

DIRECT DIAL: (202) 626-3643

December 26, 2001

BY HAND

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 104
Washington, DC 20580

*Re: Schering-Plough Corp., Upsher-Smith Laboratories, Inc.,
American Home Products Corporation, Docket No. 9297*

Dear Judge Chappell:

On behalf of Upsher-Smith, we enclose two courtesy copies of our oppositions to (i) Complaint Counsel's "Emergency Motion" regarding IPC and (ii) Complaint Counsel's Motion For Notice.

Thank you for your consideration of these papers.

Sincerely,

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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)

Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories, Inc.,)
a corporation,)

and)

American Home Products Corporation,)
a corporation.)
_____)

Docket No. 9297

**UPSHER-SMITH'S OPPOSITION TO COMPLAINT COUNSEL'S
"EMERGENCY" MOTION REGARDING IPC**

Complaint Counsel consciously decided not to depose IPC witnesses prior to the close of fact discovery. In so doing, Complaint Counsel assumed the risk that IPC would not cooperate with them after the close of fact discovery. Now that IPC is not cooperating with either side, Complaint Counsel must live with their earlier decision. Complaint Counsel may subpoena IPC's Mike Valazza to testify at trial, but Complaint Counsel has no right to an informal *ex parte* meeting before then.

BACKGROUND

Since the very start of this proceeding, Complaint Counsel has known about IPC and its role in Upsher-Smith's manufacturing process. Complaint Counsel themselves identified IPC and Mike Valazza in their Initial Disclosures dated April 30, 2001. Thereafter, Complaint Counsel has consistently identified IPC's Mike Valazza on their witness list, starting from the Preliminary Witness List dated June 14, 2001. Upsher-Smith has identified Mike Valazza and another IPC employee, George Tomaisch, on their witness list since September 20, 2001. Yet in the six months of fact discovery, Complaint Counsel elected *not* to take discovery from IPC.

Complaint Counsel's election not to take formal discovery from IPC was fully informed. Complaint Counsel not only knew of IPC's role in Upsher-Smith's manufacturing process, but also knew that IPC had confidentiality obligations to Upsher-Smith. Agreements containing those confidentiality obligations were produced by Upsher-Smith and IPC during the FTC investigation even before this proceeding was commenced.

Earlier this month, however, despite knowing of IPC's confidentiality obligations, Complaint Counsel scheduled *ex parte* meetings with IPC personnel, unbeknownst to Upsher-Smith. When informed by IPC that an *ex parte* meeting had been scheduled between Complaint Counsel and IPC, counsel for Upsher-Smith alerted counsel for IPC of the confidentiality agreements. IPC subsequently cancelled the scheduled meeting with Complaint Counsel.

ARGUMENT

Complaint Counsel appears to be under the misimpression that they have some right to an informal *ex parte* meeting with IPC. The authority upon which they rely, however, does not support their position. The only three cases cited by Complaint Counsel (Mo. at 2-3) stand for the unremarkable proposition that a private confidentiality agreement cannot preclude *formal fact discovery* in the form of a document request or subpoena. Here, of course, Complaint Counsel elected to forego formal fact discovery from IPC.

Upsher-Smith, incidentally, never expressed any opposition to Complaint Counsel taking formal discovery from IPC during the period of fact discovery. Nor would Upsher-Smith have ever done so. Upsher-Smith's only concern arises from Complaint Counsel's attempt to hold informal *ex parte* interviews, without Upsher-Smith being represented and a proper record being made.

Upsher-Smith has valid grounds for its concern. Earlier in the proceeding, Complaint Counsel and one of their experts (Timothy Bresnahan) contacted David Pettit of The Moreton Company, Ltd., an outside licensing professional bound by a confidentiality agreement with

Upsher-Smith. Complaint Counsel did not inform Upsher-

discovery rules that gives the right to a party to informal interviews with potential witnesses, there is nothing wrong with a party seeking to do so ***However, there is nothing in the discovery rules that gives a party the right to compel an informal interview.*** *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 41 (D. Md. 2000) (distinguishing subpoena for a deposition from informal interview) (emphasis added).

Complaint Counsel had ample opportunity to take discovery from IPC during the six months of fact discovery. For their own reasons, Complaint Counsel chose not to do so. It is too late for them to revisit that decision now. Complaint Counsel can subpoena Mike Valazza to appear at trial, but they cannot force him or anyone else at IPC to participate in any informal *ex parte* meeting or in any twelfth-hour deposition.

CONCLUSION

For all the reasons stated above, Complaint Counsel's motion should be denied.

Dated: December 26, 2001

Respectfully submitted,

WHITE & CASE LLP

By: _____

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Attorneys for Upsher-Smith L0 sG0 s5 8 0 TD 3Tj 3.75 0 T

Certificate of Service

I hereby certify that this 26th day of December 2002 I caused an original, one paper copy and an electronic copy of Upsher-Smith's Opposition to Complaint Counsel's 'Emergency' Motion Regarding IPC to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

Karen Bokat
Federal Trade Commission
Room 3410
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Laura S. Shores
Howrey Simon Arnold & White LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Christopher M. Curran

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**UPSHER-SMITH'S JOINDER IN SCHERING-PLOUGH'S
OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR OFFICIAL NOTICE**

Upsher-Smith hereby joins in Schering-Plough Corporation's Opposition to Complaint Counsel's Motion for Official Notice.

For all the reasons stated in Schering-Plough's Opposition, Upsher-Smith respectfully requests that the Court deny Complaint Counsel's Motion for Official Notice.

Dated: December 26, 2001

Respectfully submitted,

Certificate of Service

I hereby certify that this 26th day of December 2002, I caused an original, one paper copy and an electronic copy of Upsher-Smith's Joinder In Schering-Plough Corporation's Opposition to Complaint Counsel's Motion for Official Notice to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 1044 Tw msOppos

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