UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

UPSHER-SMITH'S RESPONSE TO COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND ADMISSIONS

Nearly two months after the close of fact discovery Complaint Counsel seek on the eve of trial to compel Upsher-Smith to supplement once again answers to their Interrogatories and Requests for Admissions. Complaint Counsel waited over two months since Upsher-Smith served its answers to Complaint Counsel's interrogatories to file this motion. More importantly, Complaint Counsel failed to raise any issues regarding Upsher-Smith's responses to Complaint Counsel's request for admissions and interrogatories until the short time leading up to the filing of this motion.

Complaint Counsel's interrogatory requests are unnecessarily cumulative and duplicative where, as here, further answers are sought after key fact and expert witnesses have been deposed. Complaint Counsel have already fully taken the discovery or had the opportunity to take the discovery that they now seek in the multiple depositions of Upsher-Smith fact and expert witnesses and in documents that Upsher-Smith has already produced. In light of the limitation on

duplicative discovery under Rule 3.31(c)(1)(i)-(iii) where a party has already had ample opportunity to discover the information sought, Upsher-Smith's initial and supplemental responses are appropriate. In conformity with Rule 3.35(c) Upsher-Smith's responses included specific references to deponents who provided testimony and bates-labeled documents that contain information and facts responsive to Complaint Counsel's interrogatories. These answers are appropriate in light of the cumulative nature of the interrogatories and thus are in accordance with the Commission's rules on answering interrogatories and with the Court's recent order on this issue.

Also, pursuant to Rule 3.32, Upsher-Smith fully responded to Complaint Counsel's request for admissions. Requests for admissions are supposed to be used to narrow peripheral issues, not to resolve material issues that are at the heart of the litigation. Many of Complaint Counsel's requests for admissions were vague and poorly written and seek Upsher-Smith's admissions not on peripheral issues, but many of the hotly contested and key issues Your Honor will be deciding at trial. This is an improper use of admissions. Upsher-Smith properly denied those requests and provided a full explanation as to the denial of each request.

Upsher-Smith has provided full responses to both Complaint Counsel's interrogatories and requests for admissions. Complaint Counsel's efforts to manufacture issues related to discovery requests served months ago should be denied.

I. Upsher-Smith's Interrogatory Responses Are Proper In Light Of The Cumulative Discovery That Complaint Counsel Is Seeking

A. Complaint Counsel's Interrogatories Are Cumulative Under Rule 3.31(c)(1) As Complaint Counsel Has Already Had Ample Opportunity To Discover The Information Sought

Complaint Counsel's interrogatories are cumulative and should be limited pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice. Rule 3.31(c)(1)(i)-(iii) applies if the

discovery sought is "cumulative or duplicative," a party has already had ample opportunity to obtain information or the "burden and expense of the proposed discovery outweighs its likely benefit." FTC Rules of Practice Sec. 3.31(c)(1)(i)-(iii). Upsher-Smith has already provided the information sought here through deposition testimony, expert reports and its thorough document production. Complaint Counsel's motion only seeks to make work and require Upsher-Smith to marshal discovery materials and information that Complaint Counsel already has sought and obtained.

Since the filing of the Complaint in April, Complaint Counsel have had months to obtain the information sought in Complaint Counsel's interrogatories. Complaint Counsel have in fact already taken the discovery now sought in these interrogatories from witnesses who are Upsher-Smith employees. During the course of discovery, Complaint Counsel took no fewer than ten depositions of Upsher-Smith employees. These depositions included every employee who had any conceivable knowledge about the facts in issue — from top management to staff. Complaint Counsel even took at least four depositions of Upsher-Smith employees who had previously given testimony to the Commission's staff during investigational hearings. Complaint Counsel also deposed a number of other individuals who were retained by Upsher-Smith or in some way affiliated with the company. Additionally during fact discovery, Complaint Counsel requested and received over 120 boxes of Upsher-Smith documents, complimenting an earlier production of some 9 boxes of documents produced by Upsher-Smith during the Commission's investigation, all totaling over 260,000 pages of documents.

Despite all of this discovery, as the deadline for fact discovery was drawing near, Complaint Counsel demanded that Upsher-Smith respond to interrogatories retracing the very same areas covered in the numerous depositions and document requests. In responding to these

interrogatories in October, Upsher-Smith invoked its right under Rule 3.35(c) to refer Complaint Counsel to discovery already taken. After all, in light of the extensive prior discovery, the interrogatories were plainly cumulative. Complaint Counsel appeared to accept Upsher-Smith's answers, for they did not voice any objections for nearly two months. Then in December, after the close of fact discovery and even as Upsher-Smith was beginning its trial preparation, Complaint Counsel suddenly asserted that Upsher-Smith's answers to Complaint Counsel's interrogatories were deficient. This belated objection is wrong, for Upsher-Smith's answers are fully compliant with the FTC Rules of Practice given Complaint Counsel's cumulative discovery demands.

Complaint Counsel misplace reliance upon Your Honor's order dated December 14, 2001, in which Your Honor required Complaint Counsel to "fully" answer Schering-Plough's interrogatories. Schering-Plough had not taken extensive discovery of Complaint Counsel on the issues raised in Schering-Plough's interrogatories prior to serving them. Nor had Complaint Counsel provided an extensive document production. The December 14th order requiring Complaint Counsel to "fully" answer Schering-Plough's interrogatories was fully warranted, but the present circumstances are very different.

Oddly, Complaint Counsel omit any reference to Upsher-Smith's initial responses in its motion and only quotes from one of Upsher-Smith's supplemental responses. *See* Memo. at 3-4. Complaint Counsel wrongly contend in their motion that Upsher-Smith's responses to Interrogatory 4, as well as other Upsher-Smith responses, are deficient.

In responding to Complaint Counsel's interrogatories, Upsher-Smith's initial responses clearly indicated the individuals who already provided testimony on the information that Complaint Counsel was seeking in its interrogatories. Interrogatory 4, which Complaint

Counsel's motion focused on, seeks information that Complaint Counsel previously acquired during both fact discovery as well as expert discovery. Upsher-Smith's initial response to Interrogatory 4 appropriately indicated that the information sought had already been provided to Complaint Counsel in "Upsher-Smith's and Schering-Plough's expert reports and the testimony of Ian Troup, Denise Dolan, Philip Dritsas, Paul Kralovec, Victoria O'Neill, Mark Robbins, and others, including individuals yet to be deposed." Upsher-Smith Interrog. Resp. No. 4.[1]

Upsher-Smith's response to Interrogatory 4, as well as the other interrogatory responses, are all appropriate in light of the cumulative and duplicative nature of Complaint Counsel's interrogatories. Upsher-Smith properly identified the witnesses that had already provided deposition testimony on the information and facts sought by Complaint Counsel's interrogatories. Complaint Counsel's attempt to obtain the same information in interrogatories that it has either already received through fact and expert witness testimony or other forms of discovery such as document production, is inappropriate. *See Pulsecard Inc. v. Discovery Card Services.*, 168 F.R.D. 295, 306 (D.C. Kan. 1996) (party's use of interrogatory requesting information on the same subject matter covered in a deposition found to be improper and abusive, as it "would provide plaintiff with no information not already in its possession"). [2]

This case is just weeks from going to trial and Complaint Counsel has deposition testimony, expert reports and document production containing the information and facts that they now seek

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[1] *See, e.g.*, attached deposition transcript for Ian Troup (83-90) and Walter Bratic (85-88); (150-152) at Attachment A.

[2] Notwithstanding the fact that Complaint Counsel's interrogatories were cumulative, Upsher-Smith still supplemented their responses and provided specific references to documents that contain facts and information that are responsive to Complaint Counsel's interrogatories.

in their interrogatories. The cumulative nature of the discovery that Complaint Counsel seek is clearly evidenced by the sweeping nature of their interrogatory requests. In light of the limitation of cumulative and duplicative discovery under Rule 3.31(c)(1)(i)-(iii) where a party has already had ample opportunity to discover the information sought, Upsher-Smith's initial and supplemental responses should be deemed appropriate.

B. Upsher-Smith's Interrogatory Answers Are Responsive and Comply With The Commission's Rules On Responding to Interrogatories

Contrary to Complaint Counsel's assertions, Upsher-Smith's responses and supplemental responses to Complaint Counsel's interrogatories complied with 3.35(c) of the Federal Trade Commission's Rules of Practice. In responding to Complaint Counsel's interrogatories, Upsher-Smith's responses provided specific references to bates-labeled documents. These citations to specific documents in Upsher-Smith's responses are fully in accordance with Rule 3.35(c).

Rule 3.35(c) allows a party the "option to produce records" in response to interrogatory requests. A party identifying records in response to an interrogatory must provide "sufficient detail" to allow the documents to be identified and the "burden on deriving and ascertaining the answer is substantially the same" for both parties. FTC Rules of Practice Sec. 3.35(c).

Complaint Counsel erroneously assert in their motion that Upsher-Smith failed to comply with Rule 3.35(c). Complaint Counsel claim that Upsher-Smith failed to meet the specificity requirement of 3.35(c) and that the burden is somehow substantially greater for Complaint Counsel than for Upsher. Both of these claims are meritless. Complaint Counsel now seek an order requiring a level of specificity that would undermine the spirit and purpose of Rule 3.35(c).

Complaint Counsel essentially ignore the fact that in responding to their interrogatory requests, Upsher-Smith provided specific references to bates-labeled documents. *See* Memo at 5

("It does not identify specific documents from which complaint counsel's answer may be derived.").[3] Upsher-Smith's interrogatory responses for 3, 4, 5, 6, 10, 11, 12 and 13 all provide answers that contain specific references to bates-labeled documents that respond to Complaint Counsel's interrogatories. *See* Upsher-Smith Supp. Interrog. Resp. No. 3 ("Upsher-Smith refers Complaint Counsel to ... Upsher-Smith FTC 088067, Upsher-Smith FTC 123136-123137 and Upsher-Smith FTC 088477-088480 along with the expert report of William Kerr and in particular Exhibits 1-4 of his report.") These bates-labeled documents provide direct information and answers to Complaint Counsel's interrogatories.

Complaint Counsel cite *Owen v. Kmart Corp.*, 175 F.R.D. 560, 564 (D. Kan. 1997), for the proposition that a party must specifically identify documents to answer an interrogatory. *See* Memo at 5, n. 6. In fact, this case only confirms that Upsher-Smith complied with Rule 3.35(c). Upsher-Smith's responses did identify specific documents consistent with the court's requirement in *Owen*. Upsher-Smith went well beyond what was required in *Owen* by identifying documents by specific bates number thereby providing Complaint Counsel with sufficient answers to their interrogatories.[4]

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[3] The cases that Complaint Counsel cite regarding a party referring to a production of documents provide no guidance here. Upsher-Smith first provided references to Upsher-Smith's document production because discovery had just closed when Upsher-Smith initially responded to Complaint Counsel's interrogatories. Upsher-Smith has since provided specific references to bates-labeled documents in response to nearly all of Complaint Counsel's interrogatories. One is left to wonder, why Complaint Counsel even included these cases in the first place as these cases do not even touch on our current fact situation.

[4] Complaint Counsel also cites *Puerto Rico Aqueduct and Sewer Authority v. Clow Corp.*, 108 F.R.D. 304, 307 (D. P.R. 1985), which merely provides one example of how an answering party met the specificity requirement under Rule 3.35(c)'s counterpart in the Federal Rules of

(continued...)

Complaint Counsel themselves fail to have a consistent definition of what is sufficient to meet the definition of specificity under the Commission's rules. Complaint Counsel appear to concede that Upsher-Smith's response to Interrogatory 7, dealing with whether the '743 patent would have been infringed if Klor Con was sold before September 1, 2001, meets the specificity requirement. In responding to Interrogatory 7, Upsher-Smith answered by, among other things, indicating that responsive "information [to this request] is also found in the pleadings to the Schering/Upsher-Smith Patent Litigation, the expert reports in that litigation as well as Upsher-Smith's and Schering-Plough's expert reports submitted to Complaint Counsel....." Upsher-Smith Interrog. Resp. No. 7.

Interrogatory 7's answer is clearly sufficient under the Commission rules in that it identifies a particular sub-set of recognizable documents whereby an answer can be derived. A number of the disputed answers provide even more detail than Interrogatory 7. Interrogatories 3, 4, 5, 6, 10, 11, 12 and 13 all provide individual bates numbers of documents that contain answers and information that respond to Complaint Counsel's interrogatories.[5]

The second part of Rule 3.35(c) is that the burden is substantially the same for deriving or ascertaining the answer to an interrogatory. Complaint Counsel assert that even if Upsher-Smith provided a discrete set of documents — which Upsher-Smith did — in response to Complaint Counsel's interrogatories that there would still be a substantial burden on Complaint Counsel. In

(...continued)

Civil Procedure, Rule 33(c), not that this was required. The court there more importantly stated that the rule on specificity as to answering interrogatories should be "liberally construed." *Id.*

[5] See Attachment B for Upsher-Smith's Supplemental Responses to Complaint Counsel's Interrogatories, 6, 10, 11 and 13.

essence, Complaint Counsel are attempting to argue that no matter what Upsher-Smith provides to Complaint Counsel pursuant to Rule 3.35(c), those documents will be insufficient because Complaint Counsel will have to review those documents to determine what facts in those documents support Upsher-Smith's contentions. Again, the entire purpose of Rule 3.35(c) is to permit parties to identify documents that contain information and facts that respond to a party's interrogatories. That is exactly what Upsher-Smith has done in responding to Complaint Counsel's interrogatories. Somehow, the purpose and spirit of Rule 3.35(c) appears to escape Complaint Counsel.

Upsher-Smith, not Complaint Counsel, is the party who has overcome the substantial burden of providing specific bates numbers of documents that contain information and facts that are responsive to Complaint Counsel's interrogatories. It is disingenuous for Complaint Counsel to claim that they are in some way burdened by having to review specific documents in response to their interrogatory requests. Complaint Counsel's approach to Rule 3.5(c) in their motion flies in the face of the Rule's purpose and spirit and this Court should reject any pleas Complaint Counsel may make of purported burden.

C. Upsher-Smith Properly Objected To Complaint Counsel's Interrogatory 2

Upsher-Smith finally, does not intend to provide any additional information related to Complaint Counsel's Interrogatory 2. The text of the interrogatory is:

Upsher-Smith properly outlined a specific and detailed objection to Interrogatory 2 as follows[6]:

The case law is clear that parties do not have to respond to interrogatory requests that are overbroad or seek irrelevant information. *See Burks v. Okla. Pub., Co.* 81 F. 3d 975, 981 (10th Cir. 1996) (denying motion to compel on breadth and relevancy grounds because interrogatory

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[6] Upsher-Smith's discussion of its objections to Complaint Counsel's Interrogatory 2 and other interrogatories should not in any way be deemed to be a waiver of those objections to Complaint Counsel's other interrogatories.

sought information from defendants on every person over forty years old who was employed as a supervisor for the last 10 years); *Cockrum v. Califano,* 475 F. Supp. 1222, 1227 (D.D.C. 1979) (denying motion to compel because information requested was irrelevant).[7]

As indicated in Upsher-Smith's objections to Interrogatory 2, this request has absolutely no time reference whatsoever and as drafted requests information as to products and company activities wholly unrelated to this litigation. This interrogatory as drafted has no timeframe; thus it would require Upsher-Smith to identify and describe in detail every activity for every launch since the company's founding in 1919. Complaint Counsel certainly could have drafted a far more tailored and far less burdensome question to elicit relevant information. Notwithstanding Complaint Counsel's broad question, in a spirit of cooperation and in good faith, Upsher-Smith still identified individuals who testified and provided information and facts responsive to Complaint Counsel's interrogatory. Complaint Counsel's request to compel Upsher-Smith to provide additional information as to Interrogatory 2 should be denied.

II. Requests for Admissions

The purpose of admissions is to narrow the issues litigated at trial. *See In the Matter of General Motors Corp.*, 1977 FTC Lexis 293 at *3. "Since the consequence of an admission is to remove the fact from the case and not allow any evidence in rebuttal, a party may properly deny if it, in good faith, wants to place the fact in issue by, for example, introducing countervailing

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[7] Complaint Counsel's motion cites only to cases where responding parties offered general objections to an interrogatory. *See* Memo at 3, n 5. Upsher-Smith has provided a detailed sixteen line objection that details why Complaint Counsel's interrogatory is overbroad and unduly burdensome. None of the cases that Complaint Counsel cite concerned such a detailed and thorough objection. Thus, Complaint Counsel's cases are inapplicable.

evidence." Id. at *4 - *5. The merits of extensive requests for admission have been previously questioned in Part III proceedings, *Id.* at *5 - *6 ("the usefulness of admissions is questionable at best"), and respondent Upsher-Smith propounded no requests precisely due to the extent of the factual dispute in this case.

In this action, Complaint Counsel originally propounded 339 Requests for Admissions. Your Honor ruled this number excessive and articulated clear standards for Requests for Admissions based on the applicable case law:

> Federal case law interpreting the analogous Rule 36(a) of the Federal Rules of Civil Procedure which allows the service of requests for admission upon parties to civil actions indicates the purpose of this rule is to reduce the cost of litigation, by narrowing the scope of disputed issues, facilitating the succinct presentation of the case to the trier of fact, and eliminating the necessity of proving undisputed facts. Properly used, requests for admission serve the expedient purpose of eliminating 'the necessity of proving essentially undisputed and peripheral issues of facts.' Their proper, strategic use saves 'time, trouble, and expense' for the court and the litigants. Because requests for admission are intended to save time of the parties and the court, burdensome requests distort that purpose and therefore are properly the subject of a protective order.

Order on Motions of Schering-Plough and Upsher-Smith For a Protective Order, Nov. 2, 2001 at 2 (citations omitted). Complaint Counsel were ordered to select "no more than 100" of the 339 Requests served on Upsher-Smith in conformity with Your Honor's Order. Complaint Counsel make no reference to the November 2 Order in its Memorandum of Law.

In defiance of the November 2, 2001 Order, Complaint Counsel persisted in seeking answers to hotly contested issues of fact at the heart of the case, factual issues in the hands of third parties, mixed issues of law and fact, as well as argumentative contentions that contain material issues of fact and law. The 100 Requests that Complaint Counsel selected after November 2 are not limited to those "essentially undisputed and peripheral issues of facts" that the November 2 Order contemplated. Even a few examples demonstrate this:

> Request No. 78: Under the Schering/Upsher Agreement, the phrase "any other sustained release microencapsulated potassium chloride tablet" could include a sustained release microencapsulated potassium chloride tablet that did not infringe the '743 Patent.[8]
>
> Request No. 83: Under the Schering/Upsher Agreement, the Schering's [sic] $60 million in Up-Front Payments to Upsher were conditional.[9]
>
> Request No. 88: Schering made a payment of $28 million to Upsher within 48 hours of the date on which the Schering/Upsher Agreement was approved by Schering's Board of Directors.[10]

In fact, despite Complaint Counsel's defiance of the November 2 Order, Complaint Counsel concede that it received proper answers from Upsher-Smith for nearly two-thirds of the Requests: 63 of the Upsher-Smith Answers meet with no objection at all from Complaint Counsel. None of the contested Requests seeks an admission concerning "essentially undisputed and peripheral issues of facts."

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[8] The meaning and import of this phrase is an issue that is vigorously disputed by Respondent Upsher-Smith.

[9] Respondent Upsher-Smith has specifically supplied Your Honor with the legal and factual support for the inaccuracies of this Request in its *Motion to Bar Complaint Counsel from Asserting that Schering Made "A $60 Million Noncontingent Payment,"* dated Jan. 3, 2002. See *Memo. In Support of Its Motion to Bar Complaint Counsel from Asserting that Schering Made "A $60 Million Noncontingent Payment* (Jan. 3, 2002). There were three payments, not a single payment; *id.* at 2-3; the value of the three payments was approximately $54 million in June 1997; *id.* at 5-6 (citing Complaint Counsel's experts); and the promise to make three payments by Schering were part of the promises exchanged June 17, 1997 Agreement - courts would find constructive conditions of exchange governing Schering's performance. *Id.* at 4.

[10] Respondent Upsher-Smith was not physically present at the Schering Board of Directors meeting in which the June 17, 1997 Agreement was considered and thus lacks personal knowledge of the action taken by Schering's Board and the timing of the action; it so objected to this Request but then admitted it on information and belief.

The trial in this action will commence in nearly two weeks' time. Further time and energy should not be expended by the parties or Your Honor for Requests that fail to comply with the November 2d Order. Turning to the specific grounds of Complaint Counsel's motion only substantiates the futility for all concerned of using contention interrogatories in the guise of Requests for Admission.

1. Requests 58 and 60 Are Vague and Ambiguous; They Do Not Seek Undisputed and Peripheral Facts

Complaint Counsel lead their attack on Upsher-Smith's answers with a challenge to certain denials "based on improper objections." Complaint Counsel Memo. at 8. Complaint Counsel apparently believe that their requests are a model of clarity and precision, free from ambiguity. Complaint Counsel could not be more wrong.

As an illustration of a "denial based on improper objections," Complaint Counsel cite Upsher-Smith's Answer to Request No. 58. That Request stated: "At the time of the Schering/Upsher Agreement, there was a possibility that Upsher could have won the Schering/Upsher Patent Litigation if it continued the Schering/Upsher Patent Litigation." Upsher-Smith was on solid ground objecting to this request.

A number of aspects of the request are vague, ambiguous and confusing. What constitutes a "win"? Summary judgment? Partial summary judgment? Trial verdict? Appeal victory? Denial of certiorari? Trial verdict on remand? A finding of noninfringement but validity? A finding of infringement but invalidity? A final court victory before or after September 1, 2001? In 2002? In 2006? A court victory after $5 million in legal fees? A court victory after $10 million in legal fees? A favorable settlement? The settlement Upsher-Smith obtained? Another hypothetical settlement? When? On what terms? A victory at the expense of complete

executive distraction for many years? At bottom, what constitutes a "win" in such a complex patent litigation is a highly subjective matter. It is also a fundamental point of difference between Respondents and Complaint Counsel.

The term "possibility" is also vague. Any "possibility"? A remote "possibility"? An unrealistic "possibility"? Even a de minimus "possibility"? If, as Complaint Counsel's memorandum suggests (at 8), the request means any "possibility" — no matter how remote — then the question is purely argumentative, and theoretical, and hardly constitutes an attempt to narrow issues for trial. Request 58, and the similar request 60, simply do not relate to "peripheral or undisputed facts."

2. Requests 85 and 87 Relating to Portions of the Alleged "$60 Million" Payment Are Impossible to Answer As Drafted and Call for Legal Conclusions Not Facts

In Requests 85 and 87 Complaint Counsel improperly seek a legal opinion from Upsher-Smith as to the June 17, 1997 Agreement. (Complaint Counsel Mem. at 8). Request No. 85, for example, states: "Under the Schering/Upsher Agreement, if Upsher abandoned the development of Niacor-SR, Upsher would still receive the full $60 million in Up-Front Payments." The construction of the June 17, 1997 Agreement is a key legal issue to be addressed by Your Honor in this case. Complaint Counsel seek an answer to the legal question of the effect of the abandonment of Niacor-SR. But this hypothetical is vague and ambiguous: Is the abandonment due to insuperable regulatory obstacles? Is Upsher-Smith's ability to perform impracticable? Does the abandonment come after June 1998? Before? After June 1999? Does the abandonment affect Schering's development of the product for Europe? Does Schering claim the abandonment is a material breach of the June 17, 1997 Agreement? Does Upsher-Smith have an opportunity to cure that alleged material breach? The hypothetical legal opinion sought in Requests 85 and 87 is

simply not the sort of "peripheral or undisputed *fact*" (Order at 2, emphasis supplied) for which the Request would be proper.[11]

3. Average Selling Price of Upsher's Product vs. Average Selling Price of Schering's Products Calls Is Vague and Depends on Information Upsher Does Not Possess

Request No. 143 asks Upsher-Smith to admit: "As of September 2001, Upsher's Average Selling Price of its generic version of K-Dur 20 is at least a discount to the Average Selling Price of K-Dur 20."

This request explicitly calls for a precise quantitative comparison of the Average Selling Price of Upsher-Smith's generic version of K-Dur 20 with the actual Average Selling Price of K-Dur 20. Schering's actual selling prices for the Schering K-Dur 20 product are not known to Upsher-Smith. Upsher-Smith does not have detailed transaction history for Schering's actual sales. Schering is a competitor of Upsher-Smith, and Schering does not share that information with Upsher-Smith. To compute a price differential from the Average Selling Price of Schering's K-Dur 20 is an impossibility for Upsher-Smith. Upsher-Smith's Answer puts Complaint Counsel on notice that they must prove this point at trial if it is important to their case.

This request is not of an essentially undisputed fact, but seeks calculations from Upsher-Smith that it does not perform in the course of its business. It simply cannot perform the difference calculation without the actual transaction history from Schering. Moreover, the Request is extremely vague and inartful. "As of September 2001" is hardly self-defining. Is this

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[11] It is of no moment how Schering answered this Request; respondent Upsher-Smith is obligated to make its own answers based on its own understanding of the Agreement and the applicable law. Upsher-Smith is entitled to present its own defense of this action.

as of September 1? As of September 30? Is this an average computation for the entire month of September 2001? Is "during September" what was intended by Complaint Counsel? The request is hardly "straightforward" as Complaint Counsel view it (Memorandum at 9), and whatever calculation is actually being sought, it certainly is not a "peripheral or undisputed fact."

Finally, Complaint Counsel's Memorandum of Law misreferences Request 143 as Request 142 (Compare Memo. Of Law at 9 ("142") with the actual Request 143). The error only further substantiates the mind-numbing effect on all counsel of dealing with an unwieldy number of Requests that do not seek admission of "peripheral or undisputed facts."

4. Request No. 158 Seeks an Admission for Industry-Wide Generic Substitution Data Beyond Upsher-Smith's Knowledge

Complaint Counsel challenges Upsher-Smith's Answer to Request No. 158. That request – which Complaint Counsel does not have the temerity to quote – states: "Substitution from a brand product to its bioequivalent or AB-rated generic product occurs at a faster rate in 2001 than it did in 1997." This Request appears to seek an admission from Upsher-Smith as to the overall rate of generic substitution presumably in the entire American pharmaceutical industry. Alternatively, it addresses the substitution rate for some unspecified "brand product." This Request appears to be untethered to any fact or contention in this case. The overall rate of generic substitution in the United States for all pharma branded products (or some unspecified one) is "irrelevant to this matter" and certainly is beyond Upsher-Smith's "knowledge." Memo. at 9.

Likewise, Request No. 241 calls for an admission as to facts that Upsher-Smith lacks personal knowledge of what Schering-Plough Limited (believed to be the UK affiliate of Schering-Plough) said to Mr. Pettit. This Request seeks to have Upsher-Smith admit to an

apparently misleading half-truth. Upsher-Smith's response provides great detail, quoted here in part:

> "Upsher-Smith denies the Request insofar as it implies that any such communication on January 31, 1997, was the only communication between Schering-Plough Ltd. and David A. Pettit. Indeed, there was further correspondence on February 3, 1997, indicating that Schering-Plough Ltd. had passed along to the International Division, presumably of Schering-Plough, Moreton's proposal regarding Upsher-Smith's Niacor-SR license."

Thus, the International Division of Schering-Plough was actively considering a Niacor-SR license in the period leading up to the June 17, 1997 Agreement. Ironically, the *General Motors* case, relied upon by Complaint Counsel, expressly authorizes the denial of a misleading half-truth. *General Motors* at *7 (denial of "half-truths" is appropriate where "such 'half-truths would lead inevitably to a conclusion which is different from the whole truth").

5. Upsher-Smith Refusals to Admit or Deny Were Proper

Complaint Counsel's broadbrush attack on Admissions 173, 174, 176, 178, 294, 330 and 332 fares no better. Upsher-Smith's objections to these requests are expressly authorized by Rule 3.32(b), which provides that an responding may decline to admit or deny a Request where "the party states that it has made reasonably inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny."

Request 173, which Complaint Counsel chose as its best illustration, demonstrates the appropriateness of Upsher-Smith's invocation of Rule 3.32(b). That Request expressly seeks Upsher-Smith to respond based on the actions of any Upsher-Smith employee, consultant, agent or representative (see Complaint Counsel definition of "Upsher" – "Upsher means . . . its domestic and foreign parents, predecessors, divisions and wholly or partially owned affiliates, partnerships, and joint ventures; and all directors, officers, employees, consultants, agents and

representatives of the foregoing"), not merely the officers or directors of Upsher-Smith. Thus, the broad nature of the Request, plus the understandable lack of recollection of events years gone by, prevent a categorical admission or denial of this Request. [12] This problem infects all of the Requests referred to in their Memorandum at 10 (Requests 173, 174, 176, 178, 294, 330, and 332).

6. Upsher-Smith's Answers that Did Not Admit or Deny The Essential Truth of the Request Were Proper

Complaint Counsel used Upsher-Smith's response to Request No. 133 as an example of a failure to "meet the substance of the request." Given the quotation of the Request at the top of page 11, Complaint Counsel apparently mean Request No. 132 – yet another example of the mind-numbing nature of the exercise at this point. Notwithstanding, Upsher-Smith's response to Request No. 132 is proper. Upsher-Smith expressly denied this request.

Again, Complaint Counsel used an overbroad of "Upsher" that sweeps in all employees, consultants, agents, and representatives. The fundamental problem with these Requests is that Complaint Counsel has infused them with a misleading nature by virtue of the overbroad definition. An answer given as to a low-level employee, lacking either authority or a full understanding what Upsher-Smith's position is, would be deemed in the guise of an admission as the position of the entire corporation. The Request is argumentative because it unfairly attempts to portray as company policy the actions of any employee. Complaint Counsel have no one but

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[12] Complaint Counsel conceals their overbroad definition of "Upsher" by providing a truncated rendition of it on page 11 of their Memorandum. Apparently Complaint Counsel realizes that the actual definition of "Upsher" contained in the Requests for Admissions demonstrates the overbreadth of Request No. 173.

themselves to blame for these requests. As In the matter of *Sterling Drug*: "... each request should be stated clearly and simply so that the requested party can perceive clearly the proposition he is being asked to admit, and admit or deny it with a minimum of explanation or qualification." 1976 FTC Lexis 272 at *2. Here, Complaint Counsel's requests violate the injunction of *Sterling Drug* through the use of improper and misleading definitions. Even the low-level employee involved here was making the projections based on incomplete information and a series of simplifying assumptions that Complaint Counsel now seek to elevate to hard fact.

Moreover, as Complaint Counsel know full well, Requests 21 through 27 seek admissions for contentions in the case that are hotly disputed. Moreover, the Upsher-Smith response does provide a full and complete response to the Request. The text of Upsher-Smith's response, reproduced at page 12, puts Complaint Counsel on fair notice of exactly the disputed facts. The Upsher-Smith response admits the occurrence of an April 29, 1997 meeting, but responds, based on the facts, that the meeting did not discuss "possible" launch date scenarios. (As another example of the mind-numbing nature of this process at this hour, Complaint Counsel's block quote omits a sentence of the Upsher-Smith response contained within the quoted language and further contains typographical errors.) What Complaint Counsel characterize as "rambl[ing] on" actually provides a lucid and informative response.

Finally, Complaint Counsel are well aware from numerous depositions and other discovery of Upsher-Smith's view of the April 29, 1997 event referenced. The employee in question was not a senior officer or director, was not tracking the progress of the patent infringement litigation with Schering-Plough, and made no assumption as to the lead time required in physically constructing the additions to the Upsher-Smith manufacturing plant facility. This is not some peripheral, undisputed fact, but a key factual issue in dispute among the parties.

7. Referrals to Documents Were Proper

In Request 3 of the Initial Requests, despite objecting to and denying the Request, Upsher-Smith went further and referenced a document that may provide the answer sought. The Request and the response can be best understood by reviewing them: Request No. 3 states "In the year ending December 29, 1996, Upsher-Smith had revenues of ." Upsher-Smith's response states: "Upsher-Smith objects to and denies this Request as being vague and ambiguous because the terms "year ending December 29, 1996" and "revenues" have not been defined and there can be various interpretations of those terms. Upsher-Smith refers Complaint Counsel to Upsher-Smith document "USL01636-Confidential" - - "USL01652-Confidential" for information on this subject matter." Does "revenues" refer to U.S. revenues? Total global revenues? Total revenues for the fiscal year ended December 29, 1996? Operating revenues? Net revenues? Revenues net of cost of goods sold? Upsher-Smith cannot admit or deny such a request divorced from the context of the document it references. CFO Paul Kralovec has testified in the Investigational Hearing, in his Deposition about this document, and will be called as a live witness at trial. Complaint Counsel have no legitimate grievance.

All told, Upsher-Smith's responses to the more than 100 Requests for Admission in this action constitute good faith answers in full compliance with the Rules of Practice. The answers to these Requests give Complaint Counsel fair notice of the areas of open and vigorous dispute in this case. Complaint Counsel's disappointment with the responses received has nothing to do with the propriety of the responses and everything to do with the text of the Requests they drafted.

CONCLUSION

For the reasons stated herein, Your Honor should deny Complaint Counsel's Motion to Compel in its entirety.

Dated: January 7, 2001

Respectfully submitted,

WHITE & CASE LLP

By: _____

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CONCLUSION

For the reasons stated herein, Your Honor should deny Complaint Counsel's Motion to Compel in its entirety.

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Attorneys for Upsher-Smith Laboratories, Inc.

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	)	

ORDER

Upon consideration of Upsher-Smith's Response to Complaint Counsel's Motion to Compel Responses to Interrogatories and Admissions and Complaint Counsel's Motion to Compel Responses to Interrogatories and Admissions:

IT IS HERBY ORDERED that Complaint Counsel's Motion is DENIED.

D. Michael Chappell
Administrative Law Judge

Date: _____, 2002

ATTACHMENT A

REDACTED

ATTACHMENT B

REDACTED