

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



\_\_\_\_\_)  
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 THIRD MOTION FOR  
THE ISSUANCE OF SUBPOENAS AD TESTIFICANDUM**

Pursuant to FTC Rule of Practice 3.34(a)(2) Upsher-Smith hereby moves for an order authorizing the issuance of six subpoenas *ad testificandum* to be issued to witnesses identified on Complaint Counsel's Final Witness List of December 14, 2001. These witnesses are: Hans W. Becherer, David Garfield, H. Barclay Morley, General Carl Mundy, Patricia Russo and William Schreyer. As set forth in the accompanying memorandum, the testimony of each of these witnesses is reasonably relevant to Upsher-Smith's case in this proceeding. A proposed order is attached.

Dated: January 14, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

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*Attorneys for Upsher-Smith Laboratories, Inc.*

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**UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF  
ITS THIRD MOTION FOR THE ISSUANCE OF SUBPOENAS AD TESTIFICANDUM**

Upsher-Smith submits this memorandum in support of its motion pursuant to FTC Rule of Practice 3.34(a)(2) for an order authorizing the issuance of six subpoenas *ad testificandum* for certain witnesses Complaint Counsel confirmed as trial witnesses on its Witness List of December 14, 2001. These witnesses are: Hans W. Becherer, David Garfield, H. Barclay Morley, General Carl Mundy, Patricia Russo and William A. Schreyer. All were members of the Schering's Board of Directors in 1997 when the Board approved the license agreement at issue in this proceeding.

Upsher-Smith reserved the right, in both its Revised and Final Witness Lists, to call any witness listed as potential hearing witnesses by either of the other two parties to this proceeding. See Upsher-Smith's Final Witness List at 1; Upsher-Smith's Revised Witness List at 8. The requested subpoenas *ad testificandum* are necessary to ensure the availability of these witnesses.

As set forth below, the testimony of each of these individuals is reasonably relevant to Upsher-Smith's case in this proceeding and thus satisfies the conditions under Rule 3.34(a)(2) for the issuance of a subpoena *ad testificandum* to give testimony at an adjudicative hearing. A brief description of each individual's position, expected testimony and the relevance to Upsher-Smith's case follows.

**Mr. Becherer** is a current member of the Schering Board of Directors and was a member of the Board in 1997 when the Board approved the license agreement between Schering and Upsher-Smith. Mr. Becherer is the former Chairman and CEO of John Deere and also has served on the boards of directors of J.P. Morgan-Chase and Honeywell. We expect he will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect he will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

**Mr. Garfield** is a current member of the Schering Board of Directors and was a member of the Board in 1997 when the Board approved the license agreement between Schering and Upsher-Smith. Mr. Garfield is the former President of the Ingersoll-Rand Company. We expect he will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect he will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent

dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

**Mr. Morley** is a former member of the Schering Board of Directors and was a member of the Board in 1997 when the Board approved the license agreement between Schering and Upsher-Smith. Mr. Morely has a Ph.D. in physical chemistry, was the director of development at Wyandotte Chemical and is the former CEO of Stocker Chemical. We expect he will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect he will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

**General Mundy** (United States Marine Corp, Ret.) is a current member of the Schering Board of Directors and was a member of the Board in 1997 when the Board approved the license agreement between Schering and Upsher-Smith. General Mundy is the former Marine Corp Commandant and serves on the boards of General Dynamics and The Nations Funds Family of Funds. We expect he will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect he will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

**Ms. Russo** is a current member of the Schering Board of Directors and was a member of the Board in 1997 when the Board approved the license agreement between Schering and

Upsher-Smith. Ms. Russo is the President and Chief Operating Officer of Eastman Kodak Company. We expect she will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect she will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

Mr. Schreyer was a member of the Schering Board of Directors in 1997 when the Board approved the license agreement between Schering and Upsher-Smith. Mr. Schreyer is the former CEO of Merrill Lynch & Company and has served on the board of directors of Merrill Lynch and Calloway Golf Company, among others. We expect he will testify regarding the Schering Board of Directors approval of the license agreement between the Respondents. We further expect he will testify as to the Board's conclusion that the license agreement for the six pharmaceutical products, standing on its own merits separate and apart from Schering and Upsher-Smith's agreement to settle the patent dispute, was worth more to Schering than the license fees Schering had negotiated to pay to Upsher-Smith.

CONCLUSION

For the foregoing reasons Upsher-Smith thus respectfully requests that its motion be granted in all respects.

Dated: January 14, 2002

Respectfully submitted,

WHITE & CASE LLP

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**ORDER GRANTING UPSHER-SMITH'S THIRD MOTION  
FOR THE ISSUANCE OF SUBPOENAS *AD TESTIFICANDUM***

Upon consideration of Upsher-Smith's Third Motion For The Issuance Of Subpoenas *Ad Testificandum* any opposition thereto and the entire record herein, IT IS HEREBY ORDERED that Upsher-Smith's Motion is GRANTED; and that the Secretary shall issue to Upsher-Smith such subpoenas for the six individuals named in Upsher-Smith's motion.

Dated: January \_\_\_\_, 2002

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2002, I caused a paper original and one copy as well as an electronic version of the foregoing motion, supporting memorandum and proposed order to be filed with the Secretary of the Commission and two paper copies to be provided by hand delivery to:

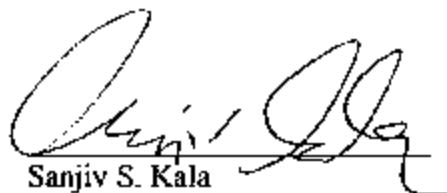
Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
601 Pennsylvania Ave, N.W.  
Washington, D.C. 20580

and one paper copy to be served upon the following counsel by hand delivery:

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Sanjiv S. Kala

Dated: January 11, 2002