

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

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

**RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER**

Schering-Plough Corporation and Upsher-Smith Laboratories, Inc.

(“Respondents”) hereby submit this reply to complaint counsel’s opposition to Respondents’ motion for a protective order striking complaint requests for admissions.

Under the Commission’s Rules of Practice, this Court clearly has the authority to grant a protective order where “[t]he burden and expense of the proposed discovery outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(1). Respondents should not be subjected to the time and expense of responding to 816 requests (477 and 339 to Schering and Upsher, respectively) absent some showing by complaint counsel that the burden is outweighed by a relative benefit. In its opposition, complaint counsel has failed to identify any potential benefit to be derived from Respondents’ responses that justifies complaint counsel’s extremely burdensome requests. Thus, a protective order is warranted, and complaint counsel’s Second Requests for Admissions should be stricken.

In defending its requests, complaint counsel argues primarily that the number of requests is insufficient to establish undue burden. However, much of the support complaint counsel offers for this argument is inapposite. The majority of the cases that complaint counsel cites for its contention that “judges have refused to strike” similarly voluminous requests for admissions do not even address an argument that the number of requests was burdensome. *See, e.g., In the Matter of General Motors Corp.*, 1977 FTC LEXIS 293 (1977) (merely examining sufficiency of GM’s responses); *In the Matter of Sterling Drug, Inc., et al.*, 1976 FTC LEXIS 272 (1976) (determining sufficiency of responses or objections not based on numerosity); *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D. Mass. 1961) (no argument that number of requests was burdensome).

Further, the discovery sought in the remainder of cases that complaint counsel cites is notably different from the requests at issue here. For example, *Berry v. Federated Mut. Ins. Co.* allowed 244 documentary requests, but the requests were less burdensome than the instant requests. 110 F.R.D. 441 (N.D. Ind. 1986) (requests sought authentication of a large number of exhibits to be introduced at trial). In *Duncan v. Santaniello*, the court permitted 292 requests, while specifically noting that the legal issues in the case were complex. 1996 U.S. Dist. LEXIS 3860, *6 (D. Mass. 1996). Significantly, the court found that the requests in *Duncan* were not objectionable, regardless of their number. *See id.* at *6-7. Complaint counsel’s requests, on the other hand, are clearly objectionable, as explained in Respondents’ motion. (*See Schering’s Motion for a Protective Order at 3-6.*)¹

¹ Complaint counsel further contends that Respondents should have particularized their objections to complaint counsel’s requests for admissions. However, to do so would be unduly burdensome and wholly defeat the purpose of this motion.

The burden of responding to hundreds of objectionable requests outweighs any benefit that complaint counsel could potentially derive from the responses. Complaint counsel has seemingly misunderstood Respondents' motion and therefore failed to demonstrate any such benefit. Accordingly, complaint counsel's Second Requests for Admissions should be stricken.

Should the Court be inclined to deny Respondents' motion, Respondents request that they be given an appropriate amount of time to respond to the numerous requests for admissions. Complaint counsel's suggestion that Respondents complete their responses by November 8, 2001 is improper considering the substantial burden associated with answering hundreds of requests. Under the Commission's Rules of Practice, a party is given ten days or, if the Court allows, longer to respond to requests. 16 C.F.R. § 3.32(b). In light of the burdensome nature of these requests and the numerous other demands on Respondent's resources, Respondents respectfully request a minimum of fourteen days from the entry of the Court's order on this motion to complete their responses.

Respectfully submitted,

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Dated: October 30, 2001

CERTIFICATION

I hereby certify that this 30th day of October, 2001, I caused an electronic copy of Respondents' 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 originals and that a paper copy with an original signature is being filed with the Secretary of the Commission.

Suzannah P. Land

CERTIFICATE OF SERVICE

I hereby certify that this 30th day of October, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondents' 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:

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