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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' JOINT MOTION FOR PROTECTIVE ORDER

Complaint counsel submit this memorandum in opposition to Schering-Plough Corporation's Motion for a Protective Order and Upsher Smith's Joinder in Schering-Plough's Motion for a Protective Order. Those motions ask this Court to strike Complaint Counsel's Second Requests for Admissions to Respondent Schering-Plough Corporation and Complaint Counsel's Third Requests for Admissions to Respondent Upsher-Smith Laboratories, Inc. dated October 2, 2001.[1] For the reasons set forth below, complaint counsel asks this Court to deny those motions.

Complaint counsel will show at trial a straightforward antitrust violation: Schering paid its two most dangerous potential competitors – Upsher Smith and AHP – millions of dollars each to delay

[1] Upsher-Smith's proposed Order attached to its motion would on its face strike all of complaint counsel's requests for admission to Schering and Upsher-Smith. From the text of the motion complaint counsel understand Upsher-Smith to only be asking that complaint counsel's requests for admission dated October 2, 2001 be sticken.

their competitive entry. Respondents chosen defense to this straightforward antitrust case is to divert attention from its anticompetitive conduct to collateral issues, such as patent infringement and validity, valuation of product licensing transactions, and the clinical benefits of sustained-release niacin products. In support of this defense strategy, on September 14, 2001, Schering and Upsher identified a total of 21 experts, many of whom were identified as testifying on these collateral issues, including four on patent validity and infringement; five on valuation of pharmaceutical licensing deals; and four on medical issues.[2]

Confronted with up to 21 experts testifying on a wide range of issues, complaint counsel propounded a set of admissions to Schering and Upsher, many of which address directly the matters expected to be raised by these experts, in order to identify and narrow the contested issues for trial.[3] Having made clear their intention to embroil this court in matters collateral to the anticompetitive agreements at issue in this proceeding, Respondents now are trying to avoid in one fell swoop responding to admissions directed at these precise issues. Respondents' motion for a protective order should be denied because:

- the admissions as a whole are not unduly burdensome;

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[2] Respondents subsequently submitted 19 expert reports, deciding not to submit reports on behalf of two medical experts previously identified.

[3] For example, complaint counsel sought admissions on patent infringement and validity (*see, e.g.,* Schering Admission Nos 14-53, 111-39; Upsher Admission Nos. 30-64); valuation of Niacor-SR license (*see, e.g.,* Schering Admission Nos. 277-435; Upsher Admission Nos. 159-265); and clinical issues relating to Niacor SR (*see, e.g.,* Schering Admission Nos. 436-60; Upsher Admission Nos. 266-94).

- the particular admissions identified by Schering as objectionable are properly directed at narrowing the contested issues for trial.

ARGUMENT

Both the Commission's Rules of Practice and the Federal Rules of Civil Procedure encourage the use of admissions to expedite the trial by identifying issues that are in genuine dispute and by resolving those that are not. Such a procedure avoids both a delay during the trial and the unnecessary expense of proving a matter which is not in dispute. This is accomplished by the receiving party either admitting or denying each request. As Judge Timony noted:

> The purpose of Federal Rule 36 (and presumably of Commission Rule 3.31 [now Rule 3.32]) is to expedite the trial and to relieve the parties of the costs of proving facts that will not be disputed at the trial, and the truth of which can be easily ascertained by reasonable inquiry. Since the crucial consideration is whether or not the answering party seriously intends to dispute the fact, the proper procedure is for the answering party to admit even if it lacks direct personal knowledge, but does not intend to place that particular fact in issue. *Beatrice*, 1979 Lexis 597 at 3 (October 15, 1979) (Order Ruling on Complaint Counsel's Third Request for Admissions).

Requests that are admitted will save time and expense at trial. Neither the Commission's Rules of Practice nor the Federal Rules of Civil Procedure exclude any of the types of admissions to which Respondents object. Nor does either limit the number of admissions that may be propounded. Moore's Federal Practice 36.04[7], at 36-42 (2d. ed. 1995) ("The terms of Rule 36 place no limitation on the number and detail of requests to admit").

A. The Admissions as a Whole are Not Unduly Burdensome

Schering fails to object to nearly 200 admissions. Upsher raises no objection to any particular

admission. Yet, respondents seek protection from responding to any of complaint counsel's admissions (presumably even those which are unobjectionable) because they claim the number of requests alone creates an "undue burden." Schering Motion at 2-3. "Once a party has requested discovery, the burden is on the party objecting to show that responding to the discovery is unduly burdensome." *Snowden v. Connaught Lab., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991). Where a party contends that the sought discovery is unduly burdensome, it must come forward with specific information about how each item of discovery is objectionable by "offering evidence revealing the nature of the burden." *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296, (E.D. Pa. 1980). And it is clear that the "mere fact that discovery requires work and may be time consuming is not sufficient to establish undue burden." *Fagan v. District of Columbia*, 136 F.R.D. 5, 7 (D.D.C. 1991); *see also Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979) (discovery may not avoided "merely because it may involve 'inconvenience and expense'"). Because admission requests serve the "highly desirable" purpose of eliminating the need for proof of issues at trial, there is a "strong disincentive" to finding an undue burden. *See Al-Jundi v. Rockefeller*, 91 F.R.D. 590. 594 (W.D.N.Y. 1981).

Respondents make no showing of undue burden other than referring to the number of requests. That number alone, however, is insufficient to establish undue burden, particularly where, as here, the requests are relatively straightforward, many of the requests address the collateral issues raised by respondents, and respondents' answers may help narrow the issues for trial. *See Roesberg*, 85 F.R.D. at 297; *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) (blanket assertions of undue burden are "not acceptable"); *United States v. Marsten Apartments, Inc.*, 1997 LEXIS 14262, at *4 (E.D. Mich. 1997). Indeed, in the context of other administrative actions before the Commission,

administrative law judges have refused to strike as unduly burdensome requests containing a similar (and greater) number of admissions than at issue here. *See General Motors*, 1977 FTC Lexis 293 (1976) (filing over 1,000 admission requests); *Sterling Drugs, Inc.*, 1976 FTC Lexis 272 (1976) (over 1,000 admission requests); *Amrep Corp.*, 1976 Lexis 392 (over 1,000 admission requests).[4]

Respondents' reliance on *Wigler v. Electronic Data Systems Corp.*, 108 F.R.D. 204 (D. Md. 1985) in support of its position, is misplaced. The extent of permissible discovery is necessarily determined on a case-by-case basis taking into consideration the complexity of the issues and the type and number of parties. *Wigler*, in which the court found 1,664 admissions (more than twice the number at issue here) to be impermissible, involved a single plaintiff employment discrimination suit. That is a far cry from the antitrust matter here which involves two large pharmaceutical companies and 19 testifying expert witnesses. Indeed, the court in *Wigler* limited its decision to the facts before it and recognized that in other circumstances such as "[w]here a case is particularly complex, a large number of requests for admissions may be justifiable." *See* Wigler, 108 F.R.D. at 206.

Respondents have not, and cannot, show that complaint counsel's admission requests, taken as a whole in the context of this litigation, impose an unreasonable burden. Accordingly, respondents' motion to strike complaint counsel's requests in their entirety is inappropriate and should be denied

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[4] Federal courts also have refused to strike requests for admissions containing similar number of requests on grounds of undue burden. *See, e.g., Duncan v. Santaniello,* 1996 Lexis 3860, at *3 (D. Mass. 1996) (292 requests); *Berry v. Federated Mut. Ins. Co.*, 110 F.R.D. 441, 43 (N.D. Ind. 1986) (244 requests); *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327, 28 (D. Mass. 1961) (requests requiring 704 separate answers).

outright. To the extent that respondents have legitimate objections to particular admission requests, they may so indicate in their responses and seek appropriate relief at that time.[5]

B. The Admissions are Appropriate

In addition to its claims of undue burden, Schering advances three reasons that it should be granted the extraordinary relief of striking complaint counsel's request for admissions in their entirety: (i) some admissions go to the primary disputed issues; (ii) some admissions cover the contents of documents and testimony, and (iii) some admissions improperly seek fact discovery that should be the subject of interrogatories. None of these are a basis for refusing to answer requests for admission.

1. It is permissible to request admissions into issues in dispute

Admissions are a form of discovery to determine what is and is not contested. F.T.C. Rule 3.32 states that: "A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth the reasons why the party cannot admit or deny it." Federal Rule 36 has been the same for the past 30 years. An answer, rather than an objection, is now the only proper response if a party considers that it has been asked to admit something that it disputes. *See* Wright & Miller § 2256 and cases cited therein.

Schering seeks a protective order on this specific ground, that complaint counsel "seek[s]

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[5] The Commission's rules requires that "[i]f objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth the reasons why the answering party cannot truthfully admit or deny the matter." *See* Section 3.32

admissions with respect to the primary disputed issues in the case." Schering Motion at 1. The proper response by Schering is to admit or deny such request. Instead, Schering files the instant motion seeking to avoid answering the requests on an impermissible ground.

Schering cites two examples of requests for admission which it objects to on this basis. Schering Motion at 3. The first, Request 12 states that "Upsher's 180-day exclusivity was triggered on September 1, 2001." Schering argues that "Upsher's eligibility for 180-day exclusivity, of course, is one of the central issues in the case" and is an issue in dispute. As noted above, the mere fact that the issue is in dispute does not relieve Schering of its obligation to answer the request. Moreover, this request illustrates why a party should not be allowed to avoid answering such requests. One issue in this case is the impact of the agreement between Upsher and Schering whereby Upsher agreed to delay entry into the market with its generic version of Schering's K-Dur 20 potassium chloride product. The issue is whether under the rules of the FDA, did that agreement not only keep Upsher's generic version of the K-Dur 20 out of the market, but did it also block other prospective manufacturers of generic versions of K-Dur 20 until 180 days after Upsher-Smtih began marketing its generic version. On September 1, 2001, Upsher-Smith finally entered the market with a generic version of Schering's K-Dur 20 potassium chloride product. By asking this request, complaint counsel can find out if Schering disputes that, with the FDA rules in operation today, the effect of the agreement between Upsher and Schering is blocking other manufacturers until 180 days after Upsher-Smith's September 1st entry, and whether complaint counsel must put on proof of that issue at trial.

The other example Schering cites is Request 62, which states that "Under the Schering/Upsher Agreement, the phrase 'and other sustained release microencapsulated potassium chloride tablet'

would include a micorencapsulated tablet that did not infringe the '743 Patent." As Schering notes, the "issue of whether Schering's settlement with Upsher prevents Upsher from marketing non-infringing products is a central disputed issue in this case." Schering Motion at 3. Again, that is not an acceptable reason for Schering to answer the request. Moreover, by finding out whether Schering disputes that the plain language of the agreement covers non-infringing products, complaint counsel can find out what proof it must present at trial on this issue, a valid purpose of requests for admission.

2. It is permissible to request admissions about documents

Requests for admission that inquire into the meaning of a document are permissible and objections that "documents speak for themselves" are inappropriate. *Diederick v. Dept. of the Army,* 132 F.R.D. 614 (S.D.N.Y. 1990). A request for admission as to the meaning of a document is simply a request for the served party to admit that its understanding of the document concurs with the understanding of the person who served the requests. *Id.* In this case complaint counsel merely seeks Schering to answer whether its understanding of the document is the same as complaint counsel's understanding.

In *Ford Motor Company,* Judge Mathias enforced Complaint Counsel requests involving general descriptions of the purpose and content of Ford reports and documents as appropriate subjects for requests for admission. *See Ford Motor Co.*, 1979 FTC Lexis 91 (Order Denying Ford's Motion to Compel). Similarly, Judge Timony over-ruled a like objection to requests for admissions by Respondents who claimed that they should not have to answer as "the documents speak for themselves." Judge Timony ordered the requests to be answered. *Beatrice et al.*, 1979 FTC Lexis 597 (1979) (Order Ruling on Complaint Counsels' Third Request for Admissions).

3. Complaint counsel is not using requests for admissions to evade the limit on the number of interrogatories

The final ground upon which Schering seeks a protective order is that complaint counsel "improperly seek new fact discovery that should be the subject of interrogatories . . ." That is not what complaint counsel has done. Requests that Schering cites for this proposition illustrate complaint counsel's position. Requests 240 and 241 are cited by Schering as examples of improper use of requests for admission. Request 140 states "Warrick did not launch a generic K-Dur product in response to the entry of generic potassium chloride supplement products that were not AB-rated to K-Dur 20." Request 141 states "Warrick did not launch a generic K-Dur product in response to price reductions in generic potassium chloride products that were not AB-rated to K-Dur 20." One of the issues in this case is the definition of the appropriate product market. If 20 mEq potassium chloride tablets and capsules are a relevant market, Schering has a monopoly position in that market. There are other forms of potassium chloride products in the market, and a potential issue for trial is whether these other types of potassium chloride are substitutes for 20 mEq capsules and tablets. Complaint counsel believes it could prove at trial that the Warrick business unit of Schering stood by to enter the market with a generic K-Dur product as soon as Schering perceived its market position in jeopardy from generic competitors. Moreover, complaint counsel could prove that there was generic entry of other types of potassium chloride products that were not AB rated with Schering's K-Dur product and that Warrick ignored their entry and their effect on prices in the market. This would be evidence that 20

mEq potassium chloride tablets and capsules were a relevant market. By these requests for admission complaint counsel simply seeks to avoid the need to put such evidence into the record at trial.

In other cases, what Schering claims are improper requests for admission that should be issued as interrogatories are simply complaint counsel's attempt to avoid objections to, and denials of, requests for admission based on unexpected or unusual construction of the language used in the requests. Another example Schering uses are Requests 285-292. Request 285 states "Mr. Jim Audibert did not review the Schering/Upsher Agreement prior to July 1, 1997." Request 286 states "Mr. Jim Audibert did not review the actual text of the Schering/Upsher-Smith Agreement prior to July 1, 1997." Without repeating all the listed requests, the others listed cover Mr. Audibert on different dates and also a Mr. Lauda.

A part of the Schering/Upsher agreement is a license agreement pursuant to which Schering agreed to pay Upsher $60 for license rights to a niacin product Upsher had under development called Niacor-SR. Complaint counsel alleges – and will prove – that the $60 million dollar payment was unrelated to the value of the license, but was rather a payment for Upsher to stay off of the market for 20 mEq potassium chloride. Its statement of the case, Schering claimed that Mr. Audibert and Mr. Lauda evaluated the license agreement between Schering and Upsher, before the parties entered into it, and determined that the licence agreement was worth the $60 million that Schering paid for it. Complaint counsel believes it can prove at trial that neither Mr. Audibert nor Mr. Lauda ever reviewed the Schering/Upsher Agreement to determine if it was worth $60 million and, at least until Mr. Lauda was shown the agreement at his deposition several weeks ago, neither of them had ever seen it. This series of requests for admission was designed to get an admission that would prove that they could not

have evaluated the license agreement without having to prove that at trial. The varying language was simply an attempt by complaint counsel to get definitive responses in case Schering's counsel would admit that Mr. Audibert did not review the Schering/Upsher Agreement but later claim at trial that Mr. Audibert had reviewed the text of the agreement (sent to him piecemeal) without ever reviewing the Schering/Upsher Agreement as a whole.

To the extent that Schering claims that particular requests for admission are improper and should be issued only as interrogatories, Schering should not be allowed to avoid answering any of the requests for admission, but should be required to file a motion relating to specific requests and explain for each such request why it is inappropriate.

C. Conclusion

For these reasons, complaint counsel respectfully request that Respondents' Joint Motion for Protective Order be denied. And, in order to maintain the jointly proposed revised schedule, Respondents should be ordered to complete their responses to the Requests by November 8, 2001 so that complaint counsel can complete its rebuttal expert reports by November 15, 2001.

Respectfully Submitted,

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