

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories,)
a corporation,)
)
and)
)
American Home Products Corporation,)
A corporation.)

Docket No. 9297

PUBLIC VERSION

**RESPONDENT SCHERING-PLOUGH CORPORATION'S
EMERGENCY MOTION AND INCORPORATED MEMORANDUM
REGARDING PRESENTATION OF DEPOSITION TESTIMONY AT HEARING**

Respondent Schering-Plough Corporation ("Schering") respectfully submits this emergency motion and incorporated memorandum regarding presentation of deposition testimony at the hearing in this matter.

I. INTRODUCTION

At the status conference held on December 20, 2001, the Court requested the parties to brief the issue of whether excerpts of deposition testimony will be read to the Court at the hearing or submitted for the record and the Court's consideration. Complaint counsel had informed Schering's counsel that it would file a motion on this subject on January 4, 2002, but no motion was filed on that date. In response to Schering's inquiry on January 5, complaint counsel stated that it planned to incorporate this issue into its response to respondents' motions *in limine* to limit complaint counsel's use of investigative hearing and deposition testimony at the hearing.

Complaint counsel plans to read brief excerpts from its deposition designations into the record as part of its case-in-chief, and seeks to prevent the portions of respondents' counterdesignations that ought in fairness to be considered with complaint counsel's designations from being read at that time. Schering believes that a prompt ruling from the Court regarding whether and how deposition testimony will be presented at the hearing will greatly assist the parties' trial preparations. Thus, Schering submits this emergency motion and asks that complaint counsel be ordered to respond to the motion by Thursday, January 10, 2002. Schering attempted to confer with complaint counsel regarding the date for its response to this motion, but as of the time of filing, complaint counsel had not yet responded to Schering's telephone call.

II. FACTUAL BACKGROUND

On December 14, 2001, pursuant to the Court's Third Revised Scheduling Order, complaint counsel provided respondents with voluminous designations of testimony from the investigative hearing and deposition transcripts of dozens of party and non-party witnesses.¹ On January 2, 2002, complaint counsel informed counsel for Schering that complaint counsel intends to submit the bulk of its designated deposition testimony as exhibits prior to the hearing.

We understand that complaint counsel plans to read brief excerpts from its designated testimony to the Court during the presentation of its case-in-chief. When counsel for Schering requested advance notice of what excerpts complaint counsel intended to read, so that Schering might designate excerpts from its counterdesignations that ought in fairness to be considered with complaint counsel's excerpts, complaint counsel stated that respondents are not entitled to advance notice. Furthermore,

¹ Respondents have challenged the admissibility of all of the investigative hearing testimony and of certain categories of deposition testimony in separate motions *in limine*. This motion does not address the admissibility of complaint counsel's designated testimony, but argues that the presentation of any admissible testimony at the hearing must be complete and fair to respondents.

complaint counsel stated that respondents should wait until their own case-in-chief to read any of their counterdesignations.

III. ARGUMENT

The one-sided presentation of testimony suggested by complaint counsel does not comport with the procedures set forth in the Commission's Rules of Practice for the use of depositions in hearings. Rule 3.33(g)(1)(iv) expressly provides that: "If only part of a deposition is offered in evidence by any party, any other party may introduce any other part which ought in fairness to be considered with the part introduced." If complaint counsel does not provide respondents with advance notice of the portions of deposition testimony it plans to read live at the hearing, respondents will be denied the opportunity to introduce additional portions of the same deposition that in fairness should be considered with the portions presented by complaint counsel.

Complaint counsel's suggestion that respondents can present additional portions of deposition testimony in their own case in chief does not satisfy Rule 3.33(g)(1)(iv). In federal cases governed by the almost identically-worded Federal Rule of Civil Procedure 32(a)(4), the usual practice is for the party offering the testimony to read in portions of its opponent's counterdesignations along with its own designations. See *Manual for Complex Litigation, Third*, § 22.331 at 147 (1999) (portions of deposition designated by one party and counterdesignations made by other party in response "usually will be introduced at trial in the same sequence in which they appear in the deposition"). Under no circumstances is the opponent required to wait until its case to read in counterdesignations that ought "in fairness to be considered with the part introduced," Fed. R. Civ. P. 32(a)(4). "[T]he opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition." *Westinghouse Elec. Corp. v. Wray Equipment Corp.*, 286 F.2d 491, 494 (1st Cir. 1961) (construing Fed. R. 26(d)(4), precursor to current Fed. R. 32(a)(4)); 7

Moore's Federal Practice & Procedure § 32.61 (2001) ("The best practice is for the adverse party to request that the additional parts be read when the party who introduced excerpts from the deposition has completed his or her reading") (citing *Westinghouse*).

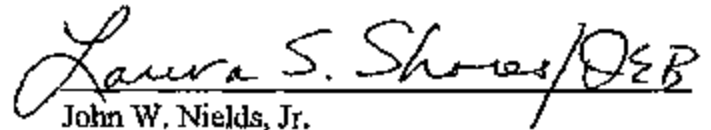
In *Westinghouse*, plaintiff read into evidence portions of several depositions. The district court denied defendants' request to introduce at the same time additional portions of those depositions relevant to those read into evidence, stating that defendants could introduce this testimony at a later time. The First Circuit held that the trial court had erred in refusing defendants' request to introduce the responsive testimony contemporaneously. The court of appeals noted that as a result of the district court's ruling, "[i]n this case the supplementary relevant testimony [offered by the defendants for completeness] . . . was separated by more than 1,000 pages of [trial] transcript from the deposition testimony introduced by the plaintiff." 286 F.2d at 494. The court concluded that "such a wide separation of the relevant parts of a deposition unduly impedes the orderly consideration of the deposition testimony, even in a non-jury case." *Id.*

Complaint counsel's proposed method of reading its designated deposition testimony without contemporaneous presentation respondents' counterdesignations would cause the same problems identified by the First Circuit in *Westinghouse*. The Court would hear portions of testimony offered by complaint counsel, but would have no way of knowing at the time whether the same deponent gave additional testimony that put complaint counsel's designations in context. Such a one-sided presentation of the evidence could create the very "misimpressions from selective use of deposition testimony" that Rule 3.33(g)(1)(iv) and its counterpart in the Federal Rules of Civil Procedure were designed to avoid. *Westinghouse*, 286 F.2d at 494.

Thus, pursuant to Rule 3.33 and the Court's authority to ensure the coherent, fair presentation of proof in this case, the Court should require complaint counsel to notify respondents in advance of the deposition excerpts it plans to present live at the hearing and should permit respondents to present, at the same time, counter-designations that

"ought in fairness to be considered" along with complaint counsel's designations. Rule 3.33(g)(1)(iv). Schering respectfully requests that complaint counsel be ordered to provide respondents notification of what excerpts they intend to read 48 hours in advance.

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura S. Shores" followed by a large, stylized initial "DEB" written over the end of the name.

John W. Nields, Jr.

Marc G. Schildkraut

Laura S. Shores

Charles A. Loughlin

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Attorneys for Respondent

SCHERING-PLOUGH CORPORATION

Dated: January 7, 2002

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)

Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories,)
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American Home Products Corporation,)
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Docket No. 9297

**ORDER GRANTING SCHERING-PLOUGH CORPORATION'S EMERGENCY
MOTION REGARDING PRESENTATION OF DEPOSITION TESTIMONY AT HEARING**

For the reasons set forth in Schering-Plough Corporation's Motion and Incorporated Memorandum, respondents will be permitted to present contemporaneous designations in response to any designations offered by complaint counsel during the hearing.

Accordingly, IT IS HEREBY ORDERED that Schering's motion regarding presentation of deposition testimony is hereby GRANTED. Complaint counsel will provide respondents with at least 48 hours advance notice regarding any deposition excerpts complaint counsel intends to read at the hearing in this matter. Respondents will provide complaint counsel with counterdesignations to be read at the same time as complaint counsel's designations.

D. Michael Chappell
Administrative Law Judge

Dated: January _____, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of January 2002, I caused an original, one paper copy and an electronic copy of Respondent Schering-Plough Corporation's Emergency Motion And Incorporated Memorandum Regarding Presentation Of Deposition Testimony At Hearing 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:

David Pender
Assistant Director, Bureau of Competition
Federal Trade Commission
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Diane E. Bieri