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interrogatories in October, Upsher-Smith invoked its right under Rule 3.35(c) to refer Complaint

()

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel agreed to accept Upsher-Smith's

Counsel's motion focused on, seeks information that Complaint Counsel previously acquired during both fact discovery as well as expert discovery. Upsher-Smith's initial response to Interrogatory 4 appropriately indicated that the information sought had already been provided to Complaint Counsel in "Upsher-Smith's and Schering-Plough's expert reports and the testimony of Ian Troup, Denise Dolan, Philip Dritsas, Paul Kralovec, Victoria O'Neill, Mark Robbins, and others, including individuals yet to be deposed." Upsher-Smith Interrog. Resp. No. 4.¹

Upsher-Smith's response to Interrogatory 4, as well as the other interrogatory responses,

[REDACTED]

[REDACTED]

in their interrogatories. The cumulative nature of the discovery that Complaint Counsel seek is

fully addressed by the cumulative nature of their interrogatories requests. To Veto of the Disposition

(4) Does not identify specific documents from which complete records were taken

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essence, Complaint Counsel are attempting to argue that no matter what Upsher-Smith provides to Complaint Counsel pursuant to Rule 3.35(c), those documents will be insufficient because Complaint Counsel will have to review those documents to determine what facts in those

Upsher-Smith v. [redacted] Case No. [redacted] 03-1-00000

B

C. Upsher-Smith Properly Objected To Complaint Counsel's Interrogatory 2

Upsher-Smith finally, does not intend to provide any additional information related to Complaint Counsel's Interrogatory 2. The text of the interrogatory is:

Upsher-Smith properly outlined a specific and detailed objection to Interrogatory 2 as follows⁶:



REDACTED



sought information from defendants on every person over forty years old who was employed as a

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

evidence." *Id.* at *4 - *5. The merits of extensive requests for admission have been previously mentioned in Part III proceedings. *Id.* at *5 - *6 ("the usefulness of admissions is maximized at

best"), and respondent Upsher-Smith propounded no requests precisely due to the extent of the

Request No. 78: Under the Schering/Upsher Agreement, the phrase "any other sustained release microencapsulated potassium chloride tablet" could include a sustained release microencapsulated potassium chloride tablet that did not infringe

Page 1

executive distraction for many years? At bottom, what constitutes a "win" in such a complex patent litigation is a highly subjective matter. It is also a fundamental point of difference between Respondents and Complaint Counsel.

The term "possibility" is also vague. Any "possibility"? A remote "possibility"? An unrealistic "possibility"? Even a de minimus "possibility"? If, as Complaint Counsel's memorandum suggests (at 8), the request means any "possibility" — no matter how remote — then the question is purely argumentative, and theoretical, and hardly constitutes an attempt to

presently issues for trial. Paragraph 59 and the similar request 60 simply do not relate to "peripheral

simply not the sort of "peripheral or undisputed *fact*" (Order at 2, emphasis supplied) for which the Request would be proper.¹¹

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as of September 1? As of September 30? Is this an average computation for the entire month of

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... (concentration of the force?) not merely the officer or Director of the ...

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7. Referrals to Documents Were Proper

In Request 3 of the Initial Requests, despite objecting to and denying the Request, Upsher-Smith went further and referenced a document that may provide the answer sought. The

Document and the responses can be best understood by reviewing them. Document No. 2 states (1)

[REDACTED]

CONCLUSION

For the reasons stated herein, Your Honor should deny Complaint Counsel's Motion to Compel in its entirety.

Dated: January 7, 2003

Respectfully submitted

By: 

CONCLUSION

For the reasons stated herein, Your Honor should deny Complaint Counsel's Motion to

Date: _____

By: _____

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

In the Matter of

Schering-Plough Corporation,
a corporation,

Upsher-Smith Laboratories,
a corporation,

and

Docket No. 9297

~~and *Various Home Products Corporation*~~

ATTACHMENT A

REP [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ATTACHMENT B

REDACTED