

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,
and
American Home Products Corporation,
a corporation.

Docket No. 9297

**RESPONDENT SCHERING-PLOUGH CORPORATION'S LEAVE TO FILE
REPLY IN RESPONSE TO EMERGENCY MOTION REGARDING
PRESENTATION OF AND OBJECTIONS TO TRIAL EXHIBITS**

Pursuant to Rule 3.22(c) of the Commission's Rules of Practice, 16 C.F.R. §
3.22(c), Respondents hereby respectfully request leave to file a brief reply to complaint
counsel's opposition to Respondent's Emergency Motion Regarding Presentation of and
Objections to Trial Exhibits.

Respondent believes that this reply will be helpful to the Court in determining the
issues presented in its motion regarding the presentation of and objections to complaint
counsel's trial exhibits.

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REPLY TO RESPONSE TO EMERGENCY MOTION REGARDING
PRESENTATION OF AND OBJECTIONS TO TRIAL EXHIBITS**

Respondent Schering-Plough Corporation ("Schering") respectfully submits this brief reply to complaint counsel's response to Schering's emergency motion regarding the presentation of and objection to trial exhibits at the hearing in this matter, which was served on Schering late yesterday.

In its emergency motion, Schering explained the difficulty respondents have in formulating objections—particularly as to relevance—to the approximately 1,000 exhibits on complaint counsel's exhibit list. Before filing the motion, counsel for Schering had pointed out this difficulty to complaint counsel, and had suggested to complaint counsel that it would be prepared to make specific relevance objections once Schering understood the purpose for which a particular document was being offered. Complaint counsel declined to identify the purpose for which any of its 1,000 exhibits is being offered.

Ordinarily, a party's purpose in introducing a piece of evidence is made clear at trial, when the evidence is offered through the testimony of a witness. At that time, the party's opponent may object to its admission. Schering believes that that is the best way to proceed. Complaint counsel, however, intends to submit all of its exhibits without calling a witness. Thus, with respect to the hundreds of documents on complaint counsel's exhibit list that were never introduced at a deposition, its purpose in offering the documents is unknown.


Complaint counsel states in its response that "if respondents are unable to determine why complaint counsel believe that a particular document is irrelevant, [they] should object at document day." That is certainly one way to proceed. But this will apply to a substantial portion of complaint counsel's 1,000 or so documents, and would consume a significant amount of the Court's time. Moreover, it seems highly unlikely that complaint counsel seriously intend to rely on all 1,000 of its exhibits, either at trial or in its post-trial proposed finding of fact. And there is no good reason for complaint counsel's refusal to explain the relevance of its documents in advance of today's hearing.

Schering proposed to complaint counsel that it identify the purpose for which its documents are being offered, so that the parties could narrow their objections and avoid spending hours, if not days, of the Court's time on objections. Regrettably, complaint counsel has declined to provide respondents with the information needed to make substantive objections. As a result, unless complaint counsel is prepared either to shorten its exhibit list to a reasonable number of exhibits, or to explain the relevance of its exhibits to respondents in advance of the hearing, there is little choice but to proceed in court on a document-by-document.

CONCLUSION

For the foregoing reasons and those set forth in Schering's motion, Schering respectfully requests that its motion be granted.

Respectfully submitted,



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Attorneys for Respondent
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Dated: January 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of January 2002, I caused an original, one paper copy and an electronic copy of Respondents Schering-Plough Corporation's Leave to File Reply and Reply to Response to Emergency Motion Regarding Presentation of and Objection to Trial Exhibits 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:

David Pender
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