

**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

PUBLIC VERSION

**COMPLAINT COUNSEL'S ANSWER TO RESPONDENTS'
OPPOSITION TO NACDS'S *AMICUS* BRIEF**

The outcome of this case will profoundly affect the availability of generic drugs and the pricing of pharmaceutical products. Respondents' opposition seeks to exclude an *amicus* brief submitted by the National Association of Chain Drug Stores (NACDS), whose members comprise some of the largest purchasers of pharmaceutical products. In the alternative to excluding the brief, respondents seek twenty additional days (for a total of 60 days) to respond to complaint counsel's appeal brief. We oppose this motion as NACDS's views will aid the Commission in addressing these important issues on appeal, and because the extension respondents request is unjustified.

1. NACDS's Brief Provides Useful Perspective for the Commission's Consideration

Commission practice favors the filing of *amicus* briefs by parties such as NACDS, whose members have a significant interest in matters pending before the Commission. Parties such as the AFL-CIO, National Small Business Association, Consumers Federation of America, Consumers Union of the United States, and Federation of Homemakers, have all been permitted by the Commission to submit *amicus* briefs in matters on appeal in which they each had an interest.¹ Similar to these parties, NACDS will provide the Commission with useful information from its members' perspective as purchasers of pharmaceuticals who will be significantly affected by higher pharmaceutical prices.

2. Respondents Have Not Demonstrated the Need for an Additional Twenty Days to Respond

Under the current briefing schedule, respondents will have 27 days to incorporate a response to NACDS's 24-page brief into its reply to our appeal. Having already been given an additional ten days to respond to complaint counsel's appeal brief, respondents have just three days less than the 30 days allocated by the Commission's Rules to answer an appellant's brief. *See* 16 C.F.R. § 3.52(c).

¹ *See Kellogg Co.*, 92 F.T.C. 351 (1978) (interlocutory order denying AFL-CIO motion to intervene, but allowing for filing of *amicus* brief); *Corning Glass Works*, 82 F.T.C. 1082 (1973) (interlocutory order granting movant permission to file *amicus* brief); *ITT Cont'l Baking Co.*, 82 F.T.C. 1082 (1973) (interlocutory order granting movants Consumers Federation of America, Consumers Union of the United States, and Federation of Homemakers, permission to file *amicus* brief).

Moreover, respondents have not demonstrated any need for a further extension.² The primary legal issue raised in NACDS's brief concerns the application of the *per se* rule to the challenged settlement agreements. Respondents are intimately familiar with this legal issue having briefed it repeatedly throughout this proceeding.³

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We urge the Commission to deny respondents' attempt to (i) prevent NACDS from presenting its views on these important matters, and (ii) garner additional time (beyond the 40 days already provided for) to submit their response to complaint counsel's brief.

Respectfully Submitted,

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August 29, 2002

² Respondents' argue that the request for a twenty day extension is justified because NACDS's brief was twenty days late. Opposition at 3. However, NACDS submitted its brief on August 19, just thirteen days after complaint counsel submitted its brief. Thus, as noted above, respondents have 27 days to answer NACDS's brief.

³ See Schering's Pretrial Brief (Jan. 15, 2002), at 5-9; Upsher's Trial Brief (Jan. 15, 2002), at 10-14; Upsher's Motion to Dismiss Due to Complaint Counsel's Failure to Establish a *Prima Facie* Case (Feb. 12, 2002), at 27-31; Upsher's Post-Trial Brief (Apr. 15, 2002), at 35-39; Schering's Corrected Brief in Support of Its Proposed Findings of Fact and Conclusions of Law Regarding the Upsher-Smith Settlement (Apr. 18, 2002), at 59-63; Schering's Reply Brief in Support of Its Proposed Findings of Fact and Conclusions of Law (Apr. 26, 2002), at 21-22, 25-26; Upsher's Post-Trial Rebuttal Brief (May 1, 2002), at 21-25.