UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

December 19, 2001

Via Federal Express and facsimile

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

Re: *In the Matter of Schering-Plough Corp., Upsher-Smith Laboratories, and American Home Products, Docket No. 9297*

Dear Judge Chappell:

On behalf of complaint counsel, I have enclosed two courtesy copies of Complaint Counsel's Motion to Strike Witnesses from Upsher-Smith's Final Witness List.

Sincerely,

Steve Vieux
Counsel Supporting the Complaint

cc: Christopher M. Curran, Esquire
Laura Shores, Esquire

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 MOTION TO STRIKE PORTIONS OF UPSHER-SMITH'S FINAL WITNESS LIST

Eight months after the complaint was filed, weeks after the close of discovery, and just over a month before the start of the hearing in this matter, Upsher still has not identified some of the specific witnesses it intends to call at trial.[1] In its final witness list, Upsher named 22 witnesses, but then also designated three broad categories of witnesses without names:

- "One or more witnesses from the Food and Drug Administration ('FDA')";
- Distributors/Physicians/Pharmacists/HMOs/Retail/Drug Store Chains; and
- Pharmaceutical Companies.[2]

[1]Complaint counsel was unable to confer with respondent Upsher-Smith on this issue after repeated attempts.

[2]Exhibit A, Upsher Smith's Final Witness List, pgs. 6-7.

The appropriate time for grouping potential witnesses into broad categories has long since passed. Upsher has had more than sufficient opportunity to identify particular witnesses from these categories, and its failure to do so leaves complaint counsel unable to even guess as to whom Upsher intends to call as witnesses from these categories. This in turn, precludes us from deposing, and preparing for cross-examination of, these still unidentified witnesses. Accordingly, we ask the court to strike from Upsher-Smith's Final Witness List all individuals who could be called under categories 8, 10, and 11 as Non-Party Witnesses.[3]

I. Upsher's failure to properly and timely designate witnesses has prejudiced complaint counsel.

The Third Revised Scheduling Order required that the parties submit and exchange their final witness lists on Friday, December 14, 2001. Rather than identifying each of the specific witnesses it intended to call at trial, Upsher submitted a witness list that groups its witnesses into three broad categories, two of which include entire industries.

Upsher makes no effort to explain why -six weeks after the close of discovery- it still cannot name these individual witnesses on its final witness list. And there is no legitimate rationale. Upsher's present tactic of still waiting to choose, at some unspecified time, anyone from two industries and a major federal agency to call at trial guts the entire purpose of a final witness list; which is to provide the opposing party with the names of potential witnesses and the subject of their testimony in order to allow for appropriate discovery. The prejudice to complaint counsel from this tactic is clear.

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[3] *Id.*

We are foreclosed from obtaining discovery, including both depositions and documents, because not only has the period for discovery ended, but even if we could obtain discovery no one has been identified from whom we should seek testimony or documents.

II. Upsher should be precluded from calling witnesses from these three broad categories, even if it later seeks to name specific individuals.

Upsher's failure to designate witnesses in a timely fashion, or in this case at all, has created an undue prejudice because it prevents complaint counsel from deposing testifying witnesses and preparing an effective cross-examination. The appropriate sanction for this discovery abuse is to preclude the witnesses from testifying. In *Automotive Breakthrough Sciences, Inc., et al.*,[4] the ALJ prohibited the respondent from calling a witness it did not place on its final witness list. In that case the ALJ correctly noted that such machinations perfect an undue prejudice on the opposing party, since it has not been able to depose the respondent's witness and prepare an effective cross-examination.

The discovery period ended on November 1, 2001, and final witness lists were due December 14, 2001. Upsher should not be allowed to attempt to cure its final witness lists by amending the final witness list to add specific names. It is much too late, after the final witness list was submitted and in the middle of a busy holiday season, to expect complaint counsel to be distracted from necessary trial preparation.[5] This is unfair when respondents, have the opportunity to use this entire period of time to focus on their trial preparation. In *Koch v. Koch Industries, Inc.*, the court excluded witnesses identified on a pre-trial supplemental witness list because the defendants didn't have the opportunity to

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[4] 1996 FTC Lexis 621 (November 12, 1996).

[5] *See, e.g., Koch v. Koch Industries, Inc.*,179 F.R.D. 606 (D. Kan. 1998).

obtain discovery from them, and would be diverted from trial preparation towards discovery matters if discovery was reopened.[6]

Furthermore, allowing Upsher to name individual witnesses this late would unfairly force complaint counsel to adjust our trial strategy to obtain new discovery and apply that discovery. The addition of these new witnesses could necessitate an adjustment to the presentation of our case. In a similar case, in *Bradley v. U.S.*,[7] the appellate court ruled that expert testimony should have been excluded as prejudicial to plaintiffs, although plaintiffs were given notice shortly before trial and were able to quickly depose two expert witnesses.[8] The court ruled that, since the window of time between notice, deposition, and trial was so short, plaintiffs were not given an opportunity to adequately prepare for cross-examination; and since they were given the opportunity for discovery so late in pre-trial preparation, it was difficult to adjust their trial strategy.[9]

III. Conclusion

Three categories of witnesses should be struck from Upsher's witness list. If Upsher were allowed to call persons from those categories at trial, it would impose a great prejudice on complaint counsel, because we have not been able to perform any discovery concerning such persons.

Respectfully Submitted,

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[6] *Id.* at 609.

[7] 866 F.2d 120 (5th Cir. 1989).

[8] *Id.* at 125.

[9] *Id.*

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Karen G. Bokat
Steve Vieux
Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: December 19, 2001

CERTIFICATE OF SERVICE

I, Steve Vieux, hereby certify that on December 19, 2001, I caused a copy of Complaint Counsel's Motion to Strike Witnesses from Upsher-Smith's Final Witness List to be filed with the Secretary of the Commission, and two paper copies to be served by hand delivery upon:

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

The following persons were served with one paper copy by Federal Express and facsimile:

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Steve Vieux