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)



**UNITED STATES' REPLY OPPOSING CONSOLIDATION OF THE PRELIMINARY-INJUNCTION HEARING WITH THE TRIAL ON THE MERITS**

Defendants' argument that the United States is not entitled to a preliminary-injunction hearing boils down to one basic but unprecedented claim: Because the Hart-Scott-Rodino ("HSR") Act grants the Department of Justice an opportunity to investigate mergers before consummation, the United States is precluded, according to defendants, from obtaining a hearing on a preliminary injunction and must instead proceed abruptly to a full trial on the merits within two months of filing the complaint. Defendants are unable to cite any case for this novel proposition that premerger investigations nullify the United States' right to a preliminary injunction--and of course such a theory has never been endorsed by any court. Rather, defendants cobble together their argument by quoting out of context one sentence from the legislative history of the HSR Act and by urging an interpretation of Section 15 of the Clayton Act that no court has ever adopted (or even noticed).

38

As the United States has explained, the HSR Act was passed to address a number of problems, including, most notably, Congress's finding that post-consummation challenges to mergers lasted on average more than five years. H.R. REP. 94-1373 at *9. What defendants fail to acknowledge is that this more than five-year average–which in large, important cases like the El Paso Gas merger could extend to as long as seventeen years–was created while courts were proceeding under Section 15 of the Clayton Act, 15 U.S.C. § 25, the provision at the heart of defendants' argument. Section 15's language that a "court shall proceed, as soon as may be, to the hearing and determination of [the] case" was therefore never deemed to foreclose the quite lengthy average of five years for merger litigation.

Even though Section 15 has been on the books since 1914, defendants are unable to cite a single authority interpreting the language as requiring a trial within even several years, much less the two months that defendants insist upon here. Section 15 has never been read in the way that defendants propose, and nothing in the plain language of the phrase "as soon as may be" can plausibly be treated as denying the government the right to a preliminary injunction hearing. *Cf. United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (declining to interpret a general term in a statute in a way that would deprive the sovereign of an established right or would work an obvious absurdity) (*citing Nardone v. United States*, 302 U.S. 379, 383-84 (1937)).

Despite the longstanding phrasing of Section 15, on which defendants rely, only when Congress passed the HSR Act did merger litigation pick up speed. As Congress understood, when mergers are challenged before consummation, parties have an incentive to litigate on a reasonable time-frame. Once the delay of interminable post-merger litigation was limited through the HSR Act, however, defendants realized that the only option left for making

procedure triumph over substance is not delay, but excessive speed. Thus, defendants here insist on a trial on the merits on June 9, and, as explained below, they want that trial while resisting discovery at almost every turn and contesting nearly every issue on the merits, including reneging on the geographic market stipulation.

Defendants' interpretation ignores Congress' statements that the Act was designed to give the United States "a meaningful chance to win a premerger injunction–which is often the only effective and realistic remedy against large, illegal mergers. . . ." H.R. REP. 94-1373 at *5. The value of a preliminary injunction is underscored by the defendants themselves. They emphatically assert that "if Defendants were to prevail at the preliminary injunction hearing, they would close the transaction." *Defendants' brief* at 3. Defendants' categorical rejection of the United States' right to a preliminary injunction in merger cases also ignores that courts have convened a preliminary-injunction hearing in merger cases–without reaching a full trial on the merits. *See, e.g., United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993). Indeed, a number of the cases relied on by defendants were consolidated only well into the proceedings–and only with the United States' consent. *See United States v. Long Island Jewish Medical Center*, 983 F. Supp. 121, 125 (E.D.N.Y. 1997) ("During the hearing conducted by the Court on the plaintiff's motion for a preliminary injunction, the parties agreed that the plenary trial of this action on the merits was to be advanced and consolidated with the hearing."); *United States v. Rockford Mem. Hosp.*, 717 F. Supp. 1251, 1252 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990) (parties stipulated to consolidation after the preliminary-injunction hearing); *United States v. Baker Hughes Inc.*, 731 F. Supp. 3, 4 n. 1 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990), (parties agreed to consolidation "[a]fter a full hearing on a motion for preliminary

injunction").

Defendants gain nothing from their selective quotation of the HSR Act's legislative history. They correctly note that the Act was intended to "advance the legitimate interests of the business community" by "making it more likely" that merger challenges "will be resolved in a timely and effective fashion." H.R. REP. 94-1373 at *10-11. But they fail to point out that this quote was preceded by a passage making clear that it was referring to the problems of "interminable post-consummation divestitures." *Id.* at 10. Nothing in the sentence quoted by defendants even approaches anything as dramatic as what defendants propose--a repeal of the United States' right to a preliminary-injunction hearing simply because it conducted a pre-complaint investigation.

Adding to the idiosyncracy of their interpretation, defendants volunteer that the Federal Trade Commission, unlike the Department of Justice, is entitled to a preliminary-injunction hearing when challenging mergers. *See Defendants' brief* at 5. This is true even though the Federal Trade Commission also conducts pre-complaint investigations and even though the administrative proceedings may be at least as lengthy as litigation in federal court.

Defendants' argument is especially striking because, in pressing for a trial on the merits within two months of the complaint, their opposition brief never asserts that their transaction is time-sensitive. Nowhere do they proffer any evidence about the urgency of the deal, and in fact they have already once moved the deadline for the deal from April to the end of July, as the Court was informed at the hearing on April 16, 2003. Defendants undoubtedly fail to assert that their deal is time-sensitive because they realize that they cannot meet the standards articulated by Judge Posner and also by the D.C. Circuit. *See Federal Trade Commission v. Elders Grain, Inc.*,

868 F.2d 901, 904 (7th Cir. 1989); *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). As Judge Henderson explained for the D.C. Circuit, "If the merger makes economic sense now, the [merging parties] have offered no reason why it would not do so later." *H.J. Heinz Co.*, 246 F.3d at 726. And even if defendants could show that the deal might unravel during litigation, defendants have failed to show how the demise of the merger would deny consumers any advantages. *See Elders Grain, Inc.*, 868 F.2d at 904-05.

Defendants also fail to acknowledge the uniform authority holding that an agency's pre-complaint investigation is not a ground for denying an agency an opportunity to take discovery in ensuing litigation. "'[T]here 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) (Rovner, J.)); *see also SEC v Softpoint Inc.*, 958 F.Supp. 846 (S.D.N.Y. 1997); *RTC v. Farmer*, 1994 WL 317464 (E.D. Pa. June 24, 1994).

Rather than respond to this caselaw, defendants choose instead to put in boldfaced print that the government's investigation lasted **seven months** and to put in italics that it was *ex parte*. *See Defendant's brief* at 2. As to the seven months, defendants do not acknowledge that their failure to submit all documents required in their HSR filing substantially delayed the investigation. As to the complaint about an *ex parte* investigation, defendants ignore that investigations by the executive branch rarely if ever invite the subject to join directly in the process of gathering evidence. Defendants were not only afforded numerous and extensive opportunities to be heard during the investigation, the United States also thoroughly explained its concerns to defendants. Defendants' participation in the investigation is underscored by their

boast that during the investigation they submitted "nearly four feet of white papers, letters, and supporting documents that outline the parties' positions on many of the core issues." *See Defendants' letter of May 8 on narrowing the issues* at 3.

Defendants' rush to judgment is especially revealing given their extensive efforts to resist discovery and refusal to narrow any issues on the merits. Their letter ostensibly "narrowing" the issues in the case took almost nothing off the table. And until May 13, defendant UPM had produced no documents responsive to the United States' First Requests for Documents, even though responses were due by May 2. Defendants have also moved to vacate to Rule 30(b)(6) deposition notices, and as the present motion on consolidation illustrates, they have attempted to consume the limited time available before the preliminary-injunction hearing with disputes on the form and scope of the hearing and the discovery preceding it.

Defendants' last refuge is in other merger cases where the United States *agreed* to consolidate the preliminary-injunction hearing with the trial on the merits. These cases are all distinguishable and merely show that when there is good reason, the United States willingly agrees to an expedited schedule.

In addition to the cases already discussed in the United States' opening brief, defendants add to the list cases such as *United States v. Carilion Health System*, 707 F. Supp. 840, 841 (W.D. Va.), *aff'd*, 892 F.2d 1042 (4th Cir. 1989) (unpublished). As defendants note, in that case a five-week consolidated hearing was held. What defendants fail to point out, however, was that the trial commenced over six months after the complaint was filed–which is what the government offered the defendants in this case. Had defendants been willing to wait until a trial on the merits in the fall as the government proposed, they would have received a schedule no different than

that in *Carilion Health System*.

In *United States v. Mercy Health Services*, 902 F. Supp. 968, 971 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997), which involved a merger that did not meet the HSR reporting requirements, the parties agreed to a consolidated hearing held 107 days after the complaint was filed. The time before the hearing was longer than what defendants request here, and the merger involved a hospital with a localized market and a handful of significant purchasers.

In *United States v. Sungard Data Systems, Inc.*, 172 F. Supp.2d 172 (D.D.C. 2001) the parties agreed to a consolidated two-day trial held just 18 days after the complaint was filed. But the government consented to this extremely rapid schedule only because the acquired firm was in bankruptcy proceedings, requiring immediate action. Again, this case illustrates merely that the government will agree to expedited proceedings–even highly accelerated proceedings–where it is necessary and in the public interest.

In *United States v. Baker Hughes Inc.*, after the court held a two-day, preliminary-injunction hearing one month after the complaint was filed, the parties agreed to treat the factual record as complete and argued the case on the merits several weeks later. The case offers no authority for requiring a consolidated hearing over the government's objection, where doing so would prejudice the government's ability to gather evidence, and where the defendants actively resisted discovery. The same can be said of *United States v. Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991), where the parties agreed to a consolidated hearing. In *United States v. Franklin Electric Co.*, 130 F. Supp. 2d 1025, 1026 (W.D. Wis. 2000), the court held a consolidated hearing two months after the complaint was filed because "the parties agreed they could be ready

for trial on the government's motion for a permanent injunction at the end of July." The issues were also extremely limited, for the parties agreed on the relevant geographic market, the relevant product market, and that the two merging companies were the only sellers in the defined market. *Id.* at 1026.

And as the United States has noted, many merger cases have taken longer to reach a trial on the merits. *See United States v. Northwest Airlines* (E.D. Mich.) (740 days from filing complaint to trial on the merits); *United States v. Primestar* (D.D.C.) (263 days from complaint to trial on the merits); *United States v. Lockheed* (D.D.C.) (168 days from complaint to hearing).

Having failed to establish that the pre-complaint investigations should deny the government the right to a preliminary injunction hearing, and having added to those arguments only a string cite of inapposite cases where the government agreed to a consolidated hearing, defendants complain that applying the Federal Rules of Civil Procedure and allowing the government a hearing on a preliminary injunction would be unduly repetitive. Defendants fail to mention, of course, that Fed. R. Civ. P. 65(a)(2) addresses just this problem by allowing that admissible evidence presented at the preliminary-injunction hearing need not be repeated at a trial on the merits.

Defendants' remaining argument is that because they plan to pack the preliminary-injunction hearing with an extensive number of witnesses–they have 26 individuals (including 4 experts) on their witness list–the United States should not be entitled to enough time to present its case on the merits. But it would be unfair indeed if defendants' efforts to expand the preliminary-injunction hearing, while thwarting discovery, were a basis for denying the United States a full hearing. As the Seventh Circuit has noted, consolidation should not be granted

where it will deprive the plaintiff of a fair opportunity to develop its case. *Paris v. U.S. Dept. of Housing & Urban Dev.*, 713 F.2d 1341, 1346 (7th Cir. 1983); *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972) (Stevens, J.). *See also* Charles Wright, Arthur Miller, and Mary Kane, *Federal Practice and Procedure*, § 2950 (2003) (*quoting Pughsley*).

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of this Reply Opposing Consolidation of the Preliminary-Injunction Hearing with the Trial on the Merits were served this 14th day of May, 2003, upon each of the parties listed below:

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