

DIRECT DIAL: (202) 626-3643

December 26, 2001

BY HAND

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room 104  
Washington, DC 20580

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

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Dear Judge Chappell:

On behalf of Upsher-Smith, we enclose two courtesy copies of our oppositions to (i) Complaint Counsel's "Emergency Motion" regarding IPC and (ii) Complaint Counsel's Motion For Notice.

Thank you for your consideration of these papers.

Sincerely,

Christopher M. Curran

Enclosure

cc: Laura S. Shores, Esq.  
Karen G. Bokar, Esq.

**UNITED STATES OF AMERICA  
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**

**UPSHER-SMITH'S OPPOSITION TO COMPLAINT COUNSEL'S  
"EMERGENCY" MOTION REGARDING IPC**

Complaint Counsel consciously decided not to depose IPC witnesses prior to the close of fact discovery. In so doing, Complaint Counsel assumed the risk that IPC would not cooperate with them after the close of fact discovery. Now that IPC is not cooperating with either side, Complaint Counsel must live with their earlier decision. Complaint Counsel may subpoena IPC's Mike Valazza to testify at trial, but Complaint Counsel has no right to an informal *ex parte* meeting before then.

**BACKGROUND**

Since the very start of this proceeding, Complaint Counsel has known about IPC and its role in Upsher-Smith's manufacturing process. Complaint Counsel themselves identified IPC and Mike Valazza in their Initial Disclosures dated April 30, 2001. Thereafter, Complaint Counsel has consistently identified IPC's Mike Valazza on their witness list, starting from the Preliminary Witness List dated June 14, 2001. Upsher-Smith has identified Mike Valazza and another IPC employee, George Tomaisch, on their witness list since September 20, 2001. Yet in the six months of fact discovery, Complaint Counsel elected *not* to take discovery from IPC.

Complaint Counsel's election not to take formal discovery from IPC was fully informed. Complaint Counsel not only knew of IPC's role in Upsher-Smith's manufacturing process, but also knew that IPC had confidentiality obligations to Upsher-Smith. Agreements containing those confidentiality obligations were produced by Upsher-Smith and IPC during the FTC investigation even before this proceeding was commenced.

Earlier this month, however, despite knowing of IPC's confidentiality obligations, Complaint Counsel scheduled *ex parte* meetings with IPC personnel, unbeknownst to Upsher-Smith. When informed by IPC that an *ex parte* meeting had been scheduled between Complaint Counsel and IPC, counsel for Upsher-Smith alerted counsel for IPC of the confidentiality agreements. IPC subsequently cancelled the scheduled meeting with Complaint Counsel.

### ARGUMENT

Complaint Counsel appears to be under the misimpression that they have some right to an informal *ex parte* meeting with IPC. The authority upon which they rely, however, does not support their position. The only three cases cited by Complaint Counsel (Mo. at 2-3) stand for the unremarkable proposition that a private confidentiality agreement cannot preclude *formal fact discovery* in the form of a document request or subpoena. Here, of course, Complaint Counsel elected to forego formal fact discovery from IPC.

Upsher-Smith, incidentally, never expressed any opposition to Complaint Counsel taking formal discovery from IPC during the period of fact discovery. Nor would Upsher-Smith have ever done so. Upsher-Smith's only concern arises from Complaint Counsel's attempt to hold informal *ex parte* interviews, without Upsher-Smith being represented and a proper record being made.

Upsher-Smith has valid grounds for its concern. Earlier in the proceeding, Complaint Counsel and one of their experts (Timothy Bresnahan) contacted David Pettit of The Moreton Company, Ltd., an outside licensing professional bound by a confidentiality agreement with

Upsher-Smith. Complaint Counsel did not inform Upsher-Smith of the discussion. There is now great controversy as to what was said. Complaint Counsel's expert relies upon statements he attributes to Mr. Pettit, while Mr. Pettit denies making these statements. Thus Complaint Counsel have a history of disregarding Upsher-Smith's confidentiality agreements and using the purported fruits of illicit discussions against Upsher-Smith.

Furthermore, communications outside the formal discovery process are not protected by the Protective Order governing this proceeding. *See* Protective Order dated May 10, 2001 (containing definition of "Discovery Material" that does not encompass informal *ex parte* interviews). Thus, Upsher-Smith has no assurance that its confidential information will be maintained once it is discussed informally. It is startling to Upsher-Smith that Complaint Counsel evidently feels free to discuss Upsher-Smith's confidential information outside the umbrella of the Protective Order.

In their motion, Complaint Counsel attempt to create the misimpression that Upsher-Smith has tried to gain a strategic advantage by impeding communications with IPC. Complaint Counsel fails to disclose that IPC's counsel has made it crystal clear that IPC – in the interest of treating each side equally – will not be cooperating informally with counsel for *either side* in this proceeding. Complaint Counsel is correct that Upsher-Smith is a customer of IPC, but Complaint Counsel ignores that IPC is a subsidiary of R.P. Scherer and ultimately of Cardinal Health, the nation's largest pharmaceutical distributor and a Fortune 60 Corporation with annual revenues of approximately \$38 billion. IPC/R.P. Scherer/Cardinal, while no doubt appreciative of Upsher-Smith's business, are not about to kowtow to Upsher-Smith. If anything, they are likely to be inclined to curry favor with the Federal agency that regulates much of their conduct.

At bottom, Complaint Counsel appears to regret its earlier choice not to depose IPC witnesses. But they cannot fault others for the choice they made. They themselves gave up their

right to depose IPC witnesses, and thereby assumed the risk that IPC might not cooperate voluntarily later.

The case law is clear that a witness who was not subjected to formal discovery requests always has the right to refuse an informal discovery request, or to otherwise impose conditions on the interview: “It is true that any defendant has the right to attempt to interview any witnesses he desires. ***It is also true that any witness has the legal right to refuse to be interviewed, if he so desires (and is not subject to legal process).***” *Byrnes v. United States*, 327 F.2d 825, 832-33 (9<sup>th</sup> Cir. 1964) (emphasis added) (“We see no basis in the facts of this case to lay down a rule that a defendant’s right to informally interview witnesses alone is greater than the witness’s right to choose whether he will be (a) informally interviewed alone; (b) with some lawyer of his choosing present; or (c) not at all.”).

Likewise, it is clear that a party has no right to compel an informal interview of a witness. Just as the Federal Rules of Civil Procedure provide parties with formal discovery mechanisms such as document requests and subpoenas, the Federal Trade Commission’s Rules of Practice expressly provide Complaint Counsel with an array of formal discovery devices. *See* 16 C.F.R. §§ 3.33 (“Depositions”) through 3.38 (“Motions for order compelling disclosure or discovery; sanctions”). Neither set of Rules provides a party the power or the right to compel informal *ex parte* interviews.

Federal precedent underscores this significant distinction between formal and informal discovery. In *Pippinger v. Rubin*, 129 F.3d 519 (10<sup>th</sup> Cir. 1997), the court held that the plaintiff in a civil action seeking to compel a informal interviews of certain witnesses “had no legal right to speak informally to any particular witness.” *Id.* at 524 n.8. After reciting the formal discovery mechanisms available to parties under Federal Rule of Civil Procedure, the Tenth Circuit held: “Nowhere do the Federal Rules of Civil Procedure provide litigants with a right to conduct informal interviews.” *Id.* Other courts recognize this rule: “While there is nothing in the

discovery rules that gives the right to a party to informal interviews with potential witnesses, there is nothing wrong with a party seeking to do so . . . . ***However, there is nothing in the discovery rules that gives a party the right to compel an informal interview.***” *Marens v. Carrabba’s Italian Grill, Inc.*, 196 F.R.D. 35, 41 (D. Md. 2000) (distinguishing subpoena for a deposition from informal interview) (emphasis added).

Complaint Counsel had ample opportunity to take discovery from IPC during the six months of fact discovery. For their own reasons, Complaint Counsel chose not to do so. It is too late for them to revisit that decision now. Complaint Counsel can subpoena Mike Valazza to appear at trial, but they cannot force him or anyone else at IPC to participate in any informal *ex parte* meeting or in any twelfth-hour deposition.

### **CONCLUSION**

For all the reasons stated above, Complaint Counsel’s motion should be denied.

Dated: December 26, 2001

Respectfully submitted,

**WHITE & CASE LLP**

By: \_\_\_\_\_

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*Attorneys for Upsher-Smith Laboratories, Inc.*

**Certificate of Service**

I hereby certify that this 26th day of December 2002 I caused an original, one paper copy and an electronic copy of Upsher-Smith's Opposition to Complaint Counsel's 'Emergency' Motion Regarding IPC to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

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

and one paper copy was hand delivered upon:

Karen Bokat  
Federal Trade Commission  
Room 3410  
601 Pennsylvania Ave, N.W.  
Washington, D.C. 20580

Laura S. Shores  
Howrey Simon Arnold & White LLP  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

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Christopher M. Curran

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	)	
and	)	
	)	
American Home Products Corporation,	)	
a corporation.	)	
	)	

**UPSHER-SMITH'S JOINDER IN SCHERING-PLOUGH'S  
OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR OFFICIAL NOTICE**

Upsher-Smith hereby joins in Schering-Plough Corporation's Opposition to Complaint Counsel's Motion for Official Notice.

For all the reasons stated in Schering-Plough's Opposition, Upsher-Smith respectfully requests that the Court deny Complaint Counsel's Motion for Official Notice.

Dated: December 26, 2001

Respectfully submitted,

**WHITE & CASE LLP**

By: \_\_\_\_\_

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