

UNITED STATES OF AMERICA
BEFORE 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 AMERICAN HOME PRODUCTS CORPORATION'S
RESPONSE TO COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENT AMERICAN HOME PRODUCTS CORPORATION TO
PRODUCE DOCUMENTS AND TESTIMONY**

In response to a document request that American Home Products ("AHP") served on complaint counsel on June 1, 2001, complaint counsel took nearly two months to produce a total of 2 boxes and 1 file of documents. Complaint counsel's Motion to Compel AHP to Produce Documents and Testimony suggests that AHP has been delinquent in taking just over four months to produce over 60 boxes of documents in response to complaint counsel's two document requests, issued on May 22 and August 3. But AHP has been producing documents to complaint counsel on a rolling basis since June, and expects that it will fully complete its production in response to both document requests before October 3, the date by which complaint counsel seek to compel AHP to complete its production. Moreover, until the week before filing their motion, when they indicated their hope that AHP would complete its document production by the end of

September, complaint counsel never asked AHP to accelerate its production or indicated that AHP's document production schedule was impeding complaint counsel's trial preparation efforts. Complaint counsel's motion to compel the production of documents is unfounded and moot.

Complaint counsel's motion to compel AHP to produce a custodian of records for deposition is similarly unfounded and unnecessary. Complaint counsel served the notice of deposition on July 11. (See Exhibit C to Complaint Counsel's Motion to Compel.) The following week, AHP's counsel sent complaint counsel a letter indicating that the notice of deposition was at best premature and that counsel for AHP was willing to discuss any concerns complaint counsel had about the scope of AHP's document search. (See Exhibit 1 attached.) Complaint counsel did not respond to that letter for nearly two months. Complaint counsel finally contacted AHP on September 10 to discuss the deposition notice, but indicated that they would not insist on scheduling the deposition right away. (See Exhibit 2 attached.) Without conferring any further with AHP, complaint counsel then filed their motion to compel. At no time did AHP indicate that it would not produce the custodian for deposition. While AHP believes that a custodian deposition is a waste of the parties' resources given the amount of pretrial work that must be accomplished in this fast-track case, AHP nevertheless will make a custodian available for deposition.

Any suggestion that AHP has obstructed the discovery process in this matter is incorrect. Complaint counsel's real objection to AHP's discovery behavior appears to be only that AHP used "imprecise" language when it wrote, in response to complaint counsel's inquiry whether AHP would complete its document production by September

28, that AHP expected "that its document production will be substantially complete by September 28" and that it would let complaint counsel know promptly if that expectation changed. AHP expects that its document production will be complete before October 3, the date requested in complaint counsel's motion. And AHP will make a custodian available for deposition during the week of October 8.

FACTS

AHP's Rolling Document Production

After having received numerous documents from AHP during the Commission's pre-complaint investigation, after the litigation was filed complaint counsel served yet another request for documents on AHP. (See Exhibit A to Complaint Counsel's Motion to Compel.) The May 22, 2001 document request was broad and extensive, requiring AHP to search and review the files not only of personnel involved in its generic drug business, but personnel throughout its brand pharmaceutical business.

In response to the document request, counsel for AHP (1) reviewed dozens of organizational charts to determine which AHP business units and job functions would be likely to have responsive documents; (2) interviewed scores of AHP employees to determine whether particular persons possessed responsive documents or knew of others within the company who did; and (3) coordinated file searches at several different AHP locations in four states, where responsive documents were expected to be located.¹ (See Exhibit 2 attached)

¹ After the file searches, counsel for AHP were responsible for reviewing each page of every document that had been retrieved, to determine whether the document was responsive and whether any document or portion of a document should be withheld because it was protected by applicable privileges. Responsive, non-privileged documents
Footnote continued on next page

On June 26, AHP began its rolling production of documents in response to complaint counsel's request. Its June 26 production consisted of two boxes of organizational charts, which were provided early to complaint counsel to enable complaint counsel to determine if there were particular areas of the company that they believed needed to be searched. On July 19, AHP provided complaint counsel with a list of individuals it planned to search for responsive documents, noting that the list might need to be altered based on ongoing client interviews – a caveat also made by complaint counsel when they produced their own search list. (See Exhibit 3 attached.) AHP's search list contained 79 employees from AHP's corporate headquarters in Madison, New Jersey, ESI Lederle in St. David's, Pennsylvania and Pearl River, New York; Wyeth Ayerst Laboratories in St. David's, and A.H. Robins in Richmond, Virginia. After providing the initial search list, counsel continued to conduct employee interviews, and ultimately determined that a total of 87 employees would be searched.

After AHP's initial document production on June 26, AHP's document production continued on a rolling basis. AHP produced documents to complaint counsel on July 3 (1 box), July 24 (10 boxes), August 1 (6 boxes), August 7 (6 boxes), August 13 (2 boxes), August 14 (1 box), August 17 (2 boxes), August 22 (3 boxes), September 5 (4 boxes), and September 25 (33 boxes). (See Exhibit 2.)

On August 3, in the midst of responding to complaint counsel's first document request, AHP received another document request from complaint counsel, relating to AHP's exit from the oral generic drug business. (See Exhibit B to Complaint Counsel's

Footnote continued from previous page
then had to be properly labeled pursuant to the protective order governing this matter and copied for production to complaint counsel and the other respondents. (See Exhibit 2)

Motion to Compel.) That topic had not been covered in complaint counsel's earlier document request, and once again, AHP had to undertake the process of reviewing organization charts, interviewing employees, and conducting file searches. (See Exhibit 2.)

On September 10, counsel for AHP spoke with complaint counsel about AHP's document production. Complaint counsel expressed concern that AHP's document production was not complete and expressed their hope that AHP would complete its production by the end of September. Complaint counsel noted that Upsher was nearing the completion of its document production. AHP's counsel indicated that AHP would continue to produce documents on a rolling basis. (See Exhibit 2.) On September 13, complaint counsel wrote a letter asking AHP to state by September 14 whether AHP would complete its document production by September 28. (See Exhibit 4 attached.) AHP responded by September 14, indicating that it expected to substantially complete its production by September 28 and stating that it would advise complaint counsel promptly if that expectation changed. (See Exhibit D to Complaint Counsel's Motion to Compel.) The next business day, complaint counsel filed their motion to compel.

At no time during this process did complaint counsel ever suggest that AHP's search list was deficient, or that additional employees or units of the company needed to be searched. Similarly, at no time during this process did complaint counsel ask AHP to accelerate its production or to produce files of particular people on an expedited basis so that complaint counsel could review those files to take a deposition. It was not until September 10 that complaint counsel expressed to AHP their hope that AHP's production would be complete by the end of September. Even then, complaint counsel never

indicated that their trial preparation work was being impeded by AHP's rolling document production. (See Exhibit 2.)

Notice of Deposition of Records Custodian

On July 11, complaint counsel served on counsel for AHP a notice of deposition for a custodian of records. (See Exhibit C to Complaint Counsel's Motion to Compel.) The notice of deposition specified three topics about which the deponent was requested to testify: the process for identifying files responsive to complaint counsel's document request, description of procedures for withholding privileged documents, and a description of AHP's document retention policies since 1995. At the same time complaint counsel served this notice on AIIP, it served similar notices of custodian depositions on Schering-Plough and Upsher-Smith. (See Exhibit 5 attached.)

The next day, on July 12, counsel for AHP told complaint counsel during a conversation about discovery that AHP believed the custodian deposition was unnecessary but at best that it would be premature. (See Exhibit 2.) The next week, on July 19, AHP's counsel wrote a letter reiterating that view and indicating that counsel for AHP would be willing to answer questions about AHP's document search. (See Exhibit 1.) Counsel for Upsher-Smith and Schering wrote similar letters to complaint counsel. (See Exhibits 6 and 7 attached.) AIIP's counsel never received a response to its letter. In contrast, complaint counsel did respond to Upsher-Smith's written objections to the deposition, indicating that complaint counsel in fact wished to pursue the deposition of Upsher's custodian. (See Exhibit 8 attached.) Given that complaint counsel did not respond to AHP's letter, while they did respond to Upsher's letter, counsel for AHP

reasonably assumed that complaint counsel did not, at least at that time, wish to schedule the deposition for AHP's custodian.

Nearly two months went by before complaint counsel finally responded to AHP's letter about the custodian deposition. On September 10, complaint counsel asked AHP's counsel about the deposition. AHP's counsel invited complaint counsel to ask whatever questions they had about the scope of AHP's search. Complaint counsel did not ask any questions, and indicated that they would hold off scheduling the deposition for the time being, pending the production of more documents. (See Exhibit 2.) The next time the issue was raised was on September 17, when complaint counsel filed its motion to compel.

ARGUMENT

The facts about AHP's document production and the history of communications between the parties about the custodian deposition – most of which were conspicuously absent from complaint counsel's motion – demonstrate that AHP has not obstructed discovery or trial preparation. Complaint counsel's argument that the speed of AHP's production has compromised complaint counsel's ability to take depositions and prepare for trial is not supported by the facts:

- Complaint counsel have not identified for the Court a single deposition the timing of which has been delayed because of AHP's rolling document production.
- Complaint counsel never told counsel for AHP that they wished to depose AHP employees but could not because of AHP's rolling document production.
- Complaint counsel never asked AHP to expedite the production of a particular employee's files so that complaint counsel could depose that person.

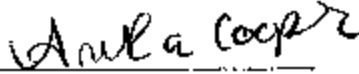
- Complaint counsel noticed depositions of other respondents' employees before receiving all documents from the files of those employees. (See Exhibit 2.)

In the face of these facts, complaint counsel will be hard-pressed to identify for the Court a single way in which AHP's rolling document production has hindered complaint counsel's ability to prepare for trial. And indeed, complaint counsel have failed to do so to date. In any event, AHP will complete its production before October 3, the date requested in complaint counsel's motion, and will make a custodian of records available for deposition during the week of October 8. Thus, complaint counsel's motion – which was unfounded and unnecessary to begin with – is moot.

For the foregoing reasons, AHP respectfully requests that complaint counsel's motion to compel be denied.

Respectfully submitted,

Elliot Feinberg
AMERICAN HOME PRODUCTS
CORPORATION
Five Giraldia Farms
Madison, N.J. 07940
(973) 660-5000


Michael N. Sohn
Donna E. Patterson
Cathy A. Hoffman
Anika Sanders Cooper
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for American Home Products
Corporation

Dated: September 27, 2001

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

-----)
In the Matter of)

Schering-Plough Corporation,)
a corporation,)

) Docket No. 9297

Upsher-Smith Laboratories,)
a corporation,)

and)

American Home Products Corporation,)
a corporation.)
-----)

CERTIFICATE OF SERVICE

I, Anika Sanders Cooper, hereby certify that on September 27, 2001, I caused a true and correct copy of the *American Home Products Corporation's Response to Complaint Counsel's Motion to Compel Respondent American Home Products to Produce Documents and Testimony* to be served upon the following persons by electronic mail and by hand delivery:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (2 copies)

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (Original and 1 copy)

Richard A. Feinstein
Assistant Director, Bureau of Competition
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Karen G. Bokal

Federal Trade Commission
601 Pennsylvania Ave., NW.
Room 3115.
Washington, D.C. 20580
Fax (202) 326-3384

Robert Paul
Christopher Curran
White & Case LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Fax (202) 639-9355

Laura S. Shores
Howrey Simon Arnold & White LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Fax (202) 383-6610



Anika Sanders Cooper
Arnold & Porter

EXHIBIT 1

ARNOLD & PORTER

Anika Sanders Cooper
Anika_Cooper@aporter.com

202.942.5632
202.942.5989 Fax

555 Twelfth Street, NW
Washington, DC 20004-1206

July 19, 2001

VIA FACSIMILE AND HAND DELIVERY

Andrew S. Ginsburg, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: In the Matter of Schering-Plough Corp., et al., Docket No. 9297

Dear Mr. Ginsburg:

I am writing to further explain American Home Products Corporation's ("AHP") objections to Complaint Counsel's notice of a rule 3.33(c) deposition for AHP. Exhibit A to the deposition notice states that Complaint Counsel wishes to depose an AHP employee about (a) the steps and procedures used to identify and collect documents responsive to Complaint Counsel's First Request for Production of Documents and Things; (b) the steps and procedures used to identify privileged materials withheld from AHP's production to Complaint Counsel; and (c) AHP's document destruction and retention policies. As I stated on July 12th during a conference call with Yaa Apori, Steve Vieux and Philip Eisenstadt, AHP believes that a custodian deposition is wholly unnecessary and, in any event, premature at this stage of AHP's production of documents to Complaint Counsel.

There are many reasons why AHP does not view a custodian deposition such as the one you proposed as necessary or justified. First, Complaint Counsel served a very extensive document request on AHP just a short while ago. As we have told Complaint Counsel, we have been and still are in the process of identifying and collecting documents responsive to that broad request. No person at AHP could testify as to the "procedures used" in identifying and collecting these documents because that process is still very much ongoing.

Second, AHP has already agreed to provide Complaint Counsel with a preliminary list of those individuals whose files will be searched for responsive documents and to supplement that list as additional names are added. With this agreement in place, there is absolutely no justification for Complaint Counsel to have any concerns about a lack of information as to where AHP intends to search for responsive documents. If Complaint Counsel has any concerns about the scope of AHP's search after receiving the first preliminary search list and reviewing the AHP organizational

ARNOLD & PORTER

Andrew S. Ginsburg, Esq.
July 19, 2001
Page 2

charts that were produced one week ago, it seems to me that the best course of action would be to set up a call with us to discuss those concerns. If the parties then find that they cannot reach accord, the next step would be for Complaint Counsel to file a motion to compel a broader search.

Third, any questioning by Complaint Counsel into the grounds or process for withholding privileged documents from the production would be objectionable under the attorney-client and/or attorney work-product privileges. Complaint Counsel is entitled to, and will receive, a privilege log from AHP identifying documents that have been withheld and the grounds for withholding them. Any disputes arising from entries on that privilege log can be dealt with when and if they occur by discussions between the parties and, if necessary, a motion to compel. A deposition that seeks to probe into those issues now is improper.

Fourth, any questioning at a deposition regarding AHP's document retention and destruction policies necessarily would be duplicative of Complaint Counsel's document request No. 19. AHP has already agreed to produce any non-privileged documents responsive to that request.

Please let me know if you have any questions regarding the scope of AHP's objection to this deposition. We hope that you will agree that an AHP custodian deposition is unwarranted.

Sincerely,



Anika Sanders Cooper

cc: Karen Bokar, Esq.
Christopher Curran, Esq.
Laura Shores, Esq.

EXHIBIT 2

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

**DECLARATION OF ANIKA SANDERS COOPER IN SUPPORT OF
RESPONDENT AMERICAN HOME PRODUCTS CORPORATION'S
RESPONSE TO COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENT AMERICAN HOME PRODUCTS CORPORATION TO
PRODUCE DOCUMENTS AND TESTIMONY**

I, Anika Sanders Cooper, declare as follows:

1. I am an associate at Arnold & Porter, counsel to American Home Products Corporation ("AHP") in this matter.
2. On July 12, 2001, I spoke with Philip Eisenstat, Yaa Apori and Steve Vieux. I indicated that complaint counsel's recent notice of deposition for a custodian of records was premature given the extensiveness of complaint counsel's document request and the fact that AHP's rolling document production was ongoing.
3. On September 10, 2001, I spoke with complaint counsel Yaa Apori regarding various discovery issues. Ms. Apori asked what the status of scheduling a deposition for an AHP custodian of records was. I responded that AHP had

objected to the notice of deposition months ago and had received no response from complaint counsel or indication that complaint counsel intended to pursue the deposition. I told Ms. Apori that we believed it made more sense for complaint counsel to raise specific concerns or questions about AHP's document production with counsel for AHP rather than go forward with a custodian deposition. I also indicated that AHP's rolling production would continue with a submission of documents that week. Ms. Apori agreed to "table" the scheduling of a custodian deposition pending the receipt of more documents from AHP during the week of September 10. I again indicated my willingness to discuss any specific concerns about perceived deficiencies in AHP's document production.

4. During the September 10th call, Ms. Apori stated for the first time that complaint counsel wanted AHP to complete its document production by the end of September. She noted that Upsher-Smith's document production was near complete. I indicated that AHP would continue with its rolling document production.
5. On September 17, 2001, I spoke with Ms. Apori and Steve Vieux of complaint counsel. Ms. Apori indicated that complaint counsel had filed a motion to compel a custodian deposition and the completion of AHP's document production by a date certain. She said that complaint counsel was concerned about whether it was going to get all the documents it needed. Ms. Apori did not provide specific concerns regarding perceived deficiencies in AHP's production.
6. AHP's rolling production of documents has consisted of the following schedule:

Two boxes of documents were submitted on June 26, 2001 containing organizational charts for relevant AHP divisions. One box of documents was produced on July 3. Ten boxes of documents were produced on July 24. Six boxes of documents were produced on August 1. Six boxes of documents were produced on August 7. Two boxes of documents were produced on August 13. One box of documents was produced on August 14. Two boxes of documents were produced on August 17. Three boxes of documents were produced on August 22. Four boxes of documents were produced on September 5. Thirty-three boxes of documents were produced on September 25.

7. AHP's process for responding to complaint counsel's document requests includes several steps. First, counsel for AHP reviewed dozens of organizational charts to determine which AHP business units and job functions would be likely to have responsive documents. Second, counsel for AHP interviewed scores of AHP employees to determine whether particular persons possessed responsive documents or knew of others within the company who did. Third, counsel for AHP coordinated file searches at several different AHP locations in St. David's Pennsylvania; Pearl River, New York; Madison, New Jersey; and Richmond, Virginia. Fourth, after the file searches, counsel for AHP were responsible for reviewing each page of every document that had been retrieved, to determine whether the document was responsive and whether any document or portion of a document should be withheld because it was protected by applicable privileges. Fifth, responsive, non-privileged documents were labeled pursuant to the protective order governing this matter and copied for production to complaint

counsel and the other respondents. AHP's final search list includes 87 AHP employees.

8. AHP served a request for documents on complaint counsel on June 1, 2001. Complaint counsel produced 2 boxes of documents to AHP on July 27, 2001 and one small file of documents on August 2, 2001. Complaint counsel has not produced any other documents to date.
9. Complaint counsel noticed depositions of other respondents' employees before receiving all documents from the files of those employees. For example, complaint counsel served the notice of deposition for Paul Kralovec of Upsher Smith on August 20, 2001. Counsel for Upsher-Smith produced documents that appear to have been sent or received by Mr. Kralovec on August 31, 2001. Mr. Kralovec's deposition was held on September 7, 2001.
10. Attached to my declaration are true and correct copies of correspondence to and from complaint counsel.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Wanda Cooper

Executed September 27, 2001

EXHIBIT 3



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

WASHINGTON, D.C. 20580

Bureau of Competition

July 19, 2001

Via U.S. Mail and electronic mail

Anika Sanders Cooper, Esq.
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004-1206

Re: Federal Trade Commission v. Schering-Plough Corporation, et al.
Docket No. 9297

Dear Ms. Cooper:

Enclosed is complaint counsel's preliminary search list as promised at last Thursday's conference call. Complaint counsel reserves the right to supplement this list as needed. If you have any questions or concerns, do not hesitate to call me at (202) 326-2306. I look forward to reviewing AHP's search list.

Sincerely,

Steve Vieux
Counsel Supporting the Complaint

Enclosure

Complaint Counsel's Preliminary Search List

1. Bradley Albert: Mr. Albert is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
2. Patricia Allen: Ms. Allen is an investigator in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
3. Yaa Apori: Ms. Apori is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
4. Karen Bokai: Mr. Bokai is the lead attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
5. Phillip Eisenstat: Mr. Eisenstat is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
6. Andrew Ginsburg: Mr. Ginsburg is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
7. Leslie Farber: Mr. Farber is the Acting Deputy Assistant Director of the Antitrust II Division of the Bureau of Economics that worked on this matter.
8. Richard Feinstein: Mr. Feinstein was the Assistant Director of the Bureau of Competition, Division of Health Care Services and Products, at the time of AHP's first set of document requests and worked on this matter.
9. Rachel Hertzman: Ms. Hertzman is a paralegal in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
10. Elizabeth Hilder: Ms. Hilder is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
11. Michael Kades: Mr. Kades is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
12. Robert Kneupper: Mr. Kneupper is an economist in the Bureau of Economics assigned to this matter.
13. Robin Moore: Ms. Moore is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
14. David Pender: Mr. Pender is the Deputy Assistant Director of the Bureau of Competition, Division of Health Care Services and Products, and worked on this matter.
15. Joel Schrag: Mr. Schrag is an economist in the Bureau of Economics assigned to this matter.

16. **Seth Silber:** Mr. Silber is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.
17. **Steve Vieux:** Mr. Vieux is an attorney in the Bureau of Competition, Division of Health Care Services and Products, assigned to this matter.

EXHIBIT 4



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Karen Bokat
Attorney

Direct Dial
(202) 326-2912

September 12, 2001

Arika Sanders Cooper, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Via electronic mail and Federal Express

Re: Schering-Plough Corp., Upsher-Smith Laboratories, Inc., American Home
Products Corporation, Docket No. 9297

Dear Ms. Cooper:

I am very concerned about the tardiness of AHP's document production, which is long overdue. Because AHP'S dilatory discovery response has seriously impeded our ability to prepare for trial, I request that you let me know by this Friday, September 14, whether you will complete your document production no later than Friday, September 28.

Sincerely,
Karen G. Bokat
Karen G. Bokat
Complaint Counsel

EXHIBIT 5

**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

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(c) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of respondent Schering-Plough Corporation as represented by one or more designated officers, directors, or other employees most knowledgeable regarding the matters set forth in Exhibit A to this notice. This deposition will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. The deposition will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W., beginning on July 27, 2001 at 9:00 AM.

Respectfully Submitted,

Andrew S. Ginsburg
Complaint Counsel

Dated: July 11, 2001

EXHIBIT A

TOPICS OF INQUIRY

1. Identification of all steps and procedures taken by Schering-Plough Corporation to locate the documents and information responsive to complaint counsel's First Request for the Production of Documents and Things. This includes, but is not limited to, identification of: (a) the physical locations searched for responsive documents and information, including, but not limited to, the offices, files, desks, and computers, in which responsive documents were contained; (b) the types of documents searched for responsive information, including, but not limited to, all originals and non-identical copies of drafts of all written, printed, recorded, photographic or graphic matter of every kind and description as well as all documents constituting, referring, or relating to electronic mail; and, (c) the instructions given to employees whose files were to be searched for responsive documents and information as well as to persons who actually conducted the search.
2. Description of procedure used to identify which materials were withheld from Schering-Plough Corporation's response to complaint counsel's First Request for the Production of Documents and Things on the basis of privilege.
3. Identification of all steps and procedures taken by Schering-Plough Corporation to locate the documents and information responsive to complaint counsel's *subpoena duces tecum*, dated November 5, 1999. This includes, but is not limited to, identification of: (a) the physical locations searched for responsive documents and information, including, but not limited to, the offices, files, desks, and computers, in which responsive documents were contained; (b) the types of documents searched for responsive information, including, but not limited to, all originals and non-identical copies of drafts of all written, printed, recorded, photographic or graphic matter of every kind and description as well as all documents constituting, referring, or relating to electronic mail; and, (c) the instructions given to employees whose files were to be searched for responsive documents and information as well as to persons who actually conducted the search.
4. Description of procedure used to identify which materials were withheld from Schering-Plough Corporation's response to complaint counsel's *subpoena duces tecum*, dated November 5, 1999, on the basis of privilege.
5. From January 1, 1995 to present, identification and description of the document destruction and retention policies of Schering-Plough Corporation.

**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

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(c) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of respondent Upsher-Smith Laboratories, Inc., as represented by one or more designated officers, directors, or other employees most knowledgeable regarding the matters set forth in Exhibit A to this notice. This deposition will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. The deposition will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W., beginning on July 25, 2001 at 9:00 AM.

Respectfully Submitted,

Andrew S. Ginsburg
Complaint Counsel

Dated: July 11, 2001

EXHIBIT A

TOPICS OF INQUIRY

1. Identification of all steps and procedures taken by Upsher-Smith Laboratories, Inc., to locate the documents and information responsive to complaint counsel's First Request for the Production of Documents and Things. This includes, but is not limited to, identification of: (a) the physical locations searched for responsive documents and information, including, but not limited to, the offices, files, desks, and computers, in which responsive documents were contained; (b) the types of documents searched for responsive information, including, but not limited to, all originals and non-identical copies of drafts of all written, printed, recorded, photographic or graphic matter of every kind and description as well as all documents constituting, referring, or relating to electronic mail; and, (c) the instructions given to employees whose files were to be searched for responsive documents and information as well as to persons who actually conducted the search.
2. Description of procedure used to identify which materials were withheld from Upsher-Smith Laboratories, Inc.'s response to complaint counsel's First Request for the Production of Documents and Things on the basis of privilege.
3. From January 1, 1995 to present, identification and description of the document destruction and retention policies of Upsher-Smith Laboratories, Inc.

EXHIBIT 6

FROM WHITE & CASE LLP DC

(TUE) 7. 24 '01 12:24/8T. 12:21/NO. 4862775909 P 2

LOS ANGELES
MIAMI
NEW YORK
PALM ALTO
WASHINGTON, D. C.

BERLIN
BRASILIA
BUENOS AIRES
BUDAPEST
DRESDEN
DUSSELDORF
FRANKFURT
HAMBURG
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BOMBAY/MUMBAI
HONG KONG
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JEDDAH
RIYADH

MERIDO CITY
SAO PAULO

JOHANNESBURG

July 24, 2001

VIA FACSIMILE

Andrew S. Ginsburg, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Schering-Plough Corp., Upsher-Smith Laboratories, Inc.,
American Home Products Corporation, Docket No. 9297

Dear Mr. Ginsburg:

I am writing to explain Upsher-Smith Laboratories, Inc.'s ("Upsher-Smith") objections to Complaint Counsel's notice of a Rule 3.33(c) deposition for Upsher-Smith. Upsher-Smith believes that a custodian deposition is unnecessary at this stage of its production.

Upsher-Smith is still in the process of searching for and identifying responsive documents to Complaint Counsel's extensive document request that was recently served on Upsher-Smith. Upsher-Smith has already provided Complaint Counsel with an initial production of documents. Furthermore, Complaint Counsel has orally agreed to begin inspecting Upsher-Smith's documents in Minneapolis on August 14, 2001. If Complaint Counsel has any concerns about the scope of Upsher-Smith's search after reviewing Upsher-Smith's initial production and their inspection of Upsher-Smith documents, then the logical course of action would be to arrange a meeting in person and discuss any issues regarding the scope of Upsher-Smith's search and production at that time. If the parties then find that they cannot reach an agreement on any open issues, then the next step would be for Complaint Counsel to file a motion to compel requesting a broader search.

With regards to areas of questioning for Complaint Counsel's requested deposition, any questioning by Complaint Counsel relating to Upsher-Smith withholding privileged documents from its production would be objectionable under the attorney-client and/or attorney work-

WHITE & CASE
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Andrew S. Ginsburg, Esq.

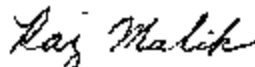
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product privileges. A deposition that seeks to probe into issues relating to privilege is improper. Complaint Counsel is entitled to and will receive a privilege log and only after Upsher-Smith produces a log will issues as to privilege be ripe.

Lastly, any inquiry into Upsher-Smith's document retention and destruction policies is duplicative of Complaint Counsel's document request No. 29. Upsher-Smith has already agreed to produce any existing, non-privileged documents responsive to that request.

Please let me know if you have any questions. We hope that you will agree that an Upsher-Smith custodian deposition is both unnecessary and unwarranted.

Sincerely,



Rajeev K. Malik

cc: Cathy Hoffman, Esq.
Laura S. Shores, Esq.

EXHIBIT 7



1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004-2902
PHONE 202.783.0800
FAX 202.383.6610
A LIMITED LIABILITY PARTNERSHIP

July 19, 2001

VIA FACSIMILE AND U.S. MAIL

Andrew S. Ginsburg, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: In the Matter of Schering-Plough Corp., et al., Docket No. 9297

Dear Mr. Ginsburg:

I write regarding complaint counsel's notice of a rule 3.33(c) deposition for Schering-Plough Corporation ("Schering"). Exhibit A to the deposition notice indicates that complaint counsel intends to depose Schering's representative about: (1) the steps and procedures used to locate documents responsive to complaint counsel's First Request for Production of Documents ("First Request"); (2) the procedures used to identify materials withheld from Schering's production in response to that request on the grounds of privilege; (3) the steps and procedures used to locate documents responsive to the Commission's *subpoena duces tecum* dated November 5, 1999; (4) the procedures used to identify materials withheld from documents responsive to that subpoena on the grounds of privilege; and (5) Schering's document destruction and retention policies.

A deposition such as the one you propose seems to us to be inappropriate for the following reasons. First, Schering has not completed its search for and production of documents responsive to the First Request. Questioning a Schering representative about the "procedures used to locate documents" before the document production has been completed would therefore be premature at best.

Second, and more fundamentally, the deposition notice is at odds with the spirit in which the parties have been working on document production issues. As you know, Schering and complaint counsel have been meeting to negotiate issues related to the scope of the First Request. As I understand it, these meetings have been conducted professionally and amicably. Any concerns about the scope of Schering's search should, it seems to us, be raised in the course of those meetings. To my knowledge, no disputes have arisen between the parties in the course of those negotiations; and to the extent that any develop, it seems to us that the proper way to resolve them would be by way of a motion to compel.



Andrew S. Ginsburg, Esq.
July 19, 2001
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Third, complaint counsel seeks testimony about Schering's production of documents during the investigatory stage of this proceeding. We are now in Part III litigation, and complaint counsel has issued document requests that largely duplicate, or expand upon, the Commission's requests during the investigatory phase. Schering will therefore be required to re-search its files for responsive documents to comply with the First Request. We fail to see what purpose would be served by questioning a Schering representative about its earlier searches, when its current search will require it to duplicate and, in some cases, expand upon its earlier efforts.

Finally, we believe that questions to Schering at a deposition about the grounds for withholding materials on privilege grounds would be improper under any circumstances. Schering identified the reasons for withholding such materials from previous productions on its privilege log, and will supply a similar log with respect to the ongoing production. We believe that its descriptions of the withheld materials are, and will be, adequate to enable complaint counsel to assess the applicability of the privilege. If complaint counsel believes that any particular entries on Schering's log are inadequate in this regard, we are open to discussing them. Questions about the reasons for withholding documents at a deposition, however, likely would be subject to objections based on the attorney-client and work-product privileges.

In short, we believe that the deposition complaint counsel seeks is inappropriate under the circumstances. We remain hopeful that the parties will continue to work together in an effort to avoid unnecessary disputes on issues related to the production of documents.

Sincerely,

A handwritten signature in cursive script, appearing to read "Laura S. Shores".

Laura S. Shores

cc: Karen Bokar, Esq.
Christopher M. Curtan, Esq.
Cathy Hoffman, Esq.

EXHIBIT 8



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20540

Philip M. Eisenstat

Direct Dial
(202) 326-2769

Rajeev K. Malik, Esq.
White & Case
601 Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807

Re: Schering-Plough Corporation, Upsher-Smith Laboratories, Inc., American Home
Products Corporation, Docket No. 9297.

Dear Mr. Malik:

I am writing in response to your letter to Andrew Ginsburg of this office, explaining why you object to our deposition under Rule 3.33(c) inquiring into the document search being undertaken by Upsher-Smith Laboratories, Inc. ("Upsher-Smith.") We disagree with you that a custodian deposition is unnecessary or unwarranted at this stage of discovery. We have concerns about the scope of the search for relevant documents being undertaken by Upsher-Smith. You propose to begin producing documents in mid-August and not to complete production until the end of August. Given the short discovery schedule in this case we can not, as you request, wait until after reviewing the documents produced by Upsher-Smith and then discuss any shortcomings of the production. In the best case, that would put us well into September before we could file a motion to compel additional document production, and, given the discovery cutoff in this case, that would effectively preclude us from obtaining additional information.

One concern with the document search by Upsher-Smith are the limitations you unilaterally announced in your letter of July 10, 2001 to Yaa Apori, limiting the document search to the same locations searched when Upsher-Smith responded to the investigative subpoena earlier issued by the Commission. Without a deposition of the document custodian(s), we cannot tell the extent to which a search based on the earlier investigative subpoena is sufficient to produce the documents to which complaint counsel is entitled. The earlier search apparently missed documents which should exist at Upsher-Smith and would be responsive to the early, more narrow, investigational subpoena. For example, in response to the investigative subpoena, we received no correspondence between Upsher-Smith and the FDA concerning Niacor-SR. We received no documents documenting the meetings between Upsher-Smith and Schering-Plough Corporation, such as travel reimbursement records, which would pinpoint the time and place of the meetings between the two companies relating to the negotiations over the settlement agreement and the license for Niacor-SR. If that search missed documents called for in the

Rajeev K. Malik, Esq.

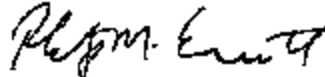
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earlier investigational subpoenas, complaint counsel cannot rely on a similarly limited search for the Complaint Counsel's First Request for the Production of Documents and Things Issued to Upsher-Smith Laboratories, Inc. ("First Document Request to Upsher-Smith"). While we can identify certain categories of documents for which we received no or virtually no documents, we have no way of telling in what other areas relevant documents exist but were not produced, except by taking a deposition of the document custodian(s).

In your July 24, 2001 letter to Andrew Ginsburg, you suggest we wait until after reviewing the documents and then simply discuss any deficiencies with you. Given the delay you have already imposed upon us in obtaining documents, and the fact that you will not begin producing documents until mid-August, we cannot wait that long. We served the First Document Request to Upsher-Smith on May 22, 2001. You served us with Upsher-Smith's Response to Complaint Counsel's First Request for the Production of Documents and Things on June 25, 2001, well after the time period called for by the Federal Trade Commission Rules of Practice. At that time we received no documents. Since then we have received only two documents, the Upsher-Smith's Articles of Incorporation, and a sample of an executed "batch" record and process validation reports. You initially stated that Upsher-Smith would make relevant documents available to complaint counsel in Minneapolis in mid-July, but stated in your July 10 letter that documents will not be available until August 14 at the earliest, and that you will not produce all the documents until August 31, 2001.

We are pleased to continue our dialogue with you on these issues; however, given the discovery schedule we feel we must proceed with the deposition of the document custodian(s). We request that you make available the witness or witnesses required in response to our notice of deposition and call Andrew Ginsburg to arrange the date and time for the deposition. If you are going to refuse to comply with the notice, please let us know by August 1, so that we can decide on our appropriate course of action.

Sincerely,



Philip M. Eisenstat
Complaint Counsel

cc: Cathy Hoffman, Esq.
Laura S. Shores, Esq.