UNITED STATES OF AMERICA
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 ON MOTIONS OF SCHERING-PLOUGH AND UPSHER-SMITH FOR A PROTECTIVE ORDER

I.

On October 15, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for a protective order. Schering seeks to have stricken Complaint Counsel's Second Requests for Admissions Served on Schering on October 2, 2001 ("Second Requests"). On October 17, 2001, Respondent Upsher-Smith Laboratories ("Upsher-Smith") filed a joinder in Schering's motion for a protective order. Upsher-Smith seeks to have stricken Complaint Counsel's Second Requests for Admissions Served on Upsher-Smith on October 2, 2001 ("Second Requests"). Respondents also moved for an order staying their obligation to respond to the Second Requests until after a ruling on the motions for protective order. By Order dated October 19, 2001, Schering and Upsher-Smith were relieved of their obligation to respond to the Second Requests until after an order on the motions for a protective order was issued.

On October 25, 2001, Complaint Counsel filed an opposition to the motion of Schering and joinder motion of Upsher-Smith.

On October 30, 2001, Respondents filed a joint motion for leave to file reply to Complaint Counsel's opposition to the motions for protective order. Respondents' request to file a reply brief is GRANTED.

For the reasons set forth below, Schering and Upsher-Smith's motions are GRANTED IN PART.

II.

Schering asserts, first, that the number of requests for admission - 477 - is overly burdensome and that the burden outweighs any likely benefit to Complaint Counsel. Schering further asserts that numerous requests are improper because they: (1) seek admissions with respect to the primary disputed issues in the case; (2) ask Schering to admit the contents of documents and deposition testimony; and (3) improperly seek new fact discovery that should be the subject of interrogatories, but for the limit on interrogatories in this matter. Upsher-Smith joins in the arguments advanced by Schering. The number of requests for admission served on Upsher-Smith is 339. Complaint Counsel responds by asserting that the requests are not unduly burdensome and that the particular admissions identified by Schering as objectionable are properly directed at narrowing the contested issues for trial.

III.

The number of requests for admission is not limited by the Commission's Rules of Practice unless the Administrative Law Judge orders otherwise. 16 C.F.R. § 3.31(a). Pursuant to Section 3.31(d) of the Commission's Rules of Practice, the Administrative Law Judge has the power to issue a protective order whenever one is needed to "protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense." 16 C.F.R. § 3.31(d). Further, the frequency or extent of use of requests for admission shall be limited by the Administrative Law Judge if he determines that "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more conventional, less burdensome, or less expensive," and when "the burden or expense of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c).

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, *Burns v. Phillips*, 50 F.R.D. 187, 188 (N.D. Ga. 1970), by narrowing the scope of disputed issues, *Webb v. Westinghouse Electric Corp.*, 81 F.R.D. 431, 436 (E.D. Pa. 1978), facilitating the succinct presentation of the case to the trier of fact, *Ranger Ins. Co. v. Culberson*, 49 F.R.D. 181, 182-83 (N.D. Ga. 1969), and eliminating the necessity of proving undisputed facts. *Peter v. Arrien*, 319 F. Supp. 1348, 1349 (E.D. Pa. 1970). Properly used, requests for admission serve the expedient purpose of eliminating "the necessity of proving essentially undisputed and peripheral issues of fact." *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 917 (2d Cir. 1959). Their proper, strategic use saves "time, trouble, and expense" for the court and the litigants. *Metropolitan Life Insurance Co. v. Carr*, 169 F. Supp. 377, 378 (D. Md. 1959). 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. *Wigler v. Electronic Data Systems, Corp.*, 108 F.R.D. 204, 207 (D. Md. 1985).

A limitation on the number of permissible requests for admission is common practice in federal courts, either through local rules of the district courts or through scheduling orders. E.g., District of Maryland Local Rule 104.1 (limiting to 30); Western District of Texas Local Rule CV-36 (limiting to 30); *Scherer v. GE Capital Corp.*, 2000 US Dist. LEXIS 3539 (March 21, 2000) (scheduling order limiting to 25). Scheduling orders entered in other administrative litigation have also limited the number of requests for admission. E.g., *In re Dura Lube Corp.*, 1999 FTC LEXIS 248, *2 (June 10, 1999) (limiting the number of requests for admission to 50). In addition, federal courts have limited the number of requests for admission where the number served is found to be excessive. E.g., *Mitchell v. Yeutter*, 1993 U.S. Dist. LEXIS 5619, *3 (D. Kan. 1993) (holding 184 requests for admission excessive and limiting the party to 40); *Phillips Petroleum Co. v. Northern Petrochemical Co.*, 1986 U.S. Dist. LEXIS 21473 (N.D. Ill. 1986) (finding 437 requests for admission an inappropriate attempt to circumvent the limit on interrogatories and limiting the party to 20); *Trabon Engineering Corp. v. Eaton*, 37 F.R.D. 51 (N.D. Oh. 1964) (where plaintiff addressed 146 requests for admission and defendant objected to 79 of them as burdensome, the court sustained objections of burdensomeness to 56 of the requests).

Though Rule 3.32 does not itself impose a limit on the number of requests for admission that may be served, it is clear that some reasonable number of requests is contemplated since the rule allows only ten days to respond to requests for admission. 16 C.F.R. § 3.32. Four hundred seventy seven requests and three hundred thirty nine requests are not reasonable numbers. Accordingly, Complaint Counsel's requests for admission will be limited. 16 C.F.R. § 3.31.

Respondents' motions for a protective order are hereby GRANTED IN PART. Complaint Counsel may serve revised second sets of requests for admission on Schering and Upsher-Smith wherein Complaint Counsel may select no more than 100 of the previous 477 requests for admission served on Schering on October 2, 2001, and no more than 100 of the previous 339 requests for admission served on Upsher-Smith on October 2, 2001. Complaint Counsel has until November 6, 2001 to serve such revised second sets of requests for admission on Schering and Upsher-Smith. Schering and Upsher-Smith have seven calendar days to respond.

Because Respondents' motions are granted in part on the foregoing grounds, the remaining arguments raised by Respondents need not be addressed.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: November 2, 2001