UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	Docket No. 9297
	)	PUBLIC VERSION
and	)	
American Home Products Corporation, a corporation	)	

RESPONDENT SCHERING-PLOUGH CORPORATION'S EMERGENCY MOTION AND INCORPORATED MEMORANDUM REGARDING PRESENTATION OF AND OBJECTIONS TO TRIAL EXHIBITS

Respondent Schering-Plough Corporation ("Schering") respectfully submits this emergency motion and incorporated memorandum regarding the presentation of and objection to trial exhibits at the hearing in this matter.

I. INTRODUCTION

Complaint counsel has identified over 1,000 documents as exhibits. During negotiations among the parties about objections to exhibits, complaint counsel stated that it intends to offer all of these exhibits into evidence at the prehearing conference scheduled for January 17, 2002. Complaint counsel stated further that its intention with respect to the majority of its exhibits was *not* to offer them as exhibits at trial, through the testimony of witnesses in a position to explain what the document meant. Rather, complaint counsel intends only to quote from them in its proposed findings of facts, which will not be submitted until after the trial is concluded. Finally,

complaint counsel is unwilling to tell respondents for what purpose any of its exhibits is being offered.

The procedure complaint counsel contemplates is problematic for a number of reasons. First, it does not permit Schering to formulate objections as to relevance, materiality, and prejudice, all of which turn on the purpose for which the document is being offered. For this reason, the Federal Rules of Civil Procedure—and scheduling orders in prior FTC adjudicative hearings—permit parties to reserve relevance and prejudice objections until the trial itself.

Second, and more fundamentally, the procedure is at odds with the purpose of the trial: to determine the truth of the allegations in the complaint. The procedure outlined by complaint counsel would permit it to take statements from documents out of context, after the close of the trial; draw some as yet unidentified inference from them; and deny respondents the ability to put them in context through the testimony of witnesses who are in a position to testify about them. The vast majority of complaint counsel's exhibits were never shown to deposition witnesses. As a result, respondents have no way of knowing what portions of the documents complaint counsel believes are relevant, or what complaint counsel believes they prove. Normally, complaint counsel's beliefs in this regard would become clear when the documents were actually introduced through witnesses at trial. But because complaint counsel apparently does not intend to introduce the documents through witnesses, or even to refer to the majority of them in any way at the trial, Schering cannot put them in the proper context for the Court.

The fact that documents from respondents' files are presumed to be authentic does not solve this problem. Establishing a document's authenticity is only a first step toward establishing its admissibility.[1] Parties in federal trials frequently agree in advance that certain

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1 As one court explained:

> If one has a record of the XYZ Corporation to offer into evidence as such, it will be first be necessary to authenticate it as a record of the XYZ Corporation. Doing so, however, proves only its genuineness; it says nothing about its admissibility as an exception to the hearsay rule, because it proves nothing about the manner of its preparation or the reliability of its contents. Consequently, over proper objections, authenticating the document as a record of the XYZ Corporation is only the first step towards admissibility of the document for the truth of its contents.

documents are authentic. The documents are nonetheless not admitted into evidence until their relevance to the issues is made clear, usually through the testimony of witnesses who are knowledgeable about the documents.

Schering fully expects that it can come to some agreement with complaint counsel about the admissibility of many of the Schering-produced documents on complaint counsel's exhibit list. Many were used in depositions, and their relevance to the issues is therefore clear. But there are many that have never been put before witnesses, and it is not clear to Schering what complaint counsel believes they prove.

Schering therefore suggests that all parties should be required to put on its evidence the way parties are required to in federal court: step by step, through the testimony of witnesses. And to the extent complaint counsel intends to offer exhibits into evidence at the prehearing conference, it should be required to disclose the purpose for which they are being offered, either in advance or at the conference itself. Schering believes that a prompt ruling from the Court regarding how trial exhibits will be presented or otherwise admitted into evidence at the hearing will greatly assist the parties' trial preparations. Thus, Schering submits this emergency motion and asks that complaint counsel be ordered to respond to the motion by Tuesday, January 15, 2002. Schering contacted complaint counsel regarding the timing of their response, and complaint counsel would not agree to respond by Tuesday, January 15.

II. DISCUSSION

"The basic purpose of a trial is the determination of truth." *Tehan v. United States*, 382 U.S. 406, 416 (1966). In his treatise on evidence, McCormick describes the normal way in which a plaintiff's proof is presented as follows:

> Under the usual order of proceeding at the trial . . . the plaintiff, who has the burden of establishing his claim, will first introduce the evidence to prove the facts necessary to enable him to recover, e.g., the making of the contract sued on, its breach, and the amount of damages. At this stage the plaintiff will bring

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United States v. Duncan, 30 M.J. 1284, 1990 CMR LEXIS 510 (N-M.C.M.R. May 25, 1990).

> forward successively all the witnesses on whom he will rely to establish these facts, together with the documents pertinent for this purpose, which will be offered when they have been authenticated by the testimony of the witnesses. During this stage each witness of the plaintiff will first be questioned by the plaintiff's counsel, upon direct examination, then cross-examined by opposing counsel, and these examinations may be followed by re-direct and re-cross examinations.

McCormick on Evidence § 4 (4th Ed. 1992).

Complaint counsel's positions regarding the reading of deposition testimony and admission of documents make clear that it intends to depart from the usual method of proving its case. Instead of presenting witnesses to testify at the hearing, complaint counsel proposes to read undisclosed excerpts of their deposition testimony. And instead of offering documents through the testimony of witnesses who can put them in context, complaint counsel proposes to introduce all 1,000 of its exhibits en masse *before* the hearing, and only argue their own interpretation of them *after* the hearing.

This unorthodox method of presenting evidence is not conducive to ascertaining the truth of complaint counsel's allegations. Unlike, for example, a hearing to determine the competitive effects of a proposed merger, this hearing requires the Court to make findings about the propriety of respondents' conduct. This will require the Court to decide issues of fact, many of which are dependent on the credibility of witnesses. For example, a central disputed issue in the case is whether the licensing agreement between Schering and Upsher-Smith was, as respondents' contend, a bona fide agreement in which consideration was paid for the licensed products, or, as complaint counsel contends, a sham.

Complaint counsel will not present the testimony of a single fact witness who will testify that the licensing transaction was a sham. That is because every fact witness with relevant knowledge who was deposed testified that the licensing agreement was bona fide. These witnesses will testify in Schering's case, and the Court will have an opportunity to determine whether or not they are credible.

Instead, complaint counsel will flood the record with hundreds and hundreds of documents, which may or may not have any bearing on the disputed issues in the case. And instead of putting them into evidence through the testimony of witnesses who can put them in context, complaint counsel intends simply to submit them at the prehearing conference and argue their own interpretation of them in post-trial briefs.

Proceeding in this fashion is flawed for two reasons. First, because complaint counsel refuses to tell respondents the purpose for which any of its 1,000 exhibits are being offered, Schering will not be in a position at the prehearing conference to make objections to relevance and prejudice. *See* Robert S. Hunter, Federal Trial Handbook (1993), § 28.2 ("It is often impossible to foresee the relevancy of testimony or of an exhibit—particularly in the early stages of the trial."). For this reason, parties are generally permitted to reserve relevance, prejudice, and hearsay objections for trial, when the document is actually offered. *See* Manual for Complex Litigation, Third § 21.642 (parties should be required "to the extent feasible, to raise objections to the admissibility of evidence in advance of trial . . . with all other objections, *except those based on relevance or prejudice*, deemed waived") (citing Fed. R. Civ. P. 26(a)(3)) (emphasis added)); *Dubose v. First Security Savings Bank*, 1997 U.S. Dist. LEXIS 22282 (Dec. 2, 1997) (reserving judgment on relevance and hearsay objections to disputed document until trial). This sequence has been followed in prior administrative proceedings before the Commission. *See In re Weight Watchers Int., Inc.*, Docket No. 9261, 1995 LEXIS 213, at *3-*4 ¶8 (July 10, 1995) (scheduling order providing for waiver of objections not made within 14 days of service of final exhibit lists, with the exception that "[o]bjections as to relevance, materiality, or hearsay, *which depend upon the purpose for which a document is offered*, may be reserved until trial." (emphasis added).[2]

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[2] *See also In re Illinois Cereal Mills, Inc.*, Docket No. 9213, 1988 FTC LEXIS 79, at *4-*5 (October 6, 1988) (presuming authenticity of proposed trial exhibits produced from respondents files while reserving objections to admissibility based on "substantive grounds such as immateriality, irrelevancy, and incompetency").

The second and more fundamental problem with complaint counsel's approach is that it would relieve complaint counsel of its burden to establish the documents' connection to the issues in the case. Statements in documents are susceptible to mischaracterization, and it is frequently the case that their meaning becomes clear only when a knowledgeable witness testifies about them. Some of complaint counsel's exhibits consist of cryptic handwritten notes, for example, whose meaning cannot be deciphered without a witness to explain them.

Schering would be prepared to set the record straight at the trial if complaint counsel tried to create the impression that one of its exhibits was proof of something that a witness could explain that it is not. But the procedure complaint counsel envisions would not permit Schering to do so with respect to the vast majority of its exhibits, which have not been the subject of any witness's testimony during discovery.

Complaint counsel's plan to articulate how these 15 boxes of documents support its theory of the case *only after the record has closed* is simply inconsistent with the Commission's rules of practice, which guarantee respondents all rights "essential to a fair hearing," including the right of cross-examination.[3] *See* 16 C.F.R. § 3.41(c). The Commission has explicitly recognized that this "right of confrontation and cross-examination applies to adverse documentary evidence." *In re Bristol-Myers Company*, Docket No. 8917C, 1978 FTC LEXIS 417, *6 (April 13, 1978).[4]

In the context of a final prehearing conference, Senior Administrative Law Judge Needelman addressed a similar situation. Well in advance of the prehearing conference, ALJ

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[3] As previously recognized by Administrative Law Judge Timony: "It is entirely unfair to allow one party to put exhibits in evidence without allowing the opposing party the opportunity to test their validity." *In re The Reuben H. Donnelly Corp.*, Docket No. 9079, 1978 FTC LEXIS, at *2 (February 23, 1978).

[4] Moreover, the Commission's rules of practice provide that respondent's right to a fair hearing includes a requirement that the fact finder's decision be based on the "whole record." *See* 16 C.F.R. § 3.51(c)(1). "[T]he rule that the 'whole record' be considered -- both evidence for and against -- means that the procedures must provide some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others. This process of introduction and criticism helps assure that the factual basis of the [agency's decision] will be accurate." *Getty Oil Co. v. Dept. of Energy*, 569 F.Supp. 1204, 1215-16 (D.Del. 1983) (quoting *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258 (D.C. Cir. 1973).

Needelman had warned complaint counsel against "pouring into the record a confusing mass of marginally useful (though arguably relevant) documents and testimony. In a word, the some 2,000 exhibits previously listed should be carefully reviewed, with an eye to severe pruning." *See In re Chain Pharmacy Ass. of New York, Inc.*, Docket No. 9227, 1990 FTC LEXIS 271, at *1-*2 (August 10, 1990). As the prehearing conference approached, the Court then issued the following order:

> On December 3 [document day], *complaint counsel should be prepared to give the court reporter . . . an exhibit list consisting solely of the CX numbers and descriptions of documents they intend to offer during their case-in-chief.* Numbers not used should not appear on this list which will be incorporated verbatim into the record for identification purposes only. Should there be later withdrawal of documents identified on December 3, this will be indicated in the record with a "withdrawal" notation by the ALJ.

In re Chain Pharmacy Ass. Of New York, Inc., Docket No. 9227, 1990 FTC LEXIS 428, *1 (November 8, 1990) (emphasis added).

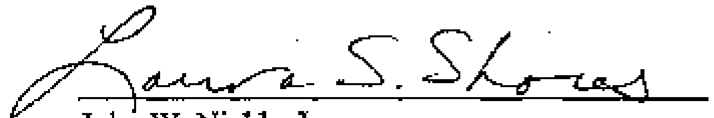
Similarly, complaint counsel in the present matter should be not be permitted to flood the record with a mass of documents. Complaint counsel should accordingly be directed to narrow their exhibits to the ones they actually intend to rely upon. Complaint counsel also should be required to present its exhibits through the testimony of witnesses who can put them in context. At a minimum, complaint counsel should be directed to disclose to respondents the purpose for which they are being offered, so that respondents may determine whether to object to their admissibility. Alternatively, Schering should be permitted to reserve its relevance, materiality, prejudice and hearsay objections until the exhibit is offered into evidence at trial.

III. CONCLUSION

Schering respectfully requests an order directing complaint counsel to offer into evidence at the prehearing conference only those exhibits they intend to introduce at trial, and providing that any documents so designated which are not introduced at trial will be

excluded from the record. Schering intends, unless the Court objects, to introduce its exhibits during the hearing itself.

Respectfully submitted,



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Dated: January 11, 2002

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	**Docket No. 9297**
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ORDER GRANTING SCHERING-PLOUGH CORPORATION'S EMERGENCY MOTION REGARDING PRESENTATION OF AND OBJECTIONS TO TRIAL EXHIBITS

For the reasons set forth in Schering-Plough Corporation's Motion and Incorporated Memorandum, IT IS HEREBY ORDERED that Schering's motion regarding presentation of and objections to trial exhibits is hereby GRANTED, and complaint counsel is directed to narrow its exhibits to only those exhibits it intends to introduce at trial. Documents so designated that are not introduced at trial will be excluded from the record in this case.

Complaint counsel is also ordered to present its exhibits through the testimony of witnesses during the course of the trial. If complaint counsel believes that it must offer certain exhibits at trial without the testimony of a witness, complaint counsel will identify those documents at the final pretrial hearing and will identify the purpose for which these exhibits are being offered, so that respondents may determine whether they wish to object to the admissibility of these exhibits. With respect to the remainder of complaint counsel's exhibits, respondents

may reserve their objections on grounds of relevance, materiality, prejudice and hearsay until the exhibits are offered into evidence at trial.

____
D. Michael Chappell
Administrative Law Judge

Dated: January ____, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of January 2002, I caused an original, one paper copy and an electronic copy of Respondent Schering-Plough Corporation's Emergency Motion And Incorporated Memorandum Regarding Presentation Of And Objection to Trial Exhibits to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
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Washington, D.C. 20580

and one paper copy was hand delivered upon:

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