UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHER-SMITH LABORATORIES, INC.
a corporation,

and

AMERICAN HOME PRODUCTS CORPORATION,

a corporation.

Docket No. 9297

PUBLIC VERSION

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' MOTIONS CONCERNING THE USE OF TRANSCRIPT EXCERPTS

Through their various motions, respondents ask this Court to bar the admissibility of relevant, material, and reliable evidence at trial because complaint counsel seek to introduce this evidence in the form of deposition and investigational hearing transcripts rather than through live testimony.[1] As set forth in detail below, we ask Your Honor to deny respondents' motions in all respects, because:

1. The FTC's rules provide for the liberal admissibility of reliable evidence, and the evidence we seek to admit through deposition and investigational hearing transcripts is reliable on its face.

2. The FTC's rules explicitly permit testimony to be admitted at trial through transcripts, and doing so is a well-established Commission practice.

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[1] In this consolidated response, we address (1) Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts (Jan. 3, 2002); (2) Joinder of Respondent Schering-Plough Corporation (Jan. 3, 2002); and (3) Schering's Emergency Motion and Incorporated Memorandum Regarding Presentation of Deposition Testimony At Hearing (Jan. 7, 2002).

3. Permitting the reading in evidence of selected portions of some transcripts at trial also is a well-established Commission practice, and it is consistent with the FTC's rules permitting Administrative Law Judges broad discretion regarding the presentation of evidence at trial.

4. Respondents' real reason for opposing the use of transcripts at trial appears to be motivated by an effort to disrupt the orderly presentation of complaint counsel's case and would unnecessarily draw out what already is likely to be a lengthy hearing.

5. Respondents will suffer no unfair prejudice by permitting the transcripts to be admitted in evidence and selected portions to be read at trial.

6. Notification to opposing counsel of transcript excerpt readings should conform to Your Honor's policy for live witnesses, and the presentation of such excerpts should occur during each party's own case.

* * * * *

1. The FTC's Rules Provide for the Liberal Admissibility of Reliable Evidence, and the Evidence We Seek to Admit Through Deposition and Investigational Hearing Transcripts Is Reliable on Its Face

It should not be necessary at this stage in the proceeding to have to point out to respondents' counsel that administrative hearings before the Federal Trade Commission are not governed, in the first instance, by the Federal Rules of Evidence, but apparently this remains necessary.[2] As the Supreme Court decided long ago in *FTC v. Cement Institute*:

> administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish

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[2] As Your Honor explained to respondents' counsel at a recent Status Conference, in response to a question about the applicability of the Federal Rules of Evidence from Upsher's counsel, Mr. Curran: "You first look to our rules, and if you can't find guidance in our rules, then you look to the Federal Rules, and any case law supporting that." Transcript of Status Conference (Dec. 20, 2001) at 16.

or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.[3]

Under the FTC's Rules of Practice, "relevant, material, and reliable evidence shall be admitted."[4] As the Commission consistently has ruled, "all relevant and material evidence -- whether hearsay or not -- is admissible, as long as it is reliable."[5] Reliability is the key to admissibility. The Commission has further observed: "Indeed one of the purposes in establishing [tribunals such as the FTC] was to devise a way whereby the exclusionary rules of evidence would be eliminated as a bar to common sense resolution of certain classes of controverted cases."[6] This is consistent with the practice throughout federal administrative agencies, and, as explained by a leading administrative law treatise in its discussion of the rules of evidence in administrative proceedings:

> There are three reasons why it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications. First, the cost of such errors is as great in the agency adjudication context as it is in the judicial context: If the ALJ erroneously excludes reliable evidence, the agency must remand for further proceedings or decide the case on the basis of an incomplete record. Second, the risk of error of exclusion is greater in the agency adjudication context

[3] 333 U.S. 683, 705-06 (1948) (citations omitted).

[4] 16 C.F.R. § 3.43(b) (emphasis added).

[5] *American Home Products Corporation*, 98 F.T.C. 136 at n.9 (1981). *See also Kellogg Co.*, 99 F.T.C. 8, 31-32 (1982) ("Section 3.43(b) of the Commission's Rules of Practice provides for the admission of relevant, material, and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received.") (citations omitted); *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) ("it is long settled that hearsay evidence is not to be out of hand rejected or excluded in administrative tribunals.")

[6] *Philadelphia Carpet Co.*, 64 F.T.C. at 773.

than in the context of a jury trial. Third, there are good reasons to take this risk in the jury trial context that do not exist in the case of agency adjudications.[7]

The evidence we seek to have admitted through deposition and investigational hearing transcripts is reliable on its face, and respondents' counsel have not even attempted to make the particularized showing necessary to demonstrate otherwise.

- The depositions each are stenographically recorded, verbatim transcripts of the witness's testimony taken under oath with the witness's counsel present, as well as counsel for each of the respondents. Respondents' counsel had the opportunity to make objections (and they did) and to conduct cross-examination and ask questions (which, in some instances, they did).[8]

- The investigational hearings each are stenographically recorded, verbatim transcripts of the witness's testimony taken under oath with the witness's counsel present. Of the 14 investigational hearing transcripts we seek to use, 12 are of witnesses from one of the respondents or Schering's co-conspirator American Home Products (AHP). In each of these instances, at least one of the respondent's counsel had the opportunity to make objections (and they did) and to conduct cross-examination and ask questions (which, in some instances, they did).[9]

- Respondents' experts, in forming their opinions, rely on many of the very depositions and investigational hearing transcripts whose admissibility respondents now challenge as "unreliable." By relying on the evidence from depositions and investigational hearings, presumably these experts concluded that this evidence is of "a type reasonably relied upon by experts in [their] particular field."[10] Surely if respondents' experts can sift through the various transcripts and

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[7] Kenneth C. Davis and Richard J. Pierce, Jr., II *Administrative Law Treatise* (3d ed. 1994) § 10.3 at 125-26.

[8] *See, e.g.*, Denise Dolan Dep., at 143-47 (June 27, 2001) (Attachment A); Mark Halverson Dep., at 195-205 (Oct. 10, 2001) (Attachment B).

[9] *See, e.g.* Ian Troup IH, at 159-64 (May 25, 2000) (Attachment C); Mark Robbins IH, at 102-03 (May 24, 2000) (Attachment D).

[10] Fed. R. of Evid. 703.

pick and choose what evidence they will rely on, Your Honor, in the first instance, and the Commission, upon appeal, can rely on such evidence as well.[11]

- Similarly, our experts have reviewed many of the deposition and investigational hearing transcripts and they rely upon them in forming their opinions and preparing their expert reports and testimony in this case.

- Lastly, the depositions and investigational hearing transcripts of the witnesses from the respondents or co-conspirator AHP (fully 60 of the 63 witnesses) are presumptively reliable and admissible as a matter of law, since they are in the nature of party admissions.[12]

2. **The FTC's Rules Explicitly Permit Testimony to be Admitted at Trial through Transcripts, and Doing So Is a Well-Established Commission Practice**

Having set forth the general rule of the admissibility of evidence in Commission proceedings and having established why the transcripts in this case are presumptively reliable – hence admissible – as a matter of Commission evidence law, we now turn to the specific legal bases for the admissibility of transcripts and their use at trial. Contrary to representations of respondents' counsel, the Commission's Rules of Practice make specific provision for the use of deposition transcript testimony at trial as substantive evidence without calling the witness, even if the witness is otherwise available, and doing precisely this is a well-established practice at the

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[11] *See generally* Davis and Pierce, Jr., II *Administrative Law Treatise* § 10.2 at 120 (observing that because agencies like the FTC are experts in the fields in which they adjudicate disputes, they should be permitted to rely on otherwise inadmissible evidence if it is of a type reasonably relied upon by experts in the field).

[12] Although it is not controlling authority in Commission proceedings, Federal Rule of Evidence 801(d)(2) establishes that statements of a party-opponent are not hearsay. Further, under Federal Rule of Evidence 801(d)(2)(E), any statements by a co-conspirator of a party during the course and in furtherance of the conspiracy also are admissible against a party as non-hearsay. In fact, the Commission has specifically applied the co-conspirator rule under the Federal Rules of Evidence to admit evidence from unnamed co-conspirators against respondents in proceedings before the Commission. *American Medical Association*, 94 F.T.C. 701, 957 (1979).

Commission. Additionally, the Commission's Rules of Practice make specific provision for the use at trial of any information and documents that were obtained during the investigation of the matter, and ALJs consistently have determined that this may include the use of investigational hearing testimony obtained during investigations. In fact, Your Honor's Scheduling Order implicitly acknowledges the presumptive admissibility of deposition testimony, where it requires that each party: "Exchange, and serve courtesy copy on ALJ, final proposed witness and exhibits lists, including designated testimony to be presented by deposition . . . ."[13]

With respect to deposition transcripts, FTC Rule of Practice at § 3.33(g)(1) states that "at the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of [several] following provisions."[14] One of the following provisions goes on to say that an "adverse party" may use deposition transcripts "for any purpose" if it is

> [t]he deposition of a party or anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation . . . which is a party.[15]

[13] *See* Scheduling Order (May 3, 2001) at p. 2, as well as every subsequent amendment of the scheduling order.

[14] 16 C.F.R. § 3.33(g)(1).

[15] 16 C.F.R. § 3.33(g)(1)(ii) (emphasis added).

This provision could not be any clearer. All of the deposition transcripts of witnesses from an adverse party – Schering and Upsher – can be used at trial for any purpose.[16]

With respect to investigational hearing transcripts, the specific basis for admitting them can be found at FTC Rule of Practice § 3.43(c), which states that

> any documents . . . or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings <u>and may be offered in evidence by counsel representing the Commission in any such proceeding</u>.[17]

Again, the rule could hardly be clearer. Testimony taken during investigational hearings, by definition, is information obtained by the Commission during the investigation, and thus all investigational hearing transcripts may be offered in evidence in this proceeding.

Having set forth the proper legal standard for admitting deposition and investigational hearing transcripts at trial, the question becomes how have these rules been put into practice in actual cases before the Commission? Administrative Law Judges at the Commission consistently have construed Rules 3.33(g) and 3.43(c) to allow the admission in evidence of deposition and investigational hearing transcripts in lieu of live testimony. In at least eight competition-related

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[16] Upsher suggests that the depositions of five of its employees are not party admissions because these employees are not "officers, directors or managing agents of Upsher-Smith." Upsher Mem. at 12. Upsher's limited view of party admissions, however, is not supported by the law. Each of these employees "exercise [their] judgement in dealing with corporate matter[s]" within the scope of their responsibilities. *Textron, Inc.* 1990 FTC Lexis 483 (1990). The depositions taken of these employees sought information about matters within these employees' responsibilities. Accordingly, under the Commission's rules, the employees identified by Upsher in its motion are "managing agents," and their prior deposition statements are party admissions and admissible as substantive evidence. *See Stearns v. Paccar, Inc.*, 1993 WL 17084, at *4 (10th Cir. 1993) (finding that a truck factory's "planner/buyer," who had discretion to choose particular supplier of bolts for use on the assembly line, fell within the definition of a "managing agent"); *cf.* Fed. R. Evid. 801(d)(2)(D) (defining admission by party-opponent).

[17] 16 C.F.R § 3.43(c) (emphasis added).

cases that have gone to trial at the Commission since 1990, the presiding ALJ permitted the use of deposition and investigational hearing transcripts as substantive evidence at trial.[18] And we are not aware of any administrative proceedings since 1990 in which an ALJ denied a party's request to introduce as substantive evidence deposition and/or investigational hearing transcripts from non-testifying witnesses.

3. Permitting the Reading in Evidence of Selected Portions of Some Transcripts at Trial Is a Well-Established Commission Practice, and It Is Consistent with the FTC's Rules Permitting Administrative Law Judges Broad Discretion Regarding the Presentation of Evidence at Trial

At the recent Status Hearing in this case, complaint counsel indicated our intent to seek leave of this Court to read selected portions of some of the investigational hearing and deposition transcripts in evidence, in lieu of merely offering the transcripts in evidence or calling certain witnesses to testify.[19] Our purpose in seeking to do so is to expedite the presentation of our case-in-chief and rebuttal. Reading selected excerpts from transcripts, where the testimony and party admissions already are locked-in, decreases the amount of time needed to present these witnesses at trial. Since almost all of these witnesses (60 of 63) are employees or experts of the respondents or co-conspirator AHP, it also will increase the effectiveness of the presentation, and

[18] These eight matters are: (1) *Chain Pharmacy Ass'n of New York State, Inc.*, FTC Dkt. 9227 (1991) (Needelman, J.); (2) *Textron, Inc.* FTC Dkt 9226 (1991) (Timony, J.); (3) *R.R. Donnelly & Sons Co., et al.*, FTC Dkt. 9243 (1991) (Parker, J.); (4) *Adventist Health Sytems/West and Ukiah Adventist Hosp.*, FTC Dkt 9234 (1992) (Parker, J.); (5) *California Dental Ass'n*, FTC Dkt. 9259 (Parker, J.); (6) *International Ass'n of Conference Interpreters*, FTC Dkt. 9270 (1996) (Timony, J.); (7) *Toys "R" Us, Inc.*, FTC Dkt. 9278 (1997) (Timony, J.); and (8) *Summit Technology, Inc. & VISX, Inc.*, FTC Dkt. 9286 (1998) (Levin, J.).

[19] At the Status Conference Your Honor requested briefing on how deposition testimony should be handled at trial. Transcript of Status Conference (Dec. 20, 2001) at 14-15. In accordance with Your Honor's request, we submit this discussion as complaint counsel's briefing on the matter.

will obviate the need to spend a lot of time examining witnesses who are, or are associated with, an adverse party.

If we are permitted to use respondents' admissions from depositions and investigational hearings as substantive evidence at trial, we estimate that we only will need approximately four or five trial days to present our case-in-chief. In contrast, respondents' counsel have indicated that they will need at least sixteen trial days to present their defense.[20] Time saved by allowing the reading of selected excerpts from transcripts likely accounts for much of the difference in these estimates. Thus, judicial economy is promoted by the reading of the transcripts, and it will expedite this hearing.

Authority to permit the reading in evidence of relevant portions of transcripts is found in FTC Rules of Practice § 3.42 and § 3.43.[21] Rule § 3.42 gives ALJs broad responsibility and discretion "to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of the proceedings, and to maintain order."[22] Further, Rule 3.43(b) gives the ALJ "control over the mode and order of interrogating witnesses and presenting evidence" so as to make the "interrogation and presentation effective for the ascertainment of truth" and to "[a]void needless consumption of time."[23] The admission in evidence of testimony through the reading of transcripts at trial is well within Your Honor's discretion to control the "mode and order . . . of

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[20] Complaint counsel plans to call three fact witnesses for its case in chief and use selected transcript excerpts for the rest. Upsher reports that it plans to call at least 19 fact witnesses. Schering plans to call at least 28 fact witnesses.

[21] 16 C.F.R. § 3.42 and § 3.43.

[22] 16 C.F.R. § 3.42(c).

[23] 16 C.F.R § 3.43(b)(1) & (2).

presenting evidence." Moreover, it furthers the interest in the efficient management of the presentation of trial evidence as contemplated by the Commission's Rules of Practice.

ALJs at the Commission frequently have ruled that Rules 3.42 and 3.43 permit the reading of deposition and investigational hearing transcripts at trial in lieu of live testimony. In at least three competition-related cases that have gone to trial at the Commission since 1990, the presiding ALJ permitted the reading in evidence of deposition and investigational hearing transcripts at trial.[24] For example, in *Toys R Us*, complaint counsel sought to read in evidence deposition and investigational hearing transcripts, and the respondent there made arguments similar to those respondents make here. Chief ALJ Timony quickly disposed of respondent's arguments and permitted the reading of transcripts in evidence.[25]

4. Respondents' Real Reason for Opposing the Use of Transcripts at Trial Appears to Be Motivated by Inappropriate Considerations and Would Unnecessarily Draw Out What Already Is Likely to Be a Lengthy Hearing

What possible purpose is served by respondents' insistence that we be required to call their officers and employees as live -- adverse -- witnesses during our case-in-chief, when we already have gotten all the admissions we need from them? Given that 60 of the 63 witnesses for whom we seek to have testimony admitted by transcript are from the respondents and co-conspirator AHP, we find unpersuasive (and disturbing) respondents' argument that complaint counsel be required to call their witnesses live because "[d]etermining the credibility of witnesses

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[24] These three matters are: (1) *California Dental Ass'n*, FTC Dkt. 9259 (Parker, J.); (2) *International Ass'n of Conference Interpreters*, FTC Dkt. 9270 (1996) (Timony, J.); and (3) *Toys "R" Us, Inc.*, FTC Dkt. 9278 (1997) (Timony, J.).

[25] *Toys "R" Us, Inc.*, FTC Dkt. 9278, Trial Tr. at 35-44 (1997) (Timony, J.) (Attachment E).

is [] crucial in this proceeding."[26] Do respondents seriously intended to challenge the credibility of their own employees? We doubt it. Rather, the more likely purpose of respondents' motions is to disrupt the orderly presentation of complaint counsel's case-in-chief, so that respondents can attempt to argue their case through their witnesses in the middle of our presentation. This need not, and should not, be permitted.

5. Respondents Will Suffer No Unfair Prejudice by Permitting the Transcripts to Be Admitted in Evidence and that Portions Be Read at Trial

Respondents cannot seriously claim unfair prejudice should Your Honor permit the deposition and investigational hearing transcripts to be admitted in evidence and portions of the transcripts to be read in evidence at trial.

With respect to the admission and reading in of deposition transcripts, respondents will suffer no unfair prejudice because:

- Respondents' counsel were present at every deposition and had the opportunity to make objections (which they did) and to conduct cross-examination and ask questions (which, in some instances, they did).
- Most of the witnesses for whom we seek to admit deposition testimony (60 of 61) are employees or experts of respondents or co-conspirator AHP.
- Respondents have included most of these people on their witness list (50 of 61), and they remain free to call all of them as part of their defense.
- As to the sole third-party witness for whom we seek to admit deposition testimony, we currently intend to call him live as a witness during our rebuttal, and respondents will have the opportunity to cross-examine him at that time.
- Respondents have had the same opportunity to identify and read in transcript excerpts of their own choosing.

[26] Upsher Motion at 10-11.

With respect to the admission and reading in of investigational hearing transcripts, respondents cannot claim unfair prejudice because:

- Of the 14 investigational hearing transcripts we seek to use, 12 are of witnesses from one of the respondents or co-conspirator AHP. In each of these instances, at least one of the respondent's counsel or counsel for co-conspirator AHP had the opportunity to make objections (and they did). (Moreover, each of these 12 witnesses were also deposed in this case. Thus, respondents' counsel have had the opportunity to make objections and cross-examine these witnesses at that time.)

- Respondents' counsel have had copies of every investigational hearing transcript – whether the witness was theirs or a third-party – since June 1, 2001, and respondents have had ample opportunity to depose the witness during the discovery phase of this case. (Respondents' failure to do so should not be a basis for preventing complaint counsel's legitimate use of these reliable transcripts.)

- Respondents have been on notice of our intention to use the testimony of each person subject to an investigational hearing, as these people have been included on our witness lists. (Again, respondents' failure to depose these witnesses should not be a basis for preventing complaint counsel's legitimate use of these reliable transcripts.)

- As to the two third-party witness for whom we seek to admit deposition testimony, we currently intend to call them live as witnesses during our rebuttal, and respondents will have the opportunity to cross-examine them at that time.

For each of these reasons, the admissibility of the deposition and investigational hearing transcripts here is readily distinguished on the facts from the due process concerns that were raised by the Commission and the courts in the cases concerning the FTC investigational hearing transcript cited by Upsher's counsel at pages 5-9 of its January 3, 2002, motion.

Simply put, respondents will not be unfairly prejudiced should Your Honor permit the deposition and investigational hearing transcripts to be admitted in evidence, and portions of the transcripts to be read in evidence at trial. On the other hand, complaint counsel will suffer

prejudice should Your Honor deny us the use of this reliable, relevant, and material evidence at trial.

6. Notification to Opposing Counsel of Transcript Excerpt Readings Should Conform to Your Honor's Policy for Live Witnesses and the Presentation of Such Excerpts Should Occur During Each Party's Own Case

Should Your Honor permit complaint counsel to read from select investigational hearing and deposition transcript excerpts at the hearing, respondents claim they are entitled to know in advance exactly which excerpts we intend to read, and to have an opportunity to offer their own counter-designations right afterwards during our case-in-chief. We disagree with respondents' position and address these points in turn.

With respect to the timing and content of the notice, we submit that each party should receive the same notice for transcript excerpts as it would for live witnesses. For live witnesses, this Court's "Logistics for Trial" memorandum states only that counsel shall identify the witnesses "they anticipate calling in the next three days."[27] In other words, parties are entitled to learn the identity of the witness three days in advance of testimony, but nothing more. For transcript readings, the notice policy should be the same – each party will identify three days in advance from whose transcripts they anticipate reading at the hearing. Respondents can hardly claim unfair prejudice by not receiving advance notice of the precise transcript portions we intend to read at the hearing, particularly since they already know from our designations the entire universe of possible excerpts for each witness. This is far more information than respondents may know about a live witness, since the pre-trial notification of expected testimony for witnesses who will be called at trial is limited only to a brief summary of expected testimony.

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[27] Schering-Plough Corp., No. 9297 - Logistics for Trial (Attachment F).

With respect to the timing of respondents' presentation of counter-designations, we submit that each party should offer its transcript excerpts during its own case. Contrary to Schering's argument, nothing in Commission Rule 3.33(g)(1)(iv) or the law requires otherwise.[28] That rule provides that if only part of a deposition is offered in evidence, the other party may introduce other portions of the same deposition for the sake of completeness.[29] But the issue here is not whether respondents can introduce in evidence additional deposition portions, they can; and respondents not only have had the opportunity to counter-designate portions of depositions and investigational hearing transcripts from which we identified excerpts, but they remain free to introduce in evidence portions of transcripts, if properly and timely designated. Indeed, if respondents do counter-designate transcript portions, they would be part of the record and available for Your Honor's consideration, whether respondents read them at the hearing or not.

Instead, the issue is whether respondents will be permitted to disrupt our presentation of evidence by arguing its case through excerpts of its witnesses during the middle of our presentation. Your Honor has the discretion to control the "mode and order. . . of presenting evidence"[30] and Rule 3.33(g)(1)(iv) says nothing to constrain that discretion. The Court will benefit from an orderly presentation of evidence in what is expected to be a lengthy hearing, and

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[28] *See Blue Cross and Blue Shield vs. Philip Morris, Inc.*, 199 F.R.D. 487, 489 (E.D.N.Y. 2001) ("Because there are so many of these depositions. . . the plaintiff will be permitted to play the portions it wishes in its case-in-chief without counter-designations. The defendants may do the same in their case after the plaintiff rests.").

[29] 16 C.F.R. § 3.33(g)(1)(iv).

[30] 16 C.F.R. § 3.43(b).

respondents will suffer no prejudice by being required to introduce their evidence during their defense.[31]

For the reasons stated above, complaint counsel respectfully requests that Your Honor deny: (1) Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts; (2) the Joinder of Respondent Schering-Plough Corporation in Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts; and (3) Respondent Schering-Plough Corporation's Emergency Motion and Incorporation Memorandum Regarding Presentation of Deposition Testimony At Hearing. We further request that Your Honor admit all of complaint counsel's transcript designations in evidence and permit us to read selected portions of those transcripts at trial.

Respectfully Submitted,

Karen Bokat
Bradley S. Albert
Karan Singh

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: January 22, 2002

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[31] Should Your Honor decide to permit respondents to introduce counter-designated transcript readings during our case-in-chief, we respectfully submit that these readings should be limited, in accordance with Rule 3.33(g)(1)(iv), to those portions necessary to put our selections in context, and should not include respondents' affirmative evidence that should only be presented during their defense.

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of January, 2002, I caused a copy of the foregoing Public Version of Complaint Counsel's Response to Respondents' Motions Concerning the Use of Transcript Excerpts to be served upon the following person by hand delivery:

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

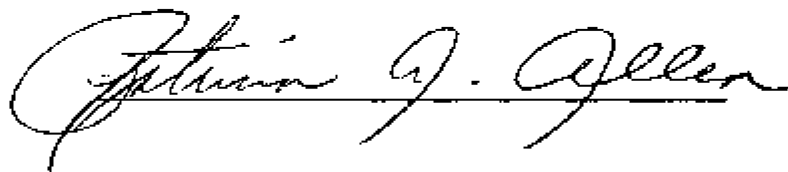
I caused one original and one copy to be served by hand delivery and one copy to be served by electronic mail upon the following person:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused copies to be served upon the following persons by electronic mail and Federal Express:

Laura S. Shores
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

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



ATTACHMENT A

In The Matter Of:

SCHERING-PLOUGH CORP., UPSHER-SMITH LABORATORIES AND AMERICAN HOME PRODUCTS CORP.

DENISE DOLAN, CONFIDENTIAL
June 27, 2001

For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333

Original File 10627DOLASC, 153 Pages
Min-U-Script® File ID: 0433178010

Word Index included with this Min-U-Script®

The remaining pages of the transcript have been redacted.

ATTACHMENT B

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

DOCKET NO.	D09297
TITLE	SCHERING-PLOUGH/UPSHER-SMITH/AMERICAN HOME PRODUCTS CORPORATION
PLACE	UPSHER-SMITH LABORATORIES 13700 FIRST AVENUE NORTH PLYMOUTH, MINNESOTA
DATE	OCTOBER 10, 2001
PAGES	1 THROUGH 210

DEPOSITION OF MARK HALVORSEN

RESTRICTED CONFIDENTIAL - ATTORNEY EYES ONLY

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

The remaining pages of the transcript have been redacted.

ATTACHMENT C

In The Matter Of:

SCHERING-PLOUGH & UPSHER-SMITH
MATTER NO. 9910256

IAN TROUP
May 25, 2000

For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333

Original File 00525TRO.ASC, 166 Pages
Min-U-Script® File ID: 0500934891

Word Index included with this Min-U-Script®

The remaining pages of the transcript have been redacted.

ATTACHMENT D

In The Matter Of:

SCHERING-PLOUGH & UPSHER-SMITH
MATTER NO. 9910256

MARK S. ROBBINS
May 24, 2000

For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333

Original File 00524ROB.ASC, 104 Pages
Min-U-Script® File ID: 2332478962

Word Index included with this Min-U-Script®

The remaining pages of the transcript have been redacted.

ATTACHMENT E

1 FEDERAL TRADE COMMISSION

2

3 In the Matter of:)

4 TOYS "R" US, INC.,)

5 a corporation.) Docket No. 9278

6 ------------------------------)

7 Friday, February 28, 1997

8

9 Room 532

10 Federal Trade Commission

11 6th Street and Pennsylvania Ave., NW

12 Washington, D.C. 20580

13

14 The above-entitled matter came on for prehearing

15 conference, pursuant to notice, at 10:00 a.m.

16

17 APPEARANCES:

18

19 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

20 RICHARD DAGEN, Attorney

21 L. BARRY COSTILO, Attorney

22 PATRICK ROACH, Attorney

23 SARAH OXENHAM ALLEN, Attorney

24 JAMES W. FROST, Attorney

25 Federal Trade Commission

1 document day as -- in terms of scheduling witnesses that were
2 coming in from out of town, we had to send out the subpoenas
3 a while back, and so we --
4 JUDGE TIMONY: So, you have already --
5 MR. DAGEN: -- we gave a day for document day and we
6 gave a day for oral argument, and there was some possibility
7 of a summary judgment argument. So, the first witness is
8 scheduled for Thursday right now.
9 JUDGE TIMONY: Well, you could move somebody up,
10 couldn't you?
11 MR. DAGEN: As I indicated before, most -- these
12 people have all been subpoenaed to come those days. These
13 are all business executives, both from the manufacturers and
14 from the warehouse clubs. We have got the presidents of a
15 couple of the clubs coming in Thursday. We have subpoenaed
16 them for Thursday, and --
17 JUDGE TIMONY: It's hard to make them re-arrange it
18 at this point, yes.
19 MR. DAGEN: It's very difficult.
20 JUDGE TIMONY: Okay, I don't want to interfere with
21 their business procedure any more than possible here, but
22 what happened to the idea that you were going to read the
23 document -- the depositions?
24 MR. DAGEN: We plan on doing that. If we only do an
25 hour's worth of opening argument on Tuesday or Wednesday,

1 whenever that is, for each side, we would plan on
2 introducing, to the extent we have time that is available on
3 Tuesday or Wednesday, we would plan on going through some of
4 the admissions from Toys "R" Us at that point.
5 JUDGE TIMONY: How many are you talking about, how
6 many depositions?
7 MR. DAGEN: How many parts of the deposition? There
8 would probably be --
9 JUDGE TIMONY: No, how many depositions? How many
10 different people are you talking about covering, how many
11 witnesses?
12 MR. DAGEN: There are probably maybe seven witnesses,
13 seven Toys "R" Us witnesses, approximately.
14 MR. FELDBERG: Two different points that might help
15 move things along, Your Honor. First of all, on the
16 depositions of Toys "R" Us witnesses, putting aside the fact
17 that these have never been signed, sent to any of these
18 people for signing, if we get beyond that objection, they are
19 going to want -- they obviously -- both sides will want
20 portions of these transcripts in. We don't need to sit here
21 and take court time to read --
22 JUDGE TIMONY: They may want to put yours in, too.
23 MR. FELDBERG: -- deposition transcripts. Let's
24 agree on what's in and what's not in, if there were
25 objections raised or whatever, and let's put it in the

1 record. Your Honor doesn't have to sit there and have
2 deposition transcripts read to you. Your Honor's perfectly
3 -- probably would prefer to read them at your leisure.
4 Let's use court time for court, for testimony.
5 JUDGE TIMONY: What's this argument about they
6 haven't been signed?
7 MR. FELDBERG: Well, they were never -- as best I
8 know, Your Honor, never sent to any of the witnesses for
9 review and signing. These are precomplaint depositions for
10 the most part, but I think we can get beyond that problem,
11 and I -- I think we can probably work something out on that.
12 There were objections made in the course of the -- of
13 the proceedings, and either we will agree on what's
14 admissible or what isn't or we will present disagreements to
15 Your Honor, but to simply take a day or two of court time
16 when we should be listening to witnesses and to read
17 transcripts is -- putting aside it's not the most interesting
18 way to spend time, it's a -- it duplicates the amount of time
19 that's needed.
20 JUDGE TIMONY: Okay.
21 MR. FELDBERG: When complaint counsel insisted that
22 this hearing be held in Washington, despite the fact that
23 there is not a single witness who lives in Washington, and
24 over our objection that the hearing be held someplace where
25 the witnesses are, they didn't tell us they were going to

1 have these problems of getting people here or filling the
2 days.
3 One of the ways to make this trial proceed
4 expeditiously is to use all of the available time, 9:30 to
5 5:30, every day to hear testimony so that maybe we finish
6 well in advance of March 24th. We think we could complete
7 complaint counsel's case in nine or ten trial days, if we us
8 our time well, and we would hope that that would be the way
9 things would proceed.
10 Complaint counsel insisted on having the trial here.
11 They won that argument. But let's have witnesses here and
12 use the time fully so that there is not added expense for
13 both sides.
14 I had a couple of other issues, Your Honor, but I
15 don't know whether --
16 JUDGE TIMONY: Let's stay on this one first.
17 MR. DAGEN: Your Honor, in terms of the trial
18 starting Thursday, again, I don't think we have much to add
19 there. These are -- if we had attempted to have, say, the
20 president or chairman of some of these companies stay here
21 for three days just so we could make sure we did a full day,
22 they would be unhappy, and I'm sure Your Honor didn't want u
23 to require that the president of Mattel and Hasbro sit here
24 at our -- at our convenience --
25 JUDGE TIMONY: Well, we are going to try to be

1 accommodating.

2 MR. DAGEN: So, that's what we have tried to do, '

3 Honor. We have tried to schedule it to make sure that we

4 get the witnesses in and out on the day that they are

5 scheduled.

6 JUDGE TIMONY: I am not going to make you move the

7 witnesses up, but how about this idea of the depositions?

8 MR. DAGEN: The investigational hearings of the To

9 "R" Us witnesses, Your Honor, are admissions.

10 JUDGE TIMONY: But I don't want to hear them all.

11 MR. DAGEN: You are not going to hear them all. Y

12 are just going to be -- there are some particular points i

13 terms of putting on our case that we think would be useful

14 for you to hear.

15 JUDGE TIMONY: How long is it going to take?

16 MR. DAGEN: We can probably read or put in the --

17 those cites in a couple of, you know, probably spend a cou

18 of hours with that and just -- in terms of the documents t

19 are admitted on -- on Tuesday, there would be some of thos

20 documents that we would also be publishing to the Court.

21 I just want -- there was one issue that Mr. Feldbe

22 raised --

23 JUDGE TIMONY: Okay, you have used the words

24 "publishing to the Court." What does that mean?

25 MR. DAGEN: There are some documents that discuss

1 various aspects of the Toys "R" Us policy that they have w
2 -- with the witness -- with the manufacturers, the policy
3 that they were setting forth, and documents that discuss t
4 agreements, and we would propose that, just to show them t
5 the Court --
6 JUDGE TIMONY: You want to argue them to me?
7 MR. DAGEN: Just -- when I use the term "publish,"
8 introduce them to the Judge. They won't be -- they will ha
9 already been admitted into evidence at that point, and we
10 would then just draw the Court's attention to those
11 particular documents.
12 JUDGE TIMONY: If we have any time, I'll consider
13 it.
14 Go ahead.
15 MR. FELDBERG: Your Honor, two thoughts on that.
16 MR. DAGEN: Before he moves on to another point --
17 MR. FELDBERG: No, I was going to respond.
18 JUDGE TIMONY: No, it's the same issue.
19 Go ahead.
20 MR. FELDBERG: Your Honor, on that issue, anything
21 Mr. Dagen wants to or Mr. Costilo or anyone on complaint
22 counsel's side wants to call to the Court's attention they
23 can put in their opening statement. I don't think we need
24 read, to have massive readings from exhibits that are in
25 evidence. That's argument.

1 There is an opening argument, there may be a closin
2 argument, there will certainly be post-hearing briefs and
3 proposed findings, and I don't think there is a need for ea
4 side to pick its hundred best documents and read them to Yo
5 Honor other than in argument. I think it's duplicative and
6 it wastes time.
7 And I had a thought that just occurred to me. It
8 looks to me like we have -- if we each give an opening
9 argument for an hour on Tuesday morning, we then have from
10 11:30 to 5:30 on Tuesday and from 9:30 to 5:30 on Wednesday
11 which are dead time, and I'm raising this off the top of my
12 head. Would -- to save time in this hearing, and since the
13 apparently can't get a witness here to fill -- or any
14 witnesses here to fill those time slots, would Your Honor
15 consider our going out of turn and putting a few of our
16 witnesses on so that we can use the time efficiently?
17 JUDGE TIMONY: No, I can't do that. Get back to th
18 documents again.
19 If we have any time -- oh, you know I thought about
20 this in this case. Did you receive my proposed findings
21 order?
22 MR. FELDBERG: No.
23 MR. DAGEN: No.
24 JUDGE TIMONY: I'm sure I had my secretary prepare
25 that for you, I -- she's been gone all week. Anyway, I was

1 going to -- I wanted you to see what I looked forward to i
2 proposed finding, and I have one that I issue in every cas
3 now, and I thought I had already issued it, and I had an i
4 what I should have done, so now I can do it.
5 That was, I wanted you to perhaps pick out for me
6 you said a hundred, I was thinking of a lesser amount --
7 MR. FELDBERG: Fine.
8 JUDGE TIMONY: -- your 20 best exhibits, numbering
9 them numerically in descending order in order of importanc
10 I don't want to read 1500 exhibits or 800 or however many
11 have.
12 MR. FELDBERG: When is Your Honor likely to want
13 proposed findings?
14 JUDGE TIMONY: We will figure out when the case --
15 how much time there is between the time the case ends and
16 when we have to have my ID in, and I will give you most of
17 it, at least half of it, and maybe more than that. I only
18 want a month.
19 MR. DAGEN: In terms of those 20 best, did you wan
20 that before trial? Is that what you were saying?
21 JUDGE TIMONY: No, no. Afterwards, I like to see
22 what the case is all about and --
23 MR. DAGEN: See a highlight film.
24 JUDGE TIMONY: Right, highlight film.
25 MR. FELDBERG: I had a few more issues.

1 MR. DAGEN: No, this is something that you raised.
2 JUDGE TIMONY: To get back to this publishing idea,
3 don't mind publishing in that it's like -- I mean, it is
4 something you could do in your argument anyway and summarize
5 but it makes it more colorful and authentic, I think.
6 You said it's argumentative. I think it's better --
7 it's less argumentative. It is more give me what I want,
8 which is what's in the record and not your adjectives and sc
9 forth. But I'm not sure I want to sit here for a day and a
10 half and listen to it either. So, I am going to limit you c
11 the time.
12 The only thing -- the only reason I won't tell you
13 right now how much time you are going to have to do that is
14 don't know how much time we are going to spend on the
15 documents. I hope we -- this isn't a case where we get into
16 one of these details where we are arguing over every
17 document.
18 MR. DAGEN: That was one of the issues that I wanted
19 to bring up. Mr. Feldberg mentioned that they had no --
20 essentially no objections to our documents, and then at some
21 point, I just want to make clear that he's talking -- when h
22 says no objections, that means to business records and to
23 authenticity. I mean, that will solve a lot of the issues
24 here, because business records goes to hearsay, and if he is
25 not objecting to them being business records, then I think

1 our document day will go --

2 JUDGE TIMONY: I think he was just limiting it to

3 authenticity, but let's hear what he says.

4 MR. FELDBERG: I was, Your Honor. Many of them are

5 business records, but business records can contain internal

6 hearsay, so that there is hearsay within -- there are many --

7 I would say most of the complaint counsel's proposed exhibits

8 have hearsay within hearsay problems. So, the business

9 records exception gets you over one hurdle, but it doesn't

10 make them admissible. But we will try -- we are going to try

11 to work that out as soon as we are finished here, and we will

12 work out as many of those issues as we can.

13 On the issue of publishing exhibits, as long as -- as

14 long as we get the same opportunity when we start our case,

15 that -- whatever Your Honor pleases.

16 JUDGE TIMONY: You sure will, yep. I find it

17 interesting, they did it in another case in front of me, not

18 these people, but another team of complaint counsel did it

19 for me last summer or whenever that case was tried in the

20 Interpreters case, and it was pretty effective.

21 MR. FELDBERG: Then we will plan to do it as well

22 when we start our case.

23 JUDGE TIMONY: Um-hum, it's a good way.

24 MR. FELDBERG: I had a couple of issues if Mr. Dagen

25 is finished responding.

ATTACHMENT F

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Administrative Law Judges

SCHERING PLOUGH CORP., No. 9297 – LOGISTICS FOR TRIAL

Refer to provisions in scheduling order regarding presentation of exhibits.

The expected hours of the hearing are 9:00 to 5:00 with a one hour lunch break around 12:00 and with a 10 minute break in both the morning and afternoon, as appropriate. If counsel need to go late in order to finish the testimony of a witness from out of town, the hours may be extended to 6:00, and in rare circumstances, to 7:00.

Respondents' counsel must provide Shirley Jones (202-326-3634) with a written list the attorneys and assistants they anticipate being at the hearing on a consistent basis and a written list of witnesses (and their counsel, if any) they anticipate calling in the next three days, so that Shirley may make arrangements with security for clearance into the building.

Counsel may remain in the courtroom when it is cleared for lunch and may remain in the courtroom for up to one half hour at the end of each day.

Counsel must not present *in camera* material until the courtroom is cleared of all people who are not authorized to see or hear *in camera* material.

Counsel may store documents in the courtroom. It is recommended that counsel bring into the courtroom a filing cabinet that can be locked for storing *in camera* materials.

All electronic devices, such as phones, beepers, watch alarms, and laptops must not be audible. All electronic equipment is the responsibility of the owner. If left in the courtroom unattended, the FTC will not be responsible for any losses or damage.