

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories,)
a corporation,)
)
and)
)
American Home Products Corporation,)
a corporation.)

Docket No. 9297

**ORDER CONDITIONALLY GRANTING COMPLAINT COUNSEL'S
MOTION TO FOR LEAVE TO TAKE DEPOSITIONS OF
WITNESSES ON SCHERING-PLOUGH'S FINAL WITNESS LIST**

I.

On December 19, 2001, Complaint Counsel filed a motion for leave to take depositions of three individuals on Schering-Plough Corporation's ("Schering") final witness list. Schering filed an opposition on December 31, 2001. For the reasons set forth below, Complaint Counsel's motion is **CONDITIONALLY GRANTED**.

II.

Complaint Counsel states that Schering's final witness list includes three individuals who had not been previously identified on Schering's revised witness list, submitted on September 20, 2001. The three individuals are representatives of various generic pharmaceutical companies which had filed ANDAs seeking approval of generic versions of Schering's K-Dur 20. Complaint Counsel argues that it would be prejudiced if not given the opportunity to depose these witnesses and prepare an effective cross-examination.

Schering responds that it does not intend to present testimony from these three individuals unless Complaint Counsel offers evidence in its case-in-chief that other generic manufacturers were prevented or deterred from entering the potassium chloride supplement market as a result of Schering's agreements with Upsher-Smith Laboratories ("Upsher-Smith") and American Home Products Corporation. Schering states that these individuals provided

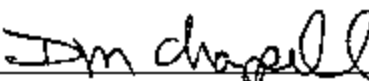
declarations which were served on Complaint Counsel by Upsher-Smith on November 13, 2001. Schering listed these individuals on its final witness list to preserve the right to call them live in the event that Complaint Counsel presents evidence that other generic manufacturers were delayed from the market and the declarations are judged to be inadmissible. Thus, Schering argues, depositions are not necessary at this time.

III.

It would be unfair to allow Schering to present live testimony at trial from witnesses Complaint Counsel has not had the opportunity to depose. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 253, *2 (Dec. 8, 1999) (allowing depositions of proposed witnesses after the close of discovery to mitigate any prejudice). *Accord Kunzman v. Enron Corp.*, 941 F. Supp. 853, 861 (N.D. Ia. 1996) (declining to strike witnesses listed two weeks before trial and after the close of discovery, but ordering depositions to cure any surprise); *Hansen v. Umtech Industrieservice Undspedition, GMBH*, 1996 U.S. Dist. LEXIS 19216 (D. Del. 1996). However, if Schering does not present testimony from these individuals, there would be no prejudice to Complaint Counsel.

Accordingly, Complaint Counsel's motion is **CONDITIONALLY GRANTED**. In the event that Schering elects to present live testimony from these individuals, Complaint Counsel will be permitted to depose these individuals prior to the presentation of their testimony. Trial will not be interrupted for the parties to conduct such depositions.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: January 22, 2002