IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiffs, v. UPM-KYMMENE, OYJ, et al., Defendants.	Civil No: 03 C 2528 (J. Zagel) Received: April 28, 2003 Michael W. Dobbins, Clerk, U.S. District Court

MOTION BY UNITED STATES ON THE SCOPE OF EVIDENCE FOR THE PRELIMINARY-INJUNCTION HEARING

The Court's scheduling and case-management order left unresolved how much time each side would receive to present its case at the preliminary-injunction hearing, as well as the allowable number of live witnesses, exhibits, declarations, and deposition transcripts. The United States believes that specific limits, set early in the short discovery period before the preliminary-injunction hearing, will significantly benefit the parties by focusing their discovery and preparation accordingly, and will benefit the Court through the parties' more orderly and efficient presentation of evidence. The United States appreciates that the Court's time is a public resource not to be idly spent.

Limits on the scope of the hearing are consistent with the established law governing preliminary injunctions. As the Supreme Court has explained, a party "is not required to prove his case in full at a preliminary-injunction hearing." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction serves the "limited purpose" of "preserv[ing] the

relative positions of the parties until a trial on the merits can be held." *Id.* In keeping with this limited purpose, procedures at a preliminary-injunction hearing "are less formal and [the] evidence . . . less complete than in a trial on the merits." *Id.* Moreover, a plaintiff seeking a preliminary injunction need only prove "some likelihood of prevailing on the merits" along with irreparable harm. *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 573 (7th Cir. 1999).

In managing the hearing, a district court exercises considerable discretion. The court may consider hearsay, *Securities and Exchange Commission v. Cherif*, 933 F.2d 403, 412 n. 8 (7th Cir. 1991), and affidavits, *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997), and may limit the number of witnesses heard. *AlliedSignal, Inc.*, 183 F.3d at 577. Indeed, as *AlliedSignal* illustrates, a court may under some circumstances decline to hear any witnesses at all. *Id. (citing Ty, Inc.*, 132 F.3d at 1171). Where factual disputes are established on a central issue, however, a district court should permit some live testimony. *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 682 (7th Cir. 1983); *Medeco Security Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981) (per curiam).

In view of the limited scope of a preliminary-injunction hearing, as opposed to a trial on the merits, the United States proposes that the Court provide the parties with 12 hours per side to present their evidence, and allow each side to present up to 5 live witnesses, 25 deposition transcripts, 150 exhibits, and 25 declarations plus a "counter" declaration from any person whose declaration is offered by the other side. By the standards of ordinary civil litigation, this scope of evidence allows the parties substantial means for making their case on the preliminary injunction. Disciplined use of that quantity of evidence should allow the parties to address their most compelling claims.

During negotiations on these issues on April 21 and 22, 2003, defendants stated they would first like to see the investigative files to be produced by the United States on April 25 before committing to any position. Since providing defendants with these files, the United States again conferred twice with defendants to seek an agreement on the number of trial days needed, as well as the number of live witnesses, deposition transcripts, exhibits, and declarations that the Court will consider. The defendants have refused to commit, however, to any specific numbers and insist that it is again premature to reach an agreement, echoing their motion for no limits on depositions. When asked when defendants might take a position, defendants stated in "ten days," which they might then roll over again to the eve of the hearing.

Given defendants' pending motion for an unlimited number of depositions, and their renewed unwillingness similarly to discuss plaintiff's proposed limits on the scope of the preliminary-injunction hearing, the United States now seeks the Court's guidance on the hearing's duration and specific caps on the evidence to be presented at the hearing. The Court's attention to these issues will (1) help focus the short discovery period; (2) minimize burdens on non-parties; (3) limit what otherwise bodes to be voluminous exchanges of deposition designations, declarations, and exhibits; and (4) streamline the hearing itself. It is also entirely consonant with the Seventh Circuit's admonition that a preliminary-injunction hearing should not be converted via a discovery battle into a trial on the merits. *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972) (Stevens, J.).

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Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

__/s/_____
Claude Scott
Weeun Wang
Steven Kramer
Karl Knutsen
Michael Spector
Michael Bishop
Ihan Kim
Trial Attorneys
Department of Justice
Antitrust Division
Litigation I Section
1401 H Street, NW, Suite 4000
Washington, D.C. 20530
(202) 307-0997

_____/s/_____
Carla Stern
Trial Attorney
Department of Justice
Antitrust Division
209 South LaSalle Street, Suite 600
Chicago, IL, 60604
(312) 353-6685