UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of SCHERING-PLOUGH CORPORATION, a corporation, UPSHER-SMITH LABORATORIES, INC., a corporation, and AMERICAN HOME PRODUCTS CORPORATION, a corporation.	Docket No. 9297

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO 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

In its motion to quash two subpoenas *ad testificandum*, American Home Products Corporation ("AHP") seeks to preclude Complaint Counsel from taking depositions of two of its employees, Dr. Michael S. Dey and Lawrence Alaburda, Esq. AHP argues that the Court should limit discovery here, under Rule 3.33(c) of the Federal Trade Commission's ("FTC") Rules of Practice for Adjudicative Proceedings ("FTC Rules of Practice"), because the burdens outweigh any benefits and because deposing Dr. Dey and Mr. Alaburda, who have already been subjects of investigational hearings, is "unreasonably cumulative or duplicative."

AHP's motion should be denied. The proposed depositions are "reasonably expected to yield information relevant" to this proceeding and, therefore, are entirely appropriate under the FTC's discovery rules. Said depositions are important and proper as they allow Complaint Counsel to explore anticipated testimony via deposition, enable us to determine what said deponents know about new facts and issues, provide a basis for impeachment at trial, and better inform us about AHP's settlement with Schering-Plough Corporation ("Schering"), still at issue in this case.

In the alternative, AHP seeks a protective order, under Rule 3.31(d) of the FTC's Rules of Practice, limiting any depositions of Dr. Dey and Mr. Alaburda to "new" subject matters and to two hours. Not only are such limitations unreasonable and unworkable, they have been rejected in the past, and should be here as well.

I. Background

In our investigation of the agreements between Schering and Upsher-Smith Laboratories, Inc. ("Upsher-Smith") and between Schering and AHP, FTC staff conducted a number of investigational hearings, including those of AHP employees Dr. Dey and Mr. Alaburda. Mr. Alaburda's investigational hearing took place over one year ago, on August 23, 2000. He is an in-house attorney at AHP and was involved in the negotiations with Schering that led to AHP receiving millions of dollars to delay entry and settle their patent infringement suit with Schering. Dr. Dey's investigational hearing also took place over one year ago, on October 5, 2000. Dr. Dey was the president of ESI-Lederle ("ESI"), a division of AHP, during the period of ESI's patent infringement suit with Schering and the subsequent settlement agreement.

Over one year has elapsed since those investigational hearings. This is important because, first,

Complaint Counsel has received a significant amount of information through discovery. We now know much more about the circumstances and considerations of the persons involved in negotiating the agreements with Schering, the chronology of how both agreements were entered into, and other key aspects of this case. Second, we have reached the point at which we are preparing for trial. One aspect of that preparation is learning what witnesses know and will say and thus whom to call to testify at trial. That is accomplished by taking depositions.

Due to new information and in an effort to prepare for trial, we feel it imperative to depose various individuals with uniquely critical information, including Dr. Dey and Mr. Alaburda.[1] Thus, on October 15, 2001, we subpoenaed them to testify in this proceeding.[2]

II. Depositions Of Dr. Dey And Mr. Alaburda Are Important To Complaint Counsel's Case

The FTC Rules of Practice allow a party to take a deposition so long as "such deposition is

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[1]AHP asserts that Complaint Counsel never gave any indication that we would seek to depose Dr. Dey. *See* AHP mot. at 3. Regardless of this being irrelevant to our ability to seek both depositions at the present time, Dr. Dey and Mr. Alaburda were listed in Complaint Counsel's Preliminary Witnesses List, p. 3 (Exhibit A) and Complaint Counsel's Revised Witness List, p. 3 (Exhibit B). Both men were listed in American Home Products Corporation's Preliminary Witness List, p. 2-3 (Exhibit C) and American Home Products Corporation's Revised Witness List, p. 2-3 (Exhibit D). Both men also were listed in Respondent Schering-Plough Corporation's Preliminary Witness List Regarding The Allegations Against Schering-Plough Corporation And American Home Products Corporation/ESI-Lederle, Inc., p. 2-3 (Exhibit E) and Respondent Schering-Plough Corporation's Revised Witness List Regarding The Allegations Against Schering-Plough Corporation And American Home Products Corporation/ESI-Lederle, Inc., p. 3-4 (Exhibit F). It should not have been a surprise that Dr. Dey and Mr. Alaburda would be deposed.

[2]In its motion, AHP notes that on October 12, 2001, the Secretary of the Commission withdrew AHP from this adjudication. *See id.* AHP fails to mention that the agreement they signed with Schering remains squarely at issue. Thus, AHP employees, with uniquely relevant information about that agreement, certainly have highly relevant information to provide this Court.

reasonably expected to yield information" relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.33. There is no dispute that the proposed deponents have knowledge relevant to the issues presented in this proceeding. Dr. Dey and Mr. Alaburda negotiated a settlement to the patent suit with Schering in which Schering paid AHP millions of dollars to delay selling a generic version of K-Dur 20 until 2004. That settlement remains at issue in this case, because Schering is still a respondent. Dr. Dey also likely has information about the potassium chloride market, the impact of generic entry on the sales and profits of branded drugs in general and with specific reference to potassium chloride, and what he and others in the industry thought about market conditions at the time he made the deal with Schering.

AHP argues that any benefits Complaint Counsel will receive from deposing Dr. Dey and Mr. Alaburda are minimal at best and do not outweigh potential burdens. First, AHP suggests the depositions would serve no purpose because, under Rule 3.33(g), Complaint Counsel could not enter the depositions directly into evidence. *See* AHP mot. at 4. That misses the role and importance of depositions.

Depositions preview testimony. AHP admits that Complaint Counsel have both men on our witness list and could compel their attendance at trial. *See id*. However, before we seek to call them as witnesses, it is essential, as Professor Moore writes, that we depose them to "find out what the witness[es] saw, heard and know[], or what the witness[es] think[]." 7 MOORE'S FEDERAL PRACTICE, § 30.02[1] at 30-14 (Matthew Bender 3d ed. 2001) ("MOORE'S"). It is vital to learn this *before* one puts a witness on the stand. It would be detrimental to our case and inefficient for the Court for Complaint Counsel to call witnesses without knowing the facts to which they can testify. Judge Parker

agreed, in stating that "the purpose of depositions is to prepare for trial, not to serve as a substitute for live testimony in court." *In re Coca-Cola Co.*, 1990 FTC LEXIS 204, at *1 (June 12, 1990). Not being able to introduce depositions at trial does not eliminate the role of depositions in preparing for trial.

This preparation is also critical because of the significant amount of information Complaint Counsel has obtained over the past year. The investigational hearings for Mr. Alaburda and Dr. Dey occurred on August 23 and October 5, 2000, respectively. Since then, Schering, AHP, and Uphser-Smith have provided numerous boxes of documents to Complaint Counsel, submitted white papers, made admissions, filed answers to interrogatories, filed Statements of the Case, and filed numerous pleadings. The documents have revealed new facts and respondents have explained arguments as well as put forward defenses. Third parties have provided new information as well. We cannot know how Dr. Dey and Mr. Alaburda will testify concerning these new issues and facts because we simply were not aware of them at the time of their investigational hearings.

Second, AHP argues that transcripts of the investigational hearings could be used to impeach Dr. Dey and Mr. Alaburda, and thus, depositions are not necessary for such a use. *See* AHP mot. at 4-5. AHP ignores the fundamentally different purposes of investigational hearings and depositions. Investigational hearings are conducted to gather evidence in order to determine if a complaint should be brought. Depositions serve the purpose of establishing testimony with an eye towards proving certain allegations during a trial.

Your Honor recently recognized those differences in allowing seven persons to be deposed who had already been the subjects of investigational hearings. *See In re Hoechst Marion Roussel,*

Inc., Dkt. 9293, Order Denying Respondents Motions for Protective Orders (Oct. 12, 2000) ("*Hoechst*") (Exhibit G).

The Commission and other courts have also recognized that each of these two phases has its own particular purpose. In *Commission Denial of Hoechst's Request for Full Commission Review of Denial of Petition to Quash*, File No. 981-0368, at 2 (Jan. 19, 2000) (Exhibit H), the Commission wrote that

> the aims and limits of administrative investigations often diverge from those of civil litigation. Civil discovery is intended to narrow the issues for trial. An administrative investigation is aimed at determining whether violations of law likely exist that should be pursued through litigation.

The Supreme Court, in *Oklahoma Press Pub Co. v. Walling*, 327 U.S. 186, 201 (1946), observed that the purpose of an administrative agency's investigative proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgement, the facts thus discovered should justify doing so." The Court of Appeals for the Seventh Circuit summarized the point in noting that the investigative phase and the adjudicative phase "have long been recognized as separate and distinct proceedings serving different functions." *Genuine Parts Co. v. FTC*, 445 F.2 1382, 1387 (5th Cir. 1971).

The particular purpose of each drives what information is sought and what questions are asked. The issue is not, as AHP claims, that Complaint Counsel "failed to elicit clear answers from the witness." AHP mot. at 5. It is, in fact, that developing testimony to be used for impeachment purposes is simply not a purpose of an investigational hearing. Questions at investigational hearings are designed to gather information for a particular inquiry. They are not designed to elicit answers looking toward

impeaching a witness at trial. The latter is one purpose of a deposition.[3] Complaint Counsel should not have been expected to and did not conduct the investigational hearings of Dr. Dey and Mr. Alaburda expecting to use their testimony for impeachment.

AHP also fails to recognize the amount and importance of new information. As stated earlier, over one year has elapsed since the investigational hearings of Dr. Dey and Mr. Alaburda. There are some topics, issues, and facts about which they presently cannot be impeached because Complaint Counsel was not aware of them in 2000 and thus did not ask about them at said investigational hearings.

Third, AHP argues that because the time for fact discovery has closed, Complaint Counsel cannot hope that these depositions will provide any useful leads for more discovery. *See* AHP mot. at 6. Whether or not such an assertion is true, it neglects other uses of information gathered during a deposition. The FTC Rules of Practice require only that a deposition be "reasonably expected to yield information relevant" to this proceeding. 16 C.F.R. § 3.33. Like all other information gathered under Rule 3.33, information from Dr. Dey and Mr. Alaburda, being highly relevant and probative, could be used as the basis for questions of witnesses at trial, assist Complaint Counsel in explaining the facts of AHP's settlement with Schering, and inform us about the impact and nature of generic entry in general, and as applied to the potassium chloride market in particular.

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[3]This purpose of a deposition is suggested by its being used often in impeachment. "The chief use of depositions at trial is for cross-examining witnesses and attempting to impeach their trial testimony to the extent it differs from testimony previously given at a deposition." 7 MOORE'S, § 30.02[1] at 30-14.

III. Minimal Burdens To Dr. Dey And Mr. Alaburda Do Not Preclude Depositions

AHP wrongly asserts that any alleged burdens associated with the proposed depositions preclude their going forward. *See* AHP mot. at 6. First, the fact that Dr. Dey and Mr. Alaburda might be busy corporate executives does not protect them from being deposed. *See Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co.*, 1993 WL 34678 (S.D.N.Y. Feb. 4, 1993) (allowing deposition of president of AIG, Inc., to proceed); *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984) (noting that "the fact that the witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery.")

Courts often recognize that the benefits of the deposition outweigh, as they do in this case, any minimal burdens. In allowing a deposition to proceed, the District Court for the District of Kansas recently wrote:

> The probability that Cudrin can provide relevant evidence to a material issue outweighs the suggested burden of his deposition. That Cudrin is too busy and that a deposition will disrupt his work carries little weight. Most deponents are busy. Most depositions involve some disruption of work or personal business. '[A] showing that discovery may involve some inconvenience. . . does not suffice to establish good cause for issuance of a protective order.'[4]

In addition, contrary to AHP's suggestions in its motion, Complaint Counsel are not asking for a second deposition. *See* AHP mot. at 6. Dr. Dey and Mr. Alaburda have been the subjects of an

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[4]*Horsewood v. Kids "R" Us*, 1998 WL 526689, at *7 (D. Kan. Aug. 13, 1998) (*quoting, in part, Tolon v. Board of County Comm'rs*, 1995 WL 761452, at *3 (D. Kan. Dec. 18, 1995). *See also Culp v. Devlin*, 78 F.R.D. 136, 141 (E.D. Pa. 1978) (holding that depositions of Mayor and Police Commissioner could proceed and saying that "[a]though this Court recognizes that the defendant Mayor and Police Commissioner are busy officials and such depositions might burden their schedules, these considerations do not outweigh the importance of allowing discovery to go forward.")

investigational hearing. Complaint Counsel now seek to depose them. For the reasons throughout this motion, investigational hearings and depositions are not the same. Burdens and concerns associated with conducting multiple depositions of persons, as suggested in the cases cited in AHP's motion, are thus simply inapplicable here.

IV. <u>Deposition Is Distinct From An Investigational Hearing And Thus Not Duplicative</u>

In arguing that depositions of Dr. Dey and Mr. Alaburda are "unreasonably cumulative and duplicative", AHP ignores recent precedent directly on point. AHP mot. at 7. Your Honor recently allowed depositions of seven persons during the adjudicative phase, even though they had already been the subjects of investigational hearings. *See Hoechst*. A previous Administrative Law Judge, Judge Parker, made a similar ruling in compelling persons be deposed, despite their having been the subjects of investigational hearings. *See In re Chain Pharmacy Ass'n, Inc.*, 1990 FTC LEXIS 193 (June 20, 1990).

As Your Honor recognized in *Hoechst*, and as stated above, investigational hearings and depositions have fundamentally different purposes. Not recognizing these differences, AHP's proposed limit on discovery would seriously impede the FTC's ability to conduct investigations and adjudications. If FTC staff could not conduct depositions as necessary, such as those at issue here, they would have to conduct broad, sweeping investigations and investigational hearings so as not to miss any evidence and have all facts established for trial. This would "convert the investigation into a trial", "make a shambles of the investigation and stifle the agency in its gathering of facts." *Hannah v. Larche*, 363 U.S. 420, 443-446 (1960) (holding that during investigational hearings, an administrative agency need not supply an individual with rights of apprisal, confrontation and cross-examination). It would impose

tremendous burdens on the FTC, targets of investigations, and relevant third parties. The adjudication would also be made less efficient as FTC staff would have a muddled and incomplete record with which to prepare for and conduct a trial.

AHP argues that *Hoechst* does not apply in this case because *Hoechst* concerned deposing employees of respondents and AHP is no longer a respondent here.[5] That distinction simply misses the point. *Hoechst* did not rest on the proposed deponents being employees of a respondent. The key issue is that just because a person is the subject of an investigational hearing does not make him or her immune from being deposed during the adjudicative phase.[6]

Finally, as stated above, in the year since the investigational hearings of Dr. Dey and Mr. Alaburda, many new pieces of information have come to light. Such new evidence provides the basis for new questions and for probing previous answers. It is not surprising that "a second deposition is often permitted, where new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition." *Keck v. Union Bank of Switzerland*, 1997 WL 411931 (July 22, 1997).

V. **AHP's Proposed Limits On Subject Matter And Time are Unreasonable and Unworkable**

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[5]While AHP might no longer be a respondent, the agreement it entered into with Schering is still at issue and AHP's employees have important information about said agreement, unlike that of the typical third party.

[6]*See Hoechst*, at 3. Judge Timony implied that such a distinction was irrelevant in writing that "it is not unusual for prospective witnesses in an antitrust case to be interviewed or deposed several times prior to their testimony." *In re Champion Spark Plug*, 1981 FTC Lexis 105, at *1 (1981). He made no distinction between third parties and respondents. *See also Collins v. Int'l Dairy Queen*, 189 F.R.D. 496 (M.D. Ga. 1999) (granting motion for leave under Fed. R. Civ. Proc. 30(a)(2) and allowing re-deposition of third-parties).

AHP asks, if the Court allows the depositions to proceed, that they be limited to "new matters" and to two hours. AHP mot. at 8. This Court rejected similar requests in *Hoechst*. Similarly, neither Judge Hyun nor Judge Parker imposed subject matter or time limitations when deponents had already been the subjects of investigational hearings. *See In re Chain* 1990 FTC LEXIS 193, at *2-4. It is clear that such limitations are unreasonable and unworkable.

First, while we do not intend to tread over old terrain, it will be necessary to question Dr. Dey and Mr. Alaburda on "matters" previously raised during the investigational hearing where new information has been produced by respondents and third parties or where respondents have asserted affirmative defenses. For example, if we are restricted to "new matters", we would be unable to ask either person about AHP's settlement or license agreement with Schering, because those issues came up in both investigational hearings. This is a critical area of inquiry and limiting depositions in this manner would be an unreasonable impingement on discovery.

Second, such a limitation is unworkable. Complaint Counsel and AHP would be hard-pressed to agree on which questions were about "new matters" and which were not. Trying to define what "new matter" includes would be a waste of the Court's time, as well as that of AHP and Complaint Counsel.

Limiting the time of the proposed depositions to two hours is also arbitrary and unreasonable. No one, including Complaint Counsel and AHP, have any idea how many hours are needed to conduct useful, worthwhile depositions of these two individuals. There is thus no way to limit said depositions ahead of time. It would be unfair to Complaint Counsel and impede the search for justice to halt a deposition not finished, simply because it had reached two hours.

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For the foregoing reasons, Complaint Counsel respectfully requests that this Court deny both AHP's motion to quash the subpoenas *ad testificandum* for Dr. Dey and Mr. Alaburda and its alternative request for a protective order limiting the subject matter and duration of the proposed depositions.

Respectfully submitted,

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Karen G. Bokat
Andrew S. Ginsburg

Dated: November 2, 2001