

**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, Inc.,)
a corporation,)
)
and)
)
American Home Products Corporation,)
a corporation.)
_____)

**REPLY 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**

As set forth in the initial memorandum in support of American Home Products Corporation’s (“AHP”) motion to quash the deposition subpoenas addressed to AHP employees Dr. Michael Dey and Lawrence Alaburda, Esq., those subpoenas should be quashed in their entirety. The depositions would be duplicative and the burdens associated with the depositions would outweigh any putative value. AHP submits this Reply Memorandum, however, solely to address the fallacies of complaint counsel’s arguments in opposition to AHP’s alternative position that, should repeat depositions be permitted to go forward, they should be limited in scope and time.

**Limiting Subject Matter and Length of Depositions is Warranted and is
Neither “Unreasonable” nor “Unworkable”**

In support of their argument that any depositions of Dr. Dey or Mr. Alaburda should not be limited in time or scope, complaint counsel makes the conclusory assertion that “[i]t is clear that such limitations are unreasonable and unworkable.” Complaint Counsel’s Opp’n at 11. Given that ALJ Timony and numerous federal judges have ordered that repeat depositions be limited to new subject matter areas and/or in duration, see AHP’s Mem. Supp. Mot. Quash at 8-9, it is far from “clear” that any such limitations are *a priori* “unreasonable and unworkable.” That different judges come out differently in different cases as to whether limitations on repeat depositions are warranted highlights that this determination rests on the particular circumstances of the case at hand. Here, complaint counsel repeatedly assert that they need to depose Dr. Dey and Mr. Alaburda in part because “new facts,” “new issues,” and “new information” have been revealed during the course of the litigation. See, e.g., Complaint Counsel’s Opp’n at 2, 5, 7. Since complaint counsel appear so readily able to identify these “new facts,” “new issues,” and “new information,” it should be an easy enough matter for complaint counsel to restrict their questioning of Dr. Dey and Mr. Alaburda to such “new facts,” “new issues,” and “new information.”

Complaint counsel also argue that time limitations on the proposed depositions would be “arbitrary and unreasonable,” because “no one ... ha[s] any idea how many hours are needed to conduct useful, worthwhile depositions of these two individuals,” and that “there is no reason to limit said depositions ahead of time.” Complaint Counsel’s Opp’n at 11. Complaint counsel’s position, which appears to boil down to an argument that it is unreasonable to limit the time of a deposition because it is impossible to tell just how long it should take, flies in the face of the rules currently governing depositions in all federal cases.

The Federal Rules of Civil Procedure now impose presumptive time limits on all depositions. See Fed. R. Civ. P. 30(d)(2) (limiting depositions to one 7-hour day, absent court order or stipulation by parties). Clearly, depositions can and should be limited in duration. See id. and cases cited in AHP's Mem. Supp. Mot. Quash at 9. The real question is the degree to which they should be limited. Here, FTC staff has already conducted daylong hearings of both Dr. Dey and Mr. Alaburda. Limiting complaint counsel's deposition to two hours is imminently reasonable in these circumstances, particularly when their response suggests they simply want to rehash much of the same ground as was covered during the prior hearings.

Complaint counsel's inability to contemplate any scope or time limitations on the depositions of Dr. Dey and Mr. Alaburda is merely another example of their unreasonable discovery tactics in this case. For example, complaint counsel recently filed nearly 500 requests for admission on Schering-Plough Corporation and over 300 such requests on Upsher-Smith Laboratories. The Court concluded that complaint counsel's requests for admission were unreasonable, setting a limit of 100 requests. See Order on Motions of Schering-Plough and Upsher-Smith for a Protective Order, In re Schering-Plough Corp, et al., Dkt. No. 9297 (Nov. 2, 2001). Similarly here, where complaint counsel already has access to a day's worth of testimony from both Dr. Dey and Mr. Alaburda, setting subject matter and time limits on any repeat depositions would provide a reasonable limitation on complaint counsel's overreaching discovery tactics against a party that has settled this matter.

Dated: November 7, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 7th day of November 2001, I caused an original, one paper copy and an electronic copy of American Home Products Corporation's Motion for Leave to File a Reply in Support of AHP'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 Reply 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:

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