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August 26, 2002

BY HAND

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *Schering-Plough Corp., Upsher-Smith Laboratories, Inc., American Home Products Corporation, Docket No. 9297*

Dear Mr. Clark:

On behalf of Respondents Schering-Plough and Upsher-Smith we enclose for filing in the above-captioned proceeding the original and twelve paper copies of (1) Respondents' Motion For Leave To File Reply Memorandum In Support Of Their Motion To Dismiss and (2) Respondents' Memorandum In Support Of Their Motion To Dismiss. We are also providing an electronic copy of each on the enclosed disk.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Peter J. Carney

Enclosures

cc: David R. Pender, Esq.
Karen G. Bokat, Esq.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
Schering-Plough Corporation,	)	
a corporation,	)	
	)	**Docket No. 9297**
Upsher-Smith Laboratories, Inc.,	)	**PUBLIC**
a corporation,	)	
	)	
and	)	
	)	
American Home Products Corporation,	)	
a corporation.	)	
	)	

RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Complaint Counsel's Opposition and the Declaration of Karen G. Bokat introduce factual assertions and documentation previously undisclosed to Respondents. Respondents feel compelled to respond to certain of these assertions and documents, and believe that their comments will be helpful and informative to the Commission. For these reasons, Respondents hereby move under Commission Rule 3.22(c) to submit the accompanying Reply Memorandum.

August 26, 2002 Respectfully submitted,

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Attorneys for Upsher-Smith Laboratories, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
Schering-Plough Corporation,	)	
a corporation,	)	
	)	**Docket No. 9297**
Upsher-Smith Laboratories, Inc.,	)	**PUBLIC**
a corporation,	)	
	)	
and	)	
	)	
American Home Products Corporation,	)	
a corporation.	)	
	)	

RESPONDENTS' REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS

Complaint Counsel's opposition contains concessions and revelations confirming that their brief was untimely and that this appeal must be dismissed for lack of jurisdiction:

1. Complaint Counsel do not dispute that if they were served with the Initial Decision on June 28, 2002, their appeal brief was untimely. In addition, Complaint Counsel do not dispute that if their appeal brief was untimely, the Initial Decision has become the Commission's decision by operation of law under the Administrative Procedures Act, 5 U.S.C. § 557(b), and Commission Rule 3.51(a). And Complaint Counsel do not dispute that if the Initial Decision has become the Commission's decision, this appeal must be dismissed for lack of jurisdiction. Thus, the sole question is whether Complaint Counsel were served with the Initial Decision on June 28, 2002.

2. Complaint Counsel do not dispute that the Secretary's Office hand-delivered to them (and to Respondents) copies of public and *in camera* versions of the Initial Decision on

June 28, 2002. And Complaint Counsel do not dispute that such hand delivery constitutes valid service under Commission Rule 4.4(a)(1)(ii). But Complaint Counsel contend that the public and *in camera* versions of the Initial Decision served on June 28, 2002 were "unofficial and non-final courtesy cop[ies]" insufficient to trigger the thirty-day appeal period. This contention is incompatible with the Commission Rules.

3. Judge Chappell filed the Initial Decision on June 26, 2002. That was the final day of the deadline under Rule 3.51(a), as it was the ninetieth day after the closing of the hearing pursuant to Rule 3.44(c) and the last day under Judge Chappell's extension of the one-year deadline. The copies of the Initial Decision attached to Complaint Counsel's Opposition as Exhibits B and C expressly indicate on the cover pages: "INITIAL DECISION FILED: June 26, 2002."

4. The copies of the Initial Decision served upon the parties on June 28, 2002 did not indicate in any way, shape or form that they were "unofficial" or "non-final" or "courtesy copies." There was no legend, stamp or marking to that effect. Judge Chappell never stated that he would be issuing any "unofficial" or "non-final" or "courtesy copies" of the Initial Decision. The Commission's Rules do not speak of any "unofficial" or "non-final" or "courtesy copies" of the Initial Decision. When serving the Initial decision on June 28, 2002, the Commission Secretary's Office did not state that the Initial Decision was "unofficial" or "non-final" or a "courtesy copy." Nor did the Secretary's Office provide a cover letter to that effect. In fact, the Secretary informed Respondents that they were free to publicly release the Initial Decision that they were served on June 28, 2002.

5. The Commission Rules foreclose any possibility that there could be any "unofficial" or "non-final" or "courtesy copy" of an Initial Decision. Commission Rules 3.51

and 3.52 clearly contemplate that an Administrative Law Judge file a single Initial Decision in each proceeding. These rules consistently speak of a single initial decision, the service of which sets in motion a series of deadlines for the appeal process (i.e., notice of appeal, appeal brief, answering brief, reply brief). Indeed, an Administrative Law Judge necessarily can file only a single Initial Decision, because under Rule 3.51(e)(2) the ALJ's jurisdiction terminates "upon the filing of his initial decision." The only exceptions to this termination of jurisdiction are "the correction of clerical errors" or "pursuant to an order of remand."

6. To support their contention that the Initial Decision served on June 28, 2002 was "an unofficial and non-final courtesy copy," Complaint Counsel reply upon a private e-mail message dated July 5, 2002 from the Commission Secretary to Complaint Counsel. Bokat Decl. Exh. 5. In that e-mail message — which has never previously been disclosed to Respondents — the Commission Secretary appears to characterize his June 28, 2002 service of the Initial Decision as a "courtesy (not service!!) copy." Neither Complaint Counsel in their Opposition, nor the Commission Secretary in his e-mail message, cite to any Commission Rule or Decision to support their interpretation. In fact, no such Rule or Decision exits.

7. The Commission Secretary acknowledged in his e-mail message that the Initial Decision served on June 28, 2002 was substantively identical to the Initial Decision he was delivering on July 5, 2002. The subject of the e-mail is "In Camera Version of Schering Initial Decision, With Typos Corrected: Parts I and II." In the e-mail message, the Secretary wrote that the final in camera version of the Initial Decision differed from the earlier version "only to the extent that a number of typographical errors have been corrected."

8. The correction of typographical errors is not tantamount to the issuance of a new Initial decision, as Complaint Counsel suggest. As noted above, Commission Rule 3.51(e)(2)

expressly authorizes an Administrative Law judge to correct "clerical errors" after the filing of "his Initial Decision." Typographical errors surely qualify as "clerical errors." Under Commission Rules 3.51 and 3.52, the correction of such clerical errors does not constitute a new filing of a new Initial Decision. Commission Rules 3.51 and 3.52 plainly recognize that the correction of clerical errors is, by definition, a non-substantive change and the Rules accordingly do not accord any legal consequence to the act. This fact appears to be recognized insofar as the filing date shown on the cover of the *in camera* version of the Initial Decision was not changed after the typographical corrections were made.[1]

9. Complaint Counsel certainly had no right to rely upon the Secretary's private e-mail as an authoritative interpretation of the applicable Commission Rules. Such advice from the Secretary's office regarding service and the time to perfect an appeal is irrelevant here and without legal effect: "Whether or not there was misleading advice . . . it cannot extend the deadline for filing the petition for review. The deadline, as we said, is jurisdictional, meaning we can't waive it; if we can't, neither can the court's nonjudicial personnel." *Sonicraft v. NLRB*, 814 F.2d 385, 387 (7th Cir. 1987) (Posner, J.) (holding that "subordinate employees of the judiciary have no authority to waive congressional limitations on judicial power."). Moreover, it is well established that reliance upon incorrect advice or information from the clerk's office does not relieve a failure to timely file. *See, e.g., Rezzonico v. H&R Block*, 182 F.3d 144, 150 (2d Cir. 1999) (denying appeal as untimely where clerk incorrectly lengthened noticed appeal deadline by one day after district court modified its order on business day after filing original order to correct clerical error in order); *United States v. Heller*, 957 F.2d 26, 28 (1st Cir. 1992) (denying *pro se*

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[1] *See also Rezzonico v. H&R Block*, 182 F.3d 144, 150 (2d Cir. 1999) ("only when the lower court changes matters of substance or resolves genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew.") (quoting *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952)).

appeal untimely filed due to reliance on mistaken assurances of district court clerk's offices regarding time to file appeal); *Spinetti v. ARCO*, 552 F.2d 927, 930 (Temp. Emerg. Ct. App. 1977) (denying appeal untimely filed on reliance of advice of clerk's office: "This Court has twice held that attorneys may not escape from their procedural errors by claiming reliance on a district court clerk's advice. We will not retreat from this position merely because it was the clerk of this court who gave the advice which appellants contend led to their failure to file the petition.") (citations omitted).

10. Complaint Counsel also assert that "[o]fficial Commission records" confirm that the June 28, 2002 service was "unofficial" (Opp. at ¶4), but the records cited show no such thing. The OSCAR reports reveal nothing about service — either on June 28, 2002 or any other date. They are completely silent on the issue of service. Significantly, however, they show the official filing date of June 26, 2002 for the *in camera* version (and a day later for the public version). Thus, official Commission records confirm that the correction of typographical errors did not result in any new Initial Decision.[2]

11. Finally, Complaint Counsel are incorrect in asserting that the Respondents received revised *in camera* versions by mail on July 5, 2002. In fact, it is apparent the envelopes delivered to Respondents contained only the public version. The Commission Secretary's records stating otherwise are mistaken. Indeed, if those records were correct, then the Secretary's Office would have committed a serious violation of the Protective Order governing this proceeding. Mr. Ian Troup, Upsher-Smith's President who was supposedly mailed an *in*

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[2] Complaint Counsel state that "ALJ Chappell's Initial Decision was still being finalized by the Secretary's Office on June 28." Opp. ¶4. Respondents assume that Complaint Counsel mean that the Secretary's Office was coordinating with Judge Chappell in correcting the typographical errors. The Secretary's Office of course would have no legal right to "finalize" or modify in any respect the Initial Decision of Judge Chappell.

camera version of the Initial Decision, is not entitled to the sensitive *in camera* information contained in the Initial Decision. Of course, what Respondents received on July 5, 2002 is not controlling.

12. Regardless of what Respondents received on July 5, 2002, the facts are undisputed that ***all*** parties, including Complaint Counsel, were served with *in camera* and public versions of the Initial Decision on June 28, 2002. That service set in motion the thirty-day period in which Complaint Counsel were required to perfect their appeal. Complaint Counsel failed to perfect their appeal in a timely manner, and the Initial Decision became the Commission's decision by operation of law. This appeal must be dismissed for lack of jurisdiction.

August 26, 2002 Respectfully submitted,

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By: _____

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Attorneys for Upsher-Smith Laboratories, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2002, I caused a paper original and twelve copies as well as an electronic version of (1) Respondents' Motion For Leave To File Reply Memorandum In Support Of Their Motion To Dismiss and (2) Respondents' Reply Memorandum In Support Of Their Motion To Dismiss to be filed with the Secretary of the Commission:

Office of the Secretary
Federal Trade Commission, Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one copy to be served by hand delivery upon:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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