

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

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 NACDS'S MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE

This matter is before the Federal Trade Commission on the Motion of the National Association of Chain Drug Stores ("NACDS") for Leave to File Brief as Amicus Curiae in the appeal from the Administrative Law Judge's Initial Decision now pending before the Commission. The Commission grants this Motion.

The Commission Rules of Practice provide, in relevant part, that "[a] brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission. . . ." 16 C.F.R. § 3.52(j) (2002). The Rules further provide:

Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. 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.

Id.

Counsel for NACDS argue in their Motion for Leave that the material they intend to submit will assist the Commission in considering the issues raised in the pending appeal. More specifically, they state that “the proposed amicus curiae brief demonstrates in detail that the Initial Decision was based upon a misunderstanding of the nature of both the *per se* rule and the patent rights granted by Congress to innovators.” Motion for Leave at 1. It is therefore the Commission’s understanding that the proposed brief will support Complaint Counsel, who in their appeal urge the Commission to reverse the Initial Decision. The Respondents do not address the substance of NACDS’s proposed amicus brief, but they jointly argue that the Commission either should reject the brief (based on their view that it was not timely filed¹) or in the alternative should extend by twenty days “the deadline for Respondents’ answering briefs and any answering *amicus* briefs. . . .”

The public and the *in camera* versions of the Initial Decision were served on the parties on July 5, 2002. Under the Commission Rules of Practice, Complaint Counsel’s appeal brief therefore was due on August 6, 2002, 16 C.F.R. §§ 3.52(b)(1), 4.3(a) (2002), and in fact was filed on that date. Consequently, unless otherwise permitted by the Commission, NACDS’s brief also should have been filed by August 6, 2002. In fact, NACDS filed its Motion for Leave and its proposed amicus brief thirteen days thereafter, on August 19, 2002.

NACDS asserts that good cause exists for the later filing of its brief because a public version of Appellant’s brief was not filed until August 9, 2002, and the amicus brief was prepared as expeditiously as possible thereafter. This assertion in and of itself may not have been persuasive. However, the Commission finds additionally that the public interest would be benefitted by hearing the perspective of NACDS in connection with the instant litigation. Taken together, these factors constitute sufficient cause to permit the later filing of NACDS’s amicus curiae brief, and the Commission hereby grants NACDS’s motion. In order to avoid any arguable prejudice to Respondents, the Commission hereby also grants Respondents an additional thirteen days to file their answering briefs; that is, until September 30, 2002.²

¹ Respondents incorrectly assert that Complaint Counsel’s appeal brief and NACDS’s amicus brief were due on July 30, 2002. Both were due on August 6, 2002. *See* Order Denying Respondents’ Motion to Dismiss The Appeal and Granting Respondents’ Motion For Leave to File Reply Memorandum (September 4, 2002).

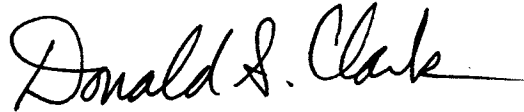
² Pursuant to the Commission’s Order issued July 25, 2002 (which granted Respondents an additional ten calendar days to file their answering briefs), Respondents’ answering briefs would have been due on September 16, 2002. By this Order, Respondents are hereby granted an additional thirteen calendar days to file answering briefs. Because the thirteenth calendar day, September 29, 2002, falls on a Sunday, these briefs must be filed by Monday, September 30, 2002.

Accordingly,

IT IS ORDERED that NACDS be and it hereby is granted leave to file the proposed amicus curiae brief; and

IT IS FURTHER ORDERED that Respondents be and they hereby are granted an additional thirteen calendar days in which to file their answering briefs; Respondents therefore must file such briefs by September 30, 2002.

By the Commission.

A handwritten signature in black ink that reads "Donald S. Clark". The signature is written in a cursive style with a long horizontal line extending to the right.

Donald S. Clark
Secretary

ISSUED: September 4, 2002