

**UNITED STATES OF AMERICAN
BEFORE THE 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)	
)	

**RESPONDENT' MOTION FOR LEAVE TO FILE REPLY TO COMPLAINT CONSEL'S
OPPOSITION TO MOTION FOR PROTECTIVE ORDER**

Pursuant to Rule 3.22(c) and (d) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(c) and (d), Schering-Plough Corporation (“Respondent”) hereby respectfully requests leave to file a brief reply to Complaint Counsel’s opposition to Respondents’ motion for a protective order.

Respondent believes that this reply will be helpful to the Court in determining that Complaint Counsel’s notice of depositions are untimely and overly burdensome in light of their negligible potential benefit.

Respectfully submitted,

Of Counsel:

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Attorneys for Respondent
Schering-Plough Corporation

Dated: November 7, 2001

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**RESPONDENTS' REPLY TO
COMPLAINT COUNSEL'S OPPOSITION TO
MOTION FOR PROTECTIVE ORDER**

Schering-Plough Corporation (“Schering”) submits this reply to Complaint Counsel’s opposition to Respondent’s motion for a protective order preventing the taking of the depositions of David Poorvin and Chris Dilascia. Here, a protective order is appropriate because the “burden . . . of the proposed discovery outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(1)(iii); *see also* 16 C.F.R. § 3.31(d).

Neither deponent had any involvement in the agreements at issue and neither is listed on any party’s witness list. Nor is either a proper rebuttal witness. Furthermore, Complaint Counsel has been well aware of Poorvin and Dilascia since the pre-complaint investigation stage, made the conscious choice not to list either on its witness list, and sought no discovery regarding the deponents until near the end of discovery.

Now however, at the end of the discovery period, Complaint Counsel wants to depose Poorvin and Dilascia despite the fact that there is minimal, if any, benefit in conducting the proposed depositions. Complaint Counsel’s arguments in favor of

deposing the individuals are unpersuasive. Complaint Counsel concedes that Poorvin and Dilascia's "existence were known to complaint counsel earlier during this proceeding," but asserts that their "significance" was not known. Opposition at 3. However, Complaint Counsel's own expert identified Mr. Poorvin and discussed his role at Schering well before they noticed Poorvin's deposition. *See* Levy Report at 14. Levy's report was submitted on August 13, 2001, seven weeks before Complaint Counsel noticed Poorvin's deposition, and over a month before Complaint Counsel served its revised witness list. Furthermore, Complaint Counsel had Respondent's organizational charts during the pre-complaint investigation. These charts detail the names and titles of the deponents and are a clear indication of any potential role Poorvin or Dilascia could have played in the matters at issue. Complaint Counsel also had documents written by or distributed to the witnesses since the investigation and clearly could have identified the alleged significance of the witnesses long ago. Despite the foregoing, Complaint Counsel chose not to list Mr. Poorvin or Mr. Dilascia on their witness list, and never sought any discovery relative to the proposed deponents until the final stages of discovery.

With regard to Mr. Dilascia, Complaint Counsel alleges that "the significance of [Dilascia's] testimony . . . only became apparent from . . . respondents' expert reports." Opposition at 3. Complaint Counsel cites as support Summanth Addanki's expert report of October 8, 2001. However, Complaint Counsel served a subpoena for the noticed deposition on October 4, 2001 – four days before Complaint Counsel ever saw this report. *See* Opposition at 6; Bokar Dec. at ¶ 2. Moreover, the documents on which the Addanki report is based are amongst the volumes of documents that have been available to Complaint Counsel since the pre-complaint investigation.

Complaint Counsel also states that it needs Dilascia as a rebuttal witness to respond to Addanki's market definition argument. However, establishing a market definition is Complaint Counsel's burden, not Respondent's. Thus, if Complaint Counsel needed Dilascia to support its market definition, they would need to affirmatively

designate him as a witness in their case in chief, which they have not done. As such, Dilascia cannot be a proper rebuttal witness. Finally, as the Addanki report never actually identifies Dilascia, it is difficult to determine how it was this report that first tipped Complaint Counsel off to the deponents' "significance." Complaint Counsel's justification for its late realization of the witnesses' significance is implausible and can provide no justification for the arguments in opposition to the protective order.

Complaint Counsel also suggests that the depositions are proper because the deponents are potential rebuttal witnesses. They are not. Complaint Counsel attempts to justify Poorvin as a rebuttal witness on the ground that Respondent has argued that there is nothing "anomalous" about the Niacor license relative to Schering's other licenses. *See* Opposition at 3. Complaint Counsel misstates Respondent's position. Indeed, Respondent has consistently taken the position that each of its license agreements is factually unique and that the process needed to evaluate each license opportunity is different. *See* Horovitz Report at 23; McVey Report at 24; Demola Dep. at 26:11-17, 27:24-28:12, 29:16-30:3; Grewcock Dep. at 117:14-118:8, 120:6-121:6, 123:11-124:10. As such, Complaint Counsel cannot justify the depositions on this ground.

Finally, Complaint Counsel argues that the Poorvin and Dilascia depositions have not taken place only as a result of Respondent's foot dragging.¹ However, Complaint Counsel's own declaration establishes that the parties promptly entered into a dialogue regarding the propriety of the depositions and that Ms. Shores, counsel for Respondent, "left a message describing her opposition to the noticed depositions" on the basis that the witnesses were not on any party's witness list. *See* Bokat Dec. at ¶ 5. A few days later, after the parties continued to discuss the propriety of the depositions, Ms. Shores again questioned the deposition notices and indicated that the present motion was forthcoming

¹ First and foremost, this argument ignores the critical fact that Complaint Counsel did absolutely nothing over the last two years to seek discovery regarding the deponents despite their obvious ability to do so. It also ignores the fact that the witnesses are improper rebuttal witnesses and had no involvement in the issues at hand.

if an agreement could not be had. *See* Bokat at Dec. ¶ 7. The parties spoke again the following day, during which Respondent reiterated its opposition and requested that Complaint Counsel withdraw the notice in light of the numerous other depositions to be completed before discovery cut-off. *See* Bokat Dec at ¶ 8. Complaint Counsel then took five days to consider and ultimately reject the requested withdrawal. *See id*; Bokat Dec. at ¶ 9. Respondent promptly filed the promised protective order only after the parties came to an impasse when reasonable negotiations failed. To suggest, therefore, that Respondent delayed the deposition is unsupported by Complaint Counsel's own opposition papers.

For the foregoing reasons and those presented in Respondent's Motion for a Protective Order, and supporting memorandum, Respondent respectfully requests that the Court grant the protective order.

Respectfully submitted,

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Attorneys for Respondent
Schering-Plough Corporation

Dated: November 7, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of November, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Motion for Leave to File a Reply Brief and Reply Memorandum in Support of Motion for Protective Order to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

Karen Bokat
Bureau of Competition
Federal Trade Commission
Washington, D.C.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
Washington, D.C. 20005

Erik T. Koons

CERTIFICATION

I hereby certify that this 7th day of November, 2001, I caused an electronic copy of Schering-Plough Corporation's Motion for Leave to File a Reply Brief and Reply Memorandum in Support of Motion for Protective Order to be filed with the Secretary of the Commission. I further certify that these are true and correct copies of the paper original and that a paper copy with an original signature is being filed with the Secretary of the Commission.

Erik T. Koons