

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

**COMPLAINT COUNSEL'S REPLY BRIEF IN SUPPORT OF THE
JOINT MOTION TO WITHDRAW RESPONDENT AMERICAN
HOME PRODUCTS CORPORATION FROM ADJUDICATION**

On October 10, 2001, pursuant to Rule 3.25(c) of the Federal Trade Commission Rules of Practice for Adjudicative Proceedings ("Commission's Rules of Practice"), complaint counsel and counsel for Respondent American Home Products Corporation ("AHP") moved that AHP be withdrawn from adjudication for the purpose of considering an executed proposed consent agreement. Rule 3.25(c) states:

If the proposed consent agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section. 16 C.F.R. § 3.25(c) (2001).
(emphasis added)

Respondents Upsher-Smith Laboratories, Inc. ("Upsher-Smith") and Schering-Plough Corporation ("Schering-Plough") have now filed an Opposition to the Joint Motion to Withdraw Respondent American Home Products Corporation From Adjudication ("Opposition to Joint

Motion”). In that Opposition to Joint Motion, Upsher-Smith and Schering-Plough complain that they have not seen the proposed consent agreement, asking that “Your Honor **decline to stay** proceedings as to AHP until Complaint Counsel and AHP serve [Schering-Plough and Upsher-Smith] with a copy of the proposed consent order.” Opposition at page 3. (emphasis added)

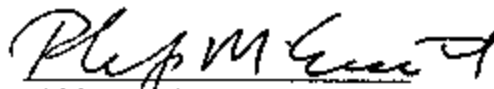
Under the Commission’s Rules of Practice, it is the Secretary of the Commission, acting for the Commission, and not the Administrative Law Judge, who withdraws a matter or portion of a matter from adjudication. Pursuant to Rule 3.25(c), the Secretary is required to withdraw a matter or a portion of a matter from adjudication if “the proposed consent agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director.” Since the proposed consent agreement in this instance was executed by complaint counsel, including the appropriate Bureau Director, the Secretary is required to withdraw this matter with respect to AHP from adjudication. In accordance with his obligations, on October 12, 2001, the Secretary withdrew this matter with respect to AHP from adjudication. A copy of that order is attached to this filing.

Since this matter has already been withdrawn from adjudication with respect to AHP by the action of the Secretary, the Opposition to the Joint Motion is moot, and complaint counsel respectfully request that you take no action with respect to the Opposition to the Joint Motion.

We note that Schering-Plough and Upsher-Smith attached to their Opposition to the Joint Motion a draft order for Your Honor’s signature, ordering complaint counsel or AHP to serve a copy of the proposed consent agreement on Schering-Plough and Upsher-Smith. Such an order is unsupported by the argument presented by Schering-Plough and Upsher-Smith, is rendered moot by the action of the Secretary withdrawing the matter from adjudication, and is

unnecessary, because, if the Commission does accept the consent order for public comment, Schering-Plough and Upsher-Smith will see the consent agreement at that time. In similar circumstances, the Commission has denied an Intervenor's request to see the proposed consent agreement before the consent agreement was accepted by the Commission and placed on the public record for public comment. *See In re General Motors Corp.*, 95 F.T.C. 335 (1980).

Respectfully Submitted,



Philip M. Eisenstat

Karen G. Bokar

Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
BEFORE 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 WITHDRAWING MATTER FROM ADJUDICATION
AS TO RESPONDENT AMERICAN HOME PRODUCTS CORPORATION**

This matter is before the Commission upon the joint motion filed by Complaint Counsel and Counsel for Respondent American Home Products Corporation that this matter be withdrawn from adjudication as to American Home Products Corporation -- pursuant to Sections 3.25 (b) and (c) of the Commission Rules of Practice, 16 C.F.R. §§ 3.25(b),(c) (2001) -- for the purpose of considering a proposed consent agreement executed by Complaint Counsel and Counsel for American Home Products Corporation.

IT IS ORDERED that the aforesaid motion to withdraw this matter from adjudication as to Respondent American Home Products Corporation be, and it hereby is, granted.

By the Commission.

Donald S. Clark
Secretary

ISSUED: October 12, 2001

CERTIFICATE OF SERVICE

I, Andrew S. Ginsburg, hereby certify that on October 12, 2001, I caused a copy of Complaint Counsel's Request For Leave To File a Reply Brief and Complaint Counsel's Reply Brief In Support Of The Joint Motion to Withdraw Respondent American Home Products Corporation From Adjudication to be served upon the following persons by hand delivery or by Federal Express and facsimile.

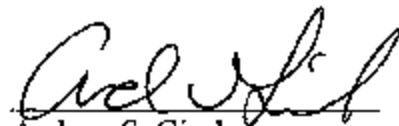
Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, D.C. 20580

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