



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

Bureau of Competition

December 19, 2001

Via Federal Express and facsimile

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHER-SMITH LABORATORIES, INC.,
a corporation,

and/or its affiliates, including Schering-Plough Health Products Inc.,

Docket No. 9297

¹Complaint counsel was unable to confer with respondent Upsher-Smith on this issue after repeated attempts.

²Exhibit A, Upsher Smith's Final Witness List, pgs. 6-7.

The appropriate time for grouping potential witnesses into broad categories has long since passed. Upsher has had more than sufficient opportunity to identify particular witnesses from these categories, and its failure to do so leaves complaint counsel unable to even guess as to whom Upsher intends to call as witnesses from these categories. This in turn, precludes us from deposing, and preparing for cross-examination of, these still unidentified witnesses. Accordingly, we ask the court to strike from Upsher-Smith's Final Witness List all individuals who could be called under categories 8, 10, and 11 as Non-Party Witnesses.³

I. Upsher's failure to properly and timely designate witnesses has prejudiced complaint counsel.

The Third Revised Scheduling Order required that the parties submit and exchange their final witness lists on Friday, December 14, 2001. Rather than identifying each of the specific witnesses it intended to call at trial, Upsher submitted a witness list that groups its witnesses into three broad categories, two of which include entire industries.

Upsher makes no effort to explain why -six weeks after the close of discovery- it still cannot name these individual witnesses on its final witness list. And there is no legitimate rationale. Upsher's present tactic of still waiting to choose, at some unspecified time, anyone from two industries and a major federal agency to call at trial guts the entire purpose of a final witness list; which is to provide the

³*Id.*

We are foreclosed from obtaining discovery, including both depositions and documents, because not only has the period for discovery ended, but even if we could obtain discovery no one has been identified from whom we should seek testimony or documents.

II.

⁴1996 FTC Lexis 621 (November 12, 1996).

⁵*See, e.g., Koch v. Koch Industries, Inc.*, 179 F.R.D. 606 (D. Kan. 1998).

obtain discovery from them, and would be diverted from trial preparation towards discovery matters if discovery was reopened.⁶

Furthermore, allowing Upsher to name individual witnesses this late would unfairly force complaint counsel to adjust our trial strategy to obtain new discovery and apply tymry and egy toTw 6/rly force

⁶ *Id.* at 609.

⁷ 866 F.2d 120 (5th Cir. 1989).

⁸ *Id.* at 125.

⁹ *Id.*

Karen G. Bokat
Steve Vieux
Counsel Supporting the Complaint

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CERTIFICATE OF SERVICE

I, Steve Vieux, hereby certify that on December 19, 2001, I caused a copy of Complaint Counsel's Motion to Strike Witnesses from Upsher-Smith's Final Witness List to be filed with the Secretary of the Commission, and two paper copies to be served by hand delivery upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The following persons were served with one paper copy by Federal Express and facsimile:

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