

**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
PUBLIC**

**RESPONDENTS' OPPOSITION TO NACDS'S
MOTION FOR LEAVE TO FILE AN UNTIMELY *AMICUS* BRIEF**

Commission Rule 3.52(j) states: "Except as otherwise permitted by the Commission, an *amicus curiae* shall file its brief within the time allowed the parties whose position as to affirmance or reversal the *amicus* brief will support. The Commission shall grant leave for a later filing only for cause shown" The National Association of Chain Drug Stores ("NACDS") is unable to show any legitimate cause for filing their *amicus* brief, which supports Complaint Counsel's position, twenty days after the deadline for Complaint Counsel's brief. Under Rule 3.52(j), NACDS's brief must be rejected.¹

Implicitly recognizing that its brief is untimely, NACDS asserts in its motion that "[g]ood cause exists for the filing of the brief at this time because a public version of [Complaint Counsel's] brief was not filed until August 9, 2002." Mot. at 1. But a purported lack of access

¹ Respondents expressly reserve all of their rights under their pending Motion to Dismiss, filed August 13, 2002. As established in that motion, Complaint Counsel's appeal brief was due on July 30, 2002. NACDS filed its motion and brief on August 19, 2002, although those papers were not delivered to Respondents until the following day.

to Complaint Counsel's brief cannot constitute good cause for NACDS to file an untimely *amicus* brief. Commission Rule 3.52(j) does not contemplate that an *amicus curiae* will have prior access to the brief for the party it is supporting. The Rule sets the same deadline for the *amicus curiae* and the party it is supporting. If a purported lack of access to a party's brief constituted "good cause" to extend the deadline for an *amicus* brief, such good cause would always exist and Rule 3.52(j)'s deadline for *amicus* briefs would be rendered meaningless.²

Aside from failing to show good cause for its untimely brief, NACDS never offers any explanation for not moving for an extension of time prior to the deadline for *amicus* briefs supporting Complaint Counsel. This is an independent basis for the denial of NACDS's motion. Commission Rule 4.3(b) states: "where a motion to extend is made after the expiration of the specified period, the Administrative Law Judge or the Commission may consider the motion where the untimely filing was the result of excusable neglect." In promulgating this Rule, the Commission declared that in a post-deadline motion for extension "the movant will have to meet the threshold test of excusable neglect before . . . the Commission will undertake to determine whether there is good cause to extend a time limit." 42 Fed. Reg. 30150 (June 13, 1977). NACDS does not even assert that its untimely request for an extension is the result of excusable neglect. Thus, NACDS has not met the threshold test of establishing excusable neglect, and the Commission should not even entertain NACDS's request for leave to file its brief out of time. *See In the Matter of General Mills, Inc.*, 86 F.T.C. 687, 687 (1975) (denying post-deadline motion for extension of time because excusable neglect not shown).

² As NACDS is forced to acknowledge in its brief (p. 1), several of its members sued Respondents last year, mimicking the allegations in the Commission's Complaint and seeking millions in damages. Judge Chappell's dismissal of the Commission's Complaint profoundly undermines those private suits, and the NACDS members have a significant monetary incentive to dispute Judge Chappell's ruling. Thus, NACDS is hardly a bona fide "friend of the court."

Finally, NACDS is unjustifiedly dismissive of the prejudice that its untimely brief would cause to Respondents, blithely asserting that “[t]he time remaining for [Respondents] to file their reply briefs is sufficient for them to respond to the arguments raised by the *amicus curiae* brief.” Mot. at 1. NACDS ignores that, in the limited time remaining for Respondents’ answering briefs, Respondents would have to answer Complaint Counsel’s 91-page brief *and* NACDS’s 25-page brief. Furthermore, NACDS ignores that its late brief shortens the time available for any *amici curiae* supportive of Respondents who may wish to respond to the NACDS brief. NACDS should not be permitted to violate the deadlines in the Commission’s Rules or to run roughshod over the rights of Respondents and other *amici curiae*.

CONCLUSION

Because it is twenty days late, NACDS’s *amicus* brief should be rejected. Alternatively, the deadline for Respondents’ answering briefs and any answering *amicus* briefs should be extended by a corresponding twenty days, so as to avoid prejudice to the rights of Respondents and any *amici curiae* supportive of Respondents.

August 22, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2002, I caused a paper original and twelve copies as well as an electronic version of the foregoing Respondents' Opposition To NACDS's Motion For Leave To File An Untimely *Amicus Curiae* Brief to be filed with the Secretary of the Commission:

Office of the Secretary
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and one copy to be served by hand delivery upon:

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