PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENT SCHERING-PLOUGH CORPORATION'S SUPPLEMENTAL RESPONSES TO COMPLAINT COUNSEL'S REVISED SECOND REQUEST FOR ADMISSIONS

Pursuant to Federal Trade Commission ("FTC") Rule of Practice Section 3.32, respondent Schering-Plough Corporation ("Schering") submits these supplemental responses to Complaint Counsel's Revised Second Request for Admissions.

GENERAL OBJECTIONS AND STATEMENT

Schering hereby incorporates by reference the objections set forth in its previous Response to Complaint Counsel's Revised Second Request for Admissions.

SPECIFIC OBJECTIONS AND REQUESTS

The full text of each request is set forth below in italics, followed by Schering's objections and responses. Provision of a response to any request shall not constitute a waiver of any applicable objection, privilege, or other right and, unless otherwise specifically stated, Schering denies each of Complaint Counsel's requests. In addition, the general objections set forth above are incorporated into each specific response below

as if set forth fully therein. In those instances in which Schering responds by noting that it can neither admit nor deny the request, the information Schering currently possesses is inadequate to provide a more substantive response, and Schering is making reasonable inquiry with respect to such request. Finally, Schering reserves the right to supplement these responses as necessary.

Request No. 47: *At the time of the Schering/Upsher Agreement, there was a possibility that Upsher could have won the Schering/Upsher Patent Litigation if it continued the Schering/Upsher Patent Litigation.*

Answer: Schering admits that, in any litigation, including the Schering/Upsher Patent Litigation, there is always some "possibility" that either side "could" win.

Request No. 48: *At the time of the Schering/Upsher Agreement, Schering believed that Upsher could have won the Schering/Upsher Patent Litigation if it continued the Schering/Upsher Patent Litigation.*

Answer: Schering objects to this request to the extent that it calls for information protected by the attorney-client privilege. Subject to and without waiving the foregoing objection, Schering admits that, in any litigation, including the Schering/Upsher Patent Litigation, there is always some possibility that either litigant "could" win.

Request No. 49: *At the time of the Schering/Upsher Agreement, it was not certain that Schering would prevail in the Schering/Upsher Patent Litigation.*

Answer: Schering admits that, in any litigation, including the Schering/Upsher Patent Litigation, it is "not certain" which party will prevail.

Request No. 133: *At the time of the Schering/AHP Points of Agreement, there was a possibility that AHP could have won the Schering/AHP Patent Litigation if it continued the Schering/AHP Patent Litigation.*

Answer: Schering admits that, in any litigation, including the Schering/AHP Patent Litigation, there is always some "possibility" that either side "could" win. In the Schering/AHP Patent Litigation, however, ESI had no substantial defense to Schering's infringement claims. *See* Expert Report of Charles Miller, ¶87.

Request No. 134: *At the time of the Schering/AHP Points of Agreement, it was not certain that Schering would prevail in the Schering/AHP Patent Litigation.*

Answer: Schering admits that, in any litigation, including the Schering/AHP Patent Litigation, it is "not certain" which party will prevail. In the Schering/AHP Patent Litigation, however, ESI had no substantial defense to Schering's infringement claims. *See* Expert Report of Charles Miller, ¶87.

Request No. 135: *At the time of the Schering/AHP Points of Agreement, Schering did not believe it was certain that Schering would prevail in the Schering/AHP Patent Litigation.*

Answer: Schering objects to this request to the extent that it calls for information protected by the attorney-client privilege. Subject to and without waiving the foregoing objection, Schering admits that, in any litigation, including the Schering/AHP Patent Litigation, it is not "certain" which party will prevail. In the Schering/AHP Patent Litigation, however, ESI had no substantial defense to Schering's infringement claims. *See* Expert Report of Charles Miller, ¶87.

Request No. 164: *The decline in sales from 1997 to 1998 projected in the Schering 1997 Operating Plan (SP 23 00219) reflects the expected impact of the entry of at least one generic K-Dur 20 product.*

Answer: Admitted in part and denied in part. Document SP 23 00219 is from Schering's 1998 Operating Plan. That document does not project a decline in sales

from 1997 to 1998. To the extent the request concerns Schering's 1997 Operating Plan, Schering objects to the request as vague. Schering's 1997 Operating Plan includes sales projections, based on a number of assumptions, for many products, and for entire product categories. Among those are conservative assumptions concerning possible entry in 1997, 1998 and 1999 of generic versions of a number of products. With regard specifically to K-Dur, the 1997 Operating Plan uses a conservative assumption of entry of a generic version or versions of K-Dur 20 in 1998.

Request No. 165: *The decline in sales from 1998 to 1999 projected in the Schering 1997 Operating Plan (SP 23 00219) reflects the expected impact of competition from generic K-Dur 20 products.*

Answer: Admitted in part and denied in part. Document SP 23 00219 is from Schering's 1998 Operating Plan. That document does not project a decline in sales from 1998 to 1999. To the extent the request concerns Schering's 1997 Operating Plan, Schering objects to the request as vague. Schering's 1997 Operating Plan includes sales projections, based on a number of assumptions, for many products, and for entire product categories. Among those are conservative assumptions concerning possible entry in 1997, 1998 and 1999 of generic versions of a number of products. With regard specifically to K-Dur, the 1997 Operating Plan uses a conservative assumption of entry of a generic version or versions of K-Dur 20 in 1998.

Request No. 272: *Schering's monthly profits on K-Dur 20 has fallen since Upsher introduced its generic version of K-Dur 20.*

Answer: Monthly profit information on K-Dur 20 has not been calculated by Schering. Thus, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny whether Schering's monthly profits on K-Dur 20 have fallen since Upsher introduced its generic

version of K-Dur 20. However, IMS data shows that prescriptions for K-Dur 20 have fallen since Upsher-Smith introduced its generic version of K-Dur 20, and it is reasonable to assume that profits on K-Dur have fallen as a result.

Request No. 418: *Schering decided not to enter into a license agreement with Kos for Niaspan in part because of clinical data demonstrating a flushing side effect resulting from taking Niaspan.*

Answer: Admitted in part and denied in part. Schering never sought to enter into a license agreement with Kos for Niaspan. However, Schering did consider a proposal to enter into a co-marketing/detailing agreement with Kos for Niaspan. Schering decided not to enter into a co-marketing/detailing agreement with Kos for a number of reasons. First, Schering decided not to enter into a co-marketing/detailing agreement with Kos because the structure and terms of the deal demanded by Kos, given Schering's sales projections, made the proposed co-marketing/detailing deal unattractive. Second, Schering believed that the Kos personnel involved in the proposed arrangement would be difficult to deal with, making the proposed co-marketing/detailing arrangement impractical. The Kos data regarding flushing, among other things, affected Schering's decision in two ways. First, Kos' unwillingness to provide certain data supported Schering's perception that the Kos people involved the proposed arrangement would be difficult to deal with in a co-marketing/detailing arrangement. Second, Kos' unwillingness to provide data made it more difficult for Schering to evaluate the sales projections for Niaspan that were being made by industry analysts.

Request No. 420: *Schering decided not to enter into a license agreement with Kos for Niaspan in part because of the size of the potential sales of Niaspan.*

Answer: Admitted in part and denied in part. Schering never sought to enter into a license agreement with Kos for Niaspan. However, Schering did consider a proposal to enter into a co-marketing/detailing agreement with Kos for Niaspan.

Schering decided not to enter into a co-marketing/detailing agreement with Kos for a number of reasons. First, Schering decided not to enter into a co-marketing/detailing agreement with Kos because the structure and terms of the deal demanded by Kos, given Schering's sales projections, made the proposed co-marketing/detailing deal unattractive. Second, Schering believed that the Kos personnel involved in the proposed arrangement would be difficult to deal with, making the proposed co-marketing/detailing arrangement impractical.

Request No. 428: *Prior to January 1, 2000, Schering was never informed by Upsher that Upsher intended to seek or considered seeking FDA approval of an ANDA for Kos' Niaspan product.*

Answer: Schering objects to this request as vague, as various conflicting inferences may be drawn from the request. Moreover, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny the negative proposition stated, *i.e.*, that prior to January 1, 2000, Schering was never informed by Upsher that Upsher intended to seek or considered seeking FDA approval of an ANDA for Kos' Niaspan product.

Request No. 430: *Prior to September 1998, Schering had not been informed by Upsher that Upsher had ceased its activities directed at submitting to the FDA an NDA for Niacor-SR.*

Answer: Schering objects to this request as vague, as various conflicting inferences may be drawn from the request. Moreover, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny the negative proposition stated, *i.e.*, that prior to September 1998, Schering had not been informed by Upsher that Upsher had ceased its activities directed at submitting an NDA for Niacor-SR.

Request No. 431: *Prior to September 1998, Schering had no discussions with Upsher about whether Upsher had reduced its level of efforts or activity directed at submitting an NDA for Niacor-SR to the FDA.*

Answer: Schering objects to this request as vague, as various conflicting inferences may be drawn from the request. Moreover, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny the negative proposition stated, *i.e.*, that prior to September 1998, Schering had no discussions with Upsher about whether Upsher had reduced its level of efforts or activity directed at submitting an NDA for Niacor-SR.

Request No. 432: *Prior to September 1998, Schering was not informed by Upsher that Upsher had decided to reduce its efforts or activities directed at submitting an NDA for Niacor-SR to the FDA.*

Answer: Schering objects to this request as vague, as various conflicting inferences may be drawn from the request. Moreover, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny the negative proposition stated, *i.e.*, that prior to September 1998, Schering was not informed by Upsher that Upsher had decided to reduce its efforts or activities directed at submitting an NDA for Niacor-SR.

Request No. 433: *At the time of the Schering/Upsher Agreement, Schering was aware that niacin was available over-the-counter in Europe.*

Answer: Schering objects to this request as overbroad as it request the knowledge of Schering as an entire company, and as Europe as a whole. For example, niacin was not available as a stand-alone non-prescription product in the major European countries in 1997. But the request's reference to all of Europe is overbroad. Thus, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny Request No. 433.

Respectfully submitted,

Of Counsel:

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Attorneys for Respondent
Schering-Plough Corporation

Dated: January 16, 2002

VERIFICATION OF RESPONSE TO REQUESTS FOR ADMISSIONS

I, Jonathan Wasserman, am an attorney employed by Schering-Plough Corporation, and am executing this Verification on behalf of Schering-Plough Corporation. The foregoing Respondent Schering-Plough Corporation's Supplemental Responses To Complaint Counsel's Revised Second Request for Admissions was compiled for Schering-Plough Corporation based on such information as was available to it after making reasonable inquiries of knowledgeable persons. I have relied on others to gather such information and to prepare such responses, but believe, based on reasonable inquiry, that such answers are true and correct to the best of my knowledge, information, and belief. Legal objections to the requests have been stated for Schering-Plough Corporation by its attorneys.

I verify under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2002.

Jonathan Wasserman

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of January 2002, I caused an original, one paper copy and an electronic copy of the foregoing Respondent's Supplemental Responses to Complaint Counsel's Revised Second Request for Admissions 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:

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