

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

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**MICHAEL W DOBBINS
CLERK, U.S. DISTRICT COURT**

_____)
UNITED STATES OF AMERICA,)
)
Plaintiffs,)
)
v.)
)
UPM-KYMMENE OYJ, et al.,)
)
Defendants.)
_____)

Civil No: 03 C 2528 (J. Zagel)

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO VACATE THE GOVERNMENT'S RULE 30(B)(6) DEPOSITION NOTICES OF UPM AND BEMIS AND THE DEPOSITION NOTICE OF JEFFREY CURLER

I. Introduction

While arguing to the Court that the preliminary injunction hearing scheduled to begin on June 9, 2003, must be consolidated with a trial on the merits, even over plaintiff's objection, defendants have moved for a protective order to vacate the first three depositions of defendants scheduled by plaintiff—Rule 30(b)(6) depositions of defendant UPM-Kymmene Oyj ("UPM") and defendant Morgan Adhesives Company ("MACTac") and a deposition of Jeffrey Curler, CEO of Bemis Company, Inc. ("Bemis"), which owns MACTac, the company that UPM seeks to acquire. Defendants premise their motion on the fact that some of defendants' executives were deposed during the Department's investigation to argue that plaintiff's post-complaint depositions, noticed to prepare efficiently for the hearing in the very limited time available, are duplicative.

But defendants' argument fails to meet their burden—in view of relevant case law and the facts—and consequently, their motion to vacate the deposition notices should be denied, and the Court should order the already-delayed depositions to be convened by May 21, 2003.

Indeed, the May 21, 2003, cutoff date under the Court's scheduling order for general pre-hearing fact discovery, defendants' skeletal statement of their defenses, and their denials of nearly all of the substantive allegations in the Complaint, fairly necessitate the Rule 30(b)(6) depositions that the United States noticed initially for May 8 (UPM) and May 9 (Bemis). The depositions will help plaintiff prepare to meet its burden of showing some likelihood of success on the merits at the preliminary-injunction hearing. In these depositions, which the United States intends to complete within the seven hours permitted by Rule 30(d)(2), the United States is entitled to update its discovery on issues that have been drawn more sharply by defendants' answers to the Complaint and defendants' elaboration of their theories of defense. The United States is also entitled to obtain testimony concerning information that has been appreciated or become available only since the taking of the investigative depositions, particularly to test defendants' wholesale denials of the Complaint's key allegations. For similar reasons, the United States is also entitled to cover relevant areas that were not covered adequately during those depositions and to obtain answers to some questions asked during investigative depositions where the deponents expressly disclaimed knowledge.

The United States is fully aware of the expedited schedule leading to the preliminary-injunction hearing and has no interest in simply duplicating testimony it received during its investigation. Though it may be necessary to clarify certain points covered previously in light of the defendants' denials of the Complaint's allegations, the United States has every incentive—and

fully intends—to minimize the overlap between the investigatory and the noticed, pre-hearing depositions. Indeed, the logic of defendants’ motion to quash—were it granted—should result also in an order precluding defendants from offering any live testimony at the hearing on the topics that they claim are completely covered by the investigative depositions because, under such circumstances, defendants should be bound by their employees’ supposedly complete investigative deposition testimony.

II. Background

On April 28, 2003, the United States issued notices of deposition to defendants UPM and MACtac pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, requiring defendants to designate knowledgeable employees or agents to testify on ten specific topics. *See* Exhibits A, B. Those issues include communications between labelstock manufacturers about labelstock pricing, UPM’s supplier relationship with Avery, MACtac’s business plans if this transaction is enjoined, defendants’ efficiencies claims, known instances of users switching from paper pressure sensitive labels to film labels or any other means of labeling, the costs of manufacturing labelstock in North America, the scope of the search for documents sought by plaintiff’s First Request for Documents, and factual support for a few statements made in the “White Papers” submitted by the defendants during the investigation in an attempt to convince the United States not to file a lawsuit challenging this transaction. *Id.*

Defendant Bemis filed timely objections to plaintiff’s Rule 30(b)(6) deposition notice on the ground that executives knowledgeable about these issues had already been deposed during the government’s investigation. UPM served its untimely objections simultaneously with defendants’ untimely motion to quash, filed on May 9, 2003, the day on which the UPM Rule

30(b)(6) deposition was rescheduled, at UPM's request, to proceed concurrently with the Bemis deposition. Oddly, defendants' motion was filed while defendants continue to maintain that their own executives' testimony during these investigative depositions is inadmissible against defendants at the hearing. *See* Scheduling Order at ¶ 13 (among issues remaining to be resolved: ("the admissibility of investigative depositions").

In meet-and-confer conferences on May 7 and 8, initiated by the United States rather than the movants (*see* Exhibits C, D), the United States stated that it had no intent to engage in unnecessary, duplicative questioning. Defendants, however, flatly maintained that the United States is not entitled to take any Rule 30(b)(6) deposition testimony from defendants.

On May 2, the United States served a notice scheduling the deposition of Jeffrey Curler, the Chief Executive Officer of defendant Bemis, for May 12, 2003. Mr. Curler is the first employee of defendants, deposed during the investigation, whom plaintiff has noticed for a deposition in this case. In the cover letter accompanying this deposition notice, the United States expressly stated that it would restrict the examination to "MACtac's recent financial performance, MACtac's future plans absent approval of the merger, and any statements regarding MACtac's plans and financial future made to the investment community." Exhibit E at 1. In addition, the letter notes that certain of these issues would be raised during the Rule 30(b)(6) deposition of Bemis that was scheduled for May 9, and that the notice for Mr. Curler's deposition might be withdrawn after that 30(b)(6) deposition had taken place. *Id.* Despite this offer, on May 5, Bemis made the same objection it had made to the Rule 30(b)(6) deposition notice, asserting that the United States was not entitled to question Mr. Curler about recent financial

events and their implications because it had deposed him during the investigation. *See* MACtac's May 5, 2003, letter attached to defendants' brief.

III. Defendants Have Failed to Show that the Rule 30(b)(6) Depositions or Mr. Curler's Contingent Deposition Will be Duplicative or Unduly Burdensome

All of the cases that have considered the precise issue raised here by defendants hold unanimously that investigative depositions do not render post-complaint depositions of the same witnesses duplicative or burdensome under the Federal Rules of Civil Procedure. Indeed, defendant's claims notwithstanding, "there is no authority which suggests that it is appropriate to limit [an enforcement agency's] right to take discovery based upon the extent of its previous investigation into the facts underlying its case." *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990)); *see also SEC v. Softpoint Inc.*, 958 F.Supp. 846, 857 (S.D.N.Y. 1997) ("Courts have avoided giving administrative inquiries preclusive effect because it would transform those inquiries into discovery or trials."); *RTC v. Farmer*, 1994 WL 317464 at *1 (E.D. Pa. June 24, 1994) (concluding that "there is no basis in law or equity to restrict the [pretrial depositions] sought by the [agency]," even though investigative depositions of the proposed deponents were taken as part of a regulatory investigation by the agency before the commencement of the action).

Judge Rovner's *Saul* opinion is directly on point. There, the SEC sought to depose five persons, including three non-party witnesses, who were five of 24 persons deposed during the investigation preceding the SEC's suit. The defendants moved to quash or limit the scope of the depositions, arguing—just as defendants do here—that the SEC had already exhausted all discovery relevant to the case during the investigation, and that further depositions would be duplicative, imposing undue burden and expense on the witnesses. 113 F.R.D. at 117.

The parties in *Saul* agreed that the witnesses had "already been examined thoroughly" during the investigation—which is not the case here on the points on which the United States seeks testimony. In *Saul*, the court denied the motion, ruling that "once [the SEC] has completed its investigation and filed suit, it is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial." *Id.* at 117-18. The court reasoned:

Whatever inquiries the agency posed in the course of its investigation were framed in the context of ascertaining whether or not to press charges against the defendants. The SEC's motives and concerns in that setting may not be dramatically different from those which currently underlie its preparation for trial; nonetheless, the contexts are sufficiently different to merit further discovery once the charges have been made and the parties are at issue.

Id. at 118. "Once the complaint has been filed and the defendants have answered, and the issues requiring resolution have been clarified, . . . all parties must be afforded the opportunity to conduct discovery and prepare for trial with those issues in mind." *Id.* at 119. Were it otherwise, the investigative depositions would be accorded a preclusive effect that Congress did not intend. Indeed, a contrary ruling "would have the effect of imbuing the investigations of government agencies with the kind of formality and binding effect characteristic of full-blown litigation." *Saul*, 113 F.R.D. at 119. Such a result would frustrate Congressional intent behind the antitrust civil investigative demand statutory scheme to ensure "effective and expeditious investigation into possible civil violations of the federal antitrust laws." H. R. Rep. No. 94-499, at 1 (1975) (Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976).

Defendants attempt to distinguish *Saul* by noting only that it was not a case involving a challenge to a merger. Motion at 5. But defendants cite no case holding that *Saul*'s principles *do not* apply in the merger context. Equally important, defendants overlook a statement in the legislative history of the HSR Act: "It is important to remember that the [Justice] Department's

objective at the pre-complaint stage of the investigation is not to “prove” its case but rather to make an informed decision on whether or not to file a complaint.” *United States v. GAF Corp.*, 596 F.2d 10, 14 (2d Cir. 1979) (quoting H. R. REP. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvement Act of 1976). Defendants must concede, therefore, that the language quoted by the Second Circuit in *GAF*, reflects a recognition in the legislative history of the HSR Act, an Act that directly relates to merger enforcement, that *Saul’s* principles are equally applicable to this merger case.

Each of the three cases cited by defendants is inapplicable to the issue raised by defendants’ motion. In part, as the case captions imply, none of the cases cited by defendants involved pre-complaint investigative depositions taken by a government agency and courts’ considerations of how such depositions differ from case depositions. In *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001), the First Circuit noted that, pursuant to Rule 30(a)(2)(B), “[a] party must obtain leave of court . . . if . . . the person to be examined already has been deposed *in the case*. . . .” (emphasis added). It upheld the invalidity of the second Rule 30(b)(6) subpoena issued to the same party without leave of the court because—unlike here—the party was *previously deposed in the case*. *Id.* Moreover, the party seeking a second post-complaint Rule 30(b)(6) deposition there “present[ed] no evidence that any new, relevant information w[ould] be obtained if it [was] permitted to take the depositions” at issue. *Id.* at 193. Similarly, in *Novartis Pharmaceuticals Corp. v. Abbott Laboratories*, 203 F.R.D. 159 (D. Del. 2001), there was no indication that the plaintiff wished to examine the witness, who had been previously deposed in the case, about recently discovered information. Instead, the court concluded that another deposition “would be cumulative to the testimony already procured.” *Id.* at 163. Moreover, the Court concluded that a party’s offer to be bound

by post-complaint deposition testimony of the most knowledgeable witness in the subject area satisfied the party's obligation under Rule 30(b)(6) to produce a witness on the subject. Far from agreeing to be bound by any of their employees' investigative deposition testimony, defendants claim that such testimony is inadmissible. Scheduling Order ¶ 13.

Finally, in the unpublished *Consolidated Rail Corp. v. Primary Industries, Corp.*, Nos. 92 Civ. 4927, 92 Civ. 6313, 1993 WL 364471 (S.D.N.Y. Sept. 10, 1993), Conrail agreed to produce seven of ten witnesses whose depositions were noticed, but moved for a protective order precluding the depositions of three of its executives, each of whom submitted an affidavit attesting that he had no personal knowledge of any relevant facts. Given these circumstances, the court deferred the three depositions until the movants demonstrated that they have some unique knowledge pertinent to the issues in the case. Here, by contrast, defendants concede that the executives at issue have knowledge because they are the ones they claim would be produced in response to the 30(b)(6) notices.

"[U]nder Fed.R.Civ.Pro. 26(c), the district court has the power to issue a protective order only upon a showing of 'good cause.'" *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994). Here, defendants have failed to meet their burden not only on the law, but also on the facts. In this case, defendants have failed to show that the noticed depositions would be duplicative for at least three reasons.

First, in preparation for the hearing, a number of the noticed Rule 30(b)(6) topics seek simply to update and pin down information that is essential to showing that UPM's proposed acquisition of MACTac "create[s] an appreciable danger of [higher prices] in the future." *Hospital Corp. of America v. F.T.C.*, 807 F.2d 1381, 1389 (7th Cir. 1986). Several of the topics

listed seek to elicit testimony about defendants' fluid plans regarding possible efficiencies, pricing, and business strategy if the merger does not proceed. The United States is entitled to update the information it has learned on these topics to be able to effectively cross examine defendants' employees called to testify at the hearing. Similarly, since the investigative depositions were taken, several events have occurred that pertain to the topics listed in the 30(b)(6) notice and that would be raised during Mr. Curler's deposition. For example, on April, 23, 2003, Mr. Curler participated in a conference call for stock investors after releasing its first-quarter financial results for MACtac, showing that it had grown its business and increased sales. Mr. Curler tried to reassure those concerned about this lawsuit that MACtac would have a bright future once the economy as a whole improved. Mr. Curler's deposition testimony about these financial results is highly relevant to testing defendants' stated intention to prove that "MACtac has been declining in competitiveness." Exhibit F at 5. The United States did not have the opportunity to obtain discovery on these matters and several other matters simply because important events have occurred after the investigative depositions were taken. Similarly, when UPM starts producing documents and ends its long delayed response to plaintiff's First Document Requests for which production was due on May 2, there will be a number of important documents to cover in the UPM Rule 30(b)(6) deposition that were unavailable during the investigation.

Similarly, after the investigative depositions had concluded, defendants submitted two substantial White Papers to the United States, including the one filed on March 27, 2003, which is 58 pages long with 22 exhibits attached. The arguments put forth in the March 27 White Paper are directly relevant to the issues in the case; indeed, defendants incorporated that White Paper

by reference when providing the United States with its theory of its defense. Exhibit F at 2. The first topic listed in UPM's Rule 30(b)(6) notice requests UPM to provide the factual support for four statements made in the March 27 White Paper. Exhibit A, at ¶ 1. The United States was not able to ask those questions during the CID depositions because those depositions occurred before that White Paper was filed.¹

Second, even for some of the topics that *were* covered in the CID depositions, further questioning of knowledgeable executives will not be duplicative because the persons who were deposed did not know the answer to those questions. For example, one of the noticed topics asks for factual support for the statement in the White Paper that "actual substitution between PSL [pressure-sensitive labels] and non-PSL is frequent." Exhibit A, at ¶ 1(b); Exhibit B, at ¶ 8(b).

¹ While expressly incorporating the statements in the White Paper into its defenses, UPM nonetheless attempts to avoid discovery of the underlying factual support by claiming that one of the ten 30(b)(6) deposition topics seeking the factual basis for four statements in its March 27, 2003, White Paper amounts to answering contention interrogatories, which are not allowed under the Scheduling Order. Where, as in this case, the topics identified in the Rule 30(b)(6) notice cover factual components of the case, courts have held that 30(b)(6) depositions are an appropriate method of acquiring this information. See *Canal Barge Co. v. Commonwealth Edison Co.*, No. 98 Civ. 0509, 2001 WL 817853, at *2 (N.D. Ill. July 19, 2001); *Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co.*, W. 90 Civ. 7811, 1993 WL 34678, at * 3 (S.D. N.Y., Feb. 4, 1993). Moreover, the various discovery methods under the Federal Rules of Civil Procedure "are clearly intended to be cumulative, as opposed to alternative or mutually exclusive." *Pulsecard v. Discovery Card Servs., Inc.*, 168 F.R.D. 295, 305 (D. Kansas 1996) (quoting *Richlin v. Sigma Design W., Ltd.*, 88 F.R.D. 634, 637 (E.D. Ca. 1980).

The two cases cited in defendants' motion (at page 5) rule that whether a Rule 30(b)(6) deposition or a contention interrogatory is more appropriate must be decided on the facts of each case. *Exxon Research and Engineering Co v. United States*, 44 Fed. Cl. 597, 601 (Ct. Cl. 1999). Those cases limited their rulings to situations where the information sought was highly complex, or required legal expertise, and required the party answering the interrogatories to respond in full, forthcoming detail. *McCormick-Morgan, Inc. v. Teledyne Indus., Inc.*, 134 F.R.D. 275 (N.D. Cal., *rev'd on other grounds*, 765 F. Supp. 611 (N.D. Cal. 1991)(involved a patent infringement case).

In its objection to the 30(b)(6) notice, Bemis claims that Mr. Madel responded to questions on that topic during his CID deposition. See MACtac's May 2, 2003, letter attached to defendants' brief, p. 3. Yet, he repeatedly testified that he lacked the knowledge to answer those questions. Exhibit G at 296:10-11 ("I don't have knowledge of that. I couldn't say one way or the other on that"); 321:15-323:13 (did not know whether end user would switch from PSL if price increased); 326:13 ("I don't know that"); 328:21-329:2 (same). Similarly, Bemis claims that Mr. Clarke testified to MACtac's purchase of label papers (see MACtac's May 2, 2003, letter attached to defendants' brief, p. 2), but when asked whether those purchases were made separately or together with Bemis, its corporate parent, Clarke said that Ron Hays, another MACtac executive, "would probably be in a better position to answer that." Exhibit H at 172:1-9. Further questioning—in the Rule 30(b)(6) deposition of someone knowledgeable on these issues—will not be duplicative of the unproductive questioning that occurred during the CID depositions.

Third, further questioning of defendants' executives is fully warranted in view of defendants' attempts to litigate each and every possible issue in this case. Despite arguing for a trial on the merits on June 9, defendants have refused to narrow the issues. Indeed, they have expanded them. Their answers to the complaint appear to disavow the only significant stipulation entered to date, namely that the United States and Canada comprise the relevant geographic market. See Defendants' Joint Answer to Verified Complaint, ¶ 21. They have also thwarted plaintiff's discovery beyond the instant motion. For example, on May 2, they refused to produce nearly all documents responsive to the United States' First Requests for Documents. To date, Bemis has still failed to produce all responsive documents for which it has not posed an

objection, and UPM has produced no responsive documents to date. Defendants' pleadings contest every issue and emphasize that they believe the case to be complex, stating:

This is not a case simply involving the determination of the relevant product market, market shares, competitive conditions and ease of entry. Instead, the Government alleges that there have been attempts at improper coordination among competitors in the labelstock industry.

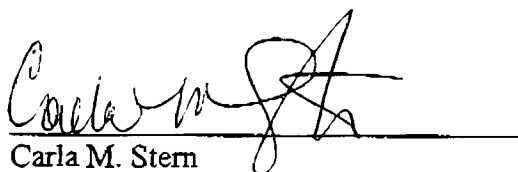
Defendant's Response on the Scope of Evidence at 3-4.

Under these circumstances, the value of the Rule 30(b)(6) depositions is manifest.

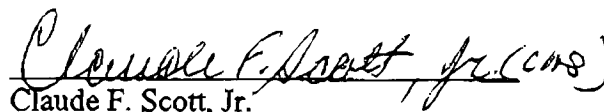
Finally, defendants' claim of undue burden is specious. Defendants themselves have noticed at least eight Rule 30(b)(6) depositions of non-parties. More importantly, at the TRO hearing before this Court on April 16, 2003, while pushing for a preliminary-injunction hearing at the earliest available date, counsel for defendants advised the Court: "We have the personnel to proceed on multiple tracks." (April 16, 2003 Proceedings, p. 15:11-12.) This statement renders their unsupported claim of undue burden here particularly hollow.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:



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



Claude F. Scott, Jr.
Weeun Wang
Steven Kramer
Karl Knutsen
Michael Spector
Michael Bishop
Ihan Kim
Richard Cooke
Trial Attorneys
Department of Justice
Antitrust Division
1401 H Street, NW, Suite 4000
Washington, D.C. 20530
(202) 307-0997

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