UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

MEMORANDUM IN SUPPORT OF AMERICAN HOME PRODUCTS CORPORATION'S MOTION TO QUASH TWO SUBPOENAS *AD TESTIFICANDUM* SERVED ON AHP AFTER AHP'S WITHDRAWAL FROM ADJUDICATION AND, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER

On October 10, 2001, complaint counsel and American Home Products Corporation ("AHP") filed a joint motion to withdraw AHP from this adjudication. On October 12, the Secretary of the Commission entered an order withdrawing AHP from adjudication. Pursuant to Federal Trade Commission ("FTC" or "Commission") Rule of Practice 3.25(c), all proceedings against AHP have been stayed. AHP must now be considered a third party to this adjudication.

The next business day following entry of the Secretary's order, complaint counsel served subpoenas *ad testificandum* seeking depositions of two AHP employees (attached as Exhibit 1). The depositions sought are unnecessary and unduly burdensome. Both employees have already been questioned extensively by complaint counsel during investigational hearings in this matter. Complaint counsel have listed the employees on their

trial witness list and have the authority to compel their attendance at trial. Transcripts of depositions of these employees likely will be inadmissible at trial under FTC Rule 3.33(g), so the depositions can not serve any direct evidentiary purpose. Moreover, if complaint counsel wish to have prior testimony of these witnesses for impeachment purposes at trial, they already have such testimony. And little "discovery" purpose can be served by complaint counsel rehashing prior testimony with these witnesses.

AHP therefore respectfully requests that the Court quash the subpoenas. Alternatively, if the Court determines that complaint counsel should be permitted to depose these witnesses, the depositions should be limited to subject matter raised by occurrences or documents produced after their investigational hearings and should be limited to two hours each.

I. BACKGROUND

During the pre-complaint investigation in this matter, FTC staff conducted investigational hearings of AHP employees Lawrence Alaburda, Esq. (Litigation Counsel, Patents), and Dr. Michael Dey (formerly President of AHP's ESI-Lederle unit, and now President of Women's Health at AHP's Wyeth-Ayerst subsidiary). The investigational hearings took place after AHP, Schering-Plough Corporation ("Schering"), and Upsher-Smith Laboratories had produced thousands of pages of documents to the FTC. FTC staff questioned Mr. Alaburda for a full day on August 23, 2000. The resulting 155-page deposition transcript demonstrates that the FTC explored a wide range of issues, including the negotiations leading up to the settlement of the patent infringement lawsuit between Schering and ESI-Lederle. Dr. Dey's day-long investigational hearing occurred on October

5, 2000, resulting in a 178-page transcript. FTC staff questioned Dr. Dey extensively, for instance, regarding ESI's development of its allegedly infringing generic K-Dur and about the patent infringement litigation and the negotiation process leading up to the Schering-ESI settlement agreement.

On October 12, 2001, the Secretary of the Commission entered an order withdrawing AHP from this adjudication so that the Commission can consider a proposed consent decree that AHP and the FTC's Bureau of Competition have signed. Commission Rule of Practice 3.25(c) provides that proceedings against AHP therefore are stayed. Recognizing that AHP can no longer be considered a party to this litigation whose employees are subject to deposition by notice, on October 15 complaint counsel served subpoenas *ad testificandum* for Mr. Alaburda and Dr. Dey.

During the entire course of this litigation, complaint counsel never served a notice of deposition for Dr. Dey, and had otherwise given no indication that they would seek to re-depose him. It was not until after AHP was withdrawn from adjudication, two weeks before the close of discovery, that complaint counsel gave AHP any notice that they intended to try to re-depose Dr. Dey.

II. ARGUMENT

AHP does not intend to oppose every attempt by complaint counsel to depose AHP employees following AHP's withdrawal from adjudication. AHP has, for instance, agreed to make available for deposition by complaint counsel a former employee, Larry Miller, who is listed on Schering's trial witness list and who has not previously been the subject of an investigational hearing or deposition. Under Commission Rule 3.31(c), however, this Court

is required in certain circumstances to limit the "frequency or extent of use of the discovery methods otherwise permitted under these rules." 16 C.F.R. § 3.31(c). Those circumstances are present here.

A. The Burden of the Proposed Discovery Outweighs Any Likely Benefit

Commission Rule 3.31(c)(1)(iii) requires the Court to limit discovery if it determines that "[t]he burden and expense of the proposed discovery outweigh its likely benefit." The "benefits" to be achieved through re-examinations of Dr. Dey and Mr. Alaburda are neither "likely" nor substantial enough to outweigh the burdens of the proposed discovery.

Complaint counsel may be seeking to re-depose Dr. Dey and Mr. Alaburda for three reasons: (1) to introduce their depositions as direct evidence at trial; (2) to be able to contradict or impeach the witnesses with prior testimony when they appear at trial; and/or (3) for discovery purposes. None of these potential justifications for re-deposing Dr. Dey and Mr. Alaburda withstands scrutiny.

First, transcripts of depositions of Dr. Dey and Mr. Alaburda likely will be inadmissible as direct evidence at trial. Commission Rule 3.33(g) sets forth the circumstances under which deposition transcripts are admissible as direct evidence at trial. None of those circumstances is present here. Complaint counsel have included both Dr. Dey and Mr. Alaburda on their trial witness list and have the authority to compel their attendance at trial. Neither witness is an employee of a party, neither witness would be unable to appear at trial because of age, sickness, infirmity, or imprisonment, and neither witness is located outside the United States.

Second, if complaint counsel wish to be able to contradict or impeach Dr. Dey or Mr. Alaburda with prior testimony if they appear at trial, they already have that ability, and do

not need to depose the witnesses for that purpose. Transcripts of the investigational hearings of Dr. Dey and Mr. Alaburda can be used to impeach or contradict their trial testimony, even if complaint counsel call Dr. Dey and Mr. Alaburda as witnesses for the FTC. See MCCORMICK ON EVIDENCE § 34 (John W. Strong et al., eds., 5th ed. 1999) (prior inconsistent statements are admissible for purpose of impeaching the witness); Fed. R. Evid. 801(d)(1)(A) (prior inconsistent statements may come in as substantive evidence at trial if the statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition"); Fed. R. Evid. 607 (credibility of witness may be attacked by any party, including the party calling the witness).

Complaint counsel expressed to counsel for AHP the view that the investigational hearing transcripts would be inadequate for purposes of impeachment because some answers to questions posed during the hearings were not as clear as they could have been and because complaint counsel now know more than at the time of the investigational hearings. See Exhibit 1 (declaration of counsel for AHP). But complaint counsel's failure to elicit clear answers from the witnesses cannot provide a legitimate justification for re-examining the witnesses. Complaint counsel's professed acquisition of more information since the time of the hearings likewise cannot justify repetitive examination of the witnesses. It is always true that counsel know more about their case as time progresses, but that does not mean that repeat depositions are warranted on that basis alone. At best, the professed acquisition of new information could justify questioning Dr. Dey and Mr. Alaburda about new subject matters that could not have been explored during the investigational hearing. See infra at 8-9.

Third, any possible "discovery" benefit from re-examining these two witnesses is likely to be minimal. The date for issuance of discovery requests had passed before complaint counsel served the subpoenas, and so complaint counsel can not hope to obtain leads for additional fact discovery by deposing Dr. Dey and Mr. Alaburda.

In any event, any minimal discovery benefit from these depositions is outweighed by the burdens imposed on AHP, Dr. Dey, and Mr. Alaburda. It should go without saying that preparing for and submitting to depositions imposes burdens on busy corporate executives, particularly when their employer is no longer a party to the action. See also, e.g., Tri-Star Pictures, Inc. v. Unger, 171 F.R.D. 94, 102 (S.D.N.Y. 1997) (expressing the court's awareness "of the burdens which appearing for a deposition can impose upon a senior corporate executive"); Wertheim Schroder & Co., Inc. v. Avon Products, Inc., No. 91 Civ. 2287, 1995 WL 6259, at *2 (S.D.N.Y. Jan. 9, 1995) ("permitting unfettered discovery of corporate executives would threaten disruption of their businesses" (quotation omitted)). In part because of these burdens, decisions interpreting the Federal Rules of Civil Procedure routinely find that "repeat depositions are disfavored."[1] Lobb v. United Air Lines, Inc., No. 92-15846, 1993 WL 259470, at *1 (9th Cir. 1993) (quoting Graebner v. James River Corp., 130 F.R.D. 440, 441 (N.D. Cal. 1989)); see also, e.g., Graebner, 130 F.R.D. at 441-42 (denying request for second deposition where party seeking repeat deposition claimed first deposition was a "settlement deposition" and that it subsequently was seeking a "trial

[1] The scope and limits of discovery under the FTC's Rules of Adjudicatory Procedure essentially mirror the Federal Rules of Civil Procedure. *Compare* 16 C.F.R. § 3.31(c)&(d) *with* Fed. R. Civ. P. 26(b)&(c). Accordingly, case law interpreting similar language of the Federal Rules should be considered persuasive authority. See generally Dura Lube Corp., 2000 FTC Lexis 1, at *31 (Jan. 14, 2000) (considering case law related to Fed. R. Civ. P. 12(f) in ruling on a motion to strike); see also L.G. Balfour Co., et. al., 61 F.T.C. 1491, 1492 (Oct. 5, 1962) (judicial precedents under the Federal Rules provide helpful guidance in resolving discovery disputes in Commission proceedings).

deposition"); 7 MOORE'S FEDERAL Practice §30.05[1][c], at 30-30 (Matthew Bender 3d ed., rev. 2001) ("Courts generally disfavor second depositions."). Repeat depositions are particularly disfavored when the person sought to be re-examined is not a party to the action. See Bonnie & Co. Fashions, Inc. v. Bankers Trust Co., 945 F. Supp. 693, 732-33 (S.D.N.Y. 1996) (refusing to give plaintiff leave to re-depose a nonparty witness where justification for retaking the deposition was simply "to re-hash old testimony").[2]

B. Depositions Addressing Areas Already Addressed in Investigational Hearings Would Be Unreasonably Cumulative and Duplicative

Rule 3.31(c)(1)(i) requires the Court to limit discovery if it determines that "[t]he discovery sought is unreasonably cumulative or duplicative." Permitting complaint counsel to question Dr. Dey and Mr. Alaburda again about the same topics covered during the investigational hearing is precisely the type of unreasonably duplicative discovery that the Commission's Rules guard against.

AHP recognizes that this Court has previously ruled that complaint counsel can depose employees of a respondent during the adjudicative phase of a case even if those employees had been subjects of investigational hearings. See In re Hoechst Marion Roussel, Inc., Dkt. No. 9323, Order Denying Respondents' Motions for Protective Orders, at 2-3 (Oct. 12, 2000) (attached at Exhibit 3) (" Hoechst/Andrx"). But AHP employees are no longer employees of a respondent, and the Hoechst/Andrx ruling therefore is inapplicable here. Burdens on nonparties are entitled to special weight in balancing the burdens and benefits of proposed discovery. See e.g., Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir.

[2] The policy disfavoring repeat depositions is evidenced by the 1993 amendments to the Federal Rules, requiring leave of the court to take a second deposition of a person who has already been deposed in the matter. See Fed. R. Civ. P. 30(a)(2)(B).

1998) ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs [regarding discovery requests]."); Dart Indus. Co. v. Westwood Chem. Co., 649 F.2d 646, 649 (9th Cir. 1980) (restrictions on discovery "may be broader when a nonparty is the target of discovery"); Laxalt v. McClatchy, 116 F.R.D. 455, 458 (D. Nev. 1986) ("nonparties to litigation enjoy greater protection from discovery than normal parties"). Particularly given that one of the reasons why parties settle litigation is to reduce burdens on employees, it would be unreasonable to require employees of a settling party to submit to the same burdens imposed on parties.

C. Any Deposition Should Be Limited to New Subject Matter and Limited to Two Hours Each

If the Court nevertheless determines that complaint counsel are entitled to re-depose nonparty employees of AHP, the Court should grant a protective order limiting the depositions to new matters that could not have been explored in the prior examinations and limiting the depositions to no more than two hours. See 16 C.F.R. § 3.31(d). In In re Champion Spark Plug Co., a third party moved to quash deposition subpoenas for three of its employees who had been previously interviewed by complaint counsel. See 1981 FTC Lexis 105 (1981). Judge Timony limited the depositions to "subjects discussed in documents recently obtained or matters occurring since the previous interviews." Id. at *2. Likewise, if the Court determines not to quash the subpoenas in their entirety, any depositions of Mr. Alaburda or Dr. Dey should be limited to new areas of exploration raised by documents produced or events occurring after their investigational hearings. See also, e.g., Tri-Star Pictures, Inc., 171 F.R.D. at 102 (ordering second deposition to be "strictly confined" to new issues and prohibiting re-questioning on topics covered in previous testimony); Dixon v.

Certainteed Corp., 164 F.R.D. 685, 690 (D. Kan. 1996) (limiting second deposition to questions about particular statements made by witness, of which plaintiff was not aware at first deposition); Christy v. Pennsylvania Turnpike Comm'n, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (limiting second deposition to areas not covered in first, after plaintiff filed an amended complaint adding several new parties and new allegations); Jones v. State Farm Fire & Cas. Co., 129 F.R.D. 170, 171 (N.D. Ind. 1990) (in case where plaintiff had already submitted to examinations under oath before insurance company representatives and attorney, court limited deposition to areas not covered in the previous examinations); Perry v. Kelly-Springfield Tire Co., Inc., 117 F.R.D. 425, 426 (N.D. Ind. 1987) (limiting second deposition to "areas not covered at first deposition" because there was "no logical reason why [the deposing party] should duplicate the same material covered at the first deposition").

Given the burdens that the depositions would place on AHP and its employees, the Court should also place time limits on any re-depositions. See, e.g., Collins v. Int'l Dairy Queen, 189 F.R.D. 496, 498 (M.D. Ga. 1999) (limiting re-deposition to four hours and stressing that questioning should focus on subjects not previously inquired about and new developments since prior depositions); Miller v. Federal Express Corp., 186 F.R.D. 376, 389 (W.D. Tenn. 1999) (permitting reopening of deposition for no more than two hours for limited purpose of questioning witness with respect to documents produced after his initial deposition); Riff v. Clawges, 1994 WL 592738, at *3 (E.D. Pa. Oct. 20, 1994) (limiting re-deposition to ninety minutes and to areas not covered in the prior deposition). Imposing a two-hour time limit will lessen the burden of these depositions on AHP and its employees.

III. CONCLUSION

For the foregoing reasons, AHP respectfully requests that this Court quash the subpoenas seeking depositions of Dr. Dey and Mr. Alaburda. Alternatively, AHP requests that any deposition of Dr. Dey or Mr. Alaburda be limited to new subject matter raised by occurrences or documents produced after their investigational hearings and limited to two hours in duration.

Respectfully submitted,

_____

Michael N. Sohn
Cathy Hoffman
David Orta
Barbara Wootton
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
(202) 942-5000
Counsel for American Home Products Corporation

Dated: October 23, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of October 2001, I caused an original, one paper copy and an electronic copy of American Home Products Corporation's Motion to Quash Two Subpoenas *Ad Testificandum* Served on AHP After AHP's Withdrawal from Adjudication and, in the Alternative, for Protective Order ("Motion to Quash") and Memorandum in Support of AHP's Motion to Quash to be filed with the Secretary of the Commission, and that two paper copies were served by hand delivery upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-104
Washington, D.C. 20580

and that one paper copy was served by hand delivery upon each of the following persons:

Karen G. Bokat, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, NW
Room 3115
Washington, D.C. 20580

Laura S. Shores, Esq.
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004-2402

Christopher M. Curran, Esq.
White & Case LLP
601 13th Street, NW
Washington, D.C. 20005

_____
Barbara Wootton