

**UNITED STATES OF AMERICA  
BEFORE 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 VERSION**

**COMPLAINT COUNSEL'S MOTION FOR LEAVE TO CALL  
WILLIAM GROTH AS A REBUTTAL WITNESS**

Complaint counsel respectfully request that this court grant us leave to call as a rebuttal witness William Groth, Development Manager for Pharmaceutical Purchasing of Walgreens. Mr. Groth was not listed on our final witness list; his testimony, however, has become necessary to rebut the unexpected and misleading testimony from several of respondents' fact and expert witnesses about how pharmacies can and do substitute easily between non-AB rated products. Because this testimony was unexpected and is incorrect, we submit we have good cause for identifying Mr. Groth as a rebuttal witness at this time.<sup>1</sup>

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<sup>1</sup>Mr. Groth is available to testify on March 15, 2001, and is available to be deposed in Washington, D.C. the previous day.

## ARGUMENT

On December 14, 2001, respondent Upsher-Smith submitted its final witness list, listing Phillip Dritsas, among others, as a potential witness. This list indicated that Mr. Dritsas would be testifying “generally as to Upsher-Smith’s efforts to market the Klor Con product and to compete with Schering’s K-Dur 20 before and after the patent settlement.” Nowhere did it identify that Mr. Dritsas would be testifying about pharmacy substitution practices or about state laws governing generic substitution. But this is precisely what Upsher decided to have Mr. Dritsas testify about during the hearing. In fact, during his testimony, Mr. Dritsas specifically invoked Walgreens and its substitution policies. In testifying about how pharmacies responded to the shortage of K-Dur 20 in the summer of 2001, Dritsas claims that

[W]e had customers, for example, like Walgreens and Rite Aid who were actually switching every K-Dur prescription for two 10s, because they had the two 10s in the warehouse, they couldn’t get any K-Dur 20 product, but they were getting prescriptions for K-Dur 20.

. . . .

[Walgreens] actually set a message in [their] system so that when the prescription comes up for K-Dur, the pharmacists are instructed to dispense two Klor Con 10 products.

Tr. at 20:4682-83. Mr. Dritsas further testified that “Walgreens simply mandated that they substitute the product, because they didn’t have any of the 20 milliequivalent.” Tr. at 20:4683. *See also* Tr. at 20:4846 (“Walgreens put into their system, ‘Simply use two 10s’”).

Mr. Groth will respond to this second-best evidence of Walgreens’ response to the supply shortage. He will explain in rebuttal that Dritsas’ representations are simply wrong, and that Walgreens

never instituted any policy to mandate substitution between K-Dur 20 and Klor-Con 10, a non-AB rated product.

Mr. Groth will also rebut other areas of unexpected testimony from Schering and Upsher witnesses, who testified at length about what pharmacists and pharmacy companies do and have done with regards to therapeutic switches – i.e., substitution between non-AB rated products, including:

- The alleged ability of pharmacists to make automatic therapeutic substitutions for non-AB-rated drugs, and mandatory generic substitution laws;<sup>2</sup> and
- The willingness of pharmacists to call physicians in order to request a therapeutic substitution, and the frequency with which they do it.<sup>3</sup>

As Development Manager for Pharmaceutical Purchasing of one of the nation's largest chain pharmacies and a former practicing pharmacist, Mr. Groth has direct, personal knowledge about these topics. He is currently responsible for the purchase of branded and generic drugs from their manufacturers. In this capacity, he has great familiarity with the market dynamics on both pharmacy and corporate levels and with Walgreens' policies on therapeutic substitutions. In rebuttal, he will explain, contrary to testimony of several respondents' witnesses that:

- There are costs (in terms of time, opportunity cost, and good will) to the pharmacy of trying to engage in therapeutic substitutions between non-AB rated products;
- For this reason, pharmacies, such as Walgreens, almost never encourage their pharmacists to attempt therapeutic substitutions between non-AB rated products; and
- Even where a Walgreen pharmacist may attempt a therapeutic substitution, that pharmacist will always obtain approval from the prescribing physician.

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<sup>2</sup>See, e.g., Tr. at 20:4634-35, 4653-54, 4694-95 (Dritsas); Tr. at 21:4956-57 (Freese); Tr. at 24:5748-49 (Addanki).

<sup>3</sup>See, e.g., Tr. at 20:4652-54, 4845-46 (Dritsas); Tr. at 21:4957 (Freese).

The testimony complaint counsel seeks to enter at this time is of the kind properly submitted during the rebuttal portion of the case. This testimony was not necessary for complaint counsel to make its prima facie case during its case-in-chief, and plaintiffs in general have no obligation to anticipate and negate in their case- in-chief facts or theories that might be raised on defense.<sup>4</sup> Instead, Mr. Groth will present testimony necessary to rebut issues raised by the misleading testimony of respondents' witnesses.

For the foregoing reasons, complaint counsel respectfully requests that this court grant leave for complaint counsel to add William Groth of Walgreens as a rebuttal witness to our final witness list.

Respectfully submitted,

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600 Pennsylvania Avenue, N.W.  
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Attorneys for Complaint Counsel

Dated: March 8, 2002

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<sup>4</sup>See *Rodriguez v. Olin Corp.*, 780 F.2d 491, 496 (5<sup>th</sup> Cir. 1986)

## CERTIFICATE OF SERVICE

I, Jerod T Klein, hereby certify that on March 8, 2002:

I caused two copies of Complaint Counsel's Motion for Leave to Call William Groth As a Rebuttal Witness to be served upon the following person by hand delivery-

Hon. D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I caused one copy of Complaint Counsel's Motion for Leave to Call William Groth As a Rebuttal Witness to be served by hand delivery and one copy to be served by electronic mail or federal express upon the following person-

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Jerod T. Klein

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**ORDER**

Upon consideration of Complaint Counsel's Motion for Leave to Call William Groth as a Rebuttal Witness and Respondents' Objections thereto:

IT IS HEREBY ORDERED that complaint counsel's Motion is granted.

D. Michael Chappel

Administrative Law Judge

Dated: