UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES, Plaintiff,	)	
v.	) MAY 14 2003	No. 03 C 2528
UPM-KYMMENE OYJ, et al., Defendants.	)	Hon. James B. Zagel Magistrate Michael T. Mason

NOTICE OF FILING

TO: SEE PROOF OF SERVICE

PLEASE TAKE NOTICE that on May 13, 2003, we filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division: **DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION TO HAVE TWO SEPARATE TRIALS**, a copy of which is herewith served upon you.

UPM-Kymmene Oyj and Raflatac, Inc.

By: _____
One of their Attorneys

Christopher M. Curran
M. Elaine Johnston
White & Case LLP
601 Thirteenth St., N.W.
Washington, DC 20005

Alan S. Madans
Daniel Cummings
ROTHSCHILD, BARRY & MYERS
55 W. Monroe St., Suite 3900
Chicago, Illinois 60603
(312) 372-2345

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PROOF OF SERVICE

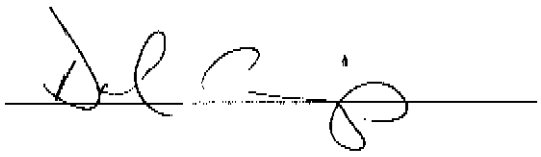
The undersigned attorney certifies that a copy of the foregoing Notice of Filing and document referred to therein were served upon the following:

(Via facsimile - 312.353.1046) and by Hand Delivery
Carla Stern
Trial Attorney
U.S. Department of Justice
Antitrust Division
209 S. LaSalle St., Suite 600
Chicago, IL 60604

(Via facsimile - 202.307.5802) and by Hand Delivery
Claude F. Scott, Jr.
Trial Attorney
U.S. Department of Justice
Antitrust Division
Litigation 1 Section
1401 H Street, Suite 4000
Washington, DC 20530

(Via facsimile - 612-766-1600) and by U.S. Mail
John French
Richard Duncan
Faegre & Benson LLP
2200 Wells Fargo Center
90 S. Seventh St.
Minneapolis, MN 55402

on this 13th day of May, 2003.



UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Eastern Division

UNITED STATES, Plaintiff, v. UPM-KYMMENE OYJ, *et al.*, Defendants.	Civil Action No. 03 C 2528 Judge James B. Zagel Magistrate Judge Michael T. Mason

DEFENDANTS' OPPOSITION TO
GOVERNMENT'S MOTION TO HAVE TWO SEPARATE TRIALS

A seven-day hearing is set to begin on June 9, 2003. The Government has identified 10 witnesses to testify live and another 15 to testify by deposition. Defendants have identified about the same number (all to testify live). Discovery has been extensive and is continuing, each side can be expected to submit a large number of exhibits. Suffice to say that the Court will have a well-developed record upon which to assess the likely competitive effects of the proposed merger.

Oddly, however, the Government proposes that the June 9 hearing constitute only the opening round in this litigation. Apparently the Government envisions that the parties would reassemble, a few months later, for yet another hearing that would constitute the trial on the merits. The Government's peculiar proposal is contrary to law, longstanding practice, and any concept of judicial economy.

Section 15 of the Clayton Act — which the Government expressly invokes in its Verified Complaint — requires the prompt determination of this case: "the court shall proceed, as soon as

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may be, to the hearing and determination of the case." 15 U.S.C. § 25. The plain meaning of this statutory mandate is that a court must proceed apace (as this Court has done) to "the hearing and determination of the case." This language unequivocally requires a prompt "determination," not some tentative interlocutory ruling.

The Government seems to suggest that this statutory mandate may be ignored because it "was enacted as part of the Clayton Act in 1914, long before the Hart-Scott-Rodino Act required companies to give the government advance notice of transactions." Gov't. Motion at 6. Statutory provisions, of course, may not be ignored simply because they are longstanding. And it is odd for the Government to make this argument, when it is expressly invoking this very same section of the original Clayton Act.

The Government is correct that the subsequent enactment of the Hart-Scott-Rodino Act is relevant, but the Government is mistaken as to why. In giving the Government sweeping powers to conduct *ex parte* nationwide pre-complaint discovery, the Hart-Scott-Rodino Act assured that the Government would have ample opportunity to be ready to litigate a merger challenge "as soon as may be" to a final "determination." In the Hart-Scott-Rodino Act, Congress specifically sought to "advance the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in timely and effective fashion." H.R. Rep. No. 84-1373 at 10-11 (1976). Thus, Congress has directed that Government merger cases must proceed promptly, but Congress has mitigated any prejudice to the antitrust enforcement agencies by vesting them with sweeping rights to conduct pre-suit *ex parte* discovery to enable them to be prepared to conduct prompt merger litigation. Here, of course, the Government had ***seven months*** in which to conduct its *ex parte* investigation.

The Government's only response is that Congress passed the Hart-Scott-Rodino Act to protect competition and "end post-consummation litigation." Gov't Motion at 6. As an initial matter, if Defendants were to prevail at the preliminary injunction hearing, they would close the transaction. The Government would then seek at trial a "post-consummation" divestiture, which is exactly what Congress sought to avoid.

Furthermore, Congress also enacted the statute "to advance the legitimate interests of the business community" and these purposes are consistent. It is perfectly reasonable to expect the Government to try a case on the merits after seven-months of pre-merger *ex parte* discovery as well as expedited discovery in this litigation. This is particularly true where the Government will have deposed or obtained documents from every party, competitor and customer from whom it has requested them. Defendants' interest in the final resolution of this case before the July 31 termination date of their transaction is wholly legitimate and consistent with the Congress's intent.

Including the two months from complaint to trial in this action, the Government has had ***nine months*** to prepare for trial. This is ample time to prepare for "the hearing and determination of [this] case." Indeed, by June 9 the record in this action will far exceed the record in ordinary commercial cases, even most complex ones.

The Government cites authority, from outside the merger context, holding that the consolidation of the preliminary injunction and trial should not deprive a plaintiff of a fair opportunity to develop its case. Gov't Mot. at 4. These authorities have no application here, given the nine-month period in which the Government will have had to develop its case.

Given the Clayton Act's requirement of a prompt "determination" and the Government's sweeping rights to take *ex parte* pre-complaint discovery, it is hardly surprising that the courts

almost always consolidate the preliminary injunction and the trial on the merits in merger cases brought by the Department of Justice Antitrust Division. *See, e.g., United States v. Rockford Mem. Hosp.*, 717 F. Supp. 1251, 1253 (N.D. Ill. 1989) (three-week consolidated hearing began within 20 days), *aff'd*, 898 F.2d 1278 (7th Cir. 1990); *United States v. SunGard Data Systems, Inc.*, 172 F. Supp.2d 172, 174 (D.D.C. 2001) (two-day consolidated hearing began within 18 days); *United States v. Franklin Electric Co., Inc.*, 130 F. Supp.2d 1025, 1026 (W.D. Wisc. 2000) (five-day consolidated hearing began within two months); *United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121 (E.D.N.Y. 1997) (13-day consolidated hearing began within two months); *United States v. Engelhard Corp.*, 126 F.3d 1302 (11th Cir. 1997) (three-week consolidated hearing began within six weeks); *United States v. Mercy Health Services*, 902 F. Supp. 968, 971 (N.D. Iowa 1995) (two-week consolidated hearing), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997); *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 4 n.1 (D.D.C.) (two-day consolidated hearing began within 32 days), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990); *United States v. Carilion Health System*, 707 F. Supp. 840, 841 (W.D. Va.) (five-week consolidated hearing), *aff'd*, 892 F.2d 1042 (4th Cir. 1989); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1065 (D. Del. 1991) (six-day consolidated hearing); *United States v. Consolidated Foods Corp.*, 455 F. supp. 108, 123 (E.D. Penn. 1978) (eight-day consolidated hearing within one month). Obviously, Defendants need not "pick and choose" from merger cases, as the Government contends (Gov't Motion at 12), to show the frequency of consolidation; consolidation is the rule, not the exception.[1]

[1] Defendants can provide the docket sheets or case-management orders from the cited cases if the Court so desires. Against the weight of these cases, the Government does not cite a single case where consolidation was sought and denied. Indeed in the three cases the Government cites (Gov't Motion at 13) the issue of consolidation does not appear to have been raised.

As the Government correctly notes (Mot. at 12), the parties in Department of Justice merger cases usually agree to consolidation of the preliminary injunction and the trial on the merits. *See United States v. Rockford Mem. Hosp.*, 717 F. Supp. at 1253. This reflects common sense. It is simply wasteful to hold two hearings before the same judge on the same case within a short period. Rule 65(a)(2)'s authorization to consolidate is custom-made for a case like this.[2]

Having no authority to support a denial of consolidation in a merger case under Section 15 of the Clayton Act, the Government relies on wholly irrelevant authority. Gov't Motion at 10. First, the Government relies on FTC cases, but the FTC brings its merger challenges under a different statutory provision, Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), which expressly authorizes the Commission to seek a preliminary injunction to enjoin a merger during the pendency of its administrative proceedings. When the FTC brings suit in aid of its administrative proceedings, there is no trial on the merits in federal court and thus nothing to consolidate with the preliminary injunction hearing. The Government also misplaces reliance upon *Chicago Prof'l Sports Ltd. P'shp v. Nat'l Basketball Ass'n*, 961 F.2d 667, 676 (7th Cir. 1992), and *AlliedSignal v. B.F. Goodrich Co.*, 183 F.3d 568, 577 (7th Cir. 1999), which were private suits not brought under Section 15 of the Clayton Act with its expediting provision. Furthermore, the parties in private antitrust actions, unlike the Government, do not have the benefits of several months of pre-complaint *ex parte* discovery. Thus, private parties have a legitimate need for additional discovery before final determination of their cases.

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[2] Rule 65(a)(2)'s authorization codifies common-sense notions of judicial economy. *See* Advisory Committee Note (1966) ("The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. . . . Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.").

CONCLUSION

Principles of judicial economy dictate that the Court consolidate the preliminary injunction hearing and the trial on the merits in this case. Such a consolidation is mandated by Section 15 of the Clayton Act, and is fair given the Government's sweeping pre-complaint *ex parte* investigation.

Dated: May 12, 2003

Respectfully submitted,

WHITE & CASE LLP

By: CHRISTOPHER M. CURRAN/DC
Christopher M. Curran
M. Elaine Johnston
Martin M. Toto
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Alan S. Madans
Daniel Cummings
Rothschild, Barry & Myers
55 W. Monroe Street, Suite 3900
Chicago, IL 60603-5012
Telephone: (312) 372-2345
Facsimile: (312) 372-2350

Attorneys for UPM-Kymmene Oyj and Raflatac, Inc.

John D. French
Richard A. Duncan
Julie Potts Close
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000

Thomas A. Doyle
Baker & McKenzie
One Prudential Plaza

130 East Randolph Drive
Chicago, IL 60601
Telephone: (312) 861-8866

Attorneys for Bemis Company, Inc. and Morgan Adhesives Company