

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

SMITHKLINE BEECHAM )  
CORPORATION, )  
d/b/a GLAXOSMITHKLINE, )  
SMITHKLINE BEECHAM PLC, and )  
GLAXO GROUP LIMITED, )  
d/b/a/ GLAXOSMITHKLINE, )

Civil Action No. 1:07cv1008 (CMH/TRJ)

Plaintiffs, )

v. )

JON W. DUDAS, in his official capacity as )  
Under-Secretary of Commerce for )  
Intellectual Property and Director of the )  
United States Patent and Trademark Office, )  
and )

UNITED STATES PATENT AND )  
TRADEMARK OFFICE, )

Defendants. )

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**EMERGENCY MOTION TO CONTINUE HEARING  
ON PRELIMINARY INJUNCTION MOTION**

Defendants Jon W. Dudas, in his official capacity as under Secretary of Commerce for the United States Patent and Trademark Office, and the United States Patent and Trademark Office (collectively “the USPTO”), respectfully move for emergency relief to continue the hearing that Plaintiffs have noticed for October 26, 2007 to October 31, 2007, thereby allowing the USPTO the amount of time to which it is entitled under the Federal and Local Civil Rules to respond to Plaintiffs’ massive, last-minute “Motion for a Temporary Restraining Order and Preliminary Injunction” (“Motion”).

1. On August 21, 2007, the USPTO published final rules in the Federal Register, which affect the procedures for filing patent applications with USPTO. See 72 Fed. Reg. 46716 (Aug. 21, 2007) (“Final Rules”). The effective date of the Final Rules is November 1, 2007, see id. at 46716, although compliance with some of the Final Rules is not required until well after November 1, 2007, see, e.g., id. at 46717 (requiring compliance with some rules by February 1, 2008).<sup>1</sup>

2. On October 10, 2007 – a full fifty (50) days after the Final Rules were published – Plaintiffs served a fifty-two page, eight-count Verified Complaint on the USPTO, challenging the Final Rules under the Administrative Procedures Act (“APA”), 5 U.S.C. § 701 et seq., on numerous grounds. Plaintiffs filed a Verified Amended Complaint on October 11, 2007. Although Plaintiffs waited until mid-October to file their complaint, thereby backing the Court up against the effective date of the Final Rules, the Final Rules hardly came as a surprise to Plaintiffs; indeed, Plaintiffs submitted public comments concerning the proposed rules on May 2, 2006. See Plaintiffs’ Motion, Ex. C.

3. Plaintiffs then waited nearly six (6) more days after serving the Verified Complaint on the USPTO – until 10:25 p.m. on October 15, 2007 – to file their Motion. In addition to a thirty-page brief, Plaintiffs’ Motion contains hundreds of pages of exhibits, many of which concern technical patent applications that were not specifically identified in either the Verified Complaint or the Verified Amended Complaint and that require significant expenditures of time

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<sup>1</sup> Given that the Final Rules will not go into effect until November 1, 2007, there is absolutely no justification for Plaintiffs’ request for a temporary restraining order (“TRO”). Pursuant to Federal Rule of Civil Procedure 65(b), a TRO must expire after ten (10) days. Ten days from the filing date of Plaintiffs’ Motion would be October 25 – before the Final Rules have even taken effect.

for the USPTO to review and analyze. See Plaintiffs’ Motion, Ex. B & sub-exhibits. Plaintiffs noticed the hearing on their Motion for Friday, October 26, 2007.

4. By contrast, Triantafyllos Tafas, the plaintiff in another civil action in this Court who is challenging the same Final Rules on substantially the same grounds, filed a complaint challenging the Final Rules on August 22, 2007 and ultimately agreed that a preliminary injunction was unnecessary. See Tafas v. Dudas, Civil Action No. 1:07cv846 (JCC/TRJ) (Dkt. No. 16, p. 1).

5. By noticing the hearing on their Motion for Friday, October 26, Plaintiffs left the USPTO with merely eight (8) days to file their opposition to the motion, even though (1) the Final Rules implicate extremely complex issues of patent prosecution procedure; (2) the Motion contains hundreds’ of pages of exhibits, including an extra legal brief masquerading as an exhibit;<sup>2</sup> and (3) the Motion requires the USPTO to investigate highly technical patent applications in order to assess the validity of Plaintiffs’ allegations of “irreparable harm,” standing, and ripeness.<sup>3</sup>

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<sup>2</sup> Among the hundreds of pages of exhibits is an eighteen-page “declaration” by an attorney from a law firm, which purports to explain how USPTO has acted contrary to the Patent Act, 35 U.S.C. § 1 et seq. in enacting the Final Rules – the central legal issue in this case. See Pl. Ex. E. This legal brief masquerading as a “declaration” is improper and must be stricken. Besides usurping the judicial function, it is a flagrant attempt to thwart Local Civil Rule 7(F)(3), which limits briefs to thirty (30) pages – not thirty pages (30) plus an extra eighteen (18) pages of legal argument. The “declaration” is also improper because it introduces materials outside the administrative record to argue the merits of the case. See Camp v. Pitts, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

<sup>3</sup> Plaintiffs may, in response to this Emergency Motion, suggest that some of the nearly six-day delay between the serving of their Verified Complaint and the filing of their Motion is attributable to undersigned USPTO counsel having asked Plaintiffs to provide specific application numbers in their filing. USPTO counsel made this suggestion, however, only after

6. Pursuant to Local Civil Rule 7(F)(1), a party opposing a motion is entitled to eleven (11) days to respond to that motion. Federal Rule of Civil Procedure 6(e) augments that time by an additional three (3) days. Thus, under the applicable rules, the USPTO is entitled to fourteen (14) days – or until October 29, 2007 – to respond to Plaintiffs’ Motion.

7. Although the USPTO recognizes that this Court typically hears civil motions on Fridays, the USPTO respectfully requests emergency relief from the Court to hold a hearing on Plaintiffs’ Motion on October 31, 2007, so that the USPTO may fully and adequately respond to the Motion. This Court should not countenance Plaintiffs’ flagrant attempt to deny the USPTO the response time to which it is entitled by waiting nearly two months after the Final Rules were published to seek a preliminary injunction, thereby forcing the Court to decide its Motion within days of the Final Rules taking effect.

8. Undersigned counsel has consulted with counsel for Plaintiffs, John Desmarais, in an effort to resolve this matter among the parties, but Mr. Desmarais would not consent to the relief sought through this motion.

9. Any earlier hearing date would prevent the USPTO from availing itself of the full amount of time to which it is entitled under the Local and Federal Rules, and which is clearly justified in light of the scope of Plaintiffs’ Motion, the complex nature of the underlying issues, and Plaintiffs’ delay in coming into Court.

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Plaintiffs’ counsel represented to USPTO counsel that Plaintiffs had already identified relevant applications. Therefore, USPTO counsel’s suggestion should not have necessitated further investigation by Plaintiffs; it merely should have prompted Plaintiffs to provide the numbers for the applications that they had already located – something that Plaintiffs needed to do, regardless of USPTO counsel’s suggestion, in order to support their allegations of standing, ripeness, and “irreparable harm.”



