

**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,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 1:07cv1008
	:	
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.	:	

**PLAINTIFFS’ RESPONSE TO DEFENDANTS’ EMERGENCY MOTION TO
CONTINUE HEARING ON PRELIMINARY INJUNCTION MOTION**

Plaintiffs, SmithKline Beecham plc, SmithKline Beecham Corporation d/b/a GlaxoSmithKline, and Glaxo Group Limited d/b/a GlaxoSmithKline (collectively referred to as “GSK”), brought this action against Defendant, 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 Defendant United States Patent and Trademark Office (“PTO”). GSK seeks temporary, preliminary, permanent injunctive relief enjoining the implementation of new PTO rules (“Final Rules”) that were published on August 21, 2007, and are scheduled to go into effect on November 1, 2007.

For the reasons stated below, Defendants' motion to continue the temporary restraining order ("TRO") and preliminary injunction hearing until October 31 should be denied. GSK submits that that its motion should be heard on the hearing day noticed, October 26, to which the Defendants had previously agreed.

Defendants Have Already Asked GSK To Delay Its Emergency Motion Once

GSK filed its *Complaint* in this matter on October 9, 2007. After providing a courtesy copy of the *Complaint* to Defendants on October 10, Counsel for GSK called Defendants' counsel and advised that GSK would be seeking a TRO and preliminary injunction against implementation of the unauthorized, arbitrary, capricious and vague Final Rules. GSK's counsel also advised Defendants' counsel that the matter would be set for hearing on October 19, nine days later. Defendants' counsel, after speaking with her client, requested that GSK agree to give Defendants more time to prepare for the hearing. Defendants also asked GSK's counsel to provide details in the briefing about examples of the GSK patent applications now pending that would be immediately affected by the Final Rules because those facts may bear on the issue of standing.¹

GSK acceded to the Defendants' requests, and delayed its filing until October 15 when the appropriate detail could be provided. Thus, in the spirit of cooperation, GSK reluctantly agreed to postpone the hearing to October 26 (Docket ## 12-16), giving Defendants a full 16 days after receipt of the *Complaint*. This agreement was reluctant because if this Court denies

¹ Counsel for the Defendants acknowledges requesting this additional information, but then complains that GSK did as it was asked (Docket # 17, *Emergency Motion* at 3-4 n.3). In another action filed by a patent applicant who is challenging the Final Rules, the Defendants have attacked the applicant for lack of standing by analyzing his pending patent applications. *See Tafas v. Dudas*, Case No. 1:07cv846 JCC/TRJ (E.D. Va. Oct. 4, 2007) (*Motion to Dismiss and Memorandum in Support*, Docket ## 17 & 18). Thus, both sides understood the necessity and importance of this information.

the TRO and preliminary injunction, GSK must have time to file an emergency motion to the Court of Appeals for the Federal Circuit (“CAFC”), and must leave time for the CAFC to respond. GSK then filed its brief in support of the TRO and preliminary injunction on Monday, October 15, with two supporting declarations. The brief and supporting declarations repeated, in large part, the information presented in the *Complaint*, which Defendants had possession of since October 10.

After requesting that GSK voluntarily delay its motion hearing for a TRO or preliminary injunction until Friday, October 26, 2007, the Defendants now insist that they need even more time to respond. While GSK believes the Defendants should be given a meaningful opportunity to respond to the pending motion (and indeed provided Defendants that opportunity by voluntarily moving the hearing date by one week), the Defendants’ request for a continuance until October 31, 2007 should be denied. Such a continuance would force this Court to rule from the bench at the hearing if a decision is to be rendered before the Final Rules take effect. It would also deny GSK the ability to seek appropriately-tailored emergent relief from the CAFC before the Final Rules become effective in the event that this Court denies GSK’s motion. Further, the Defendants already understand the “extremely complex issues of patent prosecution procedure” implicated by the Final Rules—they wrote them. And they are already familiar with the issues at hand, as evidenced by their extensive motion to dismiss filed in the *Tafas* case.²

² But the Defendants’ contention that GSK, the world’s second largest pharmaceutical company in the world, and Mr. Tafas, a sole inventor, are similarly situated under the Final Rules, and thus preliminary relief is unnecessary, is disingenuous. (Docket # 17, *Emergency Motion* at 3, ¶ 4). The Defendants cannot deny that the Final Rules will have a far greater impact on pharmaceutical companies such as GSK, companies that spend billions of dollars in researching and developing life-saving medicines and have hundreds if not thousands of pending patent applications, than sole inventors. Because of that disparate impact, GSK has properly sought a TRO or a preliminary injunction. Another litigant’s actions and case strategies cannot and should not be binding on GSK.

Thus, there is no justifiable reason why this hearing must take place the day before the Final Rules go into effect.

Defendants Caused Any Shortage Of Time

Further, any perceived difficulty Defendants experience with the present schedule is self-inflicted. The 129-page Final Rules with comments were published in the *Federal Register* on August 21, 2007 (*See* Docket # 14, Exhibit A). The Final Rules are complex, highly technical, vague in certain aspects, and represent a sea-change in patent prosecution practice. The Final Rules differ substantially from the draft proposed rules initially published. Despite the detailed nature and extensive impact of the Defendants' rulemaking, they required all U.S. patent filers to comply by an onerously short effective date: November 1, 2007. The Defendants apparently did not mind that these new rules, which exceed their rulemaking authority, will retroactively affect thousands of pending patent applications, or that they force applicants such as GSK to read, comprehend, and attempt to reorganize their business activities to comply with this sea-change in a mere two months. Thus, it strains credulity that the Defendants now argue that they do not have a sufficient amount of time to respond to an emergency challenge to these rules. In short, the Defendants' unreasonable effective date caused this situation. If Defendants require more time to respond, they should agree to postpone the effective date of the Final Rules.

GSK respectfully submits that the Defendants' motion to continue the hearing should be denied, and that the case should be heard on the normal hearing day, October 26, as originally requested by Defendants and agreed to by GSK.

ARGUMENT

Governing Principles of Law: A motion for a continuance is committed to the sound discretion of the district court. *Avrey v. Alabama*, 308 U.S. 444, 445 (1940); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Latham v. Crofters, Inc.*, 492 F.2d 913, 914 (4th Cir. 1974); *Virgin Enterprises Ltd. v. Virgin Cuts, Inc.*, 149 F. Supp. 2d 220, 225 (E.D. Va. 2000). The Court must consider “the facts and conditions then existing,” *Avrey, supra*, including the reasons for the continuance given by the movant, the hardship that may be imposed on either party, and the expedition of the case on the Court’s calendar. Under these principles, the Defendants’ motion for a continuance of the hearing to October 31 should be denied.

Reasonable Notice Has Been Given: After GSK agreed to postpone the hearing date to October 26, at the Defendants’ request, GSK moved for a TRO or preliminary injunction (Docket # 12). Defendant had already agreed that the notice was reasonable and provided the Defendants a meaningful opportunity to respond. Now, the Defendants complain that they have been short-changed. That argument cannot be credited, because, as described above, any inconvenience is self-inflicted.

Under the Final Rules, the Court may enter a TRO or preliminary injunction after “notice” is given to the opposing party. *See* FED.R.CIV.P. 65(a)(1) & (b). Rule 65 does not specify the length of notice to be given nor the date on which an opposition be filed. Instead, the party opposing a preliminary injunction must be given “a fair opportunity” to oppose it after having had reasonable time “to prepare such opposition.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 433-34 & n.7 (1974). Indeed, in certain circumstances, a TRO may be granted without any notice to preserve the *status quo* for a period not exceeding ten days, so that a preliminary injunction motion may be heard. *See Granny Goose Foods*, 415 U.S.

at 439 (*ex parte* TRO may be entered to preserve “the *status quo* and [to prevent] irreparable harm just so long as is necessary to hold a hearing, and no longer”); *see also* FED.R.CIV.P. 65(b). Therefore, how much notice is “enough” under Rule 65 varies with the circumstances of the case.³

GSK, at the request of the Defendants, set the hearing for October 26, which is reasonable notice given the nature and extent of the Defendants’ preparation and litigation to date of the *Tafas* case, which presents similar issues. The Defendants give no cogent reason why they need more time, other than making the conclusory assertion that GSK’s motion is “massive” (Docket # 17, *Emergency Motion* at 1). Most of that “mass” is actually the text of the Final Rules which the Defendants wrote and an exemplar patent (Docket # 14, Exhibit A; Docket # 15, Exhibit B-1). Mr. Manbeck’s declaration in large part avers to no more than what was in the original *Complaint*, which Defendants received on October 10. All of GSK’s legal arguments for a preliminary injunction are found within the four-corners of its brief (Docket # 14). There is no reason why the Defendants cannot respond to the motion in the eleven days between the filing date and hearing date.

The Defendants caused this problem by publishing 129 pages of complex Final Rules with comments with a requirement that they be fully implemented by all patent applicants, including large companies such as GSK, in just over two months. They cannot deny this Court ample time to consider the issues and GSK a right to appeal any resulting order by saying they cannot get prepared in time to defend their own actions.

³ The Defendants’ citation to, and reliance on, the local rules governing ordinary motion practice under Rule 7 is misplaced (Docket # 17, *Emergency Motion* at 4, ¶ 6) (citing E.D.VA.CIV.R. 7(F)(1)). Those rules are not controlling under Rule 65. Likewise, the Defendants’ calculation of time under Rules 5 and 6(e) is inapposite. The notice procedures of Rule 65(a) and (b) apply.

CONCLUSION

The Defendants' motion for a continuance of the hearing to October 31 should be denied, and this matter should be set down on the normal hearing day, October 26, which was originally requested by Defendants.

Date: October 17, 2007

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was filed electronically this 17th day of October 2007 using the CM/ECF system, which will send notification by electronic means to the following counsel of record:

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