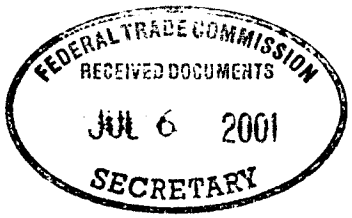
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	Docket No. 9297
and	)	
American Home Products Corporation, a corporation.	)	

ORDER DENYING SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

I.

On June 11, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for a protective order to prevent Complaint Counsel from taking the depositions of four outside members of Schering's Board of Directors. Complaint Counsel filed an opposition on June 25, 2001. On June 26, 2001, Schering filed a request for leave to file a reply brief and its reply brief. That request is GRANTED. For the reasons set forth below, Schering's motion is DENIED.

II.

The Complaint alleges that when Schering and Respondent Upsher-Smith Laboratories Corp. ("Upsher-Smith") settled a patent infringement lawsuit in 1997, Schering agreed to pay Upsher-Smith $60 million. Complaint Counsel asserts that the reasons for Schering's payment of $60 million to Upsher-Smith are central to this lawsuit. According to Complaint Counsel, Schering states that it paid $60 million as fair market value for licenses allowing Schering to market certain Upsher-Smith products.

Complaint Counsel seeks to depose four outside directors of Schering whom Complaint Counsel believes participated in Schering's decision to enter into this settlement agreement with Upsher-Smith. Complaint Counsel asserts that the four directors are uniquely qualified to testify about the factors they considered and the reasons that they approved the payments.

Schering has stated in its memorandum in support of its motion that the four directors attended a meeting of Schering's Board of Directors at which they approved the settlement of the patent litigation with Upsher-Smith. Memorandum in Support of Schering Plough Corporation's Motion for Protective Order at 3. However, Schering asserts, the four directors have no unique personal knowledge of, or daily active involvement in, matters at issue in this case. Schering further asserts that none of the named directors is an officer or employee of Schering, and none is likely to have unique or detailed knowledge of Schering's management, the development of K-Dur 20, the underlying patent litigations with Upsher and ESI, or the settlement agreements that form the foundation of the FTC Complaint. Schering argues that, of all the people attending the Board of Director's meeting at which the settlement of the Upsher patent litigation was approved, the four named directors would appear to be the least likely to have any recollection of the settlement. Schering suggests that the individuals who prepared and made the presentation to the Board, or other members of the Board who were involved in Schering's day-to-day business, likely would possess greater knowledge and recollection of the facts relevant to the Upsher settlement.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint. 16 C.F.R. § 3.31(c)(1). An Administrative Law Judge may limit discovery if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d).

Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (permitting plaintiff to proceed with deposition of publisher in defendant's absence of showing that proposed deponent had no personal knowledge). Courts granting protective orders to bar depositions of corporate officials have done so where the proposed deponent has submitted an affidavit stating that he or she has no knowledge of matters at issue in litigation. E.g., *Elvis Presley Enter., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). See also *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) (granting protective order where proposed deponent did not have any direct knowledge of the facts). A party's incantation that a proposed deponent is a corporate official with limited knowledge cannot insulate him from appropriate discovery. *Rolscreen Co. v. Pella Products, Inc.*, 145 F.R.D. 92, 97 (S.D. Ia. 1992).

"When the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action." *Travelers Rental Co., Inc. v. Fordmotor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987) (allowing depositions of four corporate officials who implemented and/or administered plan

challenged by plaintiff as anticompetitive on grounds that plaintiff was exploring defendant's motive). And, where a proposed deponent has admitted to approving a challenged agreement, plaintiff "is entitled to explore whether [the proposed deponent] has knowledge concerning the motivation behind that decision." *Rolscreen*, 145 F.R.D. at 97. Further, though the deposition testimony of corporate officials "may prove to be duplicative in some respects from that provided by lower ranking executives, individuals with greater authority may have the final word on why a company undertakes certain actions, and the motives underlying those actions." *Id.*

IV.

Schering, as the party moving for a protective order, has failed to carry its burden of demonstrating good cause why the four board members should not be deposed. Schering has not made a specific demonstration that the four directors have no personal knowledge of the agreement challenged by Complaint Counsel as anticompetitive. Instead, Schering asserts that the board members are busy individuals and that others at Schering may have greater knowledge. Schering admits that these four directors approved the settlement agreement that is at issue in this case. Therefore, the proposed deponents have personal knowledge which Complaint Counsel is entitled to discover. Accordingly, Schering's motion for a protective order is DENIED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: July 6, 2001