



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

Bureau of Competition

December 21, 2001

**Via hand delivery**

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

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith Laboratories, and  
American Home Products, Docket No. 9297*

Dear Judge Chappell:

On behalf of complaint counsel, I have enclosed two courtesy copies of the public version of Complaint Counsel's Motion for Leave To Take Depositions of Witnesses on Schering-Plough's Final Witness List.

Sincerely,

Steve Vieux  
Counsel Supporting the Complaint

cc: Christopher M. Curran, Esquire  
Laura Shores, Esquire

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

In the Matter of

SCHERING-PLOUGH CORPORATION,  
a corporation,

UPSHER-SMITH LABORATORIES, INC.,  
a corporation,

and

AMERICAN HOME PRODUCTS  
CORPORATION,  
a corporation.

Docket No. 9297

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO TAKE DEPOSITIONS OF  
WITNESSES ON SCHERING-PLOUGH'S FINAL WITNESS LIST  
(PUBLIC RECORD)**

Over a month after the close of discovery, and just over a month before the start of the hearing in this matter, Schering has included on its final witness list three new names, Mark Gashko, Steven Thornton, and Philip Vogt.<sup>1</sup> The witnesses were not included on Schering's Revised Witness List, submitted on September 20, 2001,<sup>2</sup> and Schering has not given good cause as to why they now should be included.<sup>3</sup> Although Schering's revised witness list did include a category for Section 3.33(c) witnesses from pharmaceutical companies, it did not identify specific witnesses or companies until it

---

<sup>1</sup>Exhibit A, Respondent Schering-Plough Corporation's Witness List, pgs. 9, 13-14.

<sup>2</sup>Exhibit B, Respondent Schering-Plough Corporation's Revised Witness List Regarding Allegations Against Schering-Plough Corporation and Upsher-Smith Laboratories.

<sup>3</sup>Complaint counsel has been unable to resolve this issue with respondent Schering-Plough.

submitted its final witness list. Therefore, complaint counsel seek an order allowing us to depose and obtain any other form of discovery from these witnesses despite the close of the discovery period.

**I. Complaint counsel should be allowed to obtain discovery from the newly named individuals to cure the prejudice imposed on complaint counsel.**

Schering's failure to designate witnesses in a timely fashion, or in this case at all, has created an undue prejudice because it prevents complaint counsel from deposing testifying witnesses and preparing an effective cross-examination. The appropriate sanction for this discovery abuse, in the absence of an ability to depose the witness, is to preclude the witnesses from testifying. In *Automotive Breakthrough Sciences, Inc., et al.*,<sup>4</sup> where the respondent sought to call a witness whom it did not place on its witness list, the ALJ refused to allow the testimony, noting that undue prejudice was imposed because the opposing party was not able to depose the witness and prepare an effective cross-examination.

The Third Revised Scheduling Order required that the parties submit and exchange their final witness lists on Friday, December 14, 2001. The scheduling order also required parties to show good cause for adding witnesses that were not listed in the preliminary or revised lists. Schering submitted its final witness list with these three additions last Friday, December 14, 2001, but did not show good cause for including them. (.....

.....  
.....)<sup>5</sup>

---

<sup>4</sup>1996 FTC Lexis 621 (November 12, 1996).

<sup>5</sup> ( .....  
(continued...)

Although the discovery period has ended, complaint counsel should have the opportunity to obtain discovery from these witnesses in order to prepare for their cross-examination. Schering has not shown good cause, as required by the scheduling order, for adding these witnesses to the final witness list. The remedy is to allow complaint counsel to depose these witnesses.

**II. Conclusion**

Schering did not provide good cause for the addition of these three individuals to its final witness list. Complaint counsel should be allowed to depose these three witnesses, as soon as possible, at its offices in Washington, D.C. Otherwise, prejudice would be imposed on complaint counsel, which has not obtained the necessary discovery from these witnesses to prepare for cross-examination.

Respectfully Submitted,

---

Karen G. Bokat  
Steve Vieux  
Counsel Supporting the Complaint

Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580

Dated: December 21, 2001

---

(...continued)

.....  
.....  
.....  
.....)

## CERTIFICATE OF SERVICE

I, Steve Vieux, hereby certify that on December 21, 2001, I caused a copy of the public version of Complaint Counsel's Motion for Leave To Take Depositions of Witnesses on Schering-Plough'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:

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

Christopher Curran, Esq.  
White & Case  
601 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20005

---

Steve Vieux