



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

Bureau of Competition

December 3, 2001

**Via hand delivery**

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith Laboratories, and  
American Home Products, Docket No. 9297*

Dear Judge Chappell:

On behalf of complaint counsel, I have enclosed two courtesy copies of Complaint Counsel's Opposition to Respondent Schering-Plough Corporation Motion to Compel Supplementary Interrogatory Responses On Patent Issues.

Sincerely,

Steve Vieux  
Counsel Supporting the Complaint

cc: Laura Shores, Esquire  
Christopher M. Curran, Esquire

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

In the Matter of

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<sup>1</sup> Respondent Schering-Plough Corporation's Motion for Partial Dismissal of the Complaint (June 7, 2001).

to induce them to withdraw their challenges to the patent and agree to a delayed market entry date -- violate the antitrust laws *regardless* of the underlying patent invalidity or infringement issues.<sup>2</sup>

Contention interrogatories serve “to narrow and define issues for trial and to enable the propounding party to determine the proof required to rebut the respondent’s position.”<sup>3</sup>

Complaint counsel’s responses to Schering patent interrogatories fulfill that goal. They disclose what we will contend at trial, that is, that the merits of the patent disputes between Schering and Upsher-Smith and between Schering and AHP were vigorously contested but never resolved, due to the anticompetitive settlement agreements that the parties entered into. Because complaint counsel’s answers are fully responsive, Schering’s motion to compel should be denied.

#### **I. Interrogatories 13 and 14**

The first two of the interrogatories at issue ask the same question, with respect to Upsher-Smith and AHP respectively:

*Is it Complaint Counsel’s contention that the ‘743 Patent is invalid, unenforceable or not infringed by [Upsher/AHP] in the Schering/[Upsher/AHP] Patent Infringement Litigation? If your answer is other than an unqualified statement that the patent is valid, enforceable and infringed, identify and describe your contentions, and identify all facts upon which Complaint Counsel intends to rely at trial in support of it.*

In response, complaint counsel explained that questions of invalidity, enforceability, and infringement in Schering’s patent suits against Upsher-Smith and AHP were disputed issues, but

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<sup>2</sup> Order Denying Motions of Schering-Plough and Upsher-Smith to Dismiss the Complaint (October 31, 2001) at 5.

<sup>3</sup> *Baltimore Therapeutic Equipment Co. v. Loredan Biomedical, Inc.* No. 89-1085-GEB, 1993 WL 129781, at \*16 (E.D.Cal. Feb 19, 1993).



On the contrary, we have described our contention that those issues were in dispute in the litigation. Indeed, it is impossible to determine in this proceeding how the courts would have resolved Schering's patent claims against Upsher-Smith and AHP. Moreover, since there was no trial in either case, there is no factual record, and in any event the alleged infringers no longer have the same incentive to defend their products against Schering's charges.

Schering's fundamental problem is not that complaint counsel's answers are "non-responsive." Rather, Schering's problem is that it doesn't like these answers – anymore than it likes the theory of the case that it challenged in its unsuccessful motion to dismiss. Complaint counsel's position is that all that need be shown about the patent cases is a bona fide dispute about the patent issues. Schering, on the other hand, wants to place on complaint counsel a burden to prove either a definitive resolution of the patent issues or else some sort of numerical assessment of the probabilities that Upsher-Smith and AHP would have prevailed had they continued to litigate (a burden, we note, that it urges while at the same time withholding information about contemporaneous assessments of those probabilities on grounds of privilege). But that is Schering's theory, not ours. Our interrogatory responses plainly provide Schering with our "present concept of the theory of the case."<sup>5</sup>

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<sup>5</sup> *Flowers Industries*, FTC Dkt. No. 9148, 1981 FTC LEXIS 110 at \*3 (October 7, 1981).





