PUBLIC VERSION
Corrected Version

UNITED STATES OF AMERICA
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.	)	

SCHERING-PLOUGH CORPORATION'S OPPOSITION
TO COMPLAINT COUNSEL'S MOTION FOR OFFICIAL NOTICE

Respondent Schering-Plough Corporation ("Schering") respectfully submits this memorandum in opposition to Complaint Counsel's Motion for Official Notice. For the reasons set forth below, the motion should be denied.

I. DISCUSSION

Complaint counsel urges the Court to take official notice of 32 so-called "facts" about the pharmaceutical industry and the Hatch-Waxman Act. Because these "facts" are neither indisputable nor readily verifiable by resort to unquestionably accurate sources, they may not be established through the taking of official notice.

The normal way of establishing facts is by introducing *evidence* at trial, either through the testimony of witnesses or the presentation of real evidence. This procedure flows from the fundamental requirement that a party seeking to establish a proposition

must *prove* it. The concept of official or judicial notice is an exception to this rule: when a fact is so universally known or easily verified that proof of it would be superfluous, it may be judicially noticed by the court. See Fed.R. Evid. 201. The advisory committee notes to the analogous federal rule of evidence cite as an example a case in which a Chicago court took judicial notice of the fact that a given street address was located within the city of Chicago. *See* Fed. R. Evid. 201 advisory committee's note to Subdivision (a). Such a fact was subject to ready verification and thus could not reasonably be in dispute. The court thus took notice of the fact, without the need for actual proof of it.

Complaint counsel asks this Court to relieve it of its duty to present evidence by taking official notice of generalized statements about the pharmaceutical industry set forth in various reports of government agencies. Complaint counsel asks this Court to accept these statements as true, solely because they appear in government documents. Rule 201 does not allow for this type of judicial notice. *See* Fed. R. Evid. 201(a). And, as the cases cited by complaint counsel make clear, Rule 3.43(d) does not either.

For example, in *Reuben H. Donnelley Corp*., the court specifically *declined* to take official notice of four findings in a congressional report. *In the Matter of The Reuben H. Donnelley Corp.,* Dkt No. 9079, 1978 FTC LEXIS 573, at *2 (Nov. 15, 1978). Instead, the court took official notice of the *existence* of the congressional report, and allowed the entire report to be used as an exhibit in the case. The court explained that the whole report would be admitted into evidence because only the whole report would allow the parties and the court to assess "the weight to be given to the [report's] conclusions, by showing to some extent the procedural fairness of the committee and the evidence upon

which the conclusions were based." *Id*. at *3. Indeed, the court specifically cautioned that the admission of the report

> does not mean that the court must accept the findings in the report as indisputable truth; the findings are merely evidence of the facts asserted. . . . The credibility of such evidence will vary according to the thoroughness and impartiality with which the committee conducted its investigation, the fairness of its procedure, the fullness of opportunity it afforded accused individuals or organizations to develop their side of the story; and, of course, the other party may introduce evidence tending to prove the contrary of the facts asserted in the official report.

Id. at *1 (quoting *Stasiukevich v. Nicolls*, 168 F.2d 474, 479 (1st Cir. 1948))[1].

As in *Donnelley*, complaint counsel here asks the Court to take official notice of 32 selected statements from various government reports. These statements are not propositions of generalized knowledge. For example, complaint counsel asks the Court to accept as true that pharmaceutical manufacturers invest an average of about $200 million to bring a new brand-name drug to market. Motion at 7 ¶10. That "fact" is taken from a report dated more than three years ago based on data that are presumably even older.[2] In some cases, other statements in the reports themselves cast doubt on the reliability of the conclusions. For example, the Congressional Budget Office report specifically describes the data contained in the report, and notes that "[e]ach of those data sets has its own strengths and weaknesses." CBO Report at 4. Rather than allowing the

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[1] Notably, in *Stasiukevich*, the First Circuit upheld the district court's admission of two congressional reports into evidence, but expressed doubt that the congressional reports were credible. *Stasiukevich*, 168 F.2d at 479.

[2] Complaint counsel also asks the Court to accept as "fact" other general characterizations about the industry, such as the view that "[m]anufacturers of generic drugs . . . compete more intensely on the basis of price than do innovator drugs"; that "average prices [of drugs] fall primarily because consumers switch from the higher-priced innovator drug to the lower-priced generics"; and "[p]harmaceutical research and development is a costly and risky business, but in recent years the financial rewards from R&D have more than offset its costs and risks." Motion at 7-8, ¶¶ 13, 11 and 21.

parties and the Court to examine these data to assess the reliability of the conclusion drawn from them, complaint counsel proposes that the Court simply accept the conclusion as true—even though the report itself cautions against doing so.

The very cases complaint counsel cites demonstrate that official notice is not to be used in this fashion. In *Beauty-Style Modernizers*, for example, the respondent was alleged to have violated the Truth in Lending Act and corresponding regulations of the Federal Reserve Board. *In the Matter of Beauty-Style Modernizers, Inc*., 83 F.T.C. 1761, 1974 FTC LEXIS 227 (1974). In arguing that it had complied with both the statute and the regulations, the respondent requested that the Commission take official notice of a pamphlet published by the Federal Reserve Board that explained the regulations. *Id*. at 1974 FTC LEXIS 227, *39. The Commission did so, but did not accept the statements in the pamphlet as established *facts*, as complaint counsel here suggests this Court should do. Rather, the Commission merely used the pamphlet as secondary authority useful to help interpret the regulation. *Id*. *See also In the Matter of Skylark Originals, Inc.*, 80 F.T.C. 337, 1972 FTC LEXIS 167, *28 (1972) (at respondent's request, Commission took official notice of its own advertising guidelines for purposes of evaluating respondent's compliance with law against deceptive advertising).

Similarly, in *Thompson Medical Co., Inc*., the Commission referred to the dictionary "for aid in interpreting the common meaning of [the] word ["aspirin"]." *In the Matter of Thompson Medical Co., Inc*., 104 F.T.C. 648, 809-10 (1984). The Commission used the dictionary's definition as *evidence* of how consumers understand the word aspirin, to help decide whether the respondent's advertising was deceptive to consumers. *Id*. The Commission did not, however--as complaint counsel here suggests--take official

notice of the dictionary definitions for purpose of showing that the definitions themselves were true.

Complaint counsel could have chosen to request respondents to admit certain facts about the pharmaceutical industry. Alternatively, complaint counsel might have considered presenting the testimony of an industry expert. What complaint counsel may not do is to avoid its burden of proving the allegations in the complaint by asking this Court to take official notice of alleged facts that are clearly subject to dispute. Complaint counsel must be required to shoulder the burden of proof it has assumed.

II. CONCLUSION

For these reasons, Schering respectfully requests that the Court deny Complaint Counsel's Motion for Official Notice.

Respectfully submitted,

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SCHERING-PLOUGH CORPORATION

Dated: December 26, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of December, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Official Notice, Corrected Version, 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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Erik T. Koons

CERTIFICATION

I hereby certify that this 26th day of December, 2002, I caused an electronic copy of Respondent's Opposition to Complaint Counsel's Motion for Official Notice, Corrected Version, 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