UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

UPSHER-SMITH'S MOTION IN LIMINE TO BAR
COMPLAINT COUNSEL'S PROPOSED USE OF TRANSCRIPT EXCERPTS

Upsher-Smith hereby moves to bar Complaint Counsel's proposed use of transcript excerpts. The facts and authorities in support of this motion are set forth in the accompanying memorandum.

Dated: January 3, 2002

Respectfully submitted,

WHITE & CASE LLP

By: _____

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

Complaint Counsel apparently propose to present most of their case in chief in the form of excerpts from transcripts. *See* Complaint Counsel's Final Witness List, dated December 14, 2001. As explained below, this proposal violates basic principles of evidence — including the prohibition against unreliable hearsay — and is precluded under the Commission's Rules of Practice.

BACKGROUND

For the factual part of their case in chief, Complaint Counsel apparently intend to rely almost exclusively upon selected excerpts from transcripts. These transcripts come from two sources: (i) *ex parte* investigative hearings conducted by Commission staff (*i.e.*, Complaint Counsel) before this proceeding was commenced; and (ii) depositions conducted during this proceeding.

Ex Parte Investigative Hearings

The *ex parte* investigative hearings were conducted under Part II of the Commission's Rules of Practice. Consistent with those rules, the subjects of the investigation (Upsher-Smith,

Schering-Plough and ESI–Lederle) were not given notice of the hearings, and did not have any right to attend or cross examine. § 2.8(c). Particular witnesses testifying in the investigative hearing were permitted to be represented by counsel, but under the rules the witness's counsel had limited rights to object and no right to question the witness. § 2.9(b).

At the outset of each hearing, Commission staff admonished the witness's counsel on the record as follows: "counsel is directed to Section 2.9(b)(2) which limited objections to matters that are claimed to be privileged or outside the scope of the investigation and which provides that the witness and his counsel shall not otherwise object or refuse to answer any question and shall not otherwise interrupt the hearing." Commission staff added: "This is an *ex parte* investigational hearing designed to secure relevant information concerning this investigation. It is not an adjudicative hearing in which the rights of the witness or any other parties are to be determined."

Transcripts of the investigational hearings were not provided to the witness for review, correction and signing. In this respect, Commission staff appears to have violated Rule 2.9(a). Nor were transcripts provided to Upsher-Smith (or presumably Schering and ESI–Lederle) until the investigation was completed. To this day, witnesses have not been invited to review, correct and sign their investigative-hearing transcripts.

Complaint Counsel have designated for use at trial investigative-hearing transcripts of numerous party and non-party witnesses. Every one of these witnesses appears to be available to testify live at trial.

Depositions

Complaint Counsel also intend to rely upon transcripts of depositions taken in this proceeding. These depositions were taken in accordance with Part III of the Commission's Rules of Practice, which provide all of the customary safeguards associated with depositions, including notice to parties, right to cross-examine, and the right of the witness to review, correct and sign the transcript.

Complaint Counsel have designated the deposition transcripts of numerous party and non-party witnesses. All of these witnesses appear to be available to testify live at trial, with the possible exception of non-party witness James Egan who resides in New Zealand.

ARGUMENT

COMPLAINT COUNSEL'S PROPOSED USE OF TRANSCRIPT EXCERPTS VIOLATES THE COMMISSION'S RULES OF PRACTICE.

Section 3.43(b) of the Commission's Rules of Practice requires that "unreliable evidence shall be excluded." Section 3.43(b) also states that evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Finally, the section directs the Administrative Law Judge to control the presentation of evidence so as to make the presentation "effective for the ascertainment of the truth."

For the reasons set forth below, Complaint Counsel's presentation of selected excerpts of transcripts would violate Section 3.43(b)'s bar on "unreliable evidence," any probative value of the excerpts would be far outweighed by the danger of "unfair prejudice" and "confusion," and the excerpts would be "misleading." Compared to such reliance upon transcript excerpts, live testimony is widely recognized as being more conducive to the ascertainment of the truth. *See, e.g., Loniaz v. EG & G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990) ("testimony by deposition is less

desirable than oral testimony and should be used only if the witness is not available to testify in person"); *Manning v. Lockhart*, 623 F.2d 536, 539 (9th Cir. 1980) ("There is no question that oral testimony is the preferred form of testimonial evidence, and that testimony by deposition or affidavit should be used as a substitute only if a witness is not available to testify in person."); *see also* 8 Charles A. Wright, Alan R. Miller and Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE 2D § 2142 (stating that "the federal rules have not changed the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person.").

Consistent with Section 3.43(b) and the general requirement that available witnesses testify live, Section 3.33(g)(1) of the Commission's Rules of Practice — similar to Rule 32(a) of the Federal Rules of Civil Procedure — places narrow limits on the uses of depositions in adjudicative hearings. The Rules do not authorize the use of *ex parte* Part II investigative-hearing transcripts at all. In proposing to use numerous deposition and investigative-hearing excerpts at trial, Complaint Counsel appear to have ignored these Rules altogether.

Under Section 3.33(g)(1), the permissible use of a deposition depends upon a number of factors, including who attended or had notice of the deposition, whether the deponent is an officer, director or managing agent of a party, and whether the deponent is available to testify live at trial. Given these distinctions, it is necessary to consider the operation of Section 3.33(g)(1) in a variety of contexts.

I. Non-Upsher-Smith Witnesses

Complaint Counsel apparently intend to offer into evidence excerpts of transcripts of investigative-hearing and deposition testimony of numerous non-Upsher-Smith witnesses. These include non-party witnesses as well as certain Schering-Plough witnesses. As explained below,

the investigative-hearing excerpts are plainly inadmissible, even if those hearings were considered to be "depositions," and most of the actual depositions are inadmissible as well.

A. Investigative-Hearing Transcripts

As indicated above, Part III of the Commission Rules of Practice conspicuously do not authorize the use of investigative-hearing transcripts at trial. Commission precedent confirms that investigative-hearing testimony ordinarily should not be used.

In *In re Resort Car Rental System*, 83 F.T.C. 234, 271 (1973), the Administrative Law Judge rejected Complaint Counsel's attempt to introduce excerpts of a respondent's investigative-hearing transcript, finding them unreliable. Focusing on the limited rights afforded to a witness in an investigative hearing, the judge observed that the respondent's "opportunity to clarify his statements appear[ed] to be questionable," that the excerpts "may not be within the context of [the witness's] other testimony," that introduction of "a substantial part of the total investigational transcript" would override the rights accorded in adjudicative hearings, that the "accuracy" of the transcript was not established (notwithstanding a reporter's certification), that "[t]here are no prescribed procedures in investigational hearings for correcting the record in the event of inaccuracies," and, finally, that other evidence made the investigational excerpts "cumulative." On appeal, the Commission affirmed that the investigational excerpts were "cumulative and properly excludable." *Id.* at 285.

The analysis in *In re Resort Car Rental System* is consistent with — if not dictated by — the United States Supreme Court's observation in *Hannah v. Larche*, 363 U.S. 420 (1960), that the Commission's rules "draw a clear distinction between adjudicative proceedings and investigative proceedings." 363 U.S. at 446. The Supreme Court noted that the Commission's investigative rules provide limited rights, but stated that the rules survive Due Process scrutiny because those limited rights at the investigative stage will not prejudice a person's rights at the

adjudicative stage: "We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since ***any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding*** . . . ." 363 U.S. at 446 (emphasis supplied).

Here, as in *In re Resort Car Rental System*, the *ex parte* investigative-hearing transcripts should be excluded as unreliable. Counsel for witnesses at these hearings did not have the customary rights to object, and the witnesses themselves did not have the right to clarify or explain their testimony under questioning by their own counsel, or to review, correct and sign the transcripts. Furthermore, Upsher-Smith was not represented at these hearings, and therefore it too could not object to questions, examine the witness, refresh the witness's recollection, or review and correct the transcript.

The rights and safeguards of reliability provided at the adjudicatory stage under the Part III rules would be rendered empty if *ex parte* investigative-hearing transcripts could be used. As the Supreme Court suggested, such a circumvention of Part III rules would raise serious constitutional due process concerns.

Aside from the question of rights and reliability, the *ex parte* investigational hearings are also unnecessary and cumulative. Your Honor held in *Hoechst/Andrx* that Complaint Counsel may take Part III depositions of witnesses who were examined in Part II investigative hearings. Order dated Oct 12, 2000. That ruling was followed in the present proceeding, and in fact Complaint Counsel took the deposition of virtually every witness who earlier provided testimony in investigative hearings. Accordingly, there is no need for any use of the *ex parte* investigative-hearing transcripts, and Complaint Counsel cannot claim any prejudice from being denied use of them.

Even if the *ex parte* investigative hearings could somehow be considered the equivalent of actual depositions, the investigative-hearing transcripts of non-Upsher-Smith witnesses could not be used against Upsher-Smith. Section 3.33(g)(1) provides as a threshold matter that a deposition transcript may only be used against a party "who was ***present*** or ***represented*** at the taking of the deposition or who had reasonable notice thereof" (emphasis supplied). Under this threshold requirement, a transcript of investigative-hearing testimony of a non-Upsher-Smith witness could not be used against Upsher-Smith because Upsher-Smith was not present or represented at the investigative hearing.

Indeed, under Commission precedent the Part II investigative-hearing transcripts of Schering-Plough witnesses should not be useable even against Schering-Plough, because doing so would necessarily unfairly prejudice Upsher-Smith. In *In re Steven Rizzi*, 85 F.T.C. 274, 276-77 (1975), the Administrative Law Judge declined to admit the investigative-hearing transcript of a respondent who refused to testify, because admitting the transcript would unfairly prejudice other respondents: "While reliance on the past sworn statement of a witness that refuses to testify may be appropriate where he is the only respondent, in my opinion it would be a denial of due process to permit such evidence as against other individuals who were not present at the investigational hearing and who had no opportunity to cross-examine the witness. Moreover, I do not think the issues in this case are so severable that this evidence could be admitted against one respondent without affecting the rights of the other respondents." The Commission confirmed the judge's decision. *Id.* at 306. Thus, even under the extraordinary circumstances of a respondent refusing to testify at trial, and where that respondent apparently had not been deposed under Part III rules, any use of the respondent's investigative-hearing transcript was found to violate the due process rights of other respondents.

Even beyond the threshold requirement, Section 3.33(g)(1) limits the use of any "deposition" to impeachment (§ 3.33(g)(1)(i)), unless the witness is found by the Administrative Law Judge to be unavailable to testify live at trial or unless "such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used." Here, all non-Upsher-Smith witnesses who gave testimony in investigative hearings appear to be available to testify live at trial, and there has not even been any contention that "exceptional circumstances" exist.

B. Deposition Transcripts

Complaint Counsel also designate excerpts taken from actual depositions of non-Upsher-Smith witnesses taken in this proceeding. Upsher-Smith admittedly was represented at these depositions, but Section 3.33(g)(1) nonetheless generally precludes the use of the excerpts, other than for impeachment, unless the Administrative Law Judge finds that the witness is unavailable or that "exceptional circumstances" exist. Here, again, all the non-Upsher-Smith witnesses appear to be available for trial (with the possible exception of Mr. Egan, who is out of the country) and there has not even been any contention that "exceptional circumstances" exist.

Some of the excerpts designated by Complaint Counsel are from depositions of past or present employees of Schering-Plough. Those witnesses who were not, at the time of the taking of the deposition, officers, directors or managing agents of Schering-Plough stand on the same footing as any non-party witness under Section 3.33(g)(1); their depositions cannot be used at trial, other than for impeachment, unless the Administrative Law Judge finds that the witnesses is unavailable or that "exceptional circumstances" exist. *See, e.g., Reed Paper v. Procter & Gamble*, 144 F.R.D. 2 (D. Me. 1992) (granting motion *in limine* to bar affirmative use of transcripts where witnesses were not officers, directors or managing agents of a party). Several

of the transcripts designated by Complaint Counsel are from depositions of *former* Schering employees or directors, so these are plainly barred. So, too, are depositions of current Schering employees who are not officers, directors or managing agents.

As to witnesses who were, at the time of their depositions, officers, directors or managing agents of Schering-Plough, Section 3.33(g)(1) provides that their depositions "may be used by an adverse party for any purpose." Complaint Counsel thus are authorized to use excerpts of these deposition transcripts at trial, for impeachment as well as the truth of the matter. This authorization does not, however, entitle Complaint Counsel to offer transcript excerpts in lieu of live testimony.

In *Dhyne v. Meijers Thriftway*, 184 F. 3d 983 (8th Cir. 1999), the Eight Circuit upheld the common practice of requiring a party to call the adverse party as a prerequisite to using the adverse party's deposition testimony:

> Many trial judges require that a deposed witness testify live, if available. The reason for the practice is clear: "Judge Learned Hand proclaimed the deposition to be 'second best, not to be used when the original is at hand.' If possible, it is always better if the [fact finder] can observe the witness firsthand to judge his or her demeanor." *Lainaz v. EG&G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990); *see* 8 Wright, Miller & Marcus, Federal Practice & Procedure § 2142 (1994). The practice cannot possibly cause unfair prejudice, because the party wishing to use the deposition testimony can call the adverse witness live, impeach him with the deposition if necessary, and even question the witness using the exact same questions asked at the deposition.

184 F.3d at 989-90. *See also Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773-74 (10th Cir. 1999) (affirming district court's requirement that plaintiff call defense witnesses to testify at trial before using their depositions). This approach is consistent with the use of deposition transcripts in past FTC adjudicative proceedings. *See In re Retail Credit Company*, 92 F.T.C. 1, 119-20 (1978) (limiting use of deposition transcripts because "where, as here, the same witnesses were

called and gave extensive testimony, sole reliance on their prior testimony is unwise and should be avoided for the purpose of formulating substantive findings").

Your Honor ought to follow this common practice here. Determining the credibility of witnesses — crucial in this proceeding — cannot be done with a cold transcript, and particularly with selected excerpts of one. To assess the demeanor of witnesses, Your Honor will have to see them live. *See, e.g., Loinaz*, 910 F.2d at 8 (holding that when a witness's credibility is at stake, "a deposition is an inadequate substitute for the presence of that witness"); *Howe v. Goldcorp Investments Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (where fraud and subjective intent are elements of the claim, "the live testimony of witnesses for the purpose of presenting demeanor evidence [is] essential to a fair trial"); *Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 378-79 (S.D.N.Y. 1996) (where credibility is likely to be an issue, "depositions are not an adequate substitute where live testimony is reasonably available"); *Morgan v. Ward*, 699 F. Supp. 1025 1047 n.33 (N.D.N.Y. 1988) ("in a case like this, where many of the key factual issues turn on the credibility of the witnesses, the inability of the court to observe the deposition witness's demeanor severely hinders its ability to fulfill its fact-finding responsibility"). As one court aptly stated, "[d]epositions, deadening and one-sided, are a poor substitute for live testimony, especially where, as here, vital issues of fact may hinge on credibility." *DeCracker v. Southern Pac. Transp. Co.*, 1993 WL 463285, *3 n.4 (N.D. Cal. 1993) (citation omitted).

The need for live testimony is more critical in this action given Complaint Counsel's novel theory of antitrust violation. Unlike most antitrust actions, Complaint Counsel allege in this case that the Schering/Upsher-Smith pharmaceutical licenses and related rights in the June 1997 Agreement was actually a sham, an intentional ruse to disguise a payment for delay. As Complaint Counsel recently described their theory of the case: "In the case of Upsher-Smith, Schering's $60 million payment for delayed entry was disguised as a fee to license certain

products held by Upsher-Smith." Complaint Counsel's Statement of Case at 2. In an unusual antitrust case that depends on second-guessing the bargained-for consideration between two pharmaceutical companies, and that alleges furtive conduct by the Respondents, the ability to judge the demeanor of the fact witnesses on these issues is more critical.

Moreover, Complaint Counsel apparently would like to introduce deposition transcripts in their case in chief, and then examine the same witnesses in the defense case or in rebuttal. This approach is wasteful and cumulative, and should not be tolerated. *See, e.g., Gauthier v. Crosby Marine Service*, 752 F.2d 1085, 10889 (5th Cir. 1985) (holding that, notwithstanding right to use adverse-party deposition "for any purpose," trial court could bar such a deposition as repetitious).

As to non-Upsher-Smith witnesses, in short, Complaint Counsel's proposed strategy violates Section 3.33(g)(1) in several respects. Investigative-hearing transcripts are barred, and would be barred, even if they could be considered as actual depositions. As to all witnesses other than officers, directors or managing agents of Schering-Plough, deposition transcripts are barred as well. As to officers, directors or managing agents of Schering-Plough, deposition transcripts may be used but Complaint Counsel should be required to call the witness live.

II. Upsher-Smith Witnesses

Some of the transcript excerpts that Complaint Counsel have designated are from investigative hearings or depositions of Upsher-Smith witnesses. Under the Commission's rules and precedents, many of these excerpts are not useable at trial, and the remainder should be used only during the witness's live testimony at trial.

A. Investigative-Hearing Transcripts

Complaint Counsel have designated investigative-hearing testimony of certain Upsher-Smith officers. As discussed at length above in the context of non-Upsher-Smith witnesses, the

rules in Part III do not authorize the use of investigative-hearing transcripts, and Commission precedent bars such investigative-hearing transcripts as unreliable. At the investigative-hearings of Upsher-Smith witnesses, Upsher-Smith did not have the right to object, to examine the witness, to refresh the witness's recollection, or to review and correct any transcript under Section 2.9(a). Admission of the investigative-hearing transcripts thus would violate Section 3.43(b)'s injunction against "unreliable evidence." Investigative-hearing transcripts are also unnecessary insofar as Complaint Counsel have deposed every Upsher-Smith officer who earlier provided testimony in an investigative hearing.

Aside from violating Upsher-Smith's rights, use of any excerpts from investigative-hearing testimony of any Upsher-Smith officer would also create undue confusion and could prejudice Schering-Plough's rights. As the Administrative Law Judge observed in *In re Rizzi*, 85 F.T.C. 274, 276-77 (1975), admission of investigational testimony against a respondent not present at the hearing would be a denial of Due Process, and where there is more than one respondent in a unified case the transcript should not be admitted at all.

B. Deposition Transcripts

Complaint Counsel also have designated deposition transcripts for Upsher-Smith witnesses who are not officers, directors or managing agents of Upsher-Smith, but these witnesses stand on the same footing as any non-party witness under Section 3.33(g)(1). *See* discussion *supra* at 8. The excerpts from the depositions of these witnesses, including Bob Coleman, Denise Dolan, Lori Freese, Scott Gould, and Mark Halvorsen, cannot be used at trial, other than for impeachment, unless the witness is found to be unavailable to testify at trial or unless "exceptional circumstances" are found to exist. These exceptions do not apply.

Last but not least, Complaint Counsel have designated excerpts of depositions of certain Upsher-Smith officers. Upsher-Smith admittedly was represented at these depositions and had a

right to cross-examine. Under Section 3.33(g)(1) these transcripts are admissible for any purpose. Under the common practice described above and endorsed by the Eighth Circuit in *Dhyne*, Complaint Counsel ought to be required to call Upsher-Smith's officers live as a prerequisite to using excerpts from their deposition transcripts.

CONCLUSION

To summarize the foregoing, Complaint Counsel should be (i) barred from using transcripts of investigational hearings for any purpose, (ii) barred from using transcripts of non-party depositions (except perhaps for James Egan) for any purpose other than impeachment and (iii) barred from using transcripts of party depositions (*i.e.*, those in which the witness was an officer, director or managing agent of Upsher-Smith or Schering at the time of the deposition) unless Complaint Counsel call the witness live.

Dated: January 3, 2002

Respectfully submitted,

WHITE & CASE LLP

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REDACTED

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Upsher-Smith Laboratories, a corporation,	)	Docket No. 9297
and	)	
American Home Products Corporation, a corporation	)	

ORDER GRANTING UPSHER-SMITH'S MOTION IN LIMINE TO BAR COMPLAINT COUNSEL'S PROPOSED USE OF TRANSCRIPT EXCERPTS

Upon consideration of Upsher-Smith's Motion *In Limine* to Bar Complaint Counsel's Proposed Use of Transcript Excerpts, any opposition thereto and the entire record herein,

IT IS HEREBY ORDERED that Upsher-Smith's Motion is GRANTED; and it is

FURTHER ORDERED that

(i) Complaint Counsel are barred from using transcripts of *ex parte* investigative hearings for any purpose;

(ii) Complaint Counsel are barred from using transcripts of non-party depositions of available witnesses for any purpose other than impeachment; and

(iii) Complaint Counsel are barred from using transcripts of party depositions (*i.e.*, those in which the witness was an officer, director or manager of Upsher-Smith or Schering-Plough at the time of the deposition) unless Complaint Counsel call the witness live.

SO ORDERED.

_____
D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2002 I caused copies of Upsher-Smith's Memorandum in Support of its Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts to be served upon the following by hand delivery:

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