

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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In the Matter of )

Schering-Plough Corporation, )  
a corporation, )

Upsher-Smith Laboratories, )  
a corporation, )

and )

American Home Products Corporation, )  
a corporation. )  
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Docket No. 9297

**ORDER DENYING COMPLAINT COUNSEL'S MOTION  
ON INTERVIEWS OF IPC EMPLOYEES**

**I.**

On December 12, 2001, Complaint Counsel filed its "Emergency Motion for Order That Upsher-Smith Withdraw Objection to IPC Communicating with Complaint Counsel." On December 26, 2001, Respondent Upsher-Smith Laboratories, Inc. ("Upsher-Smith") filed an opposition. For the reasons set forth below, Complaint Counsel's motion is DENIED.

**II.**

Complaint Counsel states that Upsher-Smith has impeded Complaint Counsel's ability to conduct informal interviews of employees of International Processing Corporation ("IPC"), a supplier to Upsher-Smith. According to Complaint Counsel, IPC informed Complaint Counsel that Upsher-Smith expressed concerns to IPC that any discussions IPC had with Complaint Counsel might violate the terms of a confidentiality agreement executed between IPC and Upsher-Smith in 1996. Complaint Counsel argues that parties in litigation may not rely on private agreements to foreclose a party seeking information from gaining access to that information. Complaint Counsel seeks an order requiring Upsher-Smith to provide IPC with a written notification that Upsher-Smith does not object to any communication between IPC and Complaint Counsel.

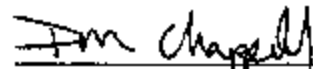
Upsher-Smith argues that Complaint Counsel has no right to an informal *ex parte* meeting with IPC's employees. Upsher-Smith states that when it was informed by IPC that Complaint Counsel had scheduled *ex parte* meetings with IPC personnel, Upsher-Smith reminded IPC of the confidentiality agreement. Upsher-Smith maintains that if Complaint Counsel wanted information from IPC, Complaint Counsel should have served IPC with subpoenas *ad testificandum*. Upsher-Smith further states that it would not have expressed opposition to Complaint Counsel taking formal discovery from IPC during the discovery period.

### III.

Parties and non-parties may not, by private contract, agree to withhold relevant, non-privileged material responsive to an opposing party's discovery request. *In re Subpoenas Duces Tecum Served on New York Marine and Gen. Ins. Co.*, 1997 U.S. Dist. LEXIS 14730, \*12 n.3 (S.D.N.Y. Sept. 26, 1997) ("[A] private agreement or promise of protection cannot by itself bar non-signatories from access to documents if they are otherwise discoverable."); *Covia Partnership v. River Parish Travel Ctr., Inc.*, 1991 U.S. Dist. LEXIS 17647, \*2 (E.D. La. Dec. 4, 1991) ("Parties may not foreclose discovery by contracting privately for the confidentiality of documents."). However, requests to conduct informal interviews of witnesses do not constitute formal discovery requests. *Reuben H. Donnelley Corp.*, 1977 FTC LEXIS 310, \*3-4 (Jan. 12, 1977). "[A]bsent compulsory process, it is entirely up to each potential witness whether or not he will be interviewed and, if so, on what terms." *Century 21 Commodore Plaza, Inc.*, 1976 FTC LEXIS 54, \*2 (Nov. 24, 1976). *See also Lovato v. Burlington Northern and Santa Fe R.R. Co.*, 200 F.R.D. 448, 452 (D. Colo. 2001) (witnesses retain the right to decline or terminate an informal interview); *Marens v. Carrabba's Italian Grill, Inc.*, 196 F.R.D. 35, 42 (D. Md. 2000) ("there is nothing in the discovery rules that gives a party the right to compel an informal interview").

IPC will not be compelled to provide Complaint Counsel with informal interviews of its employees. Accordingly, Complaint Counsel's motion is DENIED.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: January 22, 2002