

**UNITED STATES OF AMERICA
BEFORE 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

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT SCHERING-PLOUGH
CORPORATION'S MOTION TO COMPEL COMPLAINT COUNSEL TO SUPPLEMENT
ITS RESPONSES TO REQUESTS FOR DISCOVERY**

(PUBLIC RECORD)

Pursuant to Rule 3.22(c) of the Federal Trade Commission's Rules of Practice, complaint counsel hereby submit this opposition to respondent Schering-Plough Corporation's (ASchering@) motion to compel complaint counsel to supplement its responses to requests for discovery.

I. INTRODUCTION

Schering's motion seeks to compel complaint counsel to further supplement responses to Schering's First Set of Interrogatories (AInterrogatories@). Schering claims that complaint counsel's responses to interrogatories are non-responsive and do not provide the requested factual support for the contentions set forth. Schering's motion stems from dissatisfaction with the answers, not from any inadequacy in complaint counsel's responses. Complaint counsel's supplemental responses (ASupplement@) disclose in a clear and full manner exactly what we will contend at trial,

and the basis for these contentions on the topics raised by the interrogatories at issue. (See Supplement attached as Exhibit 1). Schering's motion should, therefore, be denied.

II. ARGUMENT

A. Complaint Counsel's Supplement Is Clearly Responsive And Provides Full Factual Support

Complaint counsel provided a 16-page Supplement to the interrogatories, putting forth in detail, our present concept of the theor[ies] of the case.¹ A review of our responses demonstrates that we have provided Schering with a current roadmap of where the case is headed.² Our response to Interrogatory No. 1 is illustrative of this fact. Interrogatory No. 1 asks, (A.....
.....
.....³ In responding to this interrogatory, we declared our contention and presented the factual basis for concluding that consumers are worse off under the challenged settlement than under litigation. Excerpts of our response to Interrogatory No. 1 follow³:

¹*Flowers Industries*, FTC Dkt. No. 9148 1981 FTC LEXIS 110 at *3 (October 7, 1981) (ALJ Timony).

² *Id.*

³ Complaint counsel's Supplement refers to portions of our economic expert report by identifying the pages that are relevant to answering Schering's interrogatories. As Schering possesses the entire report including all attachments and appendices, complaint counsel did not insert lengthy excerpts of the report or the documents and deposition and investigational

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hearing transcript pages into the Supplement. We have included excerpts from this report now solely to show this Court the extensive narrative answers and factual bases of complaint counsel's responses.

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This response, while not satisfactory to Schering, is nevertheless, a complete and fully responsive answer. Complaint counsel's answer to Interrogatory No. 1 directly addresses the question of (.....
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.....).

The remaining interrogatory responses are similar to this answer in that, for each answer complaint counsel: state our contention, provide an elaborate basis for this contention, and make specific references to the documents and testimony that provide a factual bases for the contention.

Interrogatory Nos. 3 and 4

Interrogatories 3 and 4 ask, (A.....
.....
.....) Schering claims that the responses to these interrogatories are non-responsive. Complaint counsel objected to these interrogatories as vague and ambiguous because of the phrases (A.....) and (A.....) Schering provided no additional clarification to these interrogatories. Nevertheless, complaint counsel

provided our contention as to how (.....)
.....
.....) Schering may disagree with this contention, but the response clearly set forth our position and is, therefore, proper.

Interrogatory Nos. 5-12

Interrogatory Nos. 5-12 seek various contentions about what would have happened (A... ..) the Schering-Upsher and Schering-ESI-Lederle agreements. For example, Interrogatories 11 and 12 ask (.....)
.....) Schering argues that our answer is non-responsive and seems to want a Ayes@ or Ano@ response to these interrogatories. But, such a response would be incomplete and misleading. Complaint counsel's responses, set forth in similar fashion to Interrogatory response 1, state our contentions, elaborate the basis of these contentions with additional explanations from expert reports, and provide substantial factual bases for these contentions.

At the hearing in this matter, complaint counsel do not intend to reconstruct what hypothetically would have happened had respondents not entered into the challenged agreements. Instead, complaint counsel will, as our interrogatory responses make clear, contend that Upsher and ESI (....., and that neither
.....) These responses fully educate Schering about complaint counsel's position concerning the relationship between (.....
.....) Complaint counsel's supplemental responses narrow the issues

reduce the possibility that Schering will be surprised at trial, and are therefore proper.⁴

B. Complaint Counsel Have No Obligation To Further Supplement Our Interrogatory Responses

⁴See *TK-7 Corp.*, Dkt. 9224, 1990 WL 606554 at *1 (March 9, 1990).

Schering relies upon a number of cases to reinforce the standard that complaint counsel must provide additional factual bases for our contentions. Complaint counsel do not dispute that there is an obligation to provide factual support for our contentions; rather we assert that these standards have been met. The supplemental responses have identified facts we intend to rely upon and have described them with the degree of specificity demanded by the current case law. In the Supplement responses, complaint counsel cite to various documents by bates number and to specific investigational hearing transcripts by page, and consequently provide a specific factual basis for all of our interrogatory responses.⁵ Schering refers to cases that have compelled further discovery responses where there are material omissions to the answers that are not present in this case.

⁵ Defendants are entitled to know specific information names, dates, times, places, documents... See *Martin v. Easton Publishing Co.*, 1980 U.S. Dist. LEXIS 10038 at** 8-9 (Jan. 24, 1980).

Schering cites *O'Connor*, *Continental Illinois*, *Martin*, and *One Bancorp*⁶, among other cases, to show the need for additional responses from complaint counsel. These cases are distinguishable and do not obligate complaint counsel to further supplement our responses. In *O'Connor*, the party responding to interrogatories improperly relied upon Rule 33 of the Federal Rules of Civil Procedure. In lieu of providing complete, direct narrative answers, the responding party referred to a voluminous amount of documents without identifying relevant pages by bates number or paragraph. **A[H]**owever, without waiving their objections, defendants generally responded to the interrogatories, under rule 33(d), stating that the answers to these interrogatories may be derived or ascertained from defendants' business records previously produced to plaintiffs.⁷ This general refusal to identify specific documents impeded defendant's ability to prepare for trial.⁸ The judge stated that the plaintiff, **A[M]***ust state specifically and identify precisely which documents will provide the desired information.*⁹

To fully answer an interrogatory under Rule 33(d) of the Federal Rules of Civil Procedure, **A[A]** responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.¹⁰ Complaint counsel did not invoke Rule 33 in any of

⁶*O'Connor, et al. v. Boeing North American, Inc.*, 185 FRD 272; *Continental Illinois National Bank v. Joen E. Caton, et al.*, 1991 U.S. Dist. LEXIS 16035 (May 22, 1991); *Martin v. Easton Publishing Co., Inc.* 1980 U.S. Dist. LEXIS 10038 (Jan. 24, 1980); *In re The One Bankcorp Securities Litigation*, 1991 U.S. Dist. LEXIS 1998 (Feb. 14, 1991).

⁷*O'Connor* at 276.

⁸ Defendants need this information in order to prepare for cross-examination and to decide whether to employ their own expert. *Martin* at **4.

⁹*Martin* at **7. citing to *Flour Mills of America, inc. v. Pace*, 75 FRD 676 (E.D. Okl. 1977); *Kozlowski v. Sears* 73 F.R.D. 73 (D.Mass 1976).

¹⁰ *O'Connor* at 277 citing *Rainbow Pioneer No. 44-184-04 A v. Hawaii-Nevada Investment Corp.*, 711 F.2d 902, 906 (9th cir. 1983).

its responses. Complaint counsel did not refer broadly to ~~business records~~ or other documents in lieu of narrative answers. Rather, complaint counsel provided full responsive narrative answers with citations referring to specific documents and pages of transcripts. ~~The~~ appropriate answer when documents are to be used [under Rule 33(d)] is to list the specific document provided the other party and indicate the page or paragraphs that are responsive to the interrogatory.¹¹

¹¹~~O'Connor~~ at 278, citing *State of Colorado v. Schmidt-Tiago Construction Co.*, 108 FRD 731,735 (D. Col. 1985).

The cases cited by Schering only identify the need to supplement answers where the responding party omits the type of material information that complaint counsel already have included as a showing of factual support. Where, like here, the responding party provided a narrative answer to the interrogatory, and did not rely upon Rule 33, the responding party was not required to supplement discovery answers in order to satisfy the interrogating party. A[D]efendants have narratively answered the interrogatory, rather than rely on rule 33(d), and defendants have answered the interrogatory, albeit not to the plaintiff's satisfaction.¹² The court in *O'Connor* denied the plaintiff's motion to compel further answers to the interrogatories answered narratively, even though the defendants answers were not what the plaintiff expected.

As stated before, Schering has not adequately show whether or not complaint counsel improperly refer to documents, impede Schering's ability to prepare its case, or improperly identify the basis of our contentions, in the supplemental answers.

¹²*O'Connor* at 278-279.

III. CONCLUSION

The supplemental interrogatory answers state with specificity complaint counsel's contentions, the bases for the contentions, and the facts supporting the contentions. Additionally, the supplemental responses provided by complaint counsel fully and directly respond to Schering's interrogatories. Schering has failed to show that complaint counsel's responses are not responsive, and complaint counsel do not have the duty to supplement the answers to Schering-Plough's satisfaction. Therefore, complaint counsel request that the Court deny Schering's motion.

Respectfully submitted

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Yaa A. Apori

Counsel Supporting the Complaint

Dated: December 3, 2001