PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	Docket No. 9297
and	)	
American Home Products Corporation, a corporation	)	

SCHERING-PLOUGH CORPORATION'S RESPONSE TO COMPLAINT COUNSEL'S CROSS-MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY ON FDA APPROVAL OF NIACOR-SR

In response to Upsher's motion to strike the testimony of Dr. Pitt, Complaint Counsel contends that none of respondents' experts other than Dr. Davidson should be permitted to offer testimony on whether Niacor-SR would have been approved by the FDA. Complaint Counsel's cross-motion, however, sweeps too broadly in that it could prevent respondents' experts from providing a full response to points raised by Complaint Counsel's initial expert, Dr. Levy.

Dr. Levy addressed the question of whether the FDA would approve Niacor-SR only in passing. However, he did clearly claim in his report that there were "major risks to approvability and marketability of Niacor-SR." (Levy Report at 30). The Court should deny

Complaint Counsel's cross-motion to the extent that it seeks to limit respondents' experts' ability to present their opinions in response to Dr. Levy's opinion in this regard.

With respect to the question of Dr. Pitt's testimony, Schering will soon file a motion in limine that will seek to exclude some of the testimony Dr. Pitt intends to present at the hearing on the subject of FDA approvability. Schering will show that, under clearly relevant case law, certain portions of his testimony are subject to exclusion. Because the issues that will be raised in Schering's motion in limine are closely related to those raised by Upsher's motion and Complaint Counsel's cross-motion, Schering respectfully suggests that the Court may wish to defer resolution of all motions relating to Dr. Pitt until breifing on Schering's motion in limine is completed.

Respectfully submitted,

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Dated: December 20, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of December, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondent's Response to Complaint Counsel's Cross-Motion In Limine to Exclude Expert Testimony on FDA Approval of Niacor-SR 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
Bureau of Competition
Federal Trade Commission
Washington, D.C.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
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Erik T. Koons

CERTIFICATION

I hereby certify that this 20th day of December, 2002, I caused an electronic copy of Respondent's Response to Complaint Counsel's Cross-Motion In Limine to Exclude Expert Testimony on FDA Approval of Niacor-SR to be filed with the Secretary of the Commission. I further certify that these are true and correct copies of the paper original and that a paper copy with an original signature is being filed with the Secretary of the Commission.

Erik T. Koons