

UNITED STATES OF AMERICA  
BEFORE THE 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

MODIFIED ORDER DENYING RESPONDENTS' MOTION TO DISMISS THE APPEAL  
AND GRANTING RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY  
MEMORANDUM

These matters are before the Commission on (1) Respondents' Joint Motion to Dismiss the Appeal, and (2) Respondents' Joint Motion for Leave to File a Reply Memorandum to Complaint Counsel's Opposition to the Motion to Dismiss. The Commission grants the latter motion and denies the former.

On August 6, 2002 Complaint Counsel filed an appeal brief in this case, in support of its appeal from the Initial Decision of the Administrative Law Judge ("ALJ"). Respondents contend that this filing was untimely and should not be considered by the Commission. This argument constitutes the sole basis for their motion to dismiss. In response, Complaint Counsel claims that its appeal brief was timely filed.

Commission Rule 3.51(a) provides in relevant part:

Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, *unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief* or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

16 C.F.R. §3.51(a) (2002) (emphasis added). Commission Rule 3.52(b) similarly provides that “[t]he appeal shall be in the form of a brief, filed within thirty (30) days after service of the initial decision. . . .” 16 C.F.R. §3.52(b) (2002).

Resolution of this motion turns on what constitutes “service” of the Initial Decision, because the official service date triggers, on the following business day, the beginning of the thirty calendar day period within which potential appellants must perfect an appeal. 16 C.F.R. §§ 3.51(a), 4.3(a) (2002). Respondents contend that service of the Initial Decision occurred on June 28, 2002. Based on the Commission’s rules and the evidence in this case, we disagree.

Official Commission records cited by Complaint Counsel indicate that the processing of the final public and *in camera* versions of the Initial Decision of the ALJ was completed on July 3, 2002. *See* Exh. 6 to Bokat Decl. at p. 1. Although draft versions were circulated before then, the Commission Secretary did not receive the final versions from the Office of Administrative Law Judges until the afternoon of July 2, 2002, and the Document Processing Section of the Office of the Secretary placed copies of those final versions in the United States mail, to effect formal service, pursuant to Commission Rule 4.4(a)(1)(i), on July 3, 2002. 16 C.F.R. § 4.4(a)(1)(i) (2002).

For at least the past five years, it has been customary for the Secretary to provide parties with copies of the draft public and *in camera* versions of initial decisions as a courtesy, in order to identify and correct any typographical errors in either version before they are finalized, and to ensure that no *in camera* material is included in the public version before it is finalized and released to the public. The record indicates that this practice was followed in this case.

Indeed, the Commission takes notice that Respondents aggressively pressed the Secretary’s office to be permitted to review a copy of the Initial Decision prior to its being finalized and served by the Secretary. *See, e.g.*, letter from John Nields to Don Clark, Attachment 1. Partially in response to that demand from Respondents’ counsel, courtesy copies of the draft public and *in camera* versions of the Initial Decision were thereafter provided to counsel for both Respondents on June 28, 2002. The fact that both versions were still subject to revision was communicated clearly to counsel for Respondents, as evidenced by their subsequent e-mail messages to the Secretary. For example, counsel for Upsher-Smith openly – and correctly – referred to the courtesy version as a “draft” in a July 2<sup>nd</sup> e-mail from Mark Gidley to the Secretary. Attachment 2. Finally, the fact that counsel for each respondent reviewed the draft

public and *in camera* versions of the Initial Decision and thereafter suggested changes for the Secretary to forward to the Administrative Law Judge – for review and possible incorporation into the final public and *in camera* versions of the Initial Decision – demonstrates that the Respondents believed the versions they received on June 28<sup>th</sup> were not yet final.

Further failing to recognize that this motion is governed by straightforward application of the Commission’s rules, Respondents also overlook the text of Commission Rule 4.4(a)(1), which notes that service of an initial decision must first be attempted “by registered or certified mail addressed to the person, partnership, corporation, or unincorporated association to be served,” second, by delivery to the party itself, or third, by delivery to the party’s address, before service on an attorney shall be deemed service on the party. 16 C.F.R. § 4.4(a)(1)(i), (ii), and (iii) (2002). The courtesy copies which Respondents now claim effectuated service were provided by hand, and only to counsel on June 28<sup>th</sup> – not to the parties themselves.<sup>1</sup> Consequently, providing these draft documents to Respondents’ counsel did not constitute effective service. In this case, the Commission’s first and only attempt to effect service was by a registered mailing that included the parties to the litigation and was received by them on July 5<sup>th</sup>. *See* Mail Receipts from Schering-Plough Corporation and Upsher-Smith Laboratories, Attachment 3.

Notwithstanding the above, Respondents’ counsel now appear before the Commission and contend that receipt of the very courtesy copies that they demanded and suggested changes to somehow constituted official service of a final order. Pursuant to Commission rules governing effective service, the Commission disagrees.

For all of the above-stated reasons, the Commission finds that service of the ALJ’s Initial Decision was perfected on July 5, 2002, and the thirty calendar day period began to run on the first business day thereafter; that is, on July 8, 2002. Consequently, Complaint Counsel’s appeal brief, filed August 6, 2002, was timely.

Respondents’ Joint Motion to Dismiss is hereby denied.

Accordingly,

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<sup>1</sup> Rule 4.4(a)(4) provides that “[w]hen a party has appeared in a proceeding by an attorney, service on that individual of any document pertaining to the proceeding other than a complaint shall be deemed service upon the party. However, service of those documents specified in paragraph (a)(1) of this section [including initial decisions] shall first be attempted in accordance with the provision of paragraphs (a)(1) (i), (ii), and (iii) of this section.” 16 C.F.R. § 4.4(a)(4) (2002).

IT IS ORDERED that Respondents' Motion for Leave to File a Reply be, and it hereby is, GRANTED; and

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss the Appeal be, and it hereby is, DENIED.

By the Commission.

  
Donald S. Clark  
Secretary

ISSUED: September 20, 2002

**Attachment 1**

HOWREY  
SIMON  
ARNOLD  
& WHITE

**HOWREY**  
ATTORNEYS AT LAW

1299 PENNSYLVANIA AVE., NW  
WASHINGTON, DC 20004-2402  
PHONE 202.783.0800  
FAX 202.383.6610  
A LIMITED LIABILITY PARTNERSHIP

JOHN W. NIELDS, JR.  
PARTNER  
202.383.6639  
nieldsj@howrey.com

June 26, 2002

VIA HAND DELIVERY

Donald S. Clark  
Secretary  
Federal Trade Commission  
Office of the Secretary  
6th and Pennsylvania Avenue, N.W.  
Room 172  
Washington, DC 20580

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

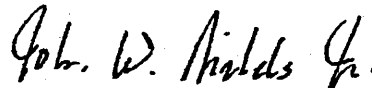
Dear Mr. Clark:

I am counsel for Schering-Plough Corp. in the above-captioned matter. The case was tried before Administrative Law Judge D. Michael Chappell during the months of January-March, 2002. The record was closed on March 28, 2002. The initial decision by Judge Chappell is to be rendered by today in accordance with an order he entered dated May 29, 2002.

We expect that, as one of the parties to the case, we will be given access to the decision as soon as it is rendered. We heard that there may be a practice whereby the decision will be embargoed while the Commission studies it and prepares a press release. We know of no legal authority for such a practice. Neither an administrative law judge nor his opinion is intended to be under the control of the Commission.

Please send counsel for Schering a copy of the administrative law judge's decision as soon as it is rendered. It may be sent by facsimile to the undersigned at 202/383-6610, or you may call the undersigned at 202/383-6639 and I will send someone to pick it up.

Sincerely,



John W. Nields, Jr.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of June 2002, I caused an original, one paper copy, and an electronic copy of the June 26, 2002 letter to Mr. Donald S. Clark, Secretary, Federal Trade Commission, to be filed with the Commission and that two paper copies of each of the foregoing documents were served by hand upon:

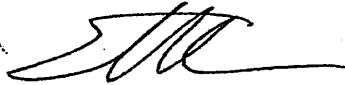
Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room 104  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

and that one paper copy was hand delivered upon:

David Pender  
Assistant Director, Bureau of Competition  
Federal Trade Commission  
Room S-3115  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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

Christopher Curran  
White & Case LLP  
601 13th St., N.W.  
Washington, D.C. 20005



---

Erik T. Koons

**Attachment 2**



**From:** "J. Mark Gidley" <MGidley@washdc.whitecase.com>  
**To:** FTC.SERIUS("dclark@ftc.gov")  
**Date:** Tue, Jul 2, 2002 10:10 AM  
**Subject:** Initial Decision - Public Version

Don:

This will confirm our phone conversation last night that we have reviewed the draft Public Version of the Initial Decision on behalf of Upsher-Smith Laboratories and do not find any confidential information to have been inadvertently disclosed in the Public Version of the I.D. We have no objection to the release of the Public Version of the Initial Decision and understand that you plan to release it to the public at 2pm today.

We appreciated the opportunity to review the I.D. Public Version prior to its release to examine confidentiality issues.

Mark Gidley

J. Mark Gidley, Esq.  
White & Case, LLP  
601 13th Street, N.W.  
Suite 600 South  
Washington, D.C. 20005  
dd 202-626-3609  
fax 202-639-9355  
main: 202-626-3600 (in office paging)  
home: 703-917-8945

Email: mgidley@whitecase.com  
Travel Email: jgidley606@aol.com

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PLEASE NOTE: The information contained in this message is privileged and confidential, and is intended only for the use of the individual named above and others who have been specifically authorized to receive it. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, or if any problems occur with transmission, please contact sender or call (202) 626-3600. Thank you.

**CC:** "Christopher Curran" <CCurran@washdc.whitecase.com>

**Attachment 3**

Document: 494197 Case: D09297  
Schering-Plough Corporation  
2000 Galloping Hill Road  
Kenilworth NJ 07033  
Attn: Jonathan Wasserman

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature *[Signature]*  Agent  
B. Received by (Printed Name) *[Signature]*  Addressee  
C. Date of Delivery *[Signature]*  
D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

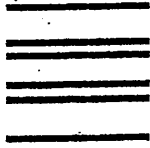
*FD-Public*  
*7.3.02*

3. Service Type  
 Certified Mail  
 Express Mail  
 Registered  
 Return Receipt for Merchandise  
 Insured Mail  
 C.O.D.  
Delivery? (Extra Fee)  Yes

**RETURN RECEIPT REQUESTED**

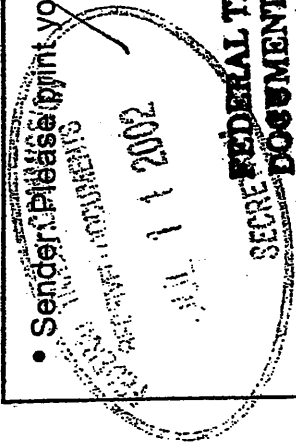
2. Article Number *E1137000256 US*  
(Transfer from service label)  
PS Form 3811, August 2001  
Domestic Return Receipt  
LAH  
PS Form 01-M-2508

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First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

• Sender, please print your name, address, and ZIP+4 in this box •



**FEDERAL TRADE COMMISSION**  
**DOCUMENT PROCESSING SECTION, RM. 159**  
**6th AND PA. AVE., N.W.**  
**WASHINGTON, D.C. 20580**

Document: 494196 Case: D09297  
Schering-Plough Corporation  
2000 Galloping Hill Road  
Kenilworth NJ 07033  
Attn: Jonathan Wasserman

DD-InCamera  
7.3.02

COMPLETE THIS SECTION ON DELIVERY

A. Signature *[Signature]*  Agent  
 Addressee  
B. Received by (Printed Name) *[Signature]*  Agent  
 Addressee  
C. Date of Delivery *[Signature]*  
D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

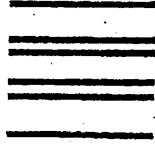
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 Registered  Return Receipt for Merchandise  
 C.O.D.  
 Delivery? (Extra Fee)  Yes

**RETURN RECEIPT REQUESTED**

2. Article Number (Transfer from service label) *EV1390031313US*

PS Form 3811, August 2001 Domestic Return Receipt **LAH 95-01-M-2509**

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First-Class Mail  
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USPS  
Permit No. G-10

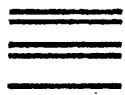
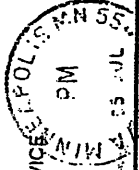
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FEDERAL TRADE COMMISSION  
DOCUMENT PROCESSING SECTION, RM. 159  
6th AND PA. AVE., N.W.  
WASHINGTON, D.C. 20580





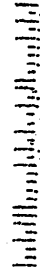
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DOCUMENT PROCESSING SECTION, RM. 169  
6th AND PA. AVE., N.W.  
WASHINGTON, D.C. 20580





Document: 494196 Case: 009297  
Upsher-Smith Laboratories, Inc.  
14905 23rd Avenue North  
Minneapolis MN 55447--470  
Attn: Ian Troup

*FD-Incarnu*  
*7.3.02*

COMPLETE THIS SECTION ON DELIVERY

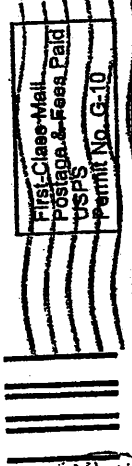
A. Signature <i>X David Dinkau</i>		<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
B. Received by (Print Name) <i>H. J. ...</i>		C. Date of Delivery
D. Is delivery address different from item 1? If YES, enter delivery address below: <i>JUL 05 2002</i>		<input type="checkbox"/> Yes <input type="checkbox"/> No
3. Service Type <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D. <input type="checkbox"/> Signature Required Delivery? (Extra Fee) <input type="checkbox"/> Yes		

**RETURN RECEIPT REQUESTED**  
2. Article Number  
(Transfer from service label) *E113906032705*

PS Form 3811, August 2001 Domestic Return Receipt

102595-100

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SECRETARY

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