

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re

SUBPOENAS AD TESTIFICANDUM

DATED FEBRUARY 13, 2008

**PETITION TO QUASH OR LIMIT
SUBPOENAS DATED FEBRUARY 13, 2008**

J. Mark Gidley
Christopher M. Curran
Eric Grannon

CASES

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83 F.T.C. 234 (1973) 11

Re: In re E.P.A. v. G. E. F. L. E. P. v. G. E. F. L. E. P.

Pursuant to 16 C.F.R. § 2.7(d), Par Pharmaceutical Companies, Inc. and Paddock

Laboratories, Inc. hereby petition to limit or suspend the [redacted] [redacted]

February 12, 2009 for the investigational purposes of [redacted] [redacted]

second day March 5, 2008. Mr. Campanelli has not been provided with a transcript of the first

day of his investigational hearing.

On January 28, 2008, Commission staff raised for the first time the issue of recording the investigational hearings by "sound-and-visual" means. Commission staff declared by letter its intention to record the investigational hearings of Messrs. Campanelli, Tarriff, and Maloney by

"~~sound-and-visual means~~" ~~January 28, 2008~~ ~~Commission staff~~ ~~declared~~ ~~its~~ ~~intention~~ ~~to~~ ~~record~~ ~~the~~ ~~investigational~~ ~~hearings~~ ~~of~~ ~~Messrs.~~ ~~Campanelli,~~ ~~Tarriff,~~ ~~and~~ ~~Maloney~~ ~~by~~

Noah A. Brumfield (“[N]othing in either the FTC Act or the FTC Rules of Practice prevents staff from videotaping investigational hearings to further this objective.”) (Exhibit I).

Par and Paddock responded that in the absence of authority other than 16 C.F.R. § 2.8(b), which expressly provides for the stenographic reporting of investigational hearings, the three

~~witnesses would not participate in investigational hearings recorded by the staff.~~

means. *See* February 12, 2008 Letter from Noah A. Brumfield to Jonathan R. Lutinski (Exhibit J); February 13, 2008 Letter from Noah A. Brumfield to Jonathan R. Lutinski (Exhibit L). Par

~~and Paddock also noted that the~~

required by 16 C.F.R. § 2.7(d)(2) at ¶ 7. Furthermore, staff admitted that its attempt to record the investigational hearings is novel and unprecedented prior to this investigation. *See id.* at ¶ 4.

I. THE COMMISSION'S AUTHORITY TO RECORD INVESTIGATIONAL

PROVIDES THAT INVESTIGATIONAL HEARINGS "SHALL BE STENOGRAPHICALLY REPORTED."

Title 16 C.F.R. § 2.8(b) provides that investigational hearings "*shall be stenographically reported* and a *transcript* thereof shall be made a part of the record of the investigation." (Emphasis added.) In addition to this express provision, each and every other reference to the recording of investigational hearings throughout the pertinent regulations refers to stenographic

whatsoever that investigational hearings might be recorded by videotaping, “sound-and-visual”

~~recording or anything other than “stenographic” means~~

The mention of only stenographic means is conspicuous because the Commission amended the provision governing investigational hearings, 16 C.F.R. § 2.8, most recently in 1996—three years *after* the Federal Rules of Civil Procedure were amended specifically to provide for depositions to be recorded by “sound-and-visual” means. Fed. R. Civ. P. 30(b)(2) (1993). Thus, the express provision for stenographic recording in 16 C.F.R. § 2.8 and the absence of any reference to other means of recording must be considered intentional and meaningful.

“It is well settled that an agency is legally bound to respect its own regulations, and commits procedural error if it fails to abide by them.” *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *see also, e.g., Battle v. F.A.A.*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) (“[A]gencies may not violate their own rules and regulations to the prejudice of others.”); *Panhandle E. Pipe Line Co. v. Fed. Energy Regulatory Comm’n*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“[W]e do

authorize videotaping investigational hearings is at loggerheads with the fundamental principle

II. RECORDING INVESTIGATIONAL HEARINGS BY SOUND-AND-VISUAL MEANS WOULD OVERRIDE THE DUE PROCESS RIGHTS ACCORDED IN ADJUDICATIVE PROCEEDINGS.

A. Under the Commission's Existing Rules, Witnesses in Investigational Hearings Lack the Due Process Rights of Witnesses in Adjudicative Proceedings.

The investigational hearings provided for under the Commission's Part II, "Nonadjudicative Procedures" regulations are distinguished expressly from the hearings in adjudicative proceedings: "Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission . . ." 16 C.F.R. § 2.8(a); *see also Hannah v. Larche*, 363 U.S. at 446 ("A typical

agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings.").

The distinction between investigational hearings and adjudicative proceedings turns on at least three limitations on the rights of witnesses in investigational hearings versus the traditional due process rights accorded to witnesses in adjudicative proceedings. First, under

Third, under the Commission's rules, the rights of witnesses to object to questions in investigational hearings are limited strictly to objections that the question: (i) is outside the

~~Commission's rules, the rights of witnesses to object to questions in~~

for example, objections are not permitted in investigational hearings even to questions that call for notoriously unreliable hearsay evidence. *Id.*

B. The Distinction Between Investigational Hearings And Adjudicative Proceedings Is Of Constitutional Moment.

In *Hannah v. Larche*, 363 U.S. 420 (1960), the U.S. Supreme Court relied on the distinction between investigational hearings and adjudicative proceedings in upholding the due process limitations in investigational hearings. "We have found no authority suggesting that

C. Videotaping Investigational Hearings Would Erode The Distinction Between

Under the Federal Rules of Civil Procedure, videotaped depositions are not problematic because the deponent has the full panoply of rights traditionally accorded to witnesses, and the

adhere if the videotaped testimony from the investigational hearing arguably could be equated to

As noted in the Background section above, the Commission staff has never offered any reason for seeking to record the investigational hearings at issue by “sound-and-visual” means. That is because there is no genuine reason to seek to do so other than to attempt to invade a subsequent adjudicative proceeding with the videotaped testimony from the investigational hearing—either as impeachment evidence or in place of trial testimony if the witness is unavailable. This danger is evident from the positions taken by staff in prior cases.

In the Part III proceeding in *In re Schering-Plough Corp.*, F.T.C. Complaint Counsel

proceeding that the investigational hearing testimony was obtained under constitutionally
circumscribed conditions and should be weighed accordingly. For stronger reason than it would

be that much harder to cabin the slippage of "Memorex" investigational hearings into
adjudicative proceedings.

Notably, F.T.C. investigational hearing testimony has slipped into adjudicative
proceedings conducted by *other* federal agencies. *E.g., Universal Church of Jesus Christ, Inc. v.*
Comm'r of Internal Revenue, 55 T.C.M. (CCH) 144 (1988) (Internal Revenue Service using a
witness's seven-year-old F.T.C. investigational hearing testimony in a federal court tax
adjudication).

should be amended as limited to the extent such witnesses concern that the subject is not a defendant

hearing "will be recorded by sound and visual means"

Dated: February 20, 2008

Respectfully submitted,

Appendix

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re

SUBPOENAS AD TESTIFICANDUM
DATED FEBRUARY 13, 2008

that 16 C.F.R. § 2.8(b) provides that investigational hearings “shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.” Mr. Brumfield requested the citation of authority providing for

a method of recording an investigational hearing other than stenographically, as provided for by 16 C.F.R. § 2.8(b), and provided notice that, absent such authority, Messrs. Campanelli, Tarriff, or Maloney, could not agree to videotaping.

2 February 6, 2008 – Mr. Brumfield received a letter from Mr. Lutinski stating that

Congress granted to the Commission broad authority to conduct investigations, but

citing no authority in support of recording investigational hearings by other than stenographic means.

4. February 8, 2008 – Mr. Brumfield and Mr. Jasinski had a teleconference with Mr.

stated also that petitioning to quash or limit the subpoenas was premature in the absence of subpoenas that provide notice that the investigational hearings would be videotaped. Mr. Brumfield re-iterated the position of Par and Paddock that Messrs. Tarriff, Maloney, and Campanelli intend to comply with subpoenas as issued.

a. At approximately 10:30 a.m., Mr. Brumfield telephoned Mr. McGrady to discuss the videotaping of the investigational hearings. Mr. Brumfield stated that the witnesses would attend a stenographically-transcribed investigational hearing, as previously agreed, but that the parties objected to videotaping as outside the scope of the F.T.C.'s authority. Mr. Brumfield reiterated that Commission staff had not provided any legal authority or any rationale supporting the videotaping. Mr. McGrady did not identify the reason or legal support for videotaping other than to identify 16 C.F.R. § 2.9(b)(6), which counsel to Par and Paddock explained was inapplicable as relating only to

b. At approximately 2:15 p.m., Mr. Brumfield telephoned Mr. McGrady, with a suggested resolution at least as to Mr. Tarriff to allow Mr. Tarriff's

indicated that the F.T.C. would not change its position on videotaping, noting that the

agency does not lend itself to commercial

Exhibits

A

1. TO

Mr. Paul Campanelli
Par Pharmaceutical Companies, Inc.
c/o Noah A. Brumfield, Esq.
White & Case LLP
701 Thirteenth Street, N.W.
Washington, DC 20005

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission.

RETURN OF SERVICE

I hereby certify that a duplicate copy of the within

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

on the person named herein on:

.....
(Month, day, and year)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
L. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY

Nature and Scope of Investigation:

To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is

engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of

B





SUBPOENA AD TESTIFICANDUM

1. TO

Mr. Scott Tarriff
c/o Noah A. Brumfield, Esq.
White & Case LLP
701 Thirteenth Street, N.W.
Washington, DC 20005

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing of

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

by registered mail.

by leaving copy at principal office or place of business to wit:

.....
.....
.....
.....

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)

.....
(Official title)

UNITED STATES OF AMERICA

COMMISSIONERS:

**Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch**

**RESOLUTION AUTHORIZING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATIONS**

Nature and Scope of Investigation:

**To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay
Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson
Pharmaceuticals, Inc. ("Watson"), and Pharmaceutical Corporation ("PC")**

C



SUBPOENA AD TESTIFICANDUM

1. TO

Mr. Ed Maloney
Paddock Laboratories, Inc.
c/o Noah A. Brumfield, Esq.
White & Case LLP

2. FROM

UNITED STATES OF AMERICA

FEDERAL BUREAU OF INVESTIGATION

Washington, D.C. 20535

RETURN OF SERVICE

subpoena was duly served: (Check the method used.)

- in person.
- by registered mail.
- by leaving copy at principal office or place of business, to wit:

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.....

on the person named herein on:

.....
(Month, day, and year)

.....
(Name of person making service)
.....
(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATIONS

File No. 0710060

Nature and Scope of Investigation:

To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay
Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson
Pharmaceuticals, Inc. ("Watson"), and other pharmaceutical companies ("Other")

D



SUBPOENA AD TESTIFICANDUM

1. TO

Mr. Paul Campanelli
Par Pharmaceutical Companies, Inc.

2. FROM

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA

**Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch**

**RESOLUTION AUTHORIZING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATIONS**

File No. 0710060

Nature and Scope of Investigation:

To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay

PART I - ATTENDANCE CERTIFICATION

1. General Information

a. Witness Name _____ d. Case Name Watson Unimed, et al.
 b. Witness Address _____ e. Case Number 0710060
 Street _____ f. District or Location _____
 City _____ State _____ Zip _____

c. U.S. Citizen: Yes No Alien: Legal Illegal

2. Travel and Attendance Information

a. Dates of Travel From Residence to Case Location: From _____ To _____
 b. Dates of Travel From Case Location to Residence: From _____ To _____
 c. Dates of Attendance: From _____ To _____

**CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND
MISCELLANEOUS EXPENSES**

PART III - RESERVED FOR FINANCE OFFICE

1. Computation

- a. New Amount Claimed by Witness (From Item 7, Part II) \$ _____
- b. Adjustments Due to Any Differences (Explain Differences) _____

c. Amount Authorized for Payment \$ _____

d. By _____ Title _____ Date _____

~~Approval Classification Date~~

E



SUBPOENA AD TESTIFICANDUM

1. TO

Mr. Scott Tarriff
c/o Noah A. Brumfield, Esq.
White & Case LLP
701 Thirteenth Street, N.W.
Washington, DC 20005

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to appear and testify at the request of the Federal Trade Commission.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

.....
.....
.....
.....

on the person named herein on:

.....

.....
(Name of person making service)

.....
(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY

PROCESS IN NONPUBLIC INVESTIGATIONS

File No. 0710060

Nature and Scope of Investigation:

To determine whether United States Patent and Trademark Office

Department of the Treasury
TFRM 4-2000

CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND SPECIAL MEANS EXPENSES

NSN 7540-00-634-4347

PART I ATTENDANCE CERTIFICATION

4. General Information

Water United, et al.

Street _____ f. District or Location _____

City _____ State _____ Zip _____ g. SSN or Tax ID Number _____

c. U.S. Citizen: Yes No Alien: Legal Illegal

? Travel and Attendance Information

IFORM 4-2000
1157-107

MISCELLANEOUS EXPENSES

Page 2 of 2

1. Computation

- a. New Amount Claimed by Witness (From Item 7, Part II)
- b. Adjustments Due to Any Differences (Explain Differences)

\$ _____

c. Amount Authorized for Payment _____

\$ _____

d. By _____ Title _____ Date _____

2. Accounting Classification Data _____

F



SUBPOENA AD TESTIFICANDUM

1. TO

Mr. Ed Maloney
Paddock Laboratories, Inc.

2. FROM

White & Case LLP

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- _____

.....
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on the person named herein on:

.....
(Month, day, and year)

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras *Chairman*

Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

RESOLUTION AUTHORIZING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATIONS

File No. 0710060

Nature and Scope of Investigation:

To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is

~~engaging in unfair methods of competition in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by unreasonably restraining trade in the manufacture or sale of AndroGel or its generic equivalent.~~

the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by unreasonably restraining trade in the manufacture or sale of AndroGel or its generic equivalent.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. § 1.1 et seq. and

a. Witness Name _____

b. Witness Address _____

Street _____

City _____ State _____ Zip _____

d. Case Name Watson Unimed, et al

e. Case Number 0710060

f. District or Location _____

CCM or TDJ Number _____

G



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

Bureau of Competition
601 New Jersey Ave, NW
Washington, DC 20001

Jonathan R. Lutinski, Esq.

Direct Line (202) 326-3670

Facsimile (202) 326-3384
E-mail: jlutinski@ftc.gov

January 28, 2008

BY ELECTRONIC MAIL

Noah A. Brumfield, Esq.
White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005

Re: Par Pharmaceuticals, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock").

H

701 Thirteenth Street, NW
Washington, DC 20005

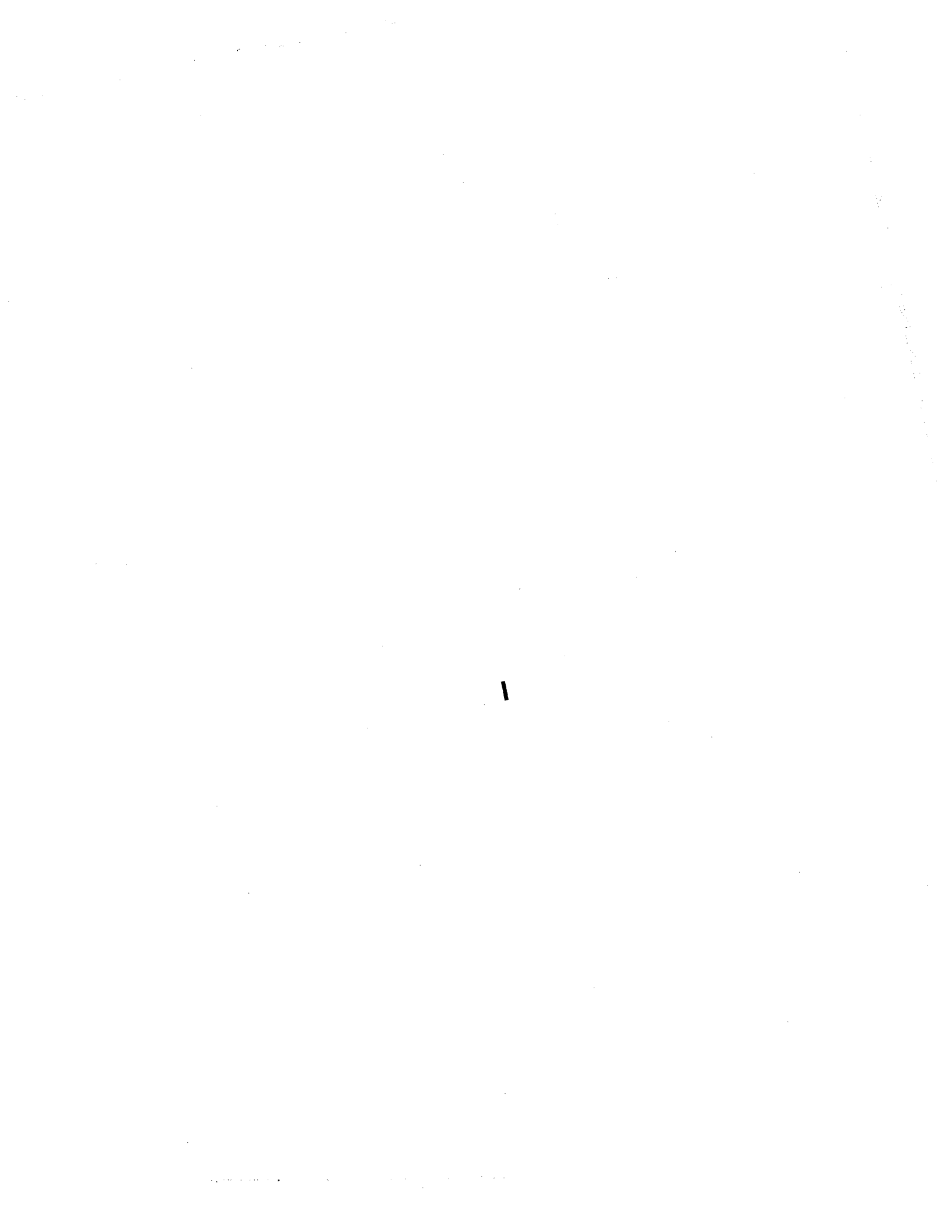
Fax + 1 202 639 9355
www.whitecase.com

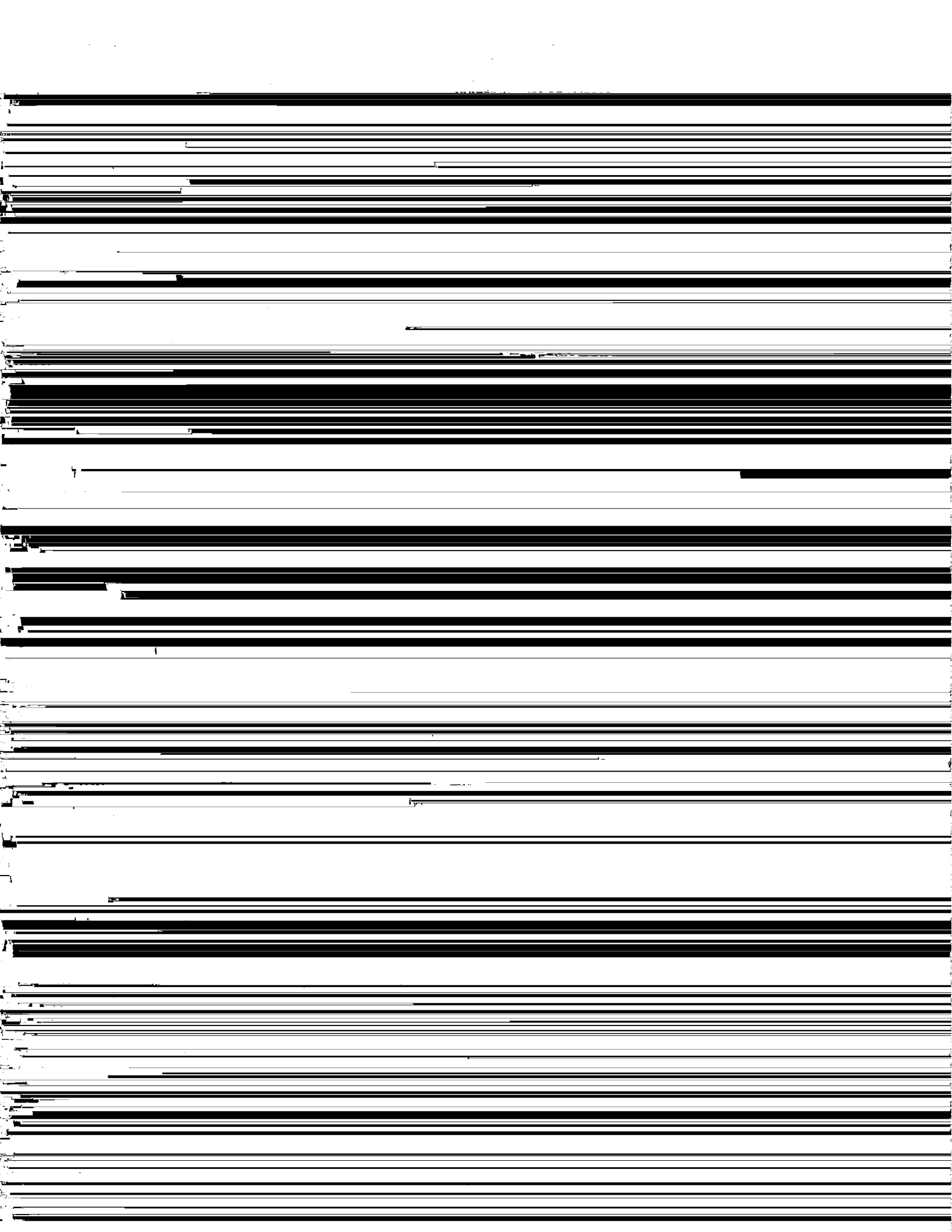
~~Phone +1 202 639 9300 alexander.feld@whitecase.com~~

the Freedom of Information Act, including without limitation 5 U.S.C. §§ 552(b)(3), (4), (6), &

Please do not hesitate to contact Dana Jasinski or me with any questions

Best regards,

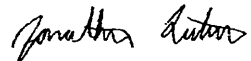




Noah A. Brumfield, Esq.
February 6, 2008
Page 2

Please contact Brad Albert, Meredyth Andrus, or me with any questions.

Best regards,

A handwritten signature in cursive script, appearing to read "Jonathan R. Lutinski".

Jonathan R. Lutinski

J

White & Case LLP
701 Thirteenth Street, NW
Washington, DC 20005

Tel + 1 202 626 3600
Fax + 1 202 639 9355
www.whitecase.com

Direct Dial + 202-626-3698 nbrumfield@whitecase.com

**COMPETITION SENSITIVE
PROPRIETARY BUSINESS INFORMATION
CONFIDENTIAL TREATMENT**

REQUESTED UNDER ETC RULES AND FOIA

February 12, 2008

VIA E-MAIL

Jonathan R. Lutinski, Esq.
Federal Trade Commission
Health Care Division
601 New Jersey Ave, NW
Washington, DC 20580

Re: Par Pharmaceuticals, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") Civil
Investigative Demands ("CIDs")

Dear Mr. Lutinski:

I write in response to your February 6, 2008 letter regarding videotaping the investigational
hearings of Paul Campanelli, Scott Tarriff, and Ed Maloney. As noted in our letter of February

Furthermore, the investigational hearing subpoenas—that were issued and signed by an FTC

K



UNITED STATES OF AMERICA

L

704 Thirteenth Street, NW
Washington, DC 20005

Fax + 1 202 639 9355
www.whitecase.com

Direct Dial 1 800 636 2609 info@whitecase.com

[REDACTED]

and § 57b-2(f), and by FTC Rule 4.10 (16 C.F.R. §4.10) and by the confidentiality provisions of
the Freedom of Information Act, including without limitation 5 U.S.C. §§ 552(b)(3) (4) (6) &

M

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COMPETITION SENSITIVE

REQUESTED UNDER FTC RULES AND FOIA

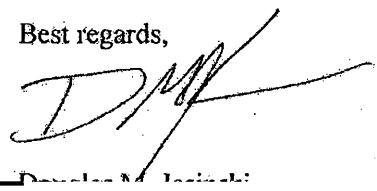
December 18, 2007
VIA HAND DELIVERY AND EMAIL

Meredyth Smith Andrus
Federal Trade Commission

Meredyth Smith Andrus

WHITE & CASE

Best regards,



Jonathan Lutinski

Enclosures

Jonathan Lutinski, Esq.

N

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

LIPSHETZ-SMITH LABORATORIES, INC.

Docket No. 9297

a corporation

3

Permitting the reading is evidence of related [redacted]

also is a well-established Commission practice, and it is consistent with the FTC's rules permitting Administrative Law Judges broad discretion regarding the

presentation of evidence at trial.

4

Respondents' real reason for opposing the use of transcripts at trial appears to be [redacted]

[redacted]

or to fasten liability on respondents for past conduct.

for the future in accordance with the general mandate of Congress.³

Under the FTC's Rules of Practice, "relevant, material, and reliable evidence shall be admitted."⁴ As the Commission consistently has ruled, "all relevant and material evidence -- whether hearsay or not -- is admissible, as long as it is reliable."⁵ Reliability is the key to admissibility. The Commission has further observed: "Indeed one of the purposes in establishing

be eliminated as a bar to common sense resolution of certain classes of controverted cases."⁶ This

context of a jury trial. Third, there are good reasons to take this risk in the jury:

The evidence we seek to have admitted is

Commission, upon appeal, can rely on such evidence as well.¹¹

- Similarly, our experts have reviewed many of the deposition and investigational hearing transcripts and they rely upon them in forming their opinions and preparing their expert reports and testimony in this case.
- Lastly, the depositions and investigational hearing transcripts of the witnesses from the respondents or co-conspirator AHP (fully 60 of the 63 witnesses) are presumptively reliable and admissible as a matter of law, since they are in the nature of party admissions.¹²

2. The FTC's Rules Explicitly Permit Testimony to be Admitted at Trial through Transcripts, and Doing So Is a Well-Established Commission Practice

Having set forth the general rule of the admissibility of evidence in Commission

proceedings and having established why the transcripts in this case are admissible — 11

Commission. Additionally, the Commission's Rules of Practice make specific reference to the

use at trial of any information and documents that were obtained during the investigation of the matter, and ALJs consistently have determined that this may include the use of investigational hearing testimony obtained during investigations. In fact, Your Honor's Scheduling Order

implicitly acknowledges the presumptive admissibility of deposition testimony, where it requires that each party "Examine and come prepared to use ALL of the deposition testimony."

This provision could not be any clearer. All of the deposition transcripts of witnesses from an adverse party – Schering and Upsher – can be used at trial for any purpose.¹⁶

With respect to investigational hearing transcripts, the specific basis for admitting them can be found at FTC Rule of Practice § 2.42(a) – 157

cases that have gone to trial at the Commission since 1990, the presiding ALJ permitted the use of deposition and investigational hearing transcripts as substantive evidence. 15

the need to spend a lot of time examining witnesses who are, or are associated with, an adverse party.

If we are permitted to use respondents' admissions from depositions and investigational hearings as substantive evidence at trial, we estimate that we only will need approximately four or five trial days to present our case-in-chief. In contrast, respondents' counsel have indicated that they will need at least sixteen trial days to present their defense.²⁰ Time saved by allowing the reading of selected excerpts from transcripts likely accounts for much of the difference in these estimates. Thus, judicial economy is promoted by the reading of the transcripts, and it will

expedite this hearing.

Authority to permit the reading in evidence of relevant portions of transcripts is found in FTC Rules of Practice § 3.42 and § 3.43.²¹ Rule § 3.42 gives ALJs broad responsibility and discretion "to conduct fair and impartial hearings, to take all necessary action to avoid delay in the

disposition of the proceedings, and to maintain order."²² Further, Rule 3.43(b) gives the ALJ "control over the mode and order of interrogating witnesses and presenting evidence" so as to "make the interrogation and presentation effective for the ascertainment of truth" and to "avoid

presenting evidence.” Moreover, it furthers the interest in the efficient management of the presentation of trial evidence as contemplated by the Commission’s Rules of Practice.

ALJs at the Commission frequently have ruled that Rules 3.42 and 3.43 permit the reading of deposition and investigational hearing transcripts at trial in lieu of live testimony. In at least three competition-related cases that have gone to trial at the Commission since 1990, the presiding ALJ permitted the reading in evidence of deposition and investigational hearing

deposition and investigational hearing transcripts, and also permitted the reading of

is crucial in this proceeding.²⁶ Do respondents seriously intend to challenge the credibility of their own employees? We doubt it. Rather, the more likely purpose of respondents' motions is to disrupt the orderly presentation of complaint counsel's case-in-chief, so that respondents can attempt to argue their case through their witnesses in the middle of our presentation. This need not, and should not, be permitted.

5. **Respondents Will Suffer No Unfair Prejudice by Permitting the Transcripts to Be Admitted in Evidence and that Portions Be Read at Trial**

Respondents argue that admitting the transcripts should Your Honor permit the

transcripts and inspectional hearing transcripts to be admitted in evidence and portions of the

With respect to the admission and reading in of investigational hearing transcripts,

respondents cannot claim unfair prejudice because:

[REDACTED]

least one of the respondent's counsel or counsel for co-conspirator AHP had the

[REDACTED] (and they did). (Moreover, each of these 12

prejudice should Your Honor deny us the use of this reliable, relevant, and material evidence.

trial.

6. Notification to Opposing Counsel of Transcript Excerpt Readings Should .

Such Excerpts Should Occur During Each Party's Own Case

Should Your Honor permit complaints to be filed by the opposing party?

With respect to the timing of respondents' presentation of counter-designations, we submit that each party should offer its transcript excerpts during its own case. Contrary to Schering's argument, nothing in Commission Rule 3.33(g)(1)(iv) or the law requires otherwise.²⁸ That rule provides that if only part of a deposition is offered in evidence, the other party may introduce other portions of the same deposition for the sake of completeness.²⁹ But the issue here

is whether respondents introduce in evidence additional deposition portions, they can, and

respondents not only have had the opportunity to counter-designate portions of depositions and investigational hearing transcripts from which we identified excerpts, but they remain free to introduce in evidence portions of transcripts if properly and timely designated. Indeed, if

respondents do counter-designate transcript portions, they would be part of the record and

respondents will suffer no prejudice by being required to introduce their evidence during their defense.³¹

For the reasons stated above, complaint counsel respectfully requests that Your Honor deny JA Ueber Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transmittal

Transmittal Enclosure (2) d. 1. 1. CD