

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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DOCKET NO. 9297

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IN THE MATTER OF

SCHERING-PLOUGH CORPORATION,

UPSHER-SMITH LABORATORIES, INC.,

and

AMERICAN HOME PRODUCTS CORPORATION

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**RESPONSE OF *AMICUS CURIAE* NATIONAL  
ASSOCIATION OF CHAIN DRUG STORES TO  
RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE  
TO FILE *AMICUS* BRIEF**

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[PUBLIC]

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HBDATA:7484

Dated: September 25, 2002

The Commission should reject the Appellees' attempt to prevent consideration of the NACDS *amicus* brief on the merits. Contrary to Appellees' contention, NACDS has shown "cause" for its late filing, and the Commission therefore has discretion to permit it.

The filing of *amicus curiae* briefs is governed by 16 C.F.R. § 3.52(j), which provides that the "Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed." NACDS has found no authority applying or interpreting this subsection. Notably, however, subsection 3.52(j) imposes no heightened standard where *amicus* seeks leave after the filing deadline, nor does the rule in any way refer back to or incorporate the "excusable neglect" standard of 16 C.F.R. § 4.3(b) urged by Appellees.<sup>1</sup>

Even if the "excusable neglect" standard were applicable, it would be readily satisfied here. The excusable neglect standard of 16 C.F.R. § 4.3(b) tracks the language of Federal Rule of Civil Procedure 6(b). *See* 42 Fed. Reg. 30150. As the Supreme Court made clear in *Pioneer Investment Services Co. v. Brunswick Assoc. Limited*, 507 U.S. 380, 391-92 & n. 6 (1993), "excusable neglect" encompasses a broad, "flexible" standard, *id.* at 389 -- an equitable standard, "taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. The Court

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<sup>1</sup> Ironically, the decision relied on by Appellees, *In re General Mills, Inc.*, 86 F.T.C. 687 (1975), actually supports NACDS here. In that case, General Mills sought to bring additional material before the Commission by way of a petition to reopen to aid the Commission in its decision-making. *Id.* at 687. The Bureau of Competition filed its response to the petition to reopen out of time, and the Commission denied the Bureau's motion. The Commission thus acted in a manner that favored consideration of additional material that might be helpful in its deliberations.

reasoned that “neglect” should be given its ordinary meaning, *i.e.*, it “encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.” *Id.* at 388.

The ALJ’s decision in this matter was rendered on June 27, 2002. Complaint Counsel’s public version of their brief was filed on August 9, 2002 -- only six weeks later. Neither NACDS nor any of its constituent members was a party to or actively participated in the proceedings before the ALJ. NACDS thus was not in contact with Complaint Counsel concerning the timing of their appeal. By the time NACDS’ counsel communicated with Complaint Counsel on the subject of filing an *amicus* brief in this matter, Complaint Counsel had already filed their brief.

In any event, NACDS could not have prepared and filed its brief until first obtaining a copy of the public version of Complaint Counsel’s brief. The appeal raises numerous legal and factual issues. NACDS did not know, indeed, could not know, which of those issues would be covered in detail by Complaint Counsel until receipt of their brief. As it happened, the issue of paramount importance to NACDS and its members -- the applicability of the *per se* rule of liability to agreements of the kind at issue here -- was not analyzed in detail in Complaint Counsel’s brief. Once able to access the public version of that brief, NACDS’ counsel prepared and filed, as expeditiously as possible, a brief addressing the *per se* issue.

NACDS regrets any inconvenience that the timing of its brief may have caused Appellees or the Commission. We respectfully suggest, however, that especially in matters of this magnitude, substance should prevail over form. The NACDS brief will be of assistance to the Commission in reaching a just and fair resolution of this matter, and we respectfully request that the

Commission consider it.

In the interest of justice, and in the absence of any showing of prejudice, NACDS respectfully requests that the Commission grant NACDS's motion for leave to file its proposed brief *amicus curiae*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 28, 2002, I served a true and correct copy of the RESPONSE OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CHAIN DRUG STORES TO RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO FILE *AMICUS* BRIEF as follows:

*Original (with original signature) and 12 copies by hand deliver, as well as, an electronic version, which is a true and correct of the paper original, to:*

Office of the Secretary  
Federal Trade Commission - Room H-159  
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Washington, D.C. 20580

*One copy by hand delivery to the following:*

Hon. D. Michael Chappell  
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