them; that the new presses are not used to print the Golden Courier and the printing for the Golden Courier did not require the new presses in order to free up time on the old presses; and that Rapid had access to adequate capital funding to begin the Golden Courier before it was acquired by the World-Herald Company.

*5 Generally, the Golden Courier sells advertising of a minimum size of a full tabloid page. On at least two

occassion, however, it sold advertising for a smaller size ad in a section called Food Fare; the Food Fare portion of the Golden Courier only appeared twice and has not been used since. That type of supplement allowed the Golden Courier to reach advertisers who desired to place less than a full-page ad. The Sun newspapers all contain a great deal of display advertising that is less than a full tabloid page.

At the time the World-Herald Company acquired Suburban the latter was losing money. There had been no significant competition between the *World-Herald* and Suburban. The rates for advertising in the two papers were and are vastly different; the Suburban papers were published weekly, the *World-Herald* daily. Gottschalk testified that Suburban does not perform an appreciable amount of work for the World-Herald and could recall only two instances where Suburban performed work for the World-Herald and neither exceeded \$1,000.00. Gottschalk also testified that Suburban's sales staff is separate from that of the *World-Herald*.

The Suburban newspapers are circulated primarily in the Ralston and Papillion, Nebraska, areas. At the hearing Sagan made allegations that the Papillion paper was attempting to expand its territory into Bellevue, where one of his papers is circulated. Terry Ausenbaugh, who is president of the Suburban newspapers, testified that the *Papillion Times* was available at four stores in Bellevue for one week in November of 1982 and only twelve copies were sold; that they were placed in those locations because local election results were printed in the paper; and that since November 1982 the *Papillion Times* has been sold at a convenience store in Bellevue, the sales averaging about five copies a week.

At some time after the Suburban papers were acquired by the World-Herald Company they began a new paper called the *MWR Revue* that was circulated on the Offutt Air Force Base in Sarpy County. There was no testimony or other evidence to show whether the *MWR Revue* had any effect on the Sun's publication, *Air Pulse*, that is circulated on the air base. The *MWR Revue* like *Air Pulse*, is printed under a contract from the federal government. Suburban sells advertising space in the *MWR Revue*. There was no evidence as to the extent of those sales or whether there has been any advertising sales taken from the Sun publication.

[*Monopoly Power - Market Study*]

A logical place to begin when considering any monopolization case under the Sherman and Clayton Acts is to define the relevant market. Such a definition takes on a number of aspects, including the geographic area, the product, and the manner in which other similar products compete with the product in question. In this regard the plaintiff presented extensive evidence through an expert witness, John S. Coulson.

Coulson identified two distinct types of advertisers within print media advertising. One group is the national advertiser who seeks to promote the image of a particular product. The purpose of the advertising is not to promote purchasing of a product in a particular location but only the eventual purchase of a product at some location. Typically, large manufacturers purchase national advertising. Local advertising, on the other hand, is geared toward encouraging a purchase at a particular store or outlet and is not much concerned with what brand of goods is purchased. The advertisers tend to be local businesses, placing ads in media close to their place of business. National advertising uses a more complex chain of distribution, involving several intermediaries, while local advertising tends to involve only the advertiser and the representatives of the particular medium. The markets for local and national advertising are recognized as separate by trade publications reporting advertising data.

*6 In studying the Omaha market, Coulson divided advertising into local and national, based on the content of the ad. Local advertising was defined as containing a local address of the business. Coulson used three local areas in his study: the Omaha SMSA, the Omaha RTZ, and Douglas and Sarpy counties. Using statistical sampling methods and other reported data, he arrived at an estimated total dollar volume of advertising contained in electronic media, billboards, directories, direct mail advertising, transit advertising, and newspapers in Omaha for 1981. While the estimate of revenues is for 1981-1982, 1982 advertising rates were used. Of his estimated total of a market of \$64.2 million for the Omaha SMSA and \$57.7 million for Douglas and Sarpy counties, Coulson estimated that the *Omaha World-Herald* and its subsidiaries account for 50 per cent of the total local advertising market in the Omaha SMSA and 54 per cent of the total local advertising market for Douglas and Sarpy counties.

Coulson excluded several media from the study to determine the share of the print media market that the *Omaha World-Herald* and its subsidiaries occupied in 1981. He excluded electronic media, directories (including yellow pages of the telephone book), billboards, and transit advertising, because he felt that they did not serve the same function as newspaper advertising. Electronic media are able to project a verbal or visual image for a short period of time; the image does not last more than a few seconds and the consumer cannot refer back to it, as with newspaper advertising. Directories differ from newspaper advertising, because they contain an exhaustive listing of businesses without the 'here and now' aspect that a newspaper ad may contain. Newspaper ads can be tailored to the particular time at which they are run, while directories are published infrequently and often do not contain more than location and general business information. Billboards and transit advertising were excluded because they are similar to directories; both are able to use only a very limited number of words and pictures to convey a message and their limited nature deprives them of the 'here and now' aspect that newspaper advertising is able to convey. It would also seem that their limited message capability would make them unlike newspaper advertising, because consumers could not refer back to the ad at a later time for information. When these categories were eliminated from the total advertising revenues, the Omaha SMSA yielded \$42.1 million in print advertising and Douglas and Sarpy counties yielded \$37.8 million under Coulson's study. Of that total, Coulson calculated that the World-Herald companies held 77 per cent of the Omaha SMSA market and 82 per cent of the Douglas and Sarpy county market.

Coulson arrived at the dollar and percentage figures by examining sample issues of the publications and determining the total linage of the advertising and converting that to dollar volume by multiplying the rates in rate cards by the linage. Only standard rates were used; no attempt was made to determine whether revenues could vary because of rates that were negotiated off the rate card. Coulson felt that if there was any error in determining the dollar amount under this method it would work to understate the World-Herald companies' share of the market. His comment was also directed at the use of the 1982 rates in computing revenue figures for a period in both 1981 and 1982.

*7 There was a certain amount of dispute between the

parties as to a number of aspects of Coulson's study that bear on its validity to prove the relevant market. One of those areas was his noninclusion of electronic media and directories. Gottschalk testified that the *Omaha World-Herald* competes with electronic media and directories, such as the telephone yellow pages, for advertising. In addition, the defendants' counsel sought to show, without success, that certain ads in the newspaper lacked the 'here and now' aspect discussed by Coulson, thereby making directory advertising and newspaper advertising sufficiently compatible that directories should be included in the relevant market. The defendants' attack on the study does not seem to assail it seriously. Gottschalk's opinion, unsubstantiated by any foundation, is not convincing in comparison to the detailed analysis used by Coulson. The yellow pages ads used tended to differ in content from the newspaper ads in that the latter conveyed some aspect of 'here and now,' while the yellow pages ads did not.

The second line of attack used by the defendants was that even if Coulson's exclusions prove valid, the local advertising market in which the *World-Herald* and the *Sun* newspapers compete is different and cannot be used as a valid means of comparison to determine the relevant market. What this line of reasoning seems to suggest is that it is necessary to break down further the World-Herald companies' revenues into categories that represent areas in which the *Sun* organization and the World-Herald organization truly compete. This is supposedly necessitated by the difference in the products offered by the two organizations, the contention being that the *Sun* offers advertising to customers who wish to advertise in a publication that appears only weekly, while advertisers in the *World-Herald* could be attracted by the fact that it is a daily publication. It should be noted, of course, that the *Golden Courier* and the *Suburban* publications would likely compete for the advertiser seeking to place advertising in a weekly publication, because they appear weekly. It should also be noted that a portion of the *World-Herald's* advertising is weekly in nature. Testimony at the hearing indicated that a disproportionate number of advertisers sought to place inserts in the *World-Herald* on Wednesday and Sunday. This would seem to add a weekly characteristic to the *World-Herald's* advertising market that the defendants' counsel's arguments tend to ignore. By arguing that weekly advertising is separate from daily advertising, the defendants are placing themselves in

the precarious position of seeking to constrain the relevant market to include even less than the plaintiff included in its study. At best this seems to be an inadequate effort to cloud the plaintiff's study. While there appears to be less than mathematical certainty with respect to the accuracy of the plaintiff's study, it is supported by logical, well explained reasoning and appears to follow a consistent methodology that was testified to as being in accordance with normal statistical procedure. The number of subcategories of local advertising could go on ad infinitum. Logic and good judgment suggest that subdividing of the market must cease somewhere in order to define the relevant market. The defendants have not shown that weekly advertising is sufficiently different from daily to justify a separate sub-market analysis. The defendants' attempt to cast a shadow on the study by pointing to some alleged inconsistency does not persuade me that the study is invalid to show that the World-Herald companies have a dominant market position in the print advertising market in the Douglas and Sarpy county area. I am persuaded that the differences between print and other types of local advertising testified to by Coulson are sufficiently significant to allow the exclusion of electronic media, directories, billboard, and transit advertising from the relevant market in which the World-Herald companies compete. The defendants' attempted refutation of the rationale for this exclusion through the testimony of Gottschalk that the *World-Herald* competes with the other forms of media for advertising is not sufficient. The degree of competition referred to by Gottschalk is not specified in the testimony. The competition may be only of a minimal area with each type of media having a distinct market. The distinctions drawn by Coulson appear to be valid.

[*Alleged Monopoly Conduct*]

*8 There was evidence presented at the hearing by which the plaintiff attempted to show that the World-Herald companies had exercised their monopoly power within the relevant market to the plaintiff's detriment. A part of the evidence dealt with the World-Herald's attempt to create a total-market-coverage vehicle through the Circulation Plus program. As previously discussed, World-Herald used the Rapid computer to develop a nonsubscriber mailing list. Circulation Plus began in March 1982, after the Golden Courier had begun to be mailed by Rapid. The Circulation Plus program encountered difficulties from the beginning, as the Postal Service

would not guarantee the World-Herald that it would be delivered on Wednesday. The days that the mailed copies of Circulation Plus appeared varied from Tuesday to Thursday, and, according to Gottschalk, this caused Circulation Plus to lose business, because many would not run advertisements unless Wednesday delivery was assured. The Circulation Plus endeavor was unable to attract sufficient advertising accounts to remain in existence and it was phased out in November 1982; the final issue contained ads from only one advertiser.

Sagan claimed that the deliveries on Tuesday or Thursday were an intentional effort by the World-Herald to preempt the market by having an advertising supplement on Wednesday in the form of the Golden Courier and on either Tuesday or Thursday with Circulation Plus. The testimony of Gottschalk indicated that the delivery on either Tuesday or Thursday was the result of limited postal service, rather than a design by the World-Herald to preempt the entire midweek advertising market.

Sagan also complained of what he felt was another improper exercise of the World-Herald's monopoly power: the timing of the Golden Courier. About the same time as the Golden Courier began, the Sun was negotiating with K-Mart stores to provide total market coverage for the Omaha area and the World-Herald was attempting to start the Circulation Plus program but was having difficulty with it. Sagan testified that he felt that the Golden Courier was speedily launched to capture the K-Mart account before Sun was able to compose a total-market-coverage system. There was scant evidence at the hearing concerning the underlying reasons for the timing of the Golden Courier's introduction. Although John Brown apparently had the idea for beginning a 'marriage mail' program long before the Golden Courier began, he did not testify as to any rationale for the date of the start-up of the mailer. While there is insufficient evidence to demonstrate that the introduction of the Golden Courier was intended to rob the Sun organization of an opportunity to begin its own total-market-coverage advertising medium, the effect of the timing of the start-up can hardly be said to have been less than devastating to the Sun organization.

Another alleged use of the monopoly power by the World-Herald organization is through the interselling of accounts. Sagan alleged that the sales staffs of the Golden Courier, the *World-Herald*, and the Suburban

publications were engaging in the interselling of accounts. He based his allegations on some incidents that he observed where an advertiser would change from one of the World-Herald publications to another. The Sun's general manager, Dixie Cavner, testified that some accounts had shifted from Circulation Plus to the Golden Courier. Gottschalk testified that the sales staffs of the Golden Courier, the *World-Herald*, and Suburban are separate and do not work together. The plaintiff has shown only isolated instances of an advertising account's shifting from one World-Herald entity to another, without any testimony that the shifts were the result of interselling. Based on that evidence, I do not believe there has been a showing that the World-Herald entities were interselling.

*9 Cavner related another alleged illicit use of monopoly power by the World-Herald through its Rapid subsidiary. Rapid first began the Golden Courier by selling advertising for the full run of the mailing list only, but as time progressed Rapid began to zone the distribution and as a final step created zones as small as 5,000 mailing addresses. Cavner testified that this had a debilitating effect on the Sun, because the Golden Courier was then able to appeal to small grocery businesses that had previously been a staple item among Sun's advertisers. There was no testimony concerning whether the down-zoning of the Golden Courier's distribution was a deliberate attempt to drive the Sun newspapers out of the market. The effect of the reduction in the Golden Courier's zones on the Sun's operation can easily be seen; it was then possible, as Cavner testified, for the Golden Courier to offer advertising to businesses wishing to saturate only a small portion of the Douglas and Sarpy counties area. This seriously challenged the Sun, because previously it had held out as its forte the ability to segment advertising into small zones.

Another alleged use of monopoly power by the Golden Courier was through its rate structure for insert advertising. World-Herald rate cards introduced into evidence indicate that the full rate for inclusion in the *Omaha World-Herald* ranged from \$41.25 to \$61.50 per thousand. Certain discounts are available, depending upon the frequency and the degree of circulation covered. The Sun's rate card for insertion shows rates varying from \$20.00 to \$35.00 per thousand for newspaper insertion. The Golden Courier offers a number of rates, the lowest of which was under the '50-50' program. In that program the

advertiser must sign a contract agreeing to place a four-page tabloid in the Golden Courier for fifty weeks. A price of \$50.00 per thousand is charged for printing and insertion with a 5,000-copy minimum. This price is considerably lower than the rate offered for only the insertion of an advertiser's tabloid in the Golden Courier. The '50-50' program offers a four-week test period during which advertisers can try the Golden Courier and can withdraw without penalty or further commitment. Brown testified that there are currently about ten '50-50' contracts outstanding and that ten contracts were entered into at the initiation of the program.

The combination of the rate structure, the '50-50' program, and the smaller zones can easily be seen to have created a strong threat to the Sun's advertising sales: businesses could be given greater control over their advertising costs through the use of smaller, more-targeted zones, and longterm contracts with the Golden Courier than had previously been possible with the Sun.

There was testimony and other evidence presented concerning the publication of Suburban titled the *MWR Revue*. Because, as discussed earlier in this memorandum, there was no evidence to demonstrate the effect of the *MWR Revue* on *Air Pulse's* ability to attract advertising, I am unable to determine whether Suburban's publication of *MWR Revue* was detrimental to Sun's publication, *Air Pulse*. Therefore, there can be no determination as to the anticompetitive effects, if any, that were occasioned by the introduction of the *MWR Revue* by the World-Herald organization.

*10 The plaintiff also complains about Suburban's attempts to sell advertising to merchants located in the Park Drive Shopping Center in South Omaha. It does not appear that these efforts were anything but bona fide efforts to sell advertising in an area that seems to be within the circulation area of the Suburban papers. Ausenbaugh testified that the Park Drive merchants logically would seek to advertise in the Suburban publications because many of their customers came from the regions served by the Suburban publications.

II.

[*Preliminary Injunction Standards*]

The plaintiff seeks to have the defendants enjoined during the pendency of this action from engaging in certain anticompetitive actions. Specifically, the Sun requests this court to order the World-Herald, Rapid, and Suburban from publishing and distributing the Golden Courier, or a similar publication, in Douglas and Sarpy counties, distributing a publication in the nature of Circulation Plus in either of the counties, or distributing a weekly shopper-type publication in the circulation area of the Suburban publications. In order to grant a preliminary injunction in this circuit, the standards set forth by *Dataphase Systems, Inc. v. C L Systems, Inc.*[1980-81 TRADE CASES P 63,700],640 F. 2d 109, 114 (C. A. 8th Cir. 1981), must be met. *Dataphase* requires consideration of:

- (1) the threat of irreparable harm to the movant;
- (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

The parties have vigorously contested each of the elements under *Dataphase*. The probability of success on the merits, however, is clearly the most vigorously contested, and I shall discuss it first.

A. [Probability of Success]

The plaintiff has introduced evidence that may possibly bear on four alternative causes of action under federal antitrust law, three of which are based on § 2 of the Sherman Act, 15 U. S. C. § 2, and one which is based on § 7 of the Clayton Act, 15 U. S. C. § 18. This court is authorized to enter forms of injunctive relief by § 4 of the Sherman Act, 15 U. S. C. § 4, and by § 16 of the Clayton Act, 15 U. S. C. § 26.

(1) [Leveraging of Monopoly Power]

The first cause of action under § 2 of the Sherman Act is a claim that the *Omaha World-Herald* used its monopoly power in a daily newspaper market to smother competition in the weekly local advertising market, the allegation being that the *World-Herald* has done this through the acquisition of Rapid and Suburban, coupled with the use of the Golden Courier by Rapid and the expansion of the territory of Suburban. The plaintiff has also alleged that there was interselling among the three entities, although

this was not borne out by the evidence. This aspect of the plaintiff's case draws on the interpretation of § 2 of the Sherman Act found in *United States v. Griffith* [1948-1949 TRADE CASES P 62,246],334 U. S. 100 (1948), and seeks to hold the *World-Herald* liable for using monopoly power in one market to gain an advantage in another market. See, also, *Berkey Photo, Inc. v. Eastman Kodak Co.*[1979-1 TRADE CASES P 62,718],603 F. 2d 263, 275 (C. A. 2nd Cir. 1979).

*11 Liability under a § 2 claim can be determined upon a showing of:

- (1) the possession of monopoly power in the relevant market and
 - (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.
- United States v. Grinnell Corp.*[1966 TRADE CASES P 71,789],384 U. S. 563, 570-571 (1966).

In addition, the plaintiff must demonstrate that it has been injured in its business or property by the acts of the defendant. *Sargent-Welch Scientific Co. v. Ventron Corp.*[1977-2 TRADE CASES P 61,761],567 F. 2d 701, 709 (C. A. 7th Cir. 1977).

A finding of monopoly power can best be described as a showing that the defendant has the 'power to control prices or exclude competition.' *United States v. E. I. du Pont de Nemours & Co.*[1956 TRADE CASES P 68,369],351 U. S. 377, 391 (1956). The existence vel non of monopoly power depends on the market that is used as the measuring stick for the defendants' power. Both the geographic area and the products are concerns in a market definition. *Id.*, at 404; *Paschall v. Kansas City Star Co.*[1982-83 TRADE CASES P 65,104],695 F. 2d 322, 326, n. 3 (C. A. 8th Cir. 1982). Once that market has been defined, the defendant's power over it must be determined. *Id.*

[Geographic Market]

The plaintiff urges that the relevant geographic market should be limited to Douglas and Sarpy counties. Failing that, it urges that the maximum size of the market should be held to encompass only the Omaha SMSA which would add portions of Pottawatomie County, Iowa, to the market. I am persuaded that the Douglas and Sarpy county area is the best geographic market for determining whether

the *World-Herald* possesses a daily newspaper market. A crucial aspect to determine the scope of the relevant market is the ability of a firm to sell its product in certain locations. II Areeda & Turner, *Antitrust Law* P 522 (1978). Statistics derived from plaintiff's Exhibit 13 are helpful. At the hearing the penetration of a newspaper in a locale was considered indicative of its market power. This figure appears to be derived by dividing the number of copies distributed in an area by the total number of households. In Douglas County, the *Omaha World-Herald* paid subscriptions, as shown by the exhibit, appear to go to over 83 per cent of the households on Sunday and about 79 per cent on other days. The figures for Sarpy County are about 79 per cent for Sunday and 69 per cent for weekdays. The figures in Pottawatomie County, Iowa, are about 37 per cent for Sunday and 26 per cent for weekdays, a drastic difference from Douglas and Sarpy counties. In Douglas and Sarpy counties, the combined penetration appears to be about 82 per cent for Sundays and 77 per cent for weekdays.

It appears that the *Omaha World-Herald* is very effective at selling its product in Douglas and Sarpy counties but that the effectiveness falls off significantly in Pottawatomie County. Exhibit 13 also shows that the *World-Herald* does not attain penetration percentages anywhere near those figures throughout Iowa and Nebraska. The importance of the Douglas and Sarpy county area circulation to the *World-Herald* is further illustrated by the fact that it represents over 50 per cent of its total Sunday paid circulation and over 57 per cent of the combined daily circulation. It appears that the Douglas and Sarpy county market is the mainstay of the *World-Herald* operation and should be considered as the relevant market for determining whether it is a monopoly daily newspaper.

*12 The percentage figures developed above concerning market penetration do not have sufficient relevance to determine the existence vel non of the *World-Herald's* daily newspaper monopoly without some discussion of the other daily newspapers sold in Omaha. For example, some other newspaper could conceivably have a circulation reaching the same percentage of Omaha households as the *World-Herald* if those households subscribed to more than one newspaper. The evidence at the hearing demonstrated that no other daily newspaper had even a five per cent penetration in the Douglas and Sarpy county area. The circulation of other daily

newspapers in the two-county area appears, therefore, to be only negligible. The defendants did not contest the dominance of the *World-Herald* in the daily newspaper market.

[*Monopoly Power*]

Given all the evidence, I conclude that the *Omaha World-Herald* possesses a monopoly position in a daily newspaper market in the two counties.

[*Product Market*]

This conclusion, of course, is based on an assumption regarding the relevant product market. Specifically, the relevant product market was assumed to be comprised only of local daily newspapers. Weekly local newspapers, magazines, and other such publications differ significantly from a local daily newspaper. The testimony of Sagan was enlightening on the difference. Daily newspapers, with their frequency, are able to carry current news of a wide variety; they tend to carry a number of stories written by wire services covering national and international events. Local weekly newspapers are more restricted in their news coverage and tend to have considerably less emphasis on news with a shortlived time value; they tend to carry more news and feature stories concerned with events around the community than national or international news. National and international news stories in local weeklies differ from those in a daily, because they do not contain extremely time-critical material. Local weekly newspapers also tend to carry less national advertising and fewer syndicated features and comics than daily newspapers. The sum of the differences between daily and weekly newspapers makes it clear that they cater to different interests and should be grouped in different product markets. This conclusion results in the exclusion of nondaily newspapers from the market for purposes of ascertaining whether the *Omaha World-Herald* has a daily newspaper monopoly in the two-county area.

I also believe that magazines and other such publications should be excluded from the market. The testimony of Coulson leaves me with the impression that only one or two magazines have an edition that is specially tailored to the midwest region surrounding Omaha. Both of the magazines mentioned readily appear to cater to a specialized audience and not to the general public, as does a daily

newspaper. In addition, the frequency of the magazines' being less than daily would dictate sufficiently different contents to distinguish them from a daily newspaper.

*13 Although the evidence shows a probability that the plaintiff will be able to show at trial that the *Omaha World-Herald* has a monopoly in the daily newspaper market, the plaintiff to be entitled to relief must show that the *World-Herald* somehow used the daily newspaper monopoly as a lever to gain an advantage in another market. See [United States v. Griffith, supra, 334 U. S. at 108](#); [Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F. 2d at 275](#). Realistically, the only thing the plaintiff has shown in this regard is that the *World-Herald* used its financial resources to purchase Rapid and Suburban. I do not believe that there has been a sufficient showing that there was any use of the *World-Herald's* monopoly power in other ways, such as interselling or account shifting. The issue then is whether the use of its financial resources amounted to an impermissible use of monopoly power to gain an advantage in the markets served by Rapid and Suburban. I believe that the advantage sought, if any, was in the local advertising market. The bounds of that market are discussed in my analysis, immediately below, of the plaintiff's second § 2 claim.

[Acquisition of Potential Competitor]

The mere acquisition of Rapid would not have been enough by itself to find improper conduct under the *Griffith* rationale. The evidence, however, is sufficiently clear for me to infer that Rapid was a potential competitor of the *World-Herald* in a related market - local advertising. As my findings of fact given above indicate, Brown considered a 'marriage mailer' like the Golden Courier as an 'idea just waiting to happen' when the sale of Rapid was being negotiated with Berkshire-Hathaway in 1980. The idea surely must have been "just waiting to happen," for he testified that Rapid, without any financial assistance from the World-Herald Company, would have been fully able to start the Golden Courier. Rapid possessed adequate capital and credit reserves to provide the financing for the operation. Only a minimal amount of capital expenditures was necessary; a few tables needed to be built and some additional space rented, but no new presses or major equipment was necessary. Given that set of circumstances, it is curious that the World-Herald Company was willing to pay a premium of about

\$1.5 million over the price for which the owners of Rapid had been willing to sell to Berkshire-Hathaway only a few months earlier. Even the name of the World-Herald subsidiary formed for the Rapid acquisition, Printers and Mailers, Inc., suggests that there was some inclination at the time of the acquisition to do some mailing. The acquisition of Rapid obviated the need for the *World-Herald* to move quickly with a total-market-cover-age mailer to avert the potential competition of Rapid, as well as the problems in going forth with such a program, which would have been similar to Circulation Plus. The *World-Herald* had a great deal of difficulty in beginning the Circulation Plus program because of problems in preparing a nonsubscriber list for the mailed copies. Rapid readily assisted in this task with its computer and the data concerning mailing addresses that had been previously acquired.

*14 The defendants assert that the acquisition of Rapid should not be held to be an unlawful use of monopoly power, because the introduction of the Golden Courier - the true gist of the plaintiff's complaint against the *World-Herald* and Rapid - represents aggressive competition on the merits through innovation. See [Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F. 2d at 281](#). I cannot agree with the defendants' assertion. The supposed innovation - use of a marriage mailer - was abundantly testified to at the hearing as an idea not unique to Rapid or the *World-Herald*. There was testimony that the *Des Moines Register* and another company, Avco, had engaged in similar projects in other cities prior to the time of the introduction of the Golden Courier. The innovation sought to be permitted by the *Berky* decision was of a wholly different character and represented the introduction of a novel product into the marketplace. Such conduct, even by a monopolist, should not be discouraged. But, as in this case, when the conduct is not an innovation, it is more properly viewed as an unlawful act of a monopolist: there is a suppression of competition without any corresponding benefits.

The result with respect to the acquisition of Suburban should be the same, although for slightly different reasons. Suburban represented a small competitor with the *World-Herald* for a portion of its business in local advertising revenues. The acquisition of it by the World-Herald Company thereby tended to reduce the competition that the *World-Herald* had to face outside its fold of companies. The *World-Herald* could be quite happy for Suburban to seek

aggressively advertising accounts at the expense of the *World-Herald*, when the revenues would ultimately come to rest in the same corporate coffers.

[Injury]

The only remaining barrier to the plaintiff's relief is an answer to whether the World-Herald Company's actions in purchasing Rapid and Suburban in some way harmed the plaintiff. There was adequate evidence to show that the plaintiff was harmed by the purchase of Rapid and the attendant start-up of the Golden Courier. The plaintiff has lost a number of advertising accounts to the Golden Courier that would have contributed to a reduction in its money-losing financial picture or possibly to profitability of its operation. The acquisition of Rapid allows the World-Herald to reap the profits that a potential competitor would have made in the submarket of local advertising in a weekly mailer at the expense of some of the World-Herald's insert accounts or Circulation Plus accounts.

As to the acquisition of Suburban, the plaintiff has not presented sufficient evidence for me to find that it has been harmed by the elimination of competition. The evidence at the hearing demonstrated that the overlap of the Suburban papers with the *Sun* papers is minimal. Only a few copies of the *Papillion Times* are sold in Bellevue each week. In addition, there was little evidence that would convince me that the Sun's *Air Pulse* was being harmed by the presence of the World-Herald's *MWR Revue* on Offutt Air Force Base. The evidence concerning the Park Drive Shopping Center advertising is not concrete enough for me to believe that the Sun newspapers actually lost an account to Suburban.

*15 Accordingly, the plaintiff has shown a probability of success on the merits with respect to this theory as to the World-Herald's acquisition of Rapid, but not as to the acquisition of Suburban.

(2) [Acquisition and Maintenance of Monopoly]

The plaintiff's second cause of action under § 2 of the Sherman Act is also based on a theory that the *World-Herald* monopolized the market in Omaha by acquiring Rapid and Suburban. The relevant market, however, differs slightly under this theory. This theory again relies on the language in *United States v. Grinnell Corp.*, *supra*, and looks to the possession of

monopoly power within the relevant market, coupled with either willful acquisition or maintenance of that power. The Supreme Court of the United States in *United States v. Griffith*, *supra*, 334 U. S. at 107, was instructive in this regard, when it stated that the 'use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful.' Another variant on the doctrine holds that unlawfully acquired monopoly power itself is 'anathema even when kept dormant.' *Berky Photo, Inc. v. Eastman Kodak Co.*, *supra*, 603 F. 2d at 275.

The plaintiff has not demonstrated that the monopoly power that the *World-Herald* may have gained through the acquisition of Rapid and Suburban was unlawfully acquired through coercive tactics or other impermissible means. The inquiry, then, must turn to whether there has been a use of monopoly power in some proscribed manner.

[Relevant Markets]

The first step in this analysis, as discussed in the previous section, is to define the relevant product and geographic market. The bounds of the relevant product market are determined by looking to whether the commodities are "reasonably interchangeable by consumers for the same purposes." *United States v. E. I. du Pont de Nemours & Co.*, *supra*, 351 U. S. at 395. Determining whether two products are the same frequently can rest in part on the cross-elasticity of demand - i.e., whether consumers would likely be prone to shift from one product to another based on relative prices. *Superturf, Inc. v. Monsanto Co.* [1981-2 TRADE CASES P 64,316]. 660 F. 2d 1275, 1278 (C. A. 8th Cir. 1981). The analysis to determine the bounds of the local advertising market for the first claim suffices to define the advertising market relating to the second claim.

The kingpin of the plaintiff's desired definition of the relevant market is the testimony of its expert, John S. Coulson. His testimony lends itself to a conclusion that the advertising market can be viewed as a whole with several sub-markets. This type of analysis is a recognized tool in antitrust cases where markets are frequently divided into sub-markets and the sub-markets considered as relevant markets for monopoly analysis. See *Superturf, Inc. v. Monsanto Co.*, *supra*.

Coulson considered the sub-market of 'local

newspaper advertising' to comprise the relevant market. His analysis would define local newspaper advertising by making several exclusions from the advertising market as a whole. First, he excluded national advertising, which he defined as advertising that was directed more at product image promotion than to promotion of purchasing at a business in a particular locality. As discussed in the earlier portion of this memorandum, there are numerous differences in the distribution networks of local and national advertising as well as the type of businesses purchasing the advertising. It is clear that different markets exist for local and national advertising, mirroring the different purposes of the two types. The industry recognizes the difference. The *World-Herald*, for example, has different advertising rates for local and national advertising. Given the widely accepted differences, I do not believe that there is a strong crosselasticity of demand between national and local advertising. The difference in purpose and advertisers and recognition of that difference through different rate structures lead me to believe that Coulson's exclusion of national advertising is reasonable, and his methodology of counting local advertising as that with an address in Douglas and Sarpy counties only is reasonable. The fact that the method exclusion does not produce results to a mathematical certainty does not concern me and is not required; all that is required is a reasonable methodology that is consistently applied and produces estimates in which the court can be reasonably confident. See [United States v. Empire Gas Corp.](#)[[[1976-1 TRADE CASES P 60,907],537 F. 2d 296, 303 (C. A. 8th Cir. 1976), cert. denied, 429 U. S. 1122 (1977)]. I note that the defendants did not seriously challenge Coulson's method of excluding national advertising.

***16** Coulson also excluded four types of local advertising from the market -television, radio, billboard, and transit advertising. Their exclusion rested basically on the same premise: their inability to convey the same amount of information as print advertising and their inability to be referred to later. Coulson's testimony concerning the rationale for this distinction was discussed earlier in this memorandum and appears to be reasonable. The defendants sought to show that they directly compete with radio and television, at least, for local advertising, Gottschalk testifying that the *World-Herald* competes with the electronic media for local advertising. No specifics were given nor any statistics concerning the amount of business the *World-Herald* loses to the two

electronic media. The testimony given is simply not enough to refute the plaintiff's evidence.

Coulson's most controversial exclusion from the local advertising market was directories and similar publications. His reasons for doing so were discussed earlier in the memorandum. As was also stated there, the defendants' attempt at casting doubt on the exclusion failed. Given these circumstances, I shall consider the relevant market as not including directory advertising.

The second phase of defining a relevant market is to define the geographic market. I conclude that the area to be considered is the Douglas and Sarpy county area. Much of the reasoning for deciding that the *World-Herald* possesses a monopoly in the daily newspaper market is applicable here. Local advertising is a sub-market of the daily newspaper market and would necessarily be inextricably bound to the circulation of the *World-Herald* with respect to the geographic market.

Another reason for holding that the Douglas-Sarpy county area is the relevant geographic market is that this is the area in which the plaintiff and the defendants effectively compete. [TV Signal Co. of Aberdeen v. American T. & T. Co.](#)[1972 TRADE CASES P 74,061],462 F. 2d 1256, 1260 (C. A. 8th Cir. 1972). The evidence at the hearing demonstrated that the *Sun* newspapers are circulated almost exclusively within Douglas and Sarpy counties; some rural areas are covered only by mail subscriptions and there is no delivery in the downtown Omaha area. The *World-Herald* circulates throughout Douglas and Sarpy counties, as does the Golden Courier. The suburban publications cover only certain portions of Sarpy county and their circulation area is not entirely overlapping with the *Sun* circulation area.

The defendants brought out a fair amount of evidence concerning the lack of the exactness of the *Sun's* circulation area and the circulation areas of the *World-Herald*, the Golden Courier, and the Suburban publications. The obvious thrust of this evidence was to support an allegation that the plaintiff's attempted definition of the geographic market was inadequate, because it failed to take into account incongruities between the various publications' circulation areas. It is difficult, if not plainly impossible, to define a geographic market with mathematical precision. There is always some inherent fuzziness in an

attempt to define the geographic market. See *United States v. Philadelphia National Bank* [1963 TRADE CASES P 70,812], [374 U. S. 321, 360, n. 37 \(1963\)](#). In the present case the defendants quibbled with the plaintiff's evidence but did not introduce any evidence as to the significance of market area incongruities.

***17** Within the Douglas-Sarpy county area Coulson's study found that the World-Herald companies accounted for 82 per cent of the total revenues from local print advertising. Within the Omaha SMSA the percentage decreases only slightly, to 77 per cent, thereby making the choice between the Douglas-Sarpy county area and the Omaha SMSA as the relevant geographical market less critical than if there were greater disparity in the figures.

The competitor with the next largest market share is the Sun newspapers, with about a seven per cent share of the total local print advertising market. Coulson's report contains estimates that all but one of the remaining competitors are below four per cent of total market share. The two largest competitors - the Sun and the *Daily Record* - have financial troubles. Given the *World-Herald's* high share of the market and the total lack of a strong competitor, either in market share or financially, it cannot be seriously questioned that the World-Herald group of companies possesses a monopoly share of the market. The fact that the monopoly is dispersed in a total of three corporate entities, the World-Herald, Rapid, and Suburban, should not alter the result with respect to the finding of monopoly. Separate corporate existence is properly ignored in this case. See *Kiefer-Stewart Co. v. Seagram & Sons* [1950-1951 TRADE CASES P 62,737], [340 U. S. 211, 215 \(1951\)](#).

Given that the World-Herald group possesses monopoly power over the local print advertising market, the next issue is whether that monopoly power has been improperly acquired or used. See *United States v. Grinnell Corp.*, *supra*. I conclude that there is inadequate evidence to demonstrate that the World-Herald unlawfully acquired the monopoly power. There is no evidence of predatory pricing or coercive tactics to acquire a monopoly. The spearhead of the plaintiff's attack under this theory is that the World-Herald group engaged in various activities to maintain a monopoly. The plaintiff's counsel clearly stated that this was the direction of the plaintiff's case. See transcript of preliminary injunction hearing at 371, lines 12-25.

Under the guise of maintenance of a monopoly I am presented with two competing lines of analysis. The one advocated by the plaintiff would have me hold that the acquisitions of Rapid and Suburban, coupled with the later product introductions and changes, are an unlawful acquisition and maintenance of a monopoly. The defendants would have me focus on the post-acquisition period and call the activities of the World-Herald entities aggressive competition on the merits, following the *Berky* decision. I am persuaded that the plaintiff's line of reasoning more closely reflects the legal significance of the facts that were presented at the hearing.

At the time the World-Herald Company acquired Rapid the idea of the Golden Courier was already conceived. Rapid was then poised and ready to enter the market as a competitor to the World-Herald, but this entry was not possible until the change in the interpretation of the postal regulation that allowed marriage mailers. The World-Herald was already into the same sub-market with its zoned inserts. By acquiring Rapid, the World-Herald was able to assure itself of retention of a dominant position in local advertising. The evidence does not show the extent of the pre-Golden Courier dominance of the World-Herald. It does show, however, that the World-Herald possessed about an 80 percent share of the local advertising market at the time of Coulson's study, without the revenues of either the Golden Courier or the Suburban group. The acquisition of Rapid, without more, would then violate § 2. See [Paschall v. Kansas City Star Co.](#), *supra*, at 329.

***18** The situation with respect to the Suburban publications acquisition is somewhat different. The testimony reflects that the Suburban newspapers and the World-Herald publications did not compete in any significant degree for advertising, and they have vastly different rate structures. The limited circulation of the Suburban publications restricted the local businesses that would want to advertise in them. The advertising carried by Suburban, however, can still be considered as local advertising under Coulson's definition. Thus, the World-Herald Company through the Suburban acquisition was able to eliminate an independent purveyor of local advertising by making it a part of the World-Herald aggregate of companies. The aim of the antitrust laws is to preserve healthy competition. See *Berkey Photo, Inc. v Eastman Kodak Co.*, *supra*. To accomplish this end, monopolists should not be permitted to lessen

competition through expansion of their domain by corporate acquisitions. The defendants point out that the Suburban papers were a losing operation prior to the acquisition by World-Herald and have since been returned to financial health. Nearly any monopolist could make a similar argument. Except in the case of a failing company, such acquisitions are suspect, inasmuch as they tend to lessen competition. The defendants have not made an attempt to avail themselves of the failing company doctrine. Thus, I hold that the acquisition of Suburban was improper.

[*Maintenance of Monopoly*]

In addition to the language in *Grinnell* proscribing acquisition of a monopoly, there is language that proscribes the maintenance of a monopoly. That language has been interpreted as requiring some form of exclusionary conduct by the monopolist. See [Paschall v Kansas City Star Co., supra, 695 F. 2d at 326.](#) Of course, the acquisition of potential competitors, as discussed above, could be termed exclusionary, because it removes one source of competition and helps erect a greater barrier to entry by further cementing the monopolist's market position and displaying a willingness to acquire any of those who dare to compete. The primary actions that the plaintiff has brought to issue in this case, however, are the rates and sales practices of the Golden Courier, Suburban, and, to a limited degree, the *World-Herald* in competing for local advertising sales.

The plaintiff's attack on the Golden Courier's practices focuses on the rate structure and the zoning of its sales. It also raises an issue as to whether certain issues of the Golden Courier containing the Food Fare section were a further attempt by the World-Herald to smother the Sun newspapers as a competitor. As to the rates of the Golden Courier, there does not appear to be any form of predatory pricing. Typically, such pricing involves sales below costs in order to drive a rival out of business. See III Areeda & Turner, *Antitrust Law* P 710 et seq. (1978). The plaintiff did not present sufficient evidence to demonstrate that the prices for the Golden Courier were below cost. John Brown testified that the Golden Courier '50-50' program was cost-feasible because of a standardized print layout for each advertiser plus smaller, lightweight paper. The '50-50' program was the only serious challenge that the plaintiff made to the Golden Courier rate structure and the evidence adduced falls far short of showing

predatory pricing.

*19 The plaintiff also has not produced sufficient evidence to show that the zoning of the Golden Courier was exclusionary. This aspect of the marriage mailer clearly seems to be aggressive competition on the merits, as described in *Berkey*. The use of the Food Fare supplements does not present a problem either, as it falls under the same permissible principle as the zoning of the Golden Courier. It simply appears to be aggressive competition on the merits that cannot be characterized as exclusionary.

As to Suburban, the plaintiff has not shown anything that could be termed exclusionary. The placing of the papers in Bellevue and the start of the *MWR Revue* all represent aggressive competition on the merits and are not condemned under the antitrust laws.

(3) [*Attempt to Monopolize*]

The plaintiff's third theory under § 2 of the Sherman Act is that the defendants attempted to monopolize the local print media advertising market in Douglas and Sarpy counties. An attempt to monopolize as proscribed by § 2 involves at a minimum the specific intent to monopolize, some conduct in furtherance of that intent, and a dangerous probability of success. *Times-Pacayune Publishing Co. v. United States* [1953 TRADE CASES P 67,494], [345 U. S. 594, 626 \(1953\)](#); [Swift & Co. v United States, 196 U. S. 375, 396 \(1905\)](#); III Areeda & Turner, *Antitrust Law* P 820 et seq. (1978).

There is a critical lack of proof in the plaintiff's attempted monopoly case. There has been virtually no evidence that would sustain a finding that the defendants had the requisite intent. A specific intent 'to destroy competition or build monopoly is essential' to an attempted monopolization case. *Times-Pacayune Publishing Co. v. United States, supra*. The evidence of the plaintiff does not provide me with any basis for inferring that the World-Herald Company lowered its guns and put the *Sun* newspapers in its sights in hopes of destroying them, nor is there any evidence of specific intent to build a monopoly. The most probative evidence I have on this matter is the testimony of Gottschalk, who stated that the acquisitions of Rapid and Suburban were made for corporate reasons independent of any desire to monopolize or destroy competition. Furthermore,

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the decisions to begin the Golden Courier and modify its operations appear to have been made, at least from the evidence adduced at the hearing, without any proscribed intent. The plaintiff has failed on a critical element of proof of this claim and has not demonstrated a probability of success on the merits under it.

(4) [*Antimerger Law Claim*]

The plaintiff's final claim is that the World-Herald's acquisition of Rapid and Suburban violated § 7 of the Clayton Act. The essentials of such a cause of action are a merger or corporate acquisition in any line of commerce where the effect may be to lessen competition substantially or tend to create a monopoly in a substantial portion of commerce. [United States v. Falstaff Brewing Corp.](#)[1973-1 TRADE CASES P 74,377],410 U. S. 526, 531 (1973). A variant on the prohibition that the plaintiff has pursued is a merger or acquisition involving a company that is a potential competitor to another company in a market. *Id.*, at 532.

*20 I believe that the plaintiff has shown a substantial probability of success on the merits on this claim. There are several factors that should be considered in determining whether the acquisition of Rapid and Suburban substantially lessened competition. See *Brown Shoe Co. v. United States* [[[1962 TRADE CASES P 70,366],370 U. S. 294, 311-323 (1962)]. Those factors have been covered in the earlier discussion of the Sherman Act claims relating to monopolization in the local print advertising market. Those acquisitions do affect a substantial portion of commerce; the total advertising market of Rapid and Suburban amounted to substantial revenues. The acquisition of Rapid - a potential competitor to the *World-Herald* in the local print advertising market - would clearly tend to lessen competition. The acquisition of Suburban would also tend to have that effect, because it would eliminate an advertising source that was unconnected to the *World-Herald*. As stated earlier, there has not been a showing that Suburban was a failing company, thereby eliminating that line of defense.

In summary, there is a probability of success on the merits under three of the four theories that I perceive the plaintiff to be advocating.

B. [*Irreparable Injury*]

[Dataphase Systems, Inc. v. C L Systems, Inc.](#), *supra*, 640 F. 2d at 114, requires a finding that the plaintiff will suffer irreparable injury in the absence of the requested relief. The requisite injury to sustain the burden under this facet of the test is not a static amount but is dependent upon the degree of the demonstrated probability of success on the merits and the state of the balance of the harms. Those equitable principles are fully applicable in antitrust cases. See [15 U. S. C. §§ 4 and 26](#).

The plaintiff has shown adequate irreparable injury. Sagan testified that the Sun newspapers are literally at the end of their rope; that the long string of losses has put the papers in a position of exhausting available financial reserves through lenders; and that he personally cannot further borrow to save the Sun newspapers. The import of this testimony is that the total collapse of the Sun organization is imminent, barring some sort of relief from this forum. There was also testimony that to begin again with the Sun newspapers after a shutdown would be extremely difficult if not impossible. Sagan testified that it would be akin to beginning a new paper, because reader loyalty and good will would quickly dissipate after cessation of operations. The magnitude of the injury to the plaintiff, coupled with the showing of substantial probability of success on the merits, indicates that some form of relief should be forthcoming, unless the balance of harms tips decidedly in favor of the defendants.

C. [*Balance of Harms*]

The third of the four *Dataphase* factors is the balancing of harms between the parties. The evidence shows that the balance of harms tips decidedly in favor of the plaintiff. The plaintiff is faced with total shutdown of its operations. This would amount to a number of individuals losing their jobs, and the cessation of the publication of the *Sun* newspapers likely would be permanent, because of the rapid loss of subscriber loyalty and good will that would make a later resumption of the operation unfeasible. The harm to the World-Herald Company by the proposed relief, even in the extreme form of requiring the Golden Courier to cease distribution in Douglas and Sarpy counties and prohibiting other World-Herald entities from entering the market in place of the Golden Courier, would be less than the threatened harm to the plaintiff. The Golden Courier's operations are not limited to Douglas and Sarpy counties; it has

marriage mailer distribution in Lincoln and Fremont, Nebraska, and Council Bluffs, Iowa, totaling over 100,000 copies. It should also be pointed out that the Golden Courier operation is only a portion of Rapid's printing enterprise; Rapid would still be able to engage in its production and printing of tabloid inserts for newspapers throughout the United States. Some of those tabloids might well be distributed in Douglas and Sarpy counties.

*21 There was also testimony that Rapid would be able to maintain a constantly updated address file without a great deal of expense. Therefore, if any prohibition by this court of Rapid's distribution of the Golden Courier in Douglas and Sarpy counties were lifted, its task of market reentry would be much less than that of the Sun, because it does not depend on subscribers to determine the extent of its distribution. Only advertisers would have to be solicited and the Golden Courier mailed to the addresses on the mailing list; there would be no need to reestablish reader loyalty and good will to have a full circulation.

As to the Suburban papers, the harm from the only form of relief that I can determine is arguably possible - preventing it from picking up the Golden Courier's operations - would be minimal. The injunction would serve only as a prophylactic measure. The same would be true for the World-Herald, because it is not presently operating a total-market-coverage advertising publication other than the Golden Courier.

D. [Public Interest]

The fourth *Dataphase* factor is the consideration of the public interest. Without serious question, this factor runs to the favor of the plaintiff. In the absence of some form of preliminary relief the plaintiff is doomed to collapse and extinction. This would silence an independent editorial voice in Douglas and Sarpy counties. There is a public interest in preserving such independent voices, as exhibited by Congress' passing certain exceptions to the antitrust laws for newspapers in the Newspaper Preservation Act of 1970, Pub. L. No. 91-353, 84 Stat. 466 (1970). Congress felt that the antitrust laws should give way in certain instances to preserve independent editorial voices. It would seem that where the antitrust laws could be used reasonably to further the same purpose, they should be.

It is also in the public interest, as exhibited by the very existence of the antitrust laws, to try to preserve competition. The requested relief can be fashioned so as to further that end. Even the most extreme of the relief requested by the plaintiff would not insulate it from competitive forces in the marketplace. Another firm or firms could begin one or more marriage mail programs in the Douglas and Sarpy county area. Be that as it may, the new entrant would not hold a monopoly position over the local advertising market in Douglas and Sarpy counties and would fit within the framework of competition envisioned in the antitrust laws. The defendants should not be heard to cry that their market dominance will be lost. The plaintiff has made a significant showing that the defendant possesses a monopoly over the local print advertising market and has used a daily newspaper monopoly to gain leverage in the local print media advertising market.

III.

[Defenses]

Although I have determined that the tests of *Dataphase* have been met, it still remains to be determined whether there are equitable defenses that would bar or alter the form of the preliminary injunction and what form the preliminary injunction should take.

[Unclean Hands]

*22 As an equitable defense, the defendants raise the doctrine of unclean hands. There is some authority to support the proposition that this defense is properly considered with regard to preliminary relief. See [Heldman v. United States Lawn Tennis Assoc., \[1973-1 TRADE CASES P 74,375\], 354 F. Supp. 1241, 1249-1252 \(U. S. D. C., S. D. N. Y. 1973\)](#). This defense is based on two attempts by Sagan to combine the Sun newspapers with the World-Herald Company. On one occasion, Sagan apparently approached the World-Herald with a proposal that a 'joint operating agreement' between the Sun newspapers and the World-Herald be entered into. On another occasion, Sagan approached the World-Herald with a proposal that it acquire the Sun newspapers.

As to the first proposal, I can see no reason to consider it an instance of unclean hands. Joint

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operating agreements between newspapers have specifically been exempted from the prohibitions of the antitrust laws. See [15 U. S. C. § 1803](#). There is no evidence that Sagan was proposing a joint operating agreement outside the confines of the exemption.

The second proposal also is not a basis for application of the unclean hands doctrine. Sagan's proposal for the acquisition of the Sun by the World-Herald was premised, apparently, on the belief that the Sun newspapers could be considered a failing company. Mergers of corporations where one is a healthy business and one is a 'failing one which no longer can be a vital competitive factor in the market,' [Brown Shoe Co. v United States, supra, 370 U. S. at 319](#), are not proscribed by the antitrust laws.

[First Amendment]

The defendants also raise a defense to any preliminary injunctive relief by asserting that such relief would encroach on their First Amendment rights, relying on [Central Hudson Gas v. Public Service Comm. of N. Y., 447 U. S. 557 \(1982\)](#), for the contention that their activities, as commercial speech, are protected by the First Amendment. That authority, however, belies their contention. In [Central Hudson](#) the Supreme Court held that government may ban forms of commercial speech that are related to illegal activity. Commercial speech related solely to proposing a commercial transaction is subject to regulation by the government in greater proportions than other forms of speech. See [Pittsburgh Press Co. v. Human Relations Commission, 413 U. S. 376, 384-386 \(1973\)](#). I believe that the regulation may properly be extended to encompass the antitrust laws, given the facts of this case, for the '[f]reedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.' [Associated Press v. United States](#) [[[1944-1945 TRADE CASES P 57,384], [326 U. S. 1, 20 \(1945\)](#)].

[Novelty; Alteration of Status Quo]

The last assertion by the defendants is that the relief requested is 'totally unprecedented' and would not be available to the plaintiff in the event of ultimate success on the merits. Courts, particularly courts of equity, are frequently faced with situations with a lack of precedent for the relief that they must fashion. If a court of equity were so bound to look to the past for a precedent, it would be unable to act in many

cases. I recognize that the proposed relief amounts to some alteration of the status quo and that drastic alterations of the status quo in preliminary relief contexts should be permitted only where there has been a strong showing of success on the merits in favor of the movant. See, e. g., [Exhibitors Poster Exchg., Inc. v. National Screen Serv. Corp., 441 F. 2d 560, 561-62 \(C. A. 5th Cir. 1971\)](#). In this case, however, the showing of probable success on the merits is adequate to allow some alteration of the status quo. I am persuaded as well that such an alteration should not allow the plaintiff to proceed in other than an expeditious manner toward an ultimate trial on the merits.

*23 The defendants also argue that the preliminary relief sought cannot be allowed, because similar relief would be unavailable should the plaintiff ultimately prevail on the merits. In support of this claim they cite [ABA Distributing, Inc. v. Adolph Coors Co., 661 F. 2d 712 \(C. A. 8th Cir. 1981\)](#). That case does not support the proposition for which it is cited. [ABA Distributing](#) dealt with a failure of the plaintiff to demonstrate that there was a substantial probability of success on the merits, because it had failed to comply with a contract arbitration clause and thereby might have been unable to prevail because of a provision in Missouri law requiring such exhaustion. [Id., at 715-716](#). The case is not an equation of relief available after trial with that available as preliminary relief but is simply an application of the probability-of-success-on-the-merits element of the *Dataphase* test. Inasmuch as I have made a determination that there is a probability of success on the merits, that element is fulfilled.

IV.

[Preliminary Injunction]

The sole task remaining in the disposition of the plaintiff's motion is the framing of the preliminary relief. The plaintiff has proposed a form of preliminary injunction that would enjoin distribution of the Golden Courier or a similar vehicle by Rapid, the World-Herald, and Suburban and would prevent Suburban from publishing the *MWR Revue* or any other new newspapers. I am persuaded that the plaintiff has demonstrated the need for relief running only to the distribution of the Golden Courier in Douglas and Sarpy counties, but I do not believe that there has been a sufficient showing that the Suburban group of newspapers has engaged in tactics that truly

are the source of the plaintiff's economic difficulties. Accordingly, the preliminary injunction will run only to prohibit the World-Herald, Rapid, and Suburban, and any subsequently acquired subsidiary of the three, from distributing a marriage mailer or similar total-market-coverage vehicle in Douglas or Sarpy County. This would include a nonsubscriber mailer operation such as Circulation Plus.

As previously mentioned, the preliminary injunction should not take effect unless the plaintiff is willing to proceed to trial in an expeditious manner. What is an expeditious manner will depend on a number of factors that include the necessary discovery and the proposed length of the trial. The defendants at trial wished to participate in further proceedings to frame the terms of the injunction. I shall allow this in the form of briefs and affidavits and, if I deem it necessary after seeing the briefs and affidavits, oral argument.

One other factor will be considered in framing a preliminary injunction. The plaintiff must propose an expeditious trial date, and the defendants must respond to that proposal.

It Therefore Hereby Is Ordered:

1. That the parties are given twenty days from the date of this order to submit briefs and affidavits with respect to the makeup of the preliminary injunction; and

*24 2. That the plaintiff is given ten days from the date of this order to submit a proposal for the date of the trial of this case, consistent with the memorandum, and the defendants are given ten days thereafter to respond to the plaintiff's proposed trial date.

Sun Newspapers, Inc. v. Omaha World-Herald Co.
Not Reported in F.Supp., 1983 WL 1853 (D.Neb.),
1983-2 Trade Cases P 65,522

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