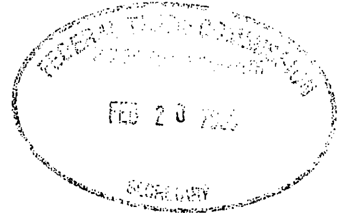

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re

SUBPOENAS AD TESTIFICANDUM
DATED FEBRUARY 13, 2008

PETITION TO QUASH OR LIMIT SUBPOENAS DATED FEBRUARY 13, 2008

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Dated: February 20, 2008

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Pursuant to 16 C.F.R. § 2.7(d), Par Pharmaceutical Companies, Inc. and Paddock Laboratories, Inc., hereby petition to limit or quash the *subpoenas ad testificandum* issued on February 13, 2008 for the investigational hearings of Messrs. Paul Campanelli, Scott Tarriff, and Ed Maloney (such subpoenas attached hereto as Exhibits A, B, and C, respectively). More specifically, Par and Paddock petition to limit or quash the subpoenas to the extent each subpoena purports that: "The investigational hearing of [named individual] will be recorded by sound-and-visual means . . . ." For the reasons detailed below, the Commission's regulations limit its authority to record investigational hearings to stenographic means. 16 C.F.R. § 2.8(b). Furthermore, the Commission has never sought a rulemaking to authorize videotaping of investigational hearings. Additionally, recording such non-adjudicative hearings by "sound-and-visual" means would override the due process rights accorded to witnesses in adjudicative proceedings. *E.g.*, *Hannah v. Larche*, 363 U.S. 420 (1960).

BACKGROUND

On November 29, 2007, a *subpoena ad testificandum* for an investigational hearing was issued for Mr. Paul Campanelli (Exhibit D). Subsequently, on January 16, 2008, *subpoenas ad testificandum* for investigational hearings were issued for Messrs. Scott Tarriff and Ed Maloney (Exhibits E and F, respectively). None of the subpoenas provided for recording the investigational hearings by means other than the stenographic reporting expressly provided for in 16 C.F.R. § 2.8(b).

On January 16, 2008, Mr. Campanelli appeared for his investigational hearing as scheduled by his subpoena. Following the Commission's regulations and customary practice, the Campanelli investigational hearing was recorded only by stenographic means. After a full-day hearing, Mr. Campanelli agreed to Commission staff's request to continue the hearing to a

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. *See* January 28, 2008 Letter from Jonathan R. Lutinski to Noah A. Brumfield (Exhibit G). Commission staff offered no authority or rationale for this deviation from the express provision of 16 C.F.R. § 2.8(b) or the Commission's customary practice (or, in the case of Mr. Campanelli's hearing, the Commission's already-commenced approach).

Counsel for Par and Paddock then attempted to resolve the matter, seeking via written and oral communications the staff's authority for videotaping of investigational hearings, as well as the rationale for this departure from the Commission's practice. *See* February 4, 2008 Letter from Noah A. Brumfield to Jonathan R. Lutinski (Exhibit H); February 6, 2008 Letter from Jonathan R. Lutinski to Noah A. Brumfield (Exhibit I); February 12, 2008 Letter from Noah A. Brumfield to Jonathan R. Lutinski (Exhibit J); February 13, 2008 Letter from Jonathan R. Lutinski to Noah A. Brumfield (Exhibit K); *see also* Statement Required by 16 C.F.R. § 2.7(d)(2) (detailing the good faith efforts to resolve by agreement the issue raised by this petition) (attached hereto as "Appendix").

In these written and oral communications, the Commission staff was unable to cite any authority for recording investigational hearings by other than stenographic means. Instead, Commission staff simply asserted that the Commission has the authority to record investigational hearings by "sound-and-visual" means because nothing in the pertinent regulations expressly prohibits such a method of recording. *See* February 13, 2008 Letter from Jonathan R. Lutinski to

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 other than stenographic 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 applicable subpoenas made no provision for the recording of the investigational hearings by anything other than the stenographic means expressly provided for by 16 C.F.R. § 2.8(b).

Apparently in response to the questions raised by Par and Paddock, on February 13, 2008 new *subpoenas ad testificandum* were issued for the continuation of Mr. Campanelli's investigational hearing and for the investigational hearings of Messrs. Tarriff and Maloney. Each new subpoena provided that the investigational hearing of the named witness would be "recorded by sound-and-visual means in addition to stenographic means." (Exhibits A, B, and C.) No regulation or authority for this wording appeared in the subpoena. The original dates for each investigational hearing were not changed. Thus, for Mr. Tarriff, for example, the new subpoena providing for recording by "sound-and-visual" means was issued only four business days prior to his scheduled investigational hearing on February 21.

Notably, throughout the communications between staff and counsel for Par and Paddock, in addition to failing to cite any authority for recording investigational hearings by "sound-and-visual" means, staff refused to provide any reason for seeking such recording, *see* Statement

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 HEARINGS IS LIMITED TO THAT PROVIDED IN 16 C.F.R. § 2.8(b), WHICH 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 means. *E.g.*, 16 C.F.R. § 2.8(c) ("In investigational hearings . . . the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and ***the stenographer*** recording such testimony."); 16 C.F.R. § 2.9(a) ("Any person compelled . . . to testify in an investigational hearing shall be entitled to retain a copy . . . of his own testimony ***as stenographically reported***, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official ***transcript*** of his testimony.") (emphases added); *see also, e.g.*, Merriam-Webster's Collegiate Dictionary 1148 (10th ed. 2000) (defining "stenography" as "1: the art or process of writing in shorthand; 2: shorthand esp. written from dictation or oral discourse; 3: the making of shorthand notes and subsequent transcription of them – stenographic . . . *adj* – stenographically . . . *adv*").

Nowhere in any of the Commission's regulations on investigational hearings is there any reference to videotaping, "sound-and-visual" recording, or memorializing investigational hearings by anything other than "stenographic" means. Nor is there any other indication

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 not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations.").

Despite the fact that 16 C.F.R. § 2.8(b) unequivocally provides that investigational hearings "shall be stenographically reported," Commission staff has taken the position that it can record investigational hearings by "sound-and-visual" means because the regulations ***do not expressly prohibit*** such a recording method. *E.g.*, February 6, 2008 Letter from Jonathan R. Lutinski to Noah A. Brumfield ("[N]othing in either the FTC Act or the FTC Rules of Practice ***prevents*** staff from videotaping investigational hearings . . . .") (emphasis added) (Exhibit I). The staff's position, which tacitly acknowledges that the FTC Act and FTC Rules do not

authorize videotaping investigational hearings, is at loggerheads with the fundamental principle of administrative law that an agency's authority is derived from its regulations. *E.g.*, *Esch*, 876 F.2d at 991 ("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."). By the staff's logic, the staff could, for example, administer lie detectors or voice stress analyzers as a means of recording its investigational hearings because such methods of recording are not prohibited expressly by the regulations. Contrary to the staff's claim, silence is not authority for agency conduct, particularly, where, as here, the regulation expressly mandates the means to be used.

Furthermore, in the 14 years since the Federal Rules of Civil Procedure were amended specifically to provide for videotaped depositions, the Commission has chosen ***not*** to attempt to amend its own rules to enable such recording of investigational hearings by "sound-and-visual" means. Permitting investigational hearings to be recorded by "sound-and-visual" means despite the express language of 16 C.F.R. § 2.8(b) and the Commission's decision not to pursue an amendment of the provision (as previously occurred under the Federal Rules) plainly would circumvent the rulemaking process and opportunity for public comment that are crucial to legitimate agency action. *E.g.*, *Am. Coke & Coal Chem. Inst. v. E.P.A.*, 452 F.3d 930, 938 (D.C. Cir. 2006) ("Under the APA, notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties . . . .").[†]

[†] That the staff's attempt to videotape investigational hearings in this investigation appears to be unprecedented is a further indication that the Commission is not authorized to do so.

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 the Commission's rules, investigational hearings are *ex parte*. 16 C.F.R. § 2.8(c) ("[T]he Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony."). Accordingly, in this multi-party investigation, the Commission has prevented counsel for Par and Paddock from attending the investigational hearings of witnesses from the other companies that are party to the investigation. *See* December 18, 2007 Letter from Douglas M. Jasinski to Meredyth Smith Andrus (Exhibit M).

Second, under the Commission's rules, there is no right to cross-examination in an investigational hearing 16 C.F.R. § 2.9(b)(5).

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 scope of the investigation; or (ii) calls for privileged information. 16 C.F.R. § 2.9(b)(2). Thus, 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 authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding . . . ." *Hannah*, 363 U.S. at 446.

The Court explained further that "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah*, 363 U.S. at 442. Thus, in *Hannah* the Court established that the testimony obtained from investigational hearings is ***not*** substitutable for the testimony obtained in adjudicative proceedings. The limitations on the rights accorded in investigational hearings dictate the limitations on the usage of the testimony so obtained.

C. Videotaping Investigational Hearings Would Erode The Distinction Between Investigational And Adjudicative Proceedings And Upset The Limited-Rights, Limited-Usage Balance Enshrined In *Hannah.*

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 testimony, accordingly, can be used at trial. Fed. R. Civ. P. 32(a)(1) ("At a hearing or trial, all or part of a deposition may be used against a party . . . ."). In particular, depositions under the Federal Rules provide for: (i) the participation of all parties to the litigation, Fed. R. Civ. P. 30(b)(1), 30(c); (ii) cross-examination, Fed. R. Civ. P. 30(c)(1); and (iii) the full range of evidentiary objections, Fed. R. Civ. P. 30(c)(2).

Indeed, under the Federal Rules, deposition testimony can be used ***in place of trial testimony*** if the witness is unavailable at the time of trial. Fed. R. Civ. P. 32(a)(4)(A)-(E). Thus, under the Federal Rules, deposition testimony, videotaped or otherwise, ***is*** substitutable for testimony in the adjudicative proceeding.

In contrast, because investigational hearing testimony is ***not*** substitutable for testimony in an adjudicative proceeding, videotaping an investigational hearing would erode the constitutional distinction between an investigational hearing and an adjudicative proceeding. *See Hannah*, 363 U.S. at 446 (noting the constitutional dimension of the distinction). The verisimilitude of a videotaped investigational hearing to the testimony rendered in an adjudicative proceeding would over-dignify the former and imperil the sanctity of the latter. ***Hannah*'s *logic*** that the circumscription of rights in an investigational hearing is tolerable under the Constitution "since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding," 363 U.S. at 446, ***would no longer***

adhere if the videotaped testimony from the investigational hearing arguably could be equated to or otherwise undermine the testimony in an adjudicative proceeding.

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 sought to depose executives of one of the Respondent companies, American Home Products ("AHP"). AHP objected that the depositions would be duplicative and harassing because the executives already had been subject to investigational hearings during the preceding Part II investigation. In that case, Complaint Counsel relied on the fundamental distinction between investigational hearing testimony and adjudicative proceeding testimony in successfully opposing AHP's petition to quash the deposition subpoenas: "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 at trial." Complaint Counsel Br. at 2, *In re Schering-Plough Corp.*, 2001 WL 1478354 (Westlaw pagination).

In particular, Complaint Counsel emphasized that the depositions were necessary to develop impeachment evidence for the Part III trial because an investigational hearing is not properly used to gather impeachment material:

> ***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 the purpose of a deposition.

Id. at 3 (emphasis added); *see also Hoechst Marion Roussel, Inc.*, 2000 WL 33596436 (F.T.C. Oct. 12, 2000) ("Simply because the agents of Respondents were examined during the pre-complaint investigation does not preclude Complaint Counsel from taking the depositions of these individuals in accordance with Part III of the Commission's Rules of Practice.").

Yet, just two months later in the very same Part III proceeding in *Schering-Plough*, Complaint Counsel argued for the admissibility at trial of the investigational hearing transcripts of Respondent company witnesses: "Testimony taken during investigational hearings, by definition, is information obtained by the Commission during the investigation, and thus ***all investigational hearing transcripts may be offered in evidence in this [Part III] proceeding.***" Complaint Counsel Opp'n Br. at 7 (emphasis added) (Exhibit N). And Complaint Counsel used this investigational hearing testimony as impeachment evidence in the Part III trial despite also having taken Part III depositions of each of the same Upsher-Smith witnesses who had been subject to the investigational hearings.

The *Schering-Plough* matter exemplifies that despite the avowed distinction between investigational hearings and adjudicative proceedings—even as enshrined by *Hannah*—the Commission nonetheless uses investigational hearing testimony in adjudicative proceedings. *See also, e.g., In re Resort Car Sys., Inc.*, 83 F.T.C. 234, 284-85 (1973) (decision of the full Commission affirming the admissibility of investigational hearing testimony in a Part III adjudication: "No testimony obtained at the investigational hearing was admitted into evidence at the adjudicative hearing for the truth of its contents."). In that event, the investigational hearing witness (or his counsel) must resign himself to pro forma caveats in the adjudicative

proceeding that the investigational hearing testimony was obtained under constitutionally circumscribed conditions and should be weighed accordingly. For stronger reason then, 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).

Thus, in addition to the due process concerns with videotaping investigational hearings, there are substantial privacy concerns both with the intrusiveness of unregulated videotaped investigational hearings as well as with the subsequent unpredictable usage of such unregulated videotaped testimony.

Beyond the plain lack of authority to videotape investigational hearings (detailed in Section I above), there is no genuine reason to videotape an investigational hearing except to misuse that testimony to intrude upon testimony in a subsequent adjudicative proceeding. (The Commission's authority to record by "sound-and-visual" means the testimony taken at the Part-III, adjudicative stage is not implicated here.)

CONCLUSION

For the foregoing reasons, the *subpoenas ad testificandum* issued on February 13, 2008 for the investigational hearings of Messrs. Paul Campanelli, Scott Tarriff, and Ed Maloney

should be quashed or limited to the extent each subpoena purports that the subject investigational hearing "will be recorded by sound-and-visual means . . . ."

Dated: February 20, 2008

Respectfully submitted,

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Appendix

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In re

SUBPOENAS AD TESTIFICANDUM
DATED FEBRUARY 13, 2008

STATEMENT REQUIRED BY 16 C.F.R. § 2.7(d)(2)

Counsel to Par Pharmaceutical Companies, Inc. and Paddock Laboratories, Inc. have conferred with Commission staff on numerous occasions in a good faith attempt to resolve by agreement the issues raised by this petition. Counsel have been unable to reach such an agreement as to any issue raised by this petition. Counsel to Par and Paddock, including Noah A. Brumfield and Douglas M. Jasinski, had written and oral communications with Commission staff, including Bradley S. Albert, Jonathan R. Lutinski, and Jackson McGrady on the occasions set forth in detail below. For each of the teleconferences listed below, counsel to Par and Paddock telephoned from the Washington, D.C., office of White & Case LLP.

The following is a chronological list of the written and oral communications between Commission staff and counsel to Par and Paddock regarding the issues raised by this petition:

1. January 28, 2008 – Mr. Brumfield received a letter from Mr. Lutinski, stating staff's intention to record the investigational hearings of Messrs. Paul Campanelli, Scott Tarriff, and Ed Maloney by "sound-and-visual" means. This was the first statement made to counsel for Par and Paddock of staff's intention to record any investigational hearing by anything other than stenographic means.
2. February 4, 2008 – Mr. Brumfield responded with a letter to Mr. Lutinski, stating

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.

3. 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. Albert that was held in the late afternoon. Mr. Albert declined to provide a reason for the proposed videotaping of the investigational hearings, nor did Mr. Albert provide the requested legal authority permitting videotaping. Instead, Mr. Albert stated that the F.T.C. rules give Commission staff broad authority and are silent as to the means of conducting an investigation. Messrs. Brumfield and Jasinski noted that, to their knowledge, the videotaping of an investigational hearing was extraordinary and without precedent. Mr. Albert acknowledged that the Commission had not before expressed a view either way as to the staff's authority to videotape an investigational hearing, suggesting that the issue is a novel one.

5. February 12, 2008 – Mr. Brumfield sent a letter to Mr. Lutinski stating that Commission staff has not provided authority for the Commission to videotape investigational hearings. Additionally, Mr. Brumfield stated in his letter that the original subpoenas for Mr. Campanelli (issued on November 29, 2007) and for

Messrs. Tarriff and Maloney (issued on January 16, 2008) do not provide notice of the Commission's intention to videotape the investigational hearings. Mr. Brumfield 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.

6. February 13, 2008 – Mr. Brumfield received a letter from Mr. Lutinski enclosing new investigational hearing subpoenas for each of Messrs. Campanelli, Tarriff, and Maloney, and noticing the recording of each would be by "sound-and-visual means in addition to stenographic means." On the same day, Mr. Brumfield responded in writing, stating that Messrs. Campanelli, Tarriff, and Maloney would appear for investigational hearings, on the scheduled dates, taken in the customary manner of stenographic recording. Mr. Brumfield also reiterated the request for the identification of legal authority for the noticed recording by non-stenographic means.

7. February 14, 2008 – At approximately 5:00 p.m., Mr. Brumfield and Mr. Jasinksi had a teleconference with Mr. Albert. Counsel to Par and Paddock requested from Mr. Albert a reason for the decision to videotape the investigational hearings and for legal authority in support of that recording method. Mr. Albert declined to provide a reason and noted that videotaping was not inconsistent with the applicable rules and statutes. Mr. Albert also declined to negotiate the matter further, stating that a videographer and a stenographer would be present at each of the investigational hearings.

8. February 15, 2008 – Mr. Brumfield and Mr. Jackson McGrady of the Office of General Counsel held three teleconferences.

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 counsel conduct and sanctions.

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 investigational hearing to proceed as scheduled on February 21, 2008, with only stenographic reporting, and thus avoid further delay. Mr. McGrady offered to consider further the option of proceeding with Mr. Tarriff's investigational hearing with only stenographic reporting.

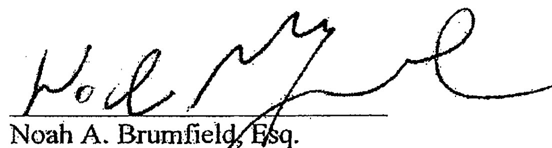
c. At approximately 2:55 p.m., Mr. McGrady telephoned Mr. Brumfield and declined the suggested resolution as to at least Mr. Tarriff, stating that Commission counsel preferred a ruling on the issue rather than to take Mr. Tarriff's investigational hearing as scheduled without videotaping. Mr. McGrady identified no alternative offer of compromise or resolution on the matter.

9. February 19, 2008 – At approximately 1:00 p.m., Mr. Brumfield and Mr. Albert spoke by telephone and discussed whether it was possible to avoid filing the petition

through an agreement not to proceed with the proposed videotaping. Mr. Albert indicated that the F.T.C. would not change its position on videotaping, noting that the issue does not lend itself to compromise.

The above identified teleconferences and correspondence represent a good faith attempt by counsel for Par and Paddock to resolve by agreement the issues raised by this petition. Such attempts by counsel for Par and Paddock are in line with Par and Paddock's course of conduct throughout this investigation, which has been to seek compromise and resolution on issues arising with staff.

Dated: February 20, 2008



Noah A. Brumfield, Esq.

Exhibits

A

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Paul Campanelli Par Pharmaceutical Companies, Inc. c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	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 [or deposition] in the proceeding described below (Item 6).

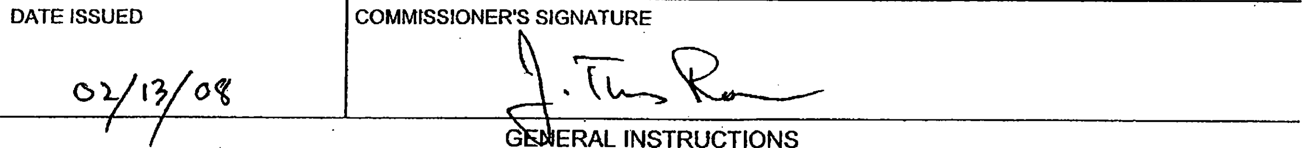
3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 3/05/08, 9am (or other agreed upon date) until complete

6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

The investigational hearing of Paul Campanelli will be recorded by sound-and-visual means in addition to stenographic means.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.



DATE ISSUED	COMMISSIONER'S SIGNATURE
02/13/08	

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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
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:

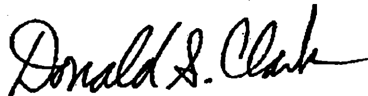
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

B

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Scott Tarriff c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	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 [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 2/21/08, 9am (or other agreed upon date) until complete

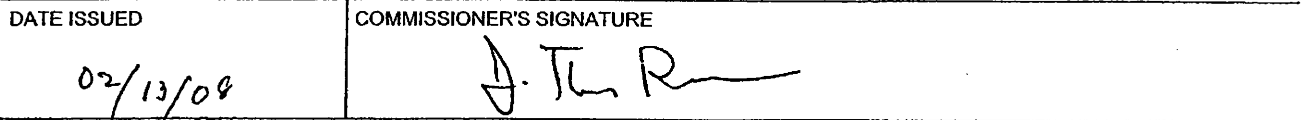
6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

The investigational hearing of Scott Tarriff will be recorded by sound-and-visual means in addition to stenographic means.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.

DATE ISSUED	COMMISSIONER'S SIGNATURE
02/13/08	



GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-A (rev. 10/93)

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
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:

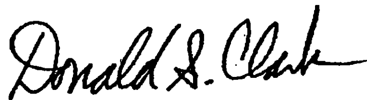
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

C

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Ed Maloney Paddock Laboratories, Inc. c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	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 [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 2/29/08, 9am (or other agreed upon date) until complete

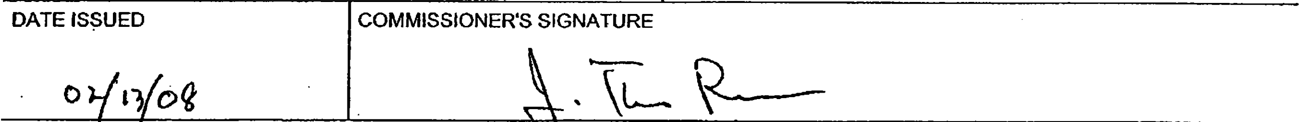
6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

The investigational hearing of Ed Maloney will be recorded by sound-and-visual means in addition to stenographic means.

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.

DATE ISSUED	COMMISSIONER'S SIGNATURE
02/13/08	



GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-A (rev. 10/93)

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
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:

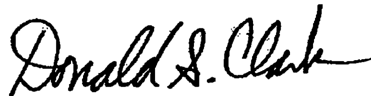
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

D

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Paul Campanelli Par Pharmaceutical Companies, Inc. c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

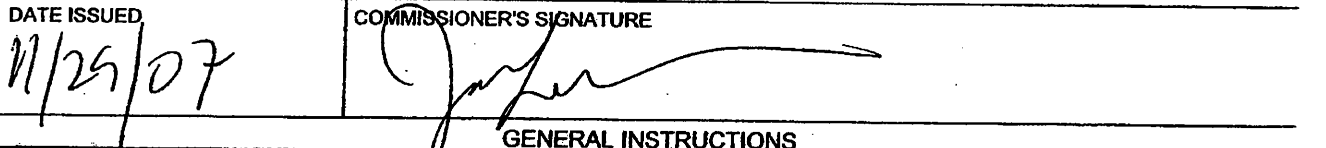
This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION January 16, 2008, 9:00 am

6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.



DATE ISSUED	COMMISSIONER'S SIGNATURE
11/29/07	

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

FTC Form 68-A (rev. 10/93)

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:

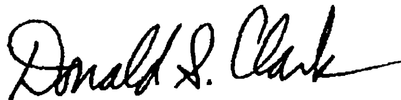
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

Standard Form 1157 (Rev. 4-80)
Department of the Treasury
I TFRM 4-2000
1157-107

CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND MISCELLANEOUS EXPENSES

Previous editions obsolete
NSN 7540-00-634-4347

PART I - ATTENDANCE CERTIFICATION

1. General Information

a. Witness Name ______________________

b. Witness Address

Street ______________________

City __________ State ______ Zip ______

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

d. Case Name Watson Unimed, et al.

e. Case Number 0710060

f. District or Location ______________________

g. SSN or Tax ID Number ______________________

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 __________

3. Certification

I certify that the witness named above attended in the case or matter indicated and is entitled to the statutory allowances for attendance and travel. In the proceedings before United States Magistrate where more than four witnesses were called, the Magistrate also certifies that the approval and certificate of the U.S. Attorney were first obtained.

(Signature) (Title) (Date)

PART II - WITNESS CLAIM FOR FEES AND ALLOWANCES

	Rate	No. of Days	Amount Claimed	Totals
1. Attendance Fees				
a. Fact, Pretrial Conference & Detained Witness			$	
Total Attendance Fees				$

2. Mileage Allowance (Indicate type of privately owned vehicle): ☐ *Auto* ☐ *Motorcycle* ☐ *Airplane*	Rate	No. of Miles	Amount Claimed	
a. From Residence to Case Location (and Return)			$	
b. From Hotel/Motel to Court (or Court to Hotel/Motel)				
Total Mileage Allowance				$

3. Subsistence Per Diem Rate: ______ *or HRGA Rate:* ______ *HRGA: High Rate Geological Area*	Rate	No. of Days	Amount Claimed	
a. Meals			$	
b. Lodging				
Total Subsistence Allowance				$

4. Miscellaneous Allowances (See Item 8 Below)	Amount Claimed	
a. Common Carrier	$	
b. Parking Fees, Tolls, Taxi Fares		
Total Miscellaneous Allowances		$
5. Total Amount Claimed (Items 1-4, Part II)		$
6. Less Outstanding Check or Cash Advances		$
7. Net Amount Claimed by Witness		$

8. Use this space to itemize your expenses from Item 4, Part II above. Receipts are required for all common carriers, hotels, parking fees, and for all other single items in excess of $75.00.

Paid by Check No.

Paid by $

(Signature of Payee)

(Date)

9. Witness Certification

I certify that the above data is correct and that payment has not been received, and that at the time of travel and attendance I (was) (was not) a U.S. Government employee and I (was) (was not) a citizen of the United States. (If not a citizen, present your Alien Registration Record with this form.) I (did) (did not) receive a Government Transportation Request to pay for my official travel.

(Signature) (Date)

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 ____________

2. Accounting Classification Data ________________________

E

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Scott Tarriff c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	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 [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 2/21/08, 9am or other agreed upon time and place

6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.

DATE ISSUED	COMMISSIONER'S SIGNATURE
1/16/08	[signature]

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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
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:

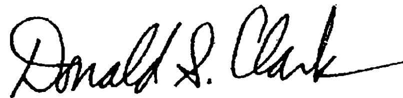
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

Standard Form 1157 (Rev. 4-80)
Department of the Treasury
I TFRM 4-2000
1157-107

CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND MISCELLANEOUS EXPENSES

Previous editions obsolete
NSN 7540-00-634-4347

PART I - ATTENDANCE CERTIFICATION

1. General Information

a. Witness Name ______________________
b. Witness Address
Street ______________________
City ______________ State ________ Zip ________
c. U.S. Citizen: Yes ○ No ○ Alien: Legal ○ Illegal ○

d. Case Name Watson Unimed, et al
e. Case Number 0710060
f. District or Location ______________________
g. SSN or Tax ID Number ______________________

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 ____________

3. Certification

I certify that the witness named above attended in the case or matter indicated and is entitled to the statutory allowances for attendance and travel. In the proceedings before United States Magistrate where more than four witnesses were called, the Magistrate also certifies that the approval and certificate of the U.S. Attorney were first obtained.

(Signature) ____________ (Title) ____________ (Date) ____________

PART II - WITNESS CLAIM FOR FEES AND ALLOWANCES

	Rate	No. of Days	Amount Claimed	Totals
1. Attendance Fees				
a. Fact, Pretrial Conference & Detained Witness			$	
Total Attendance Fees................................				$
2. Mileage Allowance (Indicate type of privately owned vehicle): ☐ *Auto* ☐ *Motorcycle* ☐ *Airplane*	**Rate**	**No. of Miles**	**Amount Claimed**	
a. From Residence to Case Location (and Return)			$	
b. From Hotel/Motel to Court (or Court to Hotel/Motel)				
Total Mileage Allowance..............................				$
3. Subsistence Per Diem Rate: ________ *or HRGA Rate:* ________ *HRGA: High Rate Geological Area*	**Rate**	**No. of Days**	**Amount Claimed**	
a. Meals			$	
b. Lodging				
Total Subsistence Allowance..........................				$
4. Miscellaneous Allowances (See Item 8 Below)			**Amount Claimed**	
a. Common Carrier			$	
b. Parking Fees, Tolls, Taxi Fares				
Total Miscellaneous Allowances........................				$
5. Total Amount Claimed (Items 1-4, Part II).....................				$
6. Less Outstanding Check or Cash Advances..................				$
7. Net Amount Claimed by Witness..........................				$

8. Use this space to itemize your expenses from Item 4, Part II above. Receipts are required for all common carriers, hotels, parking fees, and for all other single items in excess of $75.00.

Paid by Check No.
Paid by $ ____________
(Signature of Payee)
(Date)

9. Witness Certification

I certify that the above data is correct and that payment has not been received, and that at the time of travel and attendance I (was) (was not) a U.S. Government employee and I (was) (was not) a citizen of the United States. (If not a citizen, present your Alien Registration Record with this form.) I (did) (did not) receive a Government Transportation Request to pay for my official travel.

(Signature) ______________________ (Date) ______________________

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 ____________________
2. **Accounting Classification Data** ____

F

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM
Mr. Ed Maloney Paddock Laboratories, Inc. c/o Noah A. Brumfield, Esq. White & Case LLP 701 Thirteenth Street, N.W. Washington, DC 20005	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 [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
Federal Trade Commission 601 New Jersey Ave., N.W. Washington, DC 20001	Meredyth Smith Andrus, Esq. 5. DATE AND TIME OF HEARING OR DEPOSITION 2/29/08, 9am or other agreed upon time and place

6. SUBJECT OF INVESTIGATION

Unimed (AndroGel), File No. 0710060

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL
Bradley S. Albert, Esq., Custodian Meredyth Smith Andrus, Esq., Deputy Custodian	Meredyth Smith Andrus, Esq.

DATE ISSUED	COMMISSIONER'S SIGNATURE
1/16/08	[signature]

GENERAL INSTRUCTIONS

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service or, if the return date is less than 20 days after service, prior to the return date. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission. Send one copy to the Commission Counsel named in Item 8.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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
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:

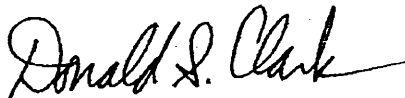
To determine whether Unimed Pharmaceuticals, Inc. ("Unimed"), Solvay Pharmaceuticals Inc. ("Solvay"), Laboratories Besins Iscovesco ("Besins"), Watson Pharmaceuticals, Inc. ("Watson"), Par Pharmaceutical Companies, Inc. ("Par") and Paddock Laboratories, Inc. ("Paddock") and their subsidiaries, or any other person, has engaged or is engaging in unfair methods of competition in or affecting commerce, 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 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 supplements thereto.

By direction of the Commission.



Donald S. Clark
Secretary

ISSUED: March 2, 2007

Standard Form 1157 (Rev. 4-80)
Department of the Treasury
I TFRM 4-2000
1157-107

CLAIMS FOR WITNESS ATTENDANCE FEES, TRAVEL, AND MISCELLANEOUS EXPENSES

Previous editions obsolete
NSN 7540-00-634-4347

PART I - ATTENDANCE CERTIFICATION

1. General Information

a. Witness Name ______________________

b. Witness Address

Street ______________________

City ____________ State ________ Zip ________

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

d. Case Name Watson Unimed, et al

e. Case Number 0710060

f. District or Location ______________________

g. SSN or Tax ID Number ______________________

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 ____________

3. Certification

I certify that the witness named above attended in the case or matter indicated and is entitled to the statutory allowances for attendance and travel. In the proceedings before United States Magistrate where more than four witnesses were called, the Magistrate also certifies that the approval and certificate of the U.S. Attorney were first obtained.

(Signature) ____________ (Title) ____________ (Date) ____________

PART II - WITNESS CLAIM FOR FEES AND ALLOWANCES

	Rate	No. of Days	Amount Claimed	Totals
1. Attendance Fees				
a. Fact, Pretrial Conference & Detained Witness			$	
Total Attendance Fees				$

2. Mileage Allowance (Indicate type of privately owned vehicle): ☐ *Auto* ☐ *Motorcycle* ☐ *Airplane*	Rate	No. of Miles	Amount Claimed	
a. From Residence to Case Location (and Return)			$	
b. From Hotel/Motel to Court (or Court to Hotel/Motel)				
Total Mileage Allowance				$

3. Subsistence Per Diem Rate: ________ *or HRGA Rate:* ________ *HRGA: High Rate Geological Area*	Rate	No. of Days	Amount Claimed	
a. Meals			$	
b. Lodging				
Total Subsistence Allowance				$

4. Miscellaneous Allowances (See Item 8 Below)	Amount Claimed	
a. Common Carrier	$	
b. Parking Fees, Tolls, Taxi Fares		
Total Miscellaneous Allowances		$
5. Total Amount Claimed (Items 1-4, Part II)		$
6. Less Outstanding Check or Cash Advances		$
7. Net Amount Claimed by Witness		$

8. Use this space to itemize your expenses from Item 4, Part II above. Receipts are required for all common carriers, hotels, parking fees, and for all other single items in excess of $75.00.

Paid by Check No. ____________

Paid by $ ____________

(Signature of Payee)

(Date)

9. Witness Certification

I certify that the above data is correct and that payment has not been received, and that at the time of travel and attendance I (was) (was not) a U.S. Government employee and I (was) (was not) a citizen of the United States. (If not a citizen, present your Alien Registration Record with this form.) I (did) (did not) receive a Government Transportation Request to pay for my official travel.

(Signature) ____________ *(Date)* ____________

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 ____________

2. Accounting Classification Data ______________________________

G

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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

Jonathan R. Lutinski, Esq.

Direct Line (202) 326-2679
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"), Civil Investigative Demands ("CID")

Dear Noah:

I write to provide notice that the following investigational hearings will be recorded by sound-and-visual means in addition to stenographic means:

Scott Tarriff (February 21)
Ed Maloney (February 29)
Paul Campanelli (March 5)

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

Best regards,

Jonathan R. Lutinski

H

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

COMPETITION SENSITIVE
PROPRIETARY BUSINESS INFORMATION
CONFIDENTIAL TREATMENT
REQUESTED UNDER FTC RULES AND FOIA

February 4, 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 to respond to your January 28, 2008 letter regarding the Commission's purported notice to have the investigational hearings of Scott Tarriff, Ed Maloney, and Paul Campanelli "recorded by sound-and-visual means in addition to stenographic means." Please note 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." Accordingly, absent your prompt citation of authority to the contrary, neither Messrs. Tarriff, Maloney, or Campanelli shall participate in any investigational hearing in which the Commission attempts to record the hearing by other than stenographic means.

The information in this letter is confidential business information of Par and Paddock. We thus respectfully request that this letter and all materials submitted by Par and Paddock be held subject to the confidentiality protections afforded by Sections 6(f), 21(b), 21(c), and 21(f) of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, including § 57b-2(b), § 57b-2(c), and § 57b-2(f), and by FTC Rule 4.10 (16 C.F.R. §4.10) and by the confidentiality provisions of

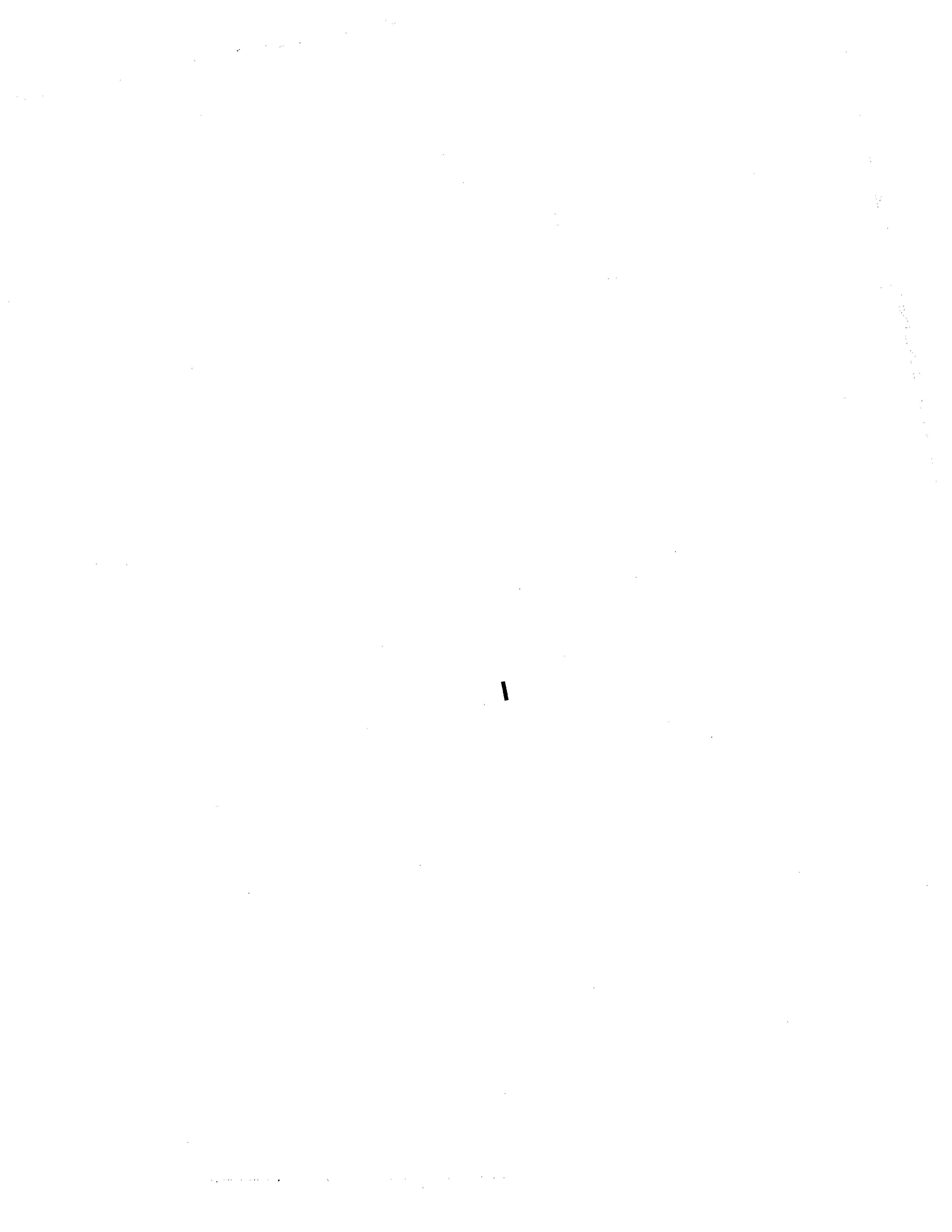
the Freedom of Information Act, including without limitation 5 U.S.C. §§ 552(b)(3), (4), (6), & (7).

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

Best regards,

Noah A. Brumfield

cc: Bradley Albert, Esq.
Meredyth Smith Andrus, Esq.
Jonathan R. Lutinski, Esq.
June Im, Esq.
Steve Vieux, Esq.
Doug M. Jasinski, Esq.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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

Jonathan R. Lutinski, Esq.

Direct Line (202) 326-2679
Facsimile (202) 326-3384
E-mail: jlutinski@ftc.gov

February 6, 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"), Civil Investigative Demands ("CID")

Dear Noah:

I write in response to your February 4, 2008 correspondence. We strongly disagree with your view that the Commission is so limited in its authority that it cannot even videotape its own investigational hearings. Indeed, it is long and well established that Congress granted the Commission broad authority in conducting investigations, issuing subpoenas, and taking testimony under the FTC Act.[1] The Commission in turn has granted staff broad discretion to "regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct...."[2] And, nothing in either the FTC Act or the FTC Rules of Practice prevents staff from videotaping investigational hearings to further this objective.

Please be aware that the outstanding subpoenas to Scott Tarriff, Ed Maloney, and Paul Campanelli remain in effect. If you continue to believe that the Commission lacks authority to videotape investigational hearings in addition to stenographic reporting, we suggest you promptly file a petition to quash or limit the subpoenas. If you choose instead to ignore these subpoenas and fail to appear and testify at the designated time and place, we will seek to enforce the subpoenas in federal district court and take all other appropriate action.

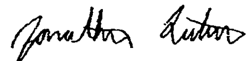
---

[1] *See FTC v. Browning*, 435 F.2d 96, 99-100 (D.C. Cir. 1970) (explaining that, "[t]he Supreme Court has [] recognized the breadth of power to obtain information that is vested in the Commission by the FTC Act.").

[2] 16 C.F.R. § 2.9(b)(6).

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

Best regards,



Jonathan R. Lutinski

J

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COMPETITION SENSITIVE
PROPRIETARY BUSINESS INFORMATION
CONFIDENTIAL TREATMENT
REQUESTED UNDER FTC 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 4, 2008, 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." Your February 6 letter ignores entirely 16 C.F.R. § 2.8(b) and cites no authority for the Commission to videotape investigational hearings.[†]

[†] *FTC v. Browning*, 435 F.2d 96 (D.C. Cir. 1970), cited in your February 6 letter, has nothing whatsoever to do with the Commission's ability to videotape investigational hearings. *Browning* addresses the territorial reach of a subpoena for documents. Your out-of-context quotation regarding the Commission's "breadth of power" is from a footnote squarely within the court's discussion of the territorial reach of the subpoena *duces tecum* at issue, *Browning*, 435 F.2d at 99 n.7, which has nothing at all to do with investigational hearings, much less videotaping them. Similarly, your citation of 16 C.F.R. § 2.9(b)(6) does not address the means of recording an investigational hearing, which is provided for expressly in 16 C.F.R. § 2.8, the provision you ignore.

Furthermore, the investigational hearing subpoenas—that were issued and signed by an FTC Commissioner—for Mr. Campanelli (on November 29, 2007) and for Messrs. Tarriff and Maloney (on January 16, 2008) do not provide notice of the Commission's intent to videotape these investigational hearings. Indeed, your January 28, 2008 letter, which raised this issue for the first time, acknowledges that the subpoenas lack such notice: "I write to provide notice that the following investigational hearings will be recorded by sound-and-visual means . . . ." Your letter did not include an amended subpoena calling for videotape recording. Notably, Mr. Campanelli's investigational hearing commenced prior to your January 28 letter and has thus far been recorded stenographically. If the Commission staff wishes to modify a subpoena, 16 C.F.R. § 2.7(c) provides for negotiation, not a unilateral modification via correspondence.

Because the subpoenas for these witnesses do not notice videotaped investigational hearings, we do not share the view expressed in your February 6 letter that it is incumbent upon us to file a petition to quash or limit the subpoenas. If and when a Commissioner issues subpoenas to these witnesses for videotaped investigational hearings, we will consider our options at that time. Until such time, neither Messrs. Campanelli, Tarriff, or Maloney shall participate in any investigational hearing in which the Commission attempts to record the hearing by other than the stenographic means expressly provided for under 16 C.F.R. § 2.8(b). To be clear, Messrs. Campanelli, Tarriff, and Maloney intend to comply with the subpoenas addressed to them (which say nothing about videotape recording).

The information in this letter is confidential business information of Par and Paddock. We thus respectfully request that this letter and all materials submitted by Par and Paddock be held subject to the confidentiality protections afforded by Sections 6(f), 21(b), 21(c), and 21(f) of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, including § 57b-2(b), § 57b-2(c), 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), & (7).

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

Best regards,

Noah A. Brumfield

cc: Bradley Albert, Esq.
Meredyth Smith Andrus, Esq.
June Im, Esq.
Steve Vieux, Esq.
Doug M. Jasinski, Esq.

K

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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

Jonathan R. Lutinski, Esq.

Direct Line (202) 326-2679
Facsimile (202) 326-3384
E-mail: jlutinski@ftc.gov

February 13, 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"), Civil Investigative Demands ("CID")

Dear Noah:

I write in response to your February 12, 2008 correspondence. As you note in your letter, we informed you on January 28, 2008 of our intention to record the investigational hearings of Scott Tarriff, Ed Maloney, and Paul Campanelli by sound-and-visual means in addition to stenographic means. Yesterday, you informed us that while Par and Paddock believe the Commission lacks authority to videotape its own investigational hearings, Par and Paddock do not need to move to quash or limit the subpoenas because the subpoenas themselves do not reference videotaping.

We disagree with your position. To be clear, we are not withdrawing the subpoenas issued to Mr. Tarriff and Mr. Maloney on January 16, 2008, and Mr. Campanelli on November 29, 2007, nor do we believe it is necessary to issue new subpoenas providing you with additional notice of our intent to videotape these investigational hearings. Nonetheless, please be advised that the Commission has issued additional subpoenas to these individuals identifying that the hearings will be recorded by sound-and-visual means in addition to stenographic means. If the witnesses ignore the subpoenas and fail to appear and testify at the designated time and place, we will seek to enforce the subpoenas in federal district court and take all other appropriate action.

Best regards,

Jonathan R. Lutinski

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COMPETITION SENSITIVE
PROPRIETARY BUSINESS INFORMATION
CONFIDENTIAL TREATMENT
REQUESTED UNDER FTC RULES AND FOIA

February 13, 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 13, 2008 letter concerning the Commission's intent to videotape the investigational hearings of Paul Campanelli, Scott Tarriff, and Ed Maloney. We note that, as stated in your letter, the Commission has, this day, "issued additional subpoenas to these individuals [Messrs. Campanelli, Tarriff, and Maloney] identifying that the hearings will be recorded by sound-and-visual means in addition to stenographic means."

As we have stated in our prior correspondence on this issue, 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."

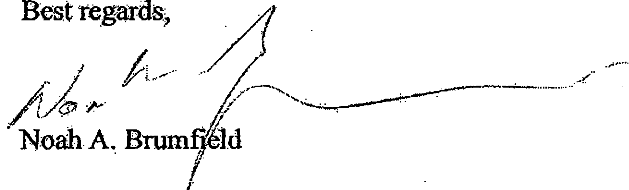
We reiterate that Messrs. Campanelli, Tarriff, or Maloney stand ready to participate in Investigational Hearings, on the scheduled dates, in the customary manner of stenographic transcription. However, as of this writing, the Commission has yet to identify any authority to record these Investigational Hearings by other than stenographic means (e.g., by video).

The information in this letter is confidential business information of Par and Paddock. We thus respectfully request that this letter and all materials submitted by Par and Paddock be held subject to the confidentiality protections afforded by Sections 6(f), 21(b), 21(c), and 21(f) of the

Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, including § 57b-2(b), § 57b-2(c), 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), & (7).

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

Best regards,



Noah A. Brumfield

cc: Bradley Albert, Esq.
Meredyth Smith Andrus, Esq.
June Im, Esq.
Steve Vieux, Esq.
Doug M. Jasinski, Esq.

M

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COMPETITION SENSITIVE
PROPRIETARY BUSINESS INFORMATION
CONFIDENTIAL TREATMENT
REQUESTED UNDER FTC RULES AND FOIA

December 18, 2007

VIA HAND DELIVERY AND EMAIL

Meredyth Smith Andrus
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, DC 20580

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

Dear Meredyth:

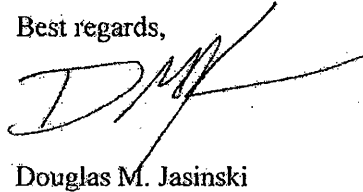
We request that the Federal Trade Commission provide Par and Paddock with reasonable notice of the date, time and place of every investigational hearing to be conducted as part of the FTC's investigation of the *Unimed Pharmaceutical, et al. v. Paddock Laboratories*, Dkt. No. 1:03-cv-02503-TWT patent litigation settlement. Furthermore, we request to attend the investigational hearings on behalf of Par and Paddock.

Par and Paddock also request a copy of each investigational hearing transcript. Par and Paddock will reimburse the FTC or the court reporter the reasonable costs for investigational hearing transcripts.

* * * * * * *

The information in this letter is confidential business information of Par and Paddock. We thus respectfully request that this letter and all materials submitted by Par and Paddock be held subject to the confidentiality protections afforded by Sections 6(f), 21(b), 21(c), and 21(f) of the Federal Trade Commission Act, 15 U.S.C. §§ 46(f) and 57b-2, including § 57b-2(b), § 57b-2(c), 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), & (7).

Best regards,



Douglas M. Jasinski

Enclosures

cc: June Im, Esq.
Jonathan Lutinski, Esq.
Steve Vieux, Esq.
Noah A. Brumfield, Esq.

N

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 **NON-PUBLIC VERSION**

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' MOTIONS CONCERNING THE USE OF TRANSCRIPT EXCERPTS

Through their various motions, respondents ask this Court to bar the admissibility of relevant, material, and reliable evidence at trial because complaint counsel seek to introduce this evidence in the form of deposition and investigational hearing transcripts rather than through live testimony.[1] As set forth in detail below, we ask Your Honor to deny respondents' motions in all respects, because:

1. The FTC's rules provide for the liberal admissibility of reliable evidence, and the evidence we seek to admit through deposition and investigational hearing transcripts is reliable on its face.

2. The FTC's rules explicitly permit testimony to be admitted at trial through transcripts, and doing so is a well-established Commission practice.

---

[1] In this consolidated response, we address (1) Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts (Jan. 3, 2002); (2) Joinder of Respondent Schering-Plough Corporation (Jan. 3, 2002); and (3) Schering's Emergency Motion and Incorporated Memorandum Regarding Presentation of Deposition Testimony At Hearing (Jan. 7, 2002).

3. Permitting the reading in evidence of selected portions of some transcripts at trial 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 motivated by an effort to disrupt the orderly presentation of complaint counsel's case and would unnecessarily draw out what already is likely to be a lengthy hearing.

5. Respondents will suffer no unfair prejudice by permitting the transcripts to be admitted in evidence and selected portions to be read at trial.

6. Notification to opposing counsel of transcript excerpt readings should conform to Your Honor's policy for live witnesses, and the presentation of such excerpts should occur during each party's own case.

* * * * *

1. The FTC's Rules Provide for the Liberal Admissibility of Reliable Evidence, and the Evidence We Seek to Admit Through Deposition and Investigational Hearing Transcripts Is Reliable on Its Face

It should not be necessary at this stage in the proceeding to have to point out to respondents' counsel that administrative hearings before the Federal Trade Commission are not governed, in the first instance, by the Federal Rules of Evidence, but apparently this remains necessary.[2] As the Supreme Court decided long ago in *FTC v. Cement Institute*:

> administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish

[2] As Your Honor explained to respondents' counsel at a recent Status Conference, in response to a question about the applicability of the Federal Rules of Evidence from Upsher's counsel, Mr. Curran: "You first look to our rules, and if you can't find guidance in our rules, then you look to the Federal Rules, and any case law supporting that." Transcript of Status Conference (Dec. 20, 2001) at 16.

> or to fasten liability on respondents for past conduct but to ban specific practices 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 [tribunals such as the FTC] was to devise a way whereby the exclusionary rules of evidence would be eliminated as a bar to common sense resolution of certain classes of controverted cases."[6] This is consistent with the practice throughout federal administrative agencies, and, as explained by a leading administrative law treatise in its discussion of the rules of evidence in administrative proceedings:

> There are three reasons why it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications. First, the cost of such errors is as great in the agency adjudication context as it is in the judicial context: If the ALJ erroneously excludes reliable evidence, the agency must remand for further proceedings or decide the case on the basis of an incomplete record. Second, the risk of error of exclusion is greater in the agency adjudication context than in the

[3] 333 U.S. 683, 705-06 (1948) (citations omitted).

[4] 16 C.F.R. § 3.43(b) (emphasis added).

[5] *American Home Products Corporation*, 98 F.T.C. 136 at n.9 (1981). *See also Kellogg Co.*, 99 F.T.C. 8, 31-32 (1982) ("Section 3.43(b) of the Commission's Rules of Practice provides for the admission of relevant, material, and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received.") (citations omitted); *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) ("it is long settled that hearsay evidence is not to be out of hand rejected or excluded in administrative tribunals.")

[6] *Philadelphia Carpet Co.*, 64 F.T.C. at 773.

context of a jury trial. Third, there are good reasons to take this risk in the jury trial context that do not exist in the case of agency adjudications.[7]

The evidence we seek to have admitted through deposition and investigational hearing transcripts is reliable on its face, and respondents' counsel have not even attempted to make the particularized showing necessary to demonstrate otherwise.

- The depositions each are stenographically recorded, verbatim transcripts of the witness's testimony taken under oath with the witness's counsel present, as well as counsel for each of the respondents. Respondents' counsel had the opportunity to make objections (and they did) and to conduct cross-examination and ask questions (which, in some instances, they did).[8]

- The investigational hearings each are stenographically recorded, verbatim transcripts of the witness's testimony taken under oath with the witness's counsel present. Of the 14 investigational hearing transcripts we seek to use, 12 are of witnesses from one of the respondents or Schering's co-conspirator American Home Products (AHP). In each of these instances, at least one of the respondent's counsel had the opportunity to make objections (and they did) and to conduct cross-examination and ask questions (which, in some instances, they did).[9]

- Respondents' experts, in forming their opinions, rely on many of the very depositions and investigational hearing transcripts whose admissibility respondents now challenge as "unreliable." By relying on the evidence from depositions and investigational hearings, presumably these experts concluded that this evidence is of "a type reasonably relied upon by experts in [their] particular field."[10] Surely if respondents' experts can sift through the various transcripts and pick and choose

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[7] Kenneth C. Davis and Richard J. Pierce, Jr., II *Administrative Law Treatise* (3d ed. 1994) § 10.3 at 125-26.

[8] *See, e.g.*, Denise Dolan Dep., at 143-47 (June 27, 2001) (Attachment A); Mark Halverson Dep., at 195-205 (Oct. 10, 2001) (Attachment B).

[9] *See, e.g.* Ian Troup IH, at 159-64 (May 25, 2000) (Attachment C); Mark Robbins IH, at 102-03 (May 24, 2000) (Attachment D).

[10] Fed. R. of Evid. 703.

what evidence they will rely on, Your Honor, in the first instance, and the 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 presumptively reliable – hence admissible – as a matter of Commission evidence law, we now turn to the specific legal bases for the admissibility of transcripts and their use at trial. Contrary to representations of respondents' counsel, the Commission's Rules of Practice make specific provision for the use of deposition transcript testimony at trial as substantive evidence without calling the witness, even if the witness is otherwise available, and doing precisely this is a well-established practice at the

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[11] *See generally* Davis and Pierce, Jr., II *Administrative Law Treatise* § 10.2 at 120 (observing that because agencies like the FTC are experts in the fields in which they adjudicate disputes, they should be permitted to rely on otherwise inadmissible evidence if it is of a type reasonably relied upon by experts in the field).

[12] Although it is not controlling authority in Commission proceedings, Federal Rule of Evidence 801(d)(2) establishes that statements of a party-opponent are not hearsay. Further, under Federal Rule of Evidence 801(d)(2)(E), any statements by a co-conspirator of a party during the course and in furtherance of the conspiracy also are admissible against a party as non-hearsay. In fact, the Commission has specifically applied the co-conspirator rule under the Federal Rules of Evidence to admit evidence from unnamed co-conspirators against respondents in proceedings before the Commission. *American Medical Association*, 94 F.T.C. 701, 957 (1979).

Commission. Additionally, the Commission's Rules of Practice make specific provision for 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: "Exchange, and serve courtesy copy on ALJ, final proposed witness and exhibits lists, including designated testimony to be presented by deposition . . . ."[13]

With respect to deposition transcripts, FTC Rule of Practice at § 3.33(g)(1) states that "at the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of [several] following provisions."[14] One of the following provisions goes on to say that an "adverse party" may use deposition transcripts "for any purpose" if it is

> [t]he deposition of a party or anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation . . . which is a party.[15]

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[13] *See* Scheduling Order (May 3, 2001) at p. 2, as well as every subsequent amendment of the scheduling order.

[14] 16 C.F.R. § 3.33(g)(1).

[15] 16 C.F.R. § 3.33(g)(1)(ii) (emphasis added).

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 § 3.43(c), which states that

> any documents . . . or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.[17]

Again, the rule could hardly be clearer. Testimony taken during investigational hearings, by definition, is information obtained by the Commission during the investigation, and thus all investigational hearing transcripts may be offered in evidence in this proceeding.

Having set forth the proper legal standard for admitting deposition and investigational hearing transcripts at trial, the question becomes how have these rules been put into practice in actual cases before the Commission? Administrative Law Judges at the Commission consistently have construed Rules 3.33(g) and 3.43(c) to allow the admission in evidence of deposition and investigational hearing transcripts in lieu of live testimony. In at least eight competition-related

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[16] Upsher suggests that the depositions of five of its employees are not party admissions because these employees are not "officers, directors or managing agents of Upsher-Smith." Upsher Mem. at 12. Upsher's limited view of party admissions, however, is not supported by the law. Each of these employees "exercise [their] judgement in dealing with corporate matter[s]" within the scope of their responsibilities. *Textron, Inc.* 1990 FTC Lexis 483 (1990). The depositions taken of these employees sought information about matters within these employees' responsibilities. Accordingly, under the Commission's rules, the employees identified by Upsher in its motion are "managing agents," and their prior deposition statements are party admissions and admissible as substantive evidence. *See Stearns v. Paccar, Inc.*, 1993 WL 17084, at *4 (10th Cir. 1993) (finding that a truck factory's "planner/buyer," who had discretion to choose particular supplier of bolts for use on the assembly line, fell within the definition of a "managing agent"); *cf.* Fed. R. Evid. 801(d)(2)(D) (defining admission by party-opponent).

[17] 16 C.F.R § 3.43(c) (emphasis added).

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 at trial.[18] And we are not aware of any administrative proceedings since 1990 in which an ALJ denied a party's request to introduce as substantive evidence deposition and/or investigational hearing transcripts from non-testifying witnesses.

3. Permitting the Reading in Evidence of Selected Portions of Some Transcripts at Trial 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

At the recent Status Hearing in this case, complaint counsel indicated our intent to seek leave of this Court to read selected portions of some of the investigational hearing and deposition transcripts in evidence, in lieu of merely offering the transcripts in evidence or calling certain witnesses to testify.[19] Our purpose in seeking to do so is to expedite the presentation of our case-in-chief and rebuttal. Reading selected excerpts from transcripts, where the testimony and party admissions already are locked-in, decreases the amount of time needed to present these witnesses at trial. Since almost all of these witnesses (60 of 63) are employees or experts of the respondents or co-conspirator AHP, it also will increase the effectiveness of the presentation, and will obviate

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[18] These eight matters are: (1) *Chain Pharmacy Ass'n of New York State, Inc.*, FTC Dkt. 9227 (1991) (Needelman, J.); (2) *Textron, Inc.* FTC Dkt 9226 (1991) (Timony, J.); (3) *R.R. Donnelly & Sons Co., et al.*, FTC Dkt. 9243 (1991) (Parker, J.); (4) *Adventist Health Sytems/West and Ukiah Adventist Hosp.*, FTC Dkt 9234 (1992) (Parker, J.); (5) *California Dental Ass'n*, FTC Dkt. 9259 (Parker, J.); (6) *International Ass'n of Conference Interpreters*, FTC Dkt. 9270 (1996) (Timony, J.); (7) *Toys "R" Us, Inc.*, FTC Dkt. 9278 (1997) (Timony, J.); and (8) *Summit Technology, Inc. & VISX, Inc.*, FTC Dkt. 9286 (1998) (Levin, J.).

[19] At the Status Conference Your Honor requested briefing on how deposition testimony should be handled at trial. Transcript of Status Conference (Dec. 20, 2001) at 14-15. In accordance with Your Honor's request, we submit this discussion as complaint counsel's briefing on the matter.

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 "[a]void needless consumption of time."[23] The admission in evidence of testimony through the reading of transcripts at trial is well within Your Honor's discretion to control the "mode and order . . . of

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[20] Complaint counsel plans to call three fact witnesses for its case in chief and use selected transcript excerpts for the rest. Upsher reports that it plans to call at least 19 fact witnesses. Schering plans to call at least 28 fact witnesses.

[21] 16 C.F.R. § 3.42 and § 3.43.

[22] 16 C.F.R. § 3.42(c).

[23] 16 C.F.R § 3.43(b)(1) & (2).

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 transcripts at trial.[24] For example, in *Toys R Us*, complaint counsel sought to read in evidence deposition and investigational hearing transcripts, and the respondent there made arguments similar to those respondents make here. Chief ALJ Timony quickly disposed of respondent's arguments and permitted the reading of transcripts in evidence.[25]

4. Respondents' Real Reason for Opposing the Use of Transcripts at Trial Appears to Be Motivated by Inappropriate Considerations and Would Unnecessarily Draw Out What Already Is Likely to Be a Lengthy Hearing

What possible purpose is served by respondents' insistence that we be required to call their officers and employees as live -- adverse -- witnesses during our case-in-chief, when we already have gotten all the admissions we need from them? Given that 60 of the 63 witnesses for whom we seek to have testimony admitted by transcript are from the respondents and co-conspirator AHP, we find unpersuasive (and disturbing) respondents' argument that complaint counsel be required to call their witnesses live because "[d]etermining the credibility of witnesses

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[24] These three matters are: (1) *California Dental Ass'n*, FTC Dkt. 9259 (Parker, J.); (2) *International Ass'n of Conference Interpreters*, FTC Dkt. 9270 (1996) (Timony, J.); and (3) *Toys "R" Us, Inc.*, FTC Dkt. 9278 (1997) (Timony, J.).

[25] *Toys "R" Us, Inc.*, FTC Dkt. 9278, Trial Tr. at 35-44 (1997) (Timony, J.) (Attachment E).

is [] crucial in this proceeding."[26] Do respondents seriously intended 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 cannot seriously claim unfair prejudice should Your Honor permit the deposition and investigational hearing transcripts to be admitted in evidence and portions of the transcripts to be read in evidence at trial.

With respect to the admission and reading in of deposition transcripts, respondents will suffer no unfair prejudice because:

- Respondents' counsel were present at every deposition and had the opportunity to make objections (which they did) and to conduct cross-examination and ask questions (which, in some instances, they did).
- Most of the witnesses for whom we seek to admit deposition testimony (60 of 61) are employees or experts of respondents or co-conspirator AHP.
- Respondents have included most of these people on their witness list (50 of 61), and they remain free to call all of them as part of their defense.
- As to the sole third-party witness for whom we seek to admit deposition testimony, we currently intend to call him live as a witness during our rebuttal, and respondents will have the opportunity to cross-examine him at that time.
- Respondents have had the same opportunity to identify and read in transcript excerpts of their own choosing.

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[26] Upsher Motion at 10-11.

With respect to the admission and reading in of investigational hearing transcripts, respondents cannot claim unfair prejudice because:

- Of the 14 investigational hearing transcripts we seek to use, 12 are of witnesses from one of the respondents or co-conspirator AHP. In each of these instances, at least one of the respondent's counsel or counsel for co-conspirator AHP had the opportunity to make objections (and they did). (Moreover, each of these 12 witnesses were also deposed in this case. Thus, respondents' counsel have had the opportunity to make objections and cross-examine these witnesses at that time.)

- Respondents' counsel have had copies of every investigational hearing transcript – whether the witness was theirs or a third-party – since June 1, 2001, and respondents have had ample opportunity to depose the witness during the discovery phase of this case. (Respondents' failure to do so should not be a basis for preventing complaint counsel's legitimate use of these reliable transcripts.)

- Respondents have been on notice of our intention to use the testimony of each person subject to an investigational hearing, as these people have been included on our witness lists. (Again, respondents' failure to depose these witnesses should not be a basis for preventing complaint counsel's legitimate use of these reliable transcripts.)

- As to the two third-party witness for whom we seek to admit deposition testimony, we currently intend to call them live as witnesses during our rebuttal, and respondents will have the opportunity to cross-examine them at that time.

For each of these reasons, the admissibility of the deposition and investigational hearing transcripts here is readily distinguished on the facts from the due process concerns that were raised by the Commission and the courts in the cases concerning the FTC investigational hearing transcript cited by Upsher's counsel at pages 5-9 of its January 3, 2002, motion.

Simply put, respondents will not be unfairly prejudiced should Your Honor permit the deposition and investigational hearing transcripts to be admitted in evidence, and portions of the transcripts to be read in evidence at trial. On the other hand, complaint counsel will suffer

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

6. Notification to Opposing Counsel of Transcript Excerpt Readings Should Conform to Your Honor's Policy for Live Witnesses and the Presentation of Such Excerpts Should Occur During Each Party's Own Case

Should Your Honor permit complaint counsel to read from select investigational hearing and deposition transcript excerpts at the hearing, respondents claim they are entitled to know in advance exactly which excerpts we intend to read, and to have an opportunity to offer their own counter-designations right afterwards during our case-in-chief. We disagree with respondents' position and address these points in turn.

With respect to the timing and content of the notice, we submit that each party should receive the same notice for transcript excerpts as it would for live witnesses. For live witnesses, this Court's "Logistics for Trial" memorandum states only that counsel shall identify the witnesses "they anticipate calling in the next three days."[27] In other words, parties are entitled to learn the identity of the witness three days in advance of testimony, but nothing more. For transcript readings, the notice policy should be the same -- each party will identify three days in advance from whose transcripts they anticipate reading at the hearing. Respondents can hardly claim unfair prejudice by not receiving advance notice of the precise transcript portions we intend to read at the hearing, particularly since they already know from our designations the entire universe of possible excerpts for each witness. This is far more information than respondents may know about a live witness, since the pre-trial notification of expected testimony for witnesses who will be called at trial is limited only to a brief summary of expected testimony.

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[27] Schering-Plough Corp., No. 9297 - Logistics for Trial (Attachment F).

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 not whether respondents can 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 available for Your Honor's consideration, whether respondents read them at the hearing or not.

Instead, the issue is whether respondents will be permitted to disrupt our presentation of evidence by arguing its case through excerpts of its witnesses during the middle of our presentation. Your Honor has the discretion to control the "mode and order. . . of presenting evidence"[30] and Rule 3.33(g)(1)(iv) says nothing to constrain that discretion. The Court will benefit from an orderly presentation of evidence in what is expected to be a lengthy hearing, and

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[28] *See Blue Cross and Blue Shield vs. Philip Morris, Inc.*, 199 F.R.D. 487, 489 (E.D.N.Y. 2001) ("Because there are so many of these depositions. . . the plaintiff will be permitted to play the portions it wishes in its case-in-chief without counter-designations. The defendants may do the same in their case after the plaintiff rests.").

[29] 16 C.F.R. § 3.33(g)(1)(iv).

[30] 16 C.F.R. § 3.43(b).

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: (1) Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts: (2) the Joinder of Respondent Schering-Plough Corporation in Upsher-Smith's Motion in Limine to Bar Complaint Counsel's Proposed Use of Transcript Excerpts: and (3) Respondent Schering-Plough Corporation's Emergency Motion and Incorporation Memorandum Regarding Presentation of Deposition Testimony At Hearing. We further request that Your Honor admit all of complaint counsel's transcript designations in evidence and permit us to read selected portions of those transcripts at trial.

Respectfully Submitted,

Karen Bokat
Bradley S. Albert
Karan Singh

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
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Dated: January 14, 2002

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[31] Should Your Honor decide to permit respondents to introduce counter-designated transcript readings during our case-in-chief, we respectfully submit that these readings should be limited, in accordance with Rule 3.33(g)(1)(iv), to those portions necessary to put our selections in context; and should not include respondents' affirmative evidence that should only be presented during their defense.