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

RESPONSE BY UNITED STATES TO DEFENDANTS' MOTION TO TAKE AN UNLIMITED NUMBER OF DEPOSITIONS

Although Fed. R. Civ. P. 30(a)(2) presumptively limits the number of depositions a party may take during the entire course of a case that may span several years, defendants in this case move the Court to "refrain from setting any limit on depositions" between now and the close of pre-hearing fact discovery on May 21, 2003. The defendants filed their motion immediately after the United States declined their extraordinary request to allow them to take a minimum of 50 depositions during the same three-week discovery period for the preliminary-injunction hearing. *See* Attachment A. In the one business day that has passed since defendants filed their motion, defendants have already served the United States with 17 notices for depositions from May 6 through May 14, 2003.

Accounting for advance time needed to schedule depositions, if defendants take only the 50 depositions they say are a "minimum," and, if the United States takes 12 depositions then the

parties would take, on average, about five depositions every business day from May 6 through May 21, 2003. Under the scheduling order, ¶ 8, the parties would then have eight days–concurrently with expert disclosures and depositions (Scheduling Order ¶ 3) and exhibit exchanges (Scheduling Order ¶ 9)–to try to digest the resultant mass of material and prepare and exchange deposition designations, counter designations, and objections in a meaningful form for the hearing in early June.

In response to defendants' insistence on taking at least 50 depositions, the United States counter-offered that each side agree to 20 fact depositions through May 21, plus those for experts–still a torrid pace of over three depositions per day. *See* Attachment A. Given the severe time constraints and the fact that this discovery period serves for only the preliminary-injunction hearing–points minimized by defendants' brief–20 depositions per side is more than sufficient. Indeed, under the circumstances, the United States believes that more stringent limitations on the number of depositions would be sensible for the few days available through May 21 before the hearing on June 2 or June 9, 2003. The United States, of course, does not object to defendants taking further discovery on a reasonable schedule between the preliminary-injunction hearing and a trial on the merits. *See* Attachment A. The only response that the United States received to its counter-offer, however, is defendants' 17 deposition notices and their pending motion requesting an "unlimited" number more.

A defendant should not be permitted to wage a campaign that, viewed charitably, is an effort to convert a hearing on preliminary relief into a final trial on the merits. Hearings for a preliminary injunction are not intended to be as exhaustive as trials. *See AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 577 (7th Cir. 1999) (affirming a district court's decision in an

antitrust case to enter a preliminary injunction blocking a merger without hearing any live witnesses). The Supreme Court has emphasized the preliminary injunction's distinct role:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus 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).

As Judge (now Justice) Stevens has explained, a party seeking a preliminary injunction should not be forced to face such high hurdles for preliminary injunctive relief that the party must "forego a prompt application for an injunction in order to prepare adequately for trial." *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972); *cf.* Paris v. U.S. Dept. of Housing & Urban Dev., 713 F.2d 1341, 1345 (7th Cir. 1983) (district court erred in converting hearing on preliminary injunctive relief into final hearing on the merits where the factual record was not fully developed and the plaintiff was not given notice). The defendants' plan will, at the very least, severely impede plaintiff's ability to prepare for and present its preliminary-injunction case to the Court in any reasonable fashion, leading the United States to conclude that this is the very reason for it.

Under Fed. R. Civ. P. 30(a)(2)(A), which governs full-blown discovery before trial on the merits, absent agreement, a party wishing to take more than ten depositions "must obtain leave of the court." As a number of courts have explained, "Rule 30(a)(2)(A) presumptively caps the number of depositions in a case at ten." *Universal City Studios, Inc. v. Reimerdes*, 104 F. Supp.2d 334, 342 (S.D.N.Y. 2000); *see Barrow v. Greenville Independent School District*, 202

F.R.D. 480, 482 (N.D. Tex. 2001) (ten is presumptive limit); *Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir. 1996) (district court did not abuse its discretion in limiting party to twelve depositions). The 1993 Advisory Committee Notes add that the presumptive ten-deposition limit is intended to "emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case."

In arguing that an unlimited number of depositions is appropriate during the few days available for fact depositions before the preliminary-injunction hearing, and in already noticing 17 depositions, the defendants rely on three cases, all of which dealt with discovery before a full trial on the merits. In *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001), the district court initially limited the plaintiff to three depositions, rather than ten, and then reduced the number to two when the defendants failed to produce one of the subpoenaed witnesses. While reversing on other grounds, the Second Circuit concluded that "[t]he record before us does not permit us to rule on [the plaintiff's] claim that discovery was impermissibly limited," but directed the district court to reopen the issue on remand. *Id.* at 628.

The defendants also cite an unpublished opinion granting a defendant 49 depositions in a class-action employment-discrimination suit. *See Rosen v. Reckitt & Coleman, Inc.*, No. 91 Civ. 1675 (LMM), 1994 WL 652534 at *4 (S.D.N.Y. Nov. 17, 1994). But that case did not endorse shoehorning more than 60 depositions into 12-13 days, followed by a preliminary-injunction hearing in two to three weeks. Quite the contrary. In a subsequent opinion denying a motion for reargument, the district court extended the discovery deadline to January 31, 1996–more than a year after the court's initial order. The court explained, "Defendants' suggestion that the extensive discovery it seeks can be completed by July 31, 1995 [more than eight months after the

court's original order] is unrealistic." *Rosen v. Reckitt & Coleman, Inc.*, No. 91 Civ. 1675 (LMM), 1995 WL 70587 at *1 (S.D.N.Y. Feb. 21, 1995). The final case cited by the defendants also does not involve discovery before a preliminary-injunction hearing and does not even hint that it would endorse discovery on the scale and time-frame envisioned by the defendants. *See Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999).

The defendants object that the United States has relied on 29 declarations and 11 investigatory depositions in support of its motion for a temporary restraining order and preliminary injunction. *See* Defendants' Motion at 1. The defendants fail to acknowledge, however, that thirteen of those declarations were obtained from individuals whom the defendants urged to write to the Department of Justice in support of the transaction. The defendants, having selected these individuals, and having presumably talked to them, are hardly in a position to claim disadvantage at the use of their declarations in these proceedings. Of the 11 depositions cited in the United States' motion, five were of defendants' employees. A total of only eight investigative depositions were taken of persons not employed by defendants, and one of those eight is a former consultant to defendant UPM-Kymmene Oyj. Moreover, transcripts of all pre-complaint depositions were provided to defendants by Friday, April 25, 2003.

The defendants also complain that they are unfairly disadvantaged because the United States conducted a seven-month investigation, as contemplated by the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act, before filing the complaint. The defendants fail to note, however, that they agreed to extend the length of the investigation after the Department concluded that their initial merger filings omitted important documents, whose production was required by the HSR Act, which delayed the Department from identifying and seeking discovery

on critical facts and issues for two months. *See* Attachments B, C. They also ignore that, unlike the United States, they have been in the industry for years, know it well, and have extensive contacts and relationships with competitors and customers. This experience should help them winnow and focus their discovery. They also have had every opportunity to use their industry knowledge in preparing for litigation during the United States' pre-complaint investigation.

Indeed, defendants busily gathered information from non-parties during the seven-month investigation. They persuaded numerous customers to contact the United States and obtained 58 affidavits from non-parties (41 of which were produced for the first time to the United States on April 25, 2003); they submitted extensive position papers with supporting graphs and data analyses; and their expert economists participated in meetings with the Department of Justice. Moreover, it is the defendants who now insist upon the preliminary-injunction hearing in this case.

Fed. R. Civ. P. 30(a)(2) directs that a court should evaluate requests to take more than ten depositions, over the entire course of proceedings in a case, in light of "the principles stated in Rule 26(b)(2)." Among the factors listed in Rule 26(b)(2) is that the "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." On Friday, April 25, 2003, the United States turned over to the defendants all documents received from third-parties during the United States's pre-complaint investigation, including 15 deposition transcripts.

Given the extensive materials available to defendants and the limited time before the preliminary-injunction hearing, defendants have not only failed to show that subjecting an "unlimited" number of non-parties to depositions is not cumulative, duplicative, or more

burdensome or expensive than other means, defendants' first 17 deposition notices embody these very problems. Eight are Rule 30(b)(6) deposition notices of non-party companies with an extensive list of topics to be covered; another eight are for specific individuals employed by these same companies. Significantly, the discovery rules are not merely intended to protect the parties, but also others who find themselves in the path of civil litigation. The defendants' insistence that they need an unlimited number of depositions before the preliminary-injunction hearing is unsupported and abusive and should be denied.

Although defendants' pending motion attempts to isolate the Court's task of determining the appropriate number of depositions from other issues, it is most effectively resolved together with other integrally related case-management issues–including limits on the number of live witnesses, declarations, deposition transcripts, and exhibits to be offered at the preliminary-injunction hearing. Therefore, the United States respectfully requests that this Court rule on the defendants' present motion only after receiving all of the parties' filings by tomorrow, April 29, 2003–as was contemplated by paragraph 13 of the parties' scheduling order.

After exhausting attempts to agree with defense counsel on limits to the scope of evidence to be presented at the preliminary-injunction hearing, the United States plans to submit later today, if necessary, a related motion requesting that this Court impose such limits. In compliance with Local Rule 37.2, the United States has attached a copy of a letter that it sent defense counsel *(see* Attachment A), memorializing the United States' attempts to negotiate over the number of depositions and avoid burdening the Court with unnecessary motions.

Respectfully submitted,

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