UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

UPSHER-SMITH'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OVERLONG APPEAL BRIEF

Commission Rule 3.52(k) states: "Extensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit." Complaint Counsel do not make the required "strong showing" here. Their attacks on Judge Chappell's Initial Decision are utterly baseless, and in any event these attacks cannot justify an overlong brief — particularly one of 28,125 words or approximately 112½ pages.

I. COMMISSION RULE AND PRECEDENT PRECLUDE EXTENDING THE PAGE LIMITATION HERE

Commission Rule 3.52(b)(2) limits an appeal brief to 18,750 words. When this limitation was adopted, just last year, the Commission stated:

> Our present limit of 90 pages for a typewritten brief is higher than several of our sister agencies, such as the SEC (60 pages) or CFTC (50 pages), but lower than the FERC (100 pages). . . . Although it is true that the Commission's Part 3 cases tend to be complex,

> concerns about the length of briefs are more compelling. The Commission accordingly sets the limit at 75 pages for principal briefs, which converts to 18,750 words using the D.C. Circuit standard of approximately 250 words per page.

66 Fed. Reg. 17622, 17627 (Apr. 3, 2001). The Commission at the same time adopted Rule 3.52(k)'s admonition that word-count extensions are "disfavored" and will only be granted where a party can make a "strong showing" of "undue prejudice."

The Commission thus set the word limitation at 18,750 with a full appreciation of the complexity of Part 3 proceedings. Yet here, in the very first appeal under the new rules, Complaint Counsel seek to exceed not only the new limit, but the old limit as well, by a wide margin. In their motion, Complaint Counsel fail to acknowledge their burden of making a "strong showing" of undue prejudice, and their self-serving assertions about the "extent of error" — a common and predictable refrain among parties who lose at trial — cannot justify that burden.

The arguments Complaint Counsel advance here in support of a lengthy brief were squarely rejected by the Commission in *In the Matter of Toys "R" Us.* There, Toys "R" Us, the losing party at trial, moved to exceed the then-90-page limit for its brief "[d]ue to the length of the proceedings, the complexity of the issues raised therein and the degree to which the Initial Decision ignores the record evidence and misapplies the law." TRU 10/17/97 Mem. at 1. Complaint Counsel opposed the motion, stating:

> Each and every point raised by TRU below is part of the record and may be referred to by TRU in the course of its briefing on appeal. There is no reason why TRU should not be able to focus the issues by succinctly stating the grounds for its appeal within the page limits set by the rules, relying for further elaboration if necessary on citation on its already exhaustive briefs, proposed findings and other discussions preserved in the record. As the Commission itself has recognized, an enlargement of page limits is not justified where a movant "provides no reason for exceeding that limit other than the difficulty of paring down its discussion of

> the case to the required length." *In the Matter of Bristol-Myers Company*, 95 F.T.C. 263 (1980).

CC's 10/23/97 Opp. at 2-3. The Commission denied Toys "R" Us's motion:

> A lengthy record and complex issues are common to many, if not all, antitrust cases litigated before the Commission. . . . Beyond conclusory assertions, the respondent has provided no specifics to show why this case is unusually complex. Finally, the argument that the administrative law judge failed properly to construe the evidence or apply the law is not unique to this appeal.

10/29/97 Order at 2. The Commission's order is attached hereto as Exhibit A. As in *Toys "R" Us*, which had a trial record equivalent in size and complexity to the one here, there is no reason why Complaint Counsel should not be able to focus its arguments within the limitation set by Commission rule.

II. COMPLAINT COUNSEL'S CRITICISMS OF THE INITIAL DECISION ARE CONTRIVED

In what amounts to a premature foray into the merits, Complaint Counsel devote the majority of their motion to discussing supposed "legal, factual, and economic errors" made by Judge Chappell in the Initial Decision. These supposed errors, even if true, would hardly justify a 112½-page appeal brief; 75 pages would still be more than ample. In fact, each and every one of the supposed errors is contrived by Complaint Counsel:

- Contrary to Complaint Counsel's contention, Judge Chappell correctly applied the preponderance-of-evidence standard dictated by §556(d) of the Administrative Procedures Act. *See Steadman v. SEC*, 450 U.S. 91, 98-101 (1981) (holding that "substantial evidence" language of § 556(d) of APA means a preponderance-of-evidence standard). The Initial Decision consistently addresses whether facts were "established" or "demonstrated" by the "greater weight" of the evidence. *See, e.g.*, ID at 87, 109. The Initial Decision's mere recitation of the more

deferential appellate standard — which necessarily must also be satisfied — does not support Complaint Counsel's contention that Judge Chappell disregarded the traditional "preponderance" standard.

- Complaint Counsel wrongly assert that Judge Chappell credited "self-serving trial testimony even when that testimony is contradicted by the parties' contemporaneous business records." Mot. at 4. In fact, none of respondents' witnesses ever provided any testimony that was contradicted by any contemporaneous business record. The sole record that Complaint Counsel identify as an "example," CX 283, is perfectly consistent with the uniform trial testimony that Schering paid fair value for the licenses it received from Upsher-Smith.
- Complaint Counsel provide a selected quotation from Judge Chappell indicating that he prefers live testimony over a document. Mot. 5 n.5. As Complaint Counsel know full well, and as the trial transcript proves, the documents that Judge Chappell was referring to in the quoted passage were ***deposition transcripts***, not contemporaneous business documents. 1/18/02 Tr. at 114. Judge Chappell's preference for live testimony over cold transcripts is consistent with settled law. *See, e.g., Manning v. Lockhart*, 623 F.2d 536, 539 (9th Cir. 1980) ("There is no question that oral testimony is the preferred form of testimonial evidence, and that testimony by deposition or affidavit should be used as a substitute only if a witness is not available to testify in person").
- Complaint Counsel attempt to create the misleading impression that in IDF 47 Judge Chappell relied on an economist, Dr. Sumanth Addanki, to establish the

"therapeutic equivalence" of potassium chloride products. Mot. 5-6. In fact, the findings immediately preceding IDF 47, specifically IDFs 38-46, show that Judge Chappell appropriately relied upon pharmacists (Lori Freese and Dean Goldberg) and other industry personnel (Ray Russo and Phillip Dritsas) to establish therapeutic equivalence. Judge Chappell then relied upon Dr. Addanki as to the economic significance of therapeutic equivalence. IDF 47. This is routine and appropriate use of expert testimony.

- Oddly, Complaint Counsel appear to question the Initial Decision's finding that "[c]ustomers viewed K-Dur 20 and other potassium chloride products as interchangeable." Mot. at 6-7. In fact, the two customer witnesses Complaint Counsel called in their case in chief, Dean Goldberg and Russell Teagarden, both testified precisely to that fact. *See* IDFs 49-55.
- Complaint Counsel criticize Judge Chappell's reliance upon CX 62 (an internal Schering document from early 1998) in IDF 402, but these criticisms are off the mark. Judge Chappell expressly was relying on CX 62 solely for market data "for 1997," the crucial year of the settlement in question. IDF 402. While Complaint Counsel criticize Judge Chappell for citing to sales data on SP 089326 rather than market-share data on the immediately following page, the market-share data is derived from the sales data, so it is appropriate to rely on either page of CX 62. Finally, contrary to Complaint Counsel's assertion (Mot. 7 & n.7), each page shows that Generic KCl was growing as fast or faster than K-Dur 20.
- Contrary to Complaint Counsel's assertion, IDF 106 and IDF 400 do not "contradict one another." Mot. 7-8. The first sentence of IDF 106 states that

"K-Dur 20 lost some market share to other potassium chloride products," and the second sentence states that "K-Dur 20 also took market share and sales from other potassium products." By quoting the first sentence and not the second, Complaint Counsel create the misleading impression that IDF 106 states a finding as to the net effect of these market dynamics.

- Contrary to Complaint Counsel's colorful assertions, Judge Chappell has not "mangled" patent law, he is not "[o]blivious to the distinction between patent validity and patent infringement," and he certainly does not suggest that the patent holder has "an absolute right to exclude an alleged infringer by any means of self-help." Mot. at 8-9. Judge Chappell accurately observed that patents are legally "presumed valid" (ID at 103), and that a "patent holder, if successful in proving that the generic product infringes his patent in the patent infringement litigation, can keep the ANDA from being approved and enjoin the marketing of the generic product until the patent expires" (IDF 389). Judge Chappell thus correctly understood these concepts of patent law.
- Judge Chappell correctly observed that "Courts consistently look to reasonable interchangeability as the primary indicator of a product market." ID at 87. To lodge a criticism, Complaint Counsel are forced to misquote the Initial Decision, substituting "functional" for "reasonable." Mot. at 9.
- Complaint Counsel also criticize Judge Chappell for distinguishing between "direct price elasticity" and "cross-elasticity of demand." Mot. at 9. But Judge Chappell is in good company. The economic textbook embraced at trial by Complaint Counsel and their economist distinguishes between the two terms.

Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization, at 615 (3rd ed. 2000) ("direct price elasticity — ***not*** the cross-elasticity of demand — determines market power") (emphasis in original).

- While Complaint Counsel dispute Judge Chappell's exclusion of certain rebuttal evidence (Mot. at 10), they fail to note that Judge Chappell liberally allowed them to call more witnesses on rebuttal than they had in their case in chief. Indeed, Judge Chappell bent over backwards throughout the trial to allow Complaint Counsel every reasonable opportunity to prove their case, but they could not do it. As to Complaint Counsel's two stated grievances, one related to Complaint Counsel's attempt to call a surprise witness without justification, and the other related to statistical evidence that the proffered witness could not explain.

Complaint Counsel's criticisms of Judge Chappell and the Initial Decision are unfair and unwarranted. While it may not be surprising that Complaint Counsel would take issue with Judge Chappell's conclusions, the harsh and personal tone of the attacks on a fellow FTC employee are most surprising. At trial, Judge Chappell allowed the parties great latitude in putting on their cases. He set no limit on the number of witnesses, on the length of direct or cross examination, on the number of exhibits or on the length of the trial. He was fully engaged, extraordinarily diligent, and unwaveringly fair and even-handed. And, as we will show in our brief on the merits, Judge Chappell's Initial Decision is factually and legally sound. Complaint Counsel did not have a strong case.

Complaint Counsel to so far as to minimize Judge Chappell's role, derisively characterizing him as a mere functionary whose "primary function is to ***assemble*** an evidentiary record for the Commission's review." Mot. at 9 (emphasis added). In fact, the Commission's

Rules make clear that the ALJ does not act as a mere "assembler" of evidence: "Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law." Commission Rule § 0.14. As the U.S. Supreme Court has observed: "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge" *Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, -- U.S. --, 122 S. Ct. 1864, 1872 (2002) (*quoting Butz v. Economou*, 438 U.S. 478 (1978)). Consequently, "great deference must be granted to the [ALJ] who has had the opportunity to observe the demeanor of the witnesses, while the reviewing body looks only at 'cold records.'" *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1299 (Fed. Cir. 2002) (*quoting Jackson v. Veterans Admin.*, 768 F.2d 1325, 1331 (Fed. Cir. 1985)).

Finally, Complaint Counsel's motion to file an overlong brief is ironic given the truncated case they elected to present at trial. Complaint Counsel's case in chief consisted of a grand total of six live witnesses, three fact witnesses and three experts. This number of witnesses is far fewer than Complaint Counsel have offered in far shorter trials. *See Cinderella Career and Finishing School v. FTC*, 425 F.2d 583, 584 (D.C. Cir. 1970) (29 witnesses called by Complaint Counsel in 16-day trial). None of the six witnesses provided credible testimony that supported Complaint Counsel's arguments. Indeed, Complaint Counsel's expert economist, the well-credentialed Professor Bresnahan, so thoroughly undermined Complaint Counsel's theories that they did not mention his testimony or his test once in their closing argument.

III. IF COMPLAINT COUNSEL ARE ALLOWED A LENGTHIER BRIEF, THE RESPONDENTS SHOULD BE GIVEN MORE TIME TO RESPOND

In the event that the Commission were to permit Complaint Counsel to file a brief in excess of the limitation in the Rules, Upsher-Smith requests that it be granted additional time to prepare and file its response brief. Sixty days, rather than the ordinary thirty days, would be a reasonable period in which to respond to a 112½-page brief. Upsher-Smith has no objection to a similar extension of time being granted to Complaint Counsel.

Indeed, the Commission may want to provide time extensions regardless of the outcome of this motion. The parties were served with the Initial Decision by hand from the Secretary of the Commission on Friday, June 28, 2002, thus giving Complaint Counsel until Monday, July 29, 2002 to perfect their appeal by filing a brief. *See* Commission Rule 4.4(a)(1)(ii), 3.52(b)(1). As Complaint Counsel presently do not know how many pages they will be allowed, an extension of time may well be appropriate. *See, e.g., In the Matter of Bristol-Myers Company*, 95 F.T.C. 263 (1980) (Commission denying motion to file overlong brief, but granting extension of time in which to file brief complying with page limitation).

CONCLUSION

For all of the foregoing reasons, Complaint Counsel's motion should be denied. Complaint Counsel have not made the "strong showing" of "undue prejudice" required under Rule 3.52(k) and have not distinguished *Toys "R" Us.* In the event that the Commission were to grant Complaint Counsel's motion, the Commission should grant Upsher-Smith a 30-day extension of time in which to file its response brief.

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Respectfully submitted,

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