PUBLIC 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 MOTION FOR A PROTECTIVE ORDER

Respondent Schering-Plough Corporation ("Schering") moves pursuant to 16 C.F.R. §§ 3.31(c) & (d) for a protective order preventing Complaint Counsel from taking the depositions of David Poorvin and Chris Dilascia.

Complaint counsel is well aware that neither Poorvin nor Dilascia had any involvement in the settlement or license agreements at issue. Additionally, neither Poorvin nor Dilascia have been listed on any party's witness list, and Complaint Counsel cannot establish the requisite good cause to identify Poorvin and Dilascia as potential witnesses at this late date. This is especially true since Complaint Counsel has been well aware of both Poorvin and Dilascia and their positions at Schering since the pre-complaint investigation stage of the case.

Furthermore, neither Poorvin nor Dilascia are proper rebuttal witnesses, despite Complaint Counsel's suggestion to the contrary. Complaint Counsel could reasonably have anticipated its need for the deponents' from the time they were first aware of the deponents in the pre-complaint investigation stage of the case. Therefore, these witnesses are improper rebuttal witnesses that clearly should have been identified, if at all, on Complaint Counsel's initial witness list.

Finally, Complaint Counsel has already conducted extensive discovery of individuals who actually have knowledge and information about events relevant to the case. Thus, deposing Poorvin and Dilascia would provide no conceivable benefit. Given the witnesses lack of involvement in the issues in this case, the limited possible use of their testimony and the fact that Complaint Counsel has already obtained relevant information from individuals with knowledge of the events at issue, subjecting Poorvin and Dilascia -- a third party -- to examination is overly burdensome. This burden clearly outweighs any potential benefits of deposing these individuals. Therefore, the Court should grant a protective order.

For the foregoing reasons and those set forth in the accompanying memorandum, Schering respectfully requests that the Court grant the motion for a protective order.

Respectfully submitted,

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Attorneys for Respondent
Schering-Plough Corporation

Dated: October 26, 2001

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MEMORANDUM IN SUPPORT OF SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

Respondent Schering-Plough Corporation ("Schering") moves pursuant to 16 C.F.R. §§ 3.31(c) & (d) for a protective order preventing Complaint Counsel from taking the depositions of David Poorvin, Schering's Vice-President of Worldwide Licensing, and Chris Dilascia, a former Schering employee. Neither had any involvement in the settlement or license agreements at issue. Neither is listed on any party's witness list, nor are they proper or necessary rebuttal witnesses. As such, respondent respectfully requests a protective order to protect the deponents and parties from these unnecessary, burdensome and unjustified depositions at this late date.

II. ARGUMENT

This Court has the power to issue a protective order to "protect a party or other person from . . . undue burden" or where the "burden . . . of the proposed discovery outweigh its likely benefit." 16 C.F.R. §§ 3.31(c)(1)(iii) & (d). Here, a protective order is appropriate to prevent Schering and the two proposed witnesses from burdensome depositions that will provide minimal benefit to complaint counsel.

Complaint Counsel already deposed the six individuals complaint counsel viewed as primarily involved in the licensing and settlement agreements -- Messrs. Kapur, Lauda, Driscoll, Audibert, Hoffman and Wasserstein -- in the pre-complaint investigative stage of the case. In the

complaint stage, Complaint Counsel has already deposed five of these individuals for a second time, and by the close of discovery, will have deposed all six. Additionally, Complaint Counsel has deposed fifteen other Schering individuals, including cumulative examinations of six members of Schering's Board of Directors. Complaint Counsel has also noticed the deposition of six other individuals it intends to depose, not including Mr. DiLascia and Mr. Poorvin,

Significantly, neither Poorvin nor Dilascia had any involvement in the settlement or license agreements. It comes as no surprise then that during the extensive discovery had to date, Complaint Counsel never showed any interest in Poorvin or Dilascia. Indeed, Complaint Counsel never even sought to speak with Poorvin or Dilascia in the investigative stage of the case, much less seek to depose either of them. The reason quite frankly is that Complaint Counsel has already identified and thoroughly examined, some of them multiple times, all key individuals with any knowledge of the agreements at issue. As such, deposing these witnesses is unlikely to provide any significant additional benefit to complaint counsel, especially given the number of depositions and the over 100 boxes of document are produced by Schering in this matter.

That the proposed depositions of Poorvin and Dilascia will provide minimal benefit is also shown by the fact that neither is listed on any party's witness list. Pursuant to the Scheduling Order, the parties submitted their revised witness lists on September 20, 2001. No party can designate additional witnesses "unless good cause is shown." Second Revised Scheduling Order at 2. It is difficult to imagine how Complaint Counsel could establish good cause to identify Poorvin and Dilascia as potential witnesses at this late date. Good cause "demands a demonstration that the existing schedule [for identification of witnesses] cannot reasonably be met despite due diligence of the party seeking the extension." *Carrizales v. City of Omaha*, 2000 U.S. Dist. LEXIS 19387, *3 (D. Neb. Jan. 19, 2000) (internal quotations omitted). Complaint Counsel cannot meet that burden here, given that Complaint Counsel has been well aware of both Poorvin and Dilascia and their positions at Schering since Schering's document productions during the pre-complaint investigative phase of the case – almost two years ago. *See* SP 23 00037, SP 23 00065 (produced in response to Complaint Counsel's request of November

5, 1999); SPCID 00090 (produced in response to Complaint Counsel's request of April 13, 2000); SPCID2 1A 00056 (Produced in response to Complaint Counsel's request of August 18, 2000). Furthermore, Complaint Counsel's own expert identified Poorvin in his report months ago. *See* Levy Report at 14. Despite same, Complaint Counsel has waited until the twelfth hour to depose an individual whom Complaint Counsel's own expert describes as "not [being] involved at all with the licensing of Niacor-SR." *Id.*

Schering informed Complaint Counsel of Poorvin's and Dilascia's lack of knowledge of any material issues and stated its belief that these depositions were unnecessary, particularly in light of the imminent discovery deadlines and the numerous fact and expert witnesses yet to be deposed. The only justification offered by Complaint Counsel in response is that Complaint Counsel may possibly use their testimony in rebuttal to Schering's case in chief. Neither Poorvin nor Dilascia, however, is a proper rebuttal witness.

If a plaintiff could reasonably anticipate that it might need to present certain testimony, either to support its own allegations or to counter anticipated defenses, the witnesses that will provide this testimony are not appropriate "rebuttal witnesses" and should be identified on plaintiff's initial witness list. *See Young v. American Reliable Ins. Co.*, 1999 U.S. Dist. LEXIS 12353, *12 (E.D. La. Aug. 9, 1999) (excluding testimony of "rebuttal" expert because "plaintiffs knew that the defendants were going to utilize a suicide defense well enough in advance whereby a so-called 'rebuttal' witness is not appropriate"); *In re Barge ACBL 1391*, 1989 U.S. Dist. LEXIS 11479, *2-*3 (E.D. La. Sept. 28, 1989) (denying motion to add rebuttal witnesses where movant failed to demonstrate "sufficiently compelling need" to justify rebuttal witnesses in light of late date of motion and fact that movant could have anticipated purported need for witnesses long before motion.). It is clear from Complaint Counsel's discovery and witnesses designations that a conscious decision was made that Poorvin and Dilascia were not important enough to interview, depose or list as potential witnesses. Because Complaint Counsel was well aware of these individuals and chose not to list them as witnesses it simply cannot establish good cause to designate Poorvin or Dilascia as additional witnesses.

Here, Complaint Counsel clearly knew of, or could have anticipated, in advance of the deadline for submission of revised witness lists, any limited use it might have for Poorvin's and Dilascia's testimony. Complaint Counsel has stated to counsel for Schering that it intends to use Dilascia's testimony to rebut Schering's argument that it does not have monopoly power in the relevant market. However, Complaint Counsel bears the burden of proof with respect to market definition and monopolization, and thus it surely anticipated, prior to the deadline for the identification of witnesses, the need to present factual testimony with respect to the relevant product market.

Furthermore, given the fact that Complaint Counsel has already taken over a dozen depositions of individuals who actually do possess knowledge of relevant events, any information that deponents theoretically possess would be, at best, cumulative and unnecessary. Therefore, subjecting the deponents to examination is burdensome both to the individual deponents and to the parties, and would provide no material benefit. This burden is exacerbated by the fact that no cognizable benefit can come from permitting the noticed depositions – their testimony would likely be inadmissible at the hearing, since Complaint Counsel has not identified Poorvin or Dilascia on its revised witness list and these individuals are not proper rebuttal witnesses. The Court therefore should issue a protective order since the burdens imposed by this discovery at this late date in the case clearly outweigh any potential benefits.

III. CONCLUSION

For the foregoing reasons, Schering respectfully requests that the Court grant this motion for a protective order.

Respectfully submitted,

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Attorneys for Respondent
Schering-Plough Corporation

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ORDER GRANTING SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

IT IS HEREBY ORDERED that Schering-Plough Corporation's Motion for a Protective Order preventing Complaint Counsel from taking the depositions of David Poorvin and Chris Dilascia is hereby GRANTED.

D. Michael Chappell
Administrative Law Judge

Date: _____, 2001

CERTIFICATION

I hereby certify that this 26th day of October, 2001, I caused an electronic copy of Schering-Plough Corporation's Motion for a Protective Order and Memorandum in Support of Schering-Plough Corporation's Motion for a Protective Order 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

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of October, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondent Schering-Plough Corporation's Motion for a 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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