

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 VERSION

**UPSHER-SMITH'S 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 fifteen subpoenas *ad testificandum* to be issued to witnesses identified on Upsher-Smith's Final Witness List of December 14, 2001.

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 4, 2002

Respectfully submitted,

WHITE & CASE, LLP

By: 

Robert D. Paul  
J. Mark Gidley  
Christopher M. Curran  
Rajeev K. Malik  
601 Thirteenth Street, N.W.  
Washington, D.C. 20005-3807  
Telephone: (202) 626-3600  
Facsimile: (202) 639-9355

*Attorneys for Upsher-Smith Laboratories, Inc.*

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 VERSION

**UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF  
ITS 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 fifteen subpoenas *ad testificandum* for certain witnesses Upsher-Smith confirmed as trial witnesses on its Final Witness List of December 14, 2001.

Nine of the subpoenas are to be issued to the non-party witnesses identified by Upsher-Smith on its Final Witness List, specifically: Dr. B. Gregory Brown, Nicholas M. Cannella, Dr. Claude Drobnes, Andrew Hirschberg, George Tomaisch, Mike Valazza, Daniel Bell and Mukesh Patel. Six of the subpoenas are to be issued to employees of Upsher-Smith who are not officers, directors or managing agents, and who are identified in Upsher-Smith's Final Witness List, specifically: Bob Clark, Robert Coleman, Denise Dolan, Lori Freese, Scott Gould and Mark Halvorsen.

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.

**Non-Party Witnesses**

Dr. Brown, a professor at the University of Washington School of Medicine, is expected to testify that he strongly believed (and believes) that Niacor-SR is a viable and valuable pharmaceutical product. Dr. Brown is a clinical investigator who evaluated the preliminary clinical results of Niacor-SR. He was part of Upsher-Smith's marketing team that made various presentations to pharmaceutical companies as part of Upsher-Smith's marketing of a Niacor-SR license.

Mr. Cannella is a partner of Fitzpatrick Celia, the law firm that represented Upsher-Smith in the patent litigation against Schering. We expect he will testify

Dr. Drobnes is an outside researcher who worked on the clinical reports regarding Niacor-SR. We expect she will testify about her work for Upsher-Smith related to Niacor-SR.

Mr. Hirschberg is a licensing consultant who assisted Upsher-Smith in its negotiations with Schering-Plough. We expect he will testify about the negotiations between Upsher-Smith and Schering related to the licensing agreement.

Mr. Tomaisch and Mr. Valazza are employees of IPC. They will testify generally as to the work IPC did for Upsher-Smith in connection with Klor-Con M 20. In particular, they will testify as to the numerous steps IPC had to take to expand its facilities in order to be positioned to meet a commercial launch of Klor-Con M 20.

Additionally, George Tomiasch will testify as to the steps Upsher-Smith had to take to upgrade its facilities and equipment in order to prepare for the commercial launch of Klor-Con M 20.

Mr. Bell and Mr. Patel are officers of Kos. We expect they will confirm that Kos's niacin product was in mid-1997 believed to be a strong, viable product that had significant market potential. We also expect them to testify

#### Upsher-Smith Employees

Mr. Clark was involved with the substantial expansion Upsher-Smith conducted of its facilities in preparation for the production and commercial launch of Klor Con M. He will authenticate and describe the videotapes of the construction related to the expansion (USX ).

Mr. Coleman Mr. Coleman is Upsher-Smith's Director of Marketing. He will testify about, among other things, the launch of Klor Con M 20 and the value of Niacor SR and the

other drugs licensed to Schering. He will also testify about the marketing of all of these products.

Ms. Dolan was a Product Manager for Upsher-Smith with responsibility for Klor Con products and Niacor SR. Ms. Dolan will testify generally as to Upsher-Smith's efforts to market the Klor Con products and to compete with Schering's K-Dur 20 before and after the patent settlement. She will testify about her responsibilities related to the launch of Klor Con M 20. Ms. Dolan will testify that, at the time of the licensing agreement with Schering, Upsher-Smith believed that Niacor SR would be a valuable and competitive product.

Ms. Freese is Upsher-Smith's Professional Services Manager. She will testify about, among other things, various marketing issues including the value of Niacor SR.

Mr. Gould is Upsher-Smith's Purchasing Manager. He will testify about, among other things, the launch of Klor Con M 20 and the logistical prerequisites of it.

Mr. Halvorsen is Upsher-Smith's Director of Clinical and Regulatory Affairs and he will testify about, among other things, the value of Niacor SR and other drugs licensed to Schering. He will also testify as to Upsher-Smith's aggressive efforts to market Niacor SR to various pharmaceutical companies in the months leading up to the licensing agreement with Schering. He will explain the clinical studies on Niacor SR and he will also testify about communications between Upsher-Smith and the FDA.

**CONCLUSION**

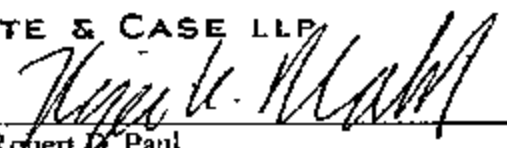
For the foregoing reasons Upsher-Smith thus respectfully requests that its motion be granted in all respects.

Dated: January 4, 2002

Respectfully submitted,

**WHITE & CASE LLP**

By: \_\_\_\_\_

  
Robert D. Paul

J. Mark Gidley

Christopher M. Curran

Rajeev K. Malik

601 Thirteenth Street, N.W.

Washington, D.C. 20005-3807

Telephone: (202) 626-3600

Facsimile: (202) 639-9355

*Attorneys for Upsher-Smith Laboratories, Inc.*

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

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

Upon consideration of Upsher-Smith's 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 fifteen 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 4, 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 served by hand delivery upon:

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

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

David R. Pender  
Assistant Director of Health Care Products Division  
Karen G. Bokat  
Federal Trade Commission, 3115  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Laura S. Shores  
Howrey Simon Arnold & White  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004

A handwritten signature in black ink, appearing to read "Robert K. Allen", is written over a horizontal line.

Dated: January 4, 2002