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Federal Trade Commission

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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 JOINDER IN SCHERING'S EMERGENCY MOTION
REGARDING PRESENTATION OF AND OBJECTIONS TO TRIAL EXHIBITS**

During the course of the past week, Upsher-Smith, Schering and Complaint Counsel have met and conferred regarding the admissibility of exhibits on the parties' final exhibit lists and have discussed the objections of each party to various of the exhibits. The parties have reached tentative agreements on certain evidentiary issues, but have been unable to resolve others.

Specifically, the parties have not been able to reach agreement regarding Complaint Counsel's plan to flood the record with over 1,000 exhibits, which they plan to offer for admission at the January 17, 2002 prehearing conference. Complaint Counsel have indicated that with respect to many, if not most, of these exhibits, they do not plan to introduce them at trial through witness testimony, but plan instead to rely upon them *only* in their post-trial briefs and papers. Complaint Counsel is also apparently unwilling to inform Respondents in advance of the January 17 conference of the evidentiary purpose for which the exhibits will be offered.

As set forth in Schering's Emergency Motion, Complaint Counsel's plan will deny the Respondents the opportunity when the exhibits are offered to formulate objections as to relevance, materiality and prejudice of each exhibit. Such basic objections depend on the

purpose for which the exhibit is offered. Further, such an approach is fundamentally at odds with the basic purpose of a trial - to ascertain the truth. Complaint Counsel's plan to admit documents and then rely upon them *only after* the individuals with knowledge of the documents have testified is akin to trial by ambush. Accordingly, even as the parties work to reach agreement on other issues, Upsher-Smith joins in Schering's Emergency Motion.

For all the reasons stated in Schering's motion, Upsher-Smith respectfully requests that the Court grant Schering's Emergency Motion Regarding Presentation And Objection To Trial Exhibits. *Given that Schering's motion relates to the procedure at the January 17 prehearing conference, Complaint Counsel should be required to respond in advance of that conference.* See Schering Mem. at 3.

Dated: January 14, 2002

Respectfully submitted,

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Certificate of Service

I hereby certify that this 14th day of January 2002, I caused an original, one paper copy and an electronic copy of Upsher-Smith's Joinder In Schering's Emergency Motion Regarding Presentation Of And Objections To Trial Exhibits to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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and one paper copy was hand delivered upon:

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A handwritten signature in black ink, appearing to read "David R. Pender", is written over a horizontal line.