UNITED STATES OF AMERICA
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 PUBLIC

UPSHER-SMITH'S MOTION FOR LEAVE TO FILE UPSHER-SMITH'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE TO BAR COMPLAINT COUNSEL'S PROPOSED USE OF TRANSCRIPT EXCERPTS

Pursuant to Rule 3.22(c) of the Commission's Rules of Practice, Upsher-Smith hereby moves for Leave to File a Reply Memorandum In Support of Its Motion In Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts. In its Response, Complaint Counsel raised new matters concerning various FTC rules and practices, laws of evidence and issues concerning Complaint Counsel's proposed use of transcript evidence. Complaint Counsel also failed to address Upsher-Smith's arguments concerning the rights of the parties by misstating and confusing certain Upsher-Smith arguments. Upsher-Smith would like to respond to these

issues raised by Complaint Counsel.

Should this motion be granted, attached is a memorandum in Reply to Complaint Counsel's Response for your consideration.

Dated: January 16, 2002

Respectfully submitted,

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By: _____

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Complaint Counsel envisions a trial in which unreliable hearsay evidence is freely admitted. But such a proceeding is inconsistent with the Commission's Rules of Practice, the Federal Rules of Evidence and basic notions of Due Process. Such a proceeding is also inconsistent with Your Honor's stated desire that the trial in this matter "look just like the one down the street in Federal District Court." December 20, 2001 Hearing Tr. At 7.[1]

I. COMPLAINT COUNSEL CANNOT USE TRANSCRIPTS FROM *EX PARTE* INVESTIGATIVE HEARINGS

Most startling is Complaint Counsel's intention to present, as affirmative evidence, excerpts from transcripts of Part II investigative hearings. The majority of these transcripts are of testimony by *non*-Upsher-Smith witnesses, so Upsher-Smith had no right to be present, let

[1] We are authorized to represent that Schering-Plough joins in the arguments presented herein as those arguments apply to it directly or by analogy.

alone a right to object, cross-examine or refresh recollections. There is simply no basis for admitting the *ex parte* investigative-hearing testimony of Schering, AHP and other witnesses against Upsher-Smith.

The right to cross-examine is the touchstone of reliability under Anglo-Saxon jurisprudence. *See, e.g.*, I *Wigmore on Evidence* § 8 at 608 (Tillers rev. 1983) ("the final establishment of the right of cross-examination by counsel, at the beginnings of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of the truth . . ."); 1 *McCormick on Evidence* § 19 at 87 (Strong Ed. 1999) ("For two centuries, common law judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony. . . . The premise that the opportunity of cross-examination is an essential safeguard has been principal justification for the general exclusion of hearsay statements."). *See also Wigmore on Evidence* § 1367 (Chadbourn ed. 1974) ("no safeguard for testing the value of human statements is comparable to that furnished by cross-examination"). The Commission's Rules of Practice, which govern these Part III proceedings, acknowledge this fact. Rule 3.33(g)(1), modeled on Rule 32(a) of the Federal Rules of Civil Procedure, expressly provides that a deposition may not be used against a party that was not given the right to attend and cross-examine at that deposition. *Ex parte* investigative-hearings are thus clearly unusable.

Complaint Counsel seems to suggest that the presence of *any* counsel at an *ex parte* Part II investigative hearing cures all ills. Opp. at 4. This suggestion is unsound, as Schering, Upsher-Smith and AHP are each separate companies with their own rights and interests. Rule 3.33(g)(1), like Federal Rule 32(a), acknowledges this reality by barring the admission of even depositions against any specific party that was not given the right to participate. The presence of

counsel for other respondents is irrelevant. Likewise, Rule 3.41(c) states: "Every party shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing." Thus, contrary to Complaint Counsel's suggestion, the presence of counsel for a Schering, AHP or KOS witness at an *ex parte* investigative hearing does not secure Upsher-Smith's rights.

Excerpts from *ex parte* investigative hearings of Upsher-Smith witnesses are also inadmissible. During the Part II investigation, Complaint Counsel does not dispute that counsel for these witnesses had sharply limited rights under Rule 2.9(b). Counsel had no right to make evidentiary objections, refresh recollections, cross-examine or otherwise clarify the record. Commission staff admonished the witnesses' counsel of their limited rights at the outset of each hearing.

Given Rule 2.9(b) and Commission Staff's routine pre-hearing admonition during the investigative hearings, Complaint Counsel is foreclosed from asserting that a witness's counsel had a "right" to make evidentiary objection or cross-examine. Nonetheless, Complaint Counsel asserts that a witness's counsel at an investigative hearing had the "opportunity" to make objections and to conduct cross-examination. Opp. At 4. This assertion can only be called disingenuous, because in fact counsel made objections, in defiance of Rule 2.9(b), on only rare occasions and questioned witnesses even more rarely and then only upon Commission staff's whimsical grant of leave. Complaint Counsel, in short, cannot deny that even witnesses' counsel were deprived of basic deposition rights at the investigative hearings.

Complaint Counsel do not dispute that during the investigation Upsher-Smith witnesses (like Schering and AHP witnesses) were denied the opportunity to review, correct and sign their investigative transcripts. Nor does Complaint Counsel dispute that the denial of these rights

violated Rule 2.9(a). Complaint Counsel asserts that the transcripts are "verbatim transcripts" that are "reliable on [their] face," but this *ipse dixit* assumes away the critical issue. In fact, a transcript cannot be assumed reliable when the fundamental safeguards associated with deposition practice (right to object, right to cross-examine, right to review transcript, right to correct transcript, right to sign transcript) are jettisoned.

Complaint Counsel flat out *ignore* the authorities that bar all use of Part II investigative-hearing transcripts. *See* Upsher-Smith Mem. At 5-7. They never cite, let alone distinguish, *In re Resort Car Rental*, in which the Administrative Law Judge rejected Complaint Counsel's attempt to introduce such transcripts. Nor do Complaint Counsel cite or distinguish the Supreme Court's pronouncement in *Hannah v. Larch* that the constitutionality of the Commission's investigative procedures for due process hinges upon the provision of "all the traditional judicial safeguards at a subsequent adjudicative proceeding." 363 U.S. at 446. Finally, Complaint Counsel do not cite or distinguish *In re Steven Rizzi*, a multi-respondent proceeding in which the Administrative Law Judge held that respondent's investigative-hearing transcript could not be admitted into evidence as an admission against that respondent, because doing so would prejudice other respondents.

While ignoring these on-point authorities, Complaint Counsel misplace reliance upon generalities about "liberal" evidence standards. Complaint Counsel's block quotes from *Cement Institute* and an administrative law treatise are not relevant. They do not support the admission into evidence of *ex parte* transcripts lacking standard safeguards of reliability. Likewise, none of the three cases Complaint Counsel cite in their footnote 5 even addresses the admission of investigative-hearing transcripts.

Complaint Counsel also point to Rule 3.43(c), but that rule does not help them in the least. Rule 3.43(c) does not even relate to admissibility of evidence; it merely authorizes

Complaint Counsel, "when necessary," to "offer[]" into evidence at adjudicative proceedings documents and information obtained in investigations. This rule does not purport to trump the rules specifically dealing with the admissibility of evidence. Certainly Rule 3.43(c) cannot be read to authorize the admission of unreliable evidence, in the face of Rule 3.43(b), or of transcripts from hearings at which a party did not participate, in the face of Rule 3.33(g)(1).

Complaint Counsel also asserts — without citing any reported or even unreported ***decisions*** — that in certain prior cases deposition and investigative-hearing transcripts were admitted into evidence.[2] Response at 8, n. 18. Even if Complaint Counsel's assertion is correct as to investigative-hearing transcripts, it proves nothing. There may be many valid reasons why investigative-hearing transcripts may be admitted under certain circumstances. A respondent may not object to the use of its own witness's investigative-hearing transcript, perhaps in exchange for an agreement that the witness need not appear at a deposition. This is particularly likely in a single-respondent case. Notably, every one of the cases cited by Complaint Counsel

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[2] Complaint Counsel cites no decision by judges or courts to support its position that depositions and investigational hearing transcripts may be used in lieu of live testimony from available witnesses. Instead, it asserts that such use was permitted by the Administrative Law Judge at eight prior proceedings. For this proposition, complaint counsel does not cite to any decision in which the court ruled on the admissibility of such transcripts. Instead, it cites merely the docket numbers assigned to the proceedings themselves.

Complaint Counsel's references to prior proceedings and their docket numbers do not constitute precedent. They are not ***decisions*** of a court, an administrative agency, or a judge thereof. And the citations do not provide this Court or respondents the ability to ascertain what happened in the proceedings cited. They are nothing more than citations to a docket number. It is therefore impossible to tell whether the transcripts were indeed used; if so, what type of transcripts they were; whether the respondent(s) in any of the proceedings objected to the use of such transcripts; whether there was more than one respondent; or whether the witness whose testimony was read was available. Without these facts, this Court and respondents have no way of determining whether they provide any support for Complaint Counsel's unorthodox method of presenting its case.

had a ***single respondent*** at trial — even the *Adventist Health* case (where the parties had merged) and the *VISX* case (where the second respondent had settled out). Thus, the cited cases did not involve the issue of use of investigative-hearing transcripts in multi-respondent proceedings.

Complaint Counsel also asserts that the respondent in *Toys "R" Us* made arguments similar to those advanced here by Upsher-Smith and that Chief Judge Timony "quickly disposed of" the arguments. Response at 10. The transcript tells a different story. The only objection raised by respondent's counsel was that the transcripts had never been signed. Tr. at 36. Respondent's counsel did not object to the use of the investigative-hearing transcripts on the grounds that there was no right to attend or cross-examine; and this the excerpt from Toys "R" Us does not address the point at all. He said only that "[t]hese are precomplaint depositions for the most part, but I think we can get beyond that problem, and I — I think we can probably work something out on that." Tr. at 37. It is not apparent from the transcript that Chief Judge Timony made any ruling on the issue one way or the other.

Complaint Counsel's remaining points on investigative-hearing transcripts are hardly worthy of rebuttal. Rule 801(d)(2)(E) of the Federal Rules of Evidence authorizes the admission of a co-conspirator's statements only when made "in furtherance of the conspiracy." This rule cannot support the admission of Part II investigative-hearing testimony. (In any event, AHP and KOS witnesses are not alleged to have conspired with Upsher-Smith.) Furthermore, whether any expert witnesses relied upon any investigative-hearing transcripts is irrelevant to whether the transcripts should be admitted into evidence, since experts are permitted to rely upon otherwise in admissible evidence (e.g., hearsay).

Finally, contrary to Complaint Counsel's argument, Upsher-Smith would indeed be prejudiced by the admission of investigative-hearing transcripts. Upsher-Smith has reviewed

those transcripts and identified numerous instances where an objection was warranted, mistakes were made in either transcription or testimony, and cross-examination was warranted. It is no answer for Complaint Counsel to say that Upsher-Smith has had the opportunity to depose the witnesses. Upsher-Smith has taken that opportunity in most instances, but it is clear from Complaint Counsel's designations of investigative-hearing transcripts that Complaint Counsel intends to introduce unreliable portions of transcripts in their case in chief. Had Upsher-Smith's counsel been present at the investigative hearings and if Upsher-Smith's counsel had full rights at those hearings, the resulting transcripts would not have been unreliable.

II. COMPLAINT COUNSEL CANNOT USE TRANSCRIPTS FROM DEPOSITIONS UNLESS IT CALLS AVAILABLE WITNESSES LIVE

Under Rule 3.33(g)(1), the deposition of a non-party witness may not be used at trial unless the Administrative Law Judge finds that the witness is unavailable or that "exceptional circumstances" exist. Here Complaint Counsel persist in arguing that they may use non-party depositions without showing unavailability or "exceptional circumstances." Complaint Counsel should be required to abide by Rule 3.33(g)(1).

As to party depositions, Complaint Counsel simply ignore the substantial authority, from Federal case law and Commission precedent, requiring a party to call the adverse party live as a prerequisite to using the adverse party's deposition. This authority expresses a clear preference for live testimony, particularly when credibility is important — as it surely is here.

Complaint Counsel raise the question of judicial economy, but that consideration plainly favors requiring Complaint Counsel to call the party witnesses live. It does not make sense for Complaint Counsel to read transcript excerpts in their case in chief, and then have the same witnesses called later in the trial.

Complaint Counsel also asserts that all employees qualify as "managing agents," and therefore party witnesses, under Rule 3.33(g)(1)(ii). This is clearly wrong. The rule could have used the term "employee," but it does not. A "managing agent" is one who exercises judgment in corporate matters, not under close supervision of a superior. *See, e.g., Textron, Inc.*, 1990 FTC lexis 483, * 2 (1990). A part-time employee without management authority, such as Upsher-Smith's Denise Dolan, cannot be considered a managing agent.

III. COMPLAINT COUNSEL SHOULD BE REQUIRED TO GIVE PRIOR NOTICE OF ANY EXCERPTS THAT THEY MAY READ

Rule 3.33(g)(1)(iv) states: "If only part of a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced." This rule-of-completeness provision permits Respondents to counterdesignate deposition excerpts to put into context any designations read by Complaint Counsel. Without prior notice of what Complaint Counsel will be reading, Respondents' counsel will be forced to disrupt the trial and identify its rule-of-completeness counterdesignations on the spot. This disruption can and should be avoided. Complaint Counsel should give prior notice — three days is sufficient — of its excerpts to be read.

Respondents agree that their counterdesignations must be limited to rule-of-completeness issues. Respondents will not be putting in any of their affirmative case at that time or in that manner.

Dated: January 16, 2002

Respectfully submitted,

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Certificate of Service

I hereby certify that this 16th day of January 2002, I caused an original, one paper copy and an electronic copy of Upsher-Smith's Motion for Leave to File a Reply Memorandum In Support of Its Motion In Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts 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
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Washington, D.C. 20580

and one paper copy was hand delivered upon:

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