

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

PUBLIC

**UPSHER-SMITH'S MOTION TO COMPEL COMPLAINT
COUNSEL TO PRODUCE PRIOR TESTIMONY OF LAWRENCE ROSENTHAL**

Upsher-Smith hereby moves to compel Complaint Counsel to produce all prior testimony and other statements obtained in this and prior matters from their fact witness Lawrence Rosenthal. The facts and authorities in support of this motion are set forth in the accompanying memorandum.

Dated: January 3, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

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**UPSHER-SMITH'S MEMORANDUM IN SUPPORT
OF ITS MOTION TO COMPEL COMPLAINT COUNSEL
TO PRODUCE PRIOR TESTIMONY OF LAWRENCE ROSENTHAL**

Complaint Counsel apparently have prior testimony and perhaps other statements from their fact witness Lawrence Rosenthal. For the reasons explained below, Complaint Counsel should be required to produce such testimony and statements to Upsher-Smith.

DISCUSSION

Mr. Rosenthal is an Executive Vice President of Andrx Pharmaceuticals, Inc. In their final witness list, Complaint Counsel designate Mr. Rosenthal as their only fact witness to support their position that Upsher-Smith's exclusivity affected any other pharmaceutical company. They also designate him as a fact witness to testify about the impact of a generic product on a branded product's revenues and market share, the status of Andrx's ANDA for a generic version of K-Dur 20, and Andrx's plans for marketing its generic product. On November 1, 2001, at his deposition in the instant case, Mr. Rosenthal testified that

It thus appears that Complaint Counsel's expectations as to Mr. Rosenthal's testimony are based entirely on his *Hoescht/Andrx* deposition. Yet Complaint Counsel refuse to produce this testimony.

Complaint Counsel's refusal to produce this prior testimony of a witness they proffer is an unfair tactic, and violates the Commission's own policy concerning prior statements of Complaint Counsel witnesses. Though the Jencks Act, 18 U.S.C. §3500(e), by its terms applies only to criminal cases, the Commission applies the standards and policies set forth in the statute to FTC adjudicative proceedings. As the Commission explained in *In the Matter of US Life Credit Corporation*, 91 F.T.C. 984 (1978): "The Commission has previously decided to apply in its proceedings the Jencks Act principle requiring production of certain prior statements by witnesses after they have testified." *Id.* at 1037 (citations omitted). *See also L.G. Balfour Co.*, 69 F.T.C. 1118, 1119 (1966) ("The Commission has ruled that it will follow the substance of the Jencks statute in those instances involving a request for production of documents in the Commission's files for the purpose of impeaching witnesses who have testified.") Mr. Rosenthal's prior testimony constitutes this type of material, yet Complaint Counsel refuse to provide Mr. Rosenthal's testimony now or at any later time.

In *US Life Credit Corp.*, the ALJ ordered Complaint Counsel to hand over "Jencks-type" statements two days after the final pre-hearing conference, as opposed to after the conclusion of direct examination:

this approach would more fully apprise counsel for respondents of witnesses' expected testimony, and would make cross-examination possible without either a recess or requiring counsel for respondents to speedread the statements of the witnesses or otherwise necessitating delay in defense counsel completing his questioning of complaint counsel's witnesses while such statements were reviewed.

91 F.T.C. at 990 (1978). The *US Life* ruling was made when adjudicative proceedings were not subject to Rule 3.51's requirement that initial decisions be filed within one year after the issuance of an administrative complaint. Its reasoning would be even more powerful now.

CONCLUSION

For the foregoing reasons, Complaint Counsel should be required to produce without further delay Mr. Rosenthal's prior deposition transcripts and any other statements they have obtained from him.

Dated: January 3, 2002

Respectfully submitted,

WHITE & CASE LLP

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**ORDER GRANTING UPSHER-SMITH'S MOTION TO COMPEL COMPLAINT
COUNSEL TO PRODUCE PRIOR TESTIMONY OF LAWRENCE ROSENTHAL**

Upon consideration of Upsher-Smith's Motion to Compel Complaint Counsel to Produce Prior Testimony of Lawrence Rosenthal, and the memorandum in support of its motion, it is hereby ORDERED that the motion is GRANTED, and that Complaint Counsel are required produce to Upsher-Smith all prior deposition transcripts and other statements of Lawrence Rosenthal.

Dated: Washington, D.C.

January ____, 2002

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

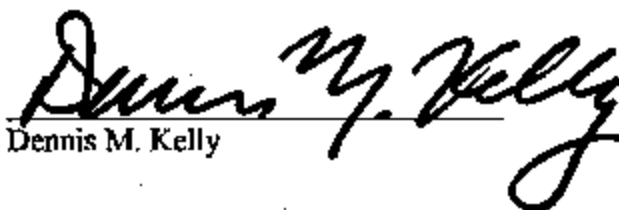
I hereby certify that on this 4th day of January, 2002 I caused copies of the public versions of Upsher-Smith's Motion to Compel Complaint Counsel to Produce Prior Testimony of Lawrence Rosenthal and supporting Memorandum served upon the following by hand delivery:

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