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

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

UPSHER-SMITH'S MOTION TO
EXCLUDE IMPROPER REBUTTAL WITNESSES

Pursuant to FTC Rule of Practice 3.42(c), Upsher-Smith hereby moves for an order excluding certain of the witnesses Complaint Counsel have designated as rebuttal witnesses. The bases for the motion are set forth in the accompanying memorandum.

Dated: March 8, 2002

Respectfully submitted,

WHITE & CASE LLP

By: _____

Robert D. Paul
J. Mark Gidley
Christopher M. Curran
Jaime M. Crowe
Peter J. Carney
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

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UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE IMPROPER REBUTTAL WITNESSES

Under the guise of a purported "rebuttal" case, Complaint Counsel — who called a total of ***six*** witnesses in their case in chief — apparently intend to call ***seven more*** rebuttal witnesses (for a total of ***eight***) at the conclusion of the Respondents' cases in chief. Most of these witnesses, however, are not proper rebuttal witnesses. As detailed below, most of these witnesses are not being called to rebut new claims or arguments raised in the Respondents' cases in chief. They are being called merely to revisit and rehash issues that Complaint Counsel themselves raised during their case in chief.

Of the seven remaining "rebuttal" witnesses, four are fact witnesses. Any suggestion that these witnesses are needed to rebut new matters raised by Respondents is contrived. Two of these witnesses, Daniel Bell and Mukesh Patel of Kos, were the subjects of investigational hearings taken by Commission Staff before this action was even commenced. Another fact

witness, Mike Valazza of IPC, was interviewed in the investigational phase by Commission Staff before this action began. The remaining fact witness, James Egan of Searle, was the subject of the very first deposition conducted by Complaint Counsel in this proceeding, and it was conducted *de bene esse* — to preserve his trial testimony. Further, each of these fact witnesses appeared on Complaint Counsel's initial witness list and every one of their subsequent witness lists. They were relegated to "rebuttal" witnesses only in Complaint Counsel's final list — clearly for improper rebuttal.

One of the "rebuttal" expert witnesses, Nelson Levy, is designated solely to rebut an expert who did not testify. Another expert witness, Max Bazerman, is simply being called to bolster the testimony of case-in-chief witness Bresnahan. Neither of these two experts are proper rebuttal witnesses.[1]

ARGUMENT

As Your Honor has already acknowledged in excluding Dr. Bertram Pitt, the rule regarding proper rebuttal is clear and simple: "Rebuttal evidence is appropriate only if it is offered in response to ***evidence first presented to the court during the defendant's case***." *Heatherly v. Zimmerman*, 15 F.3d 1159, 1993 WL 523995, *2 (D.C. Cir. April 8, 1994) (emphasis added). In *Heatherly*, the D.C. Circuit upheld the exclusion of the proffered rebuttal testimony of plaintiff's expert Dr. Miller because it "was not offered in response to evidence ***first*** presented during [defendant's expert] Dr. Zimmerman's case; it was offered to buttress Dr. Savino's testimony presented during [plaintiff's] case-in-chief." *Id.* (emphasis in original). The D.C. Circuit held: "Testimony of this sort is not proper rebuttal testimony." *Id.* Moreover, "[r]ebuttal is a term of art, denoting evidence introduced by a Plaintiff to meet new facts brought

[1] Upsher-Smith does not challenge Complaint Counsel's right to call its two patent experts, Dr. Umesh Banakar (who has already testified in rebuttal) and Professor Martin Adelman. These witnesses rebut a new matter raised for the first time in Schering's case in chief, namely the merits of the underlying patent cases.

out in his opponent's case in chief." *Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 555 (6th Cir. 1979); *Phillips v. Gen. Motors Corp.*, No. Civ. A 99-3423, 2000 WL 1407896, *1 (E.D. La. Sept. 25, 2000) (citing *Morgan*).

Cases have also made clear that courts should limit rebuttal testimony to "that which is precisely directed to rebutting ***new matter or new theories*** presented by the defendant's case-in-chief." *Bowman v. Gen. Motors Co.*, 427 F. Supp. 234, 240 (E. D. Pa. 1977) (emphasis added). In *Bowman*, the Court ordered that "to the extent that the evidence proffered would simply rehash plaintiff's basic theory . . . it was excludable as unnecessary cumulation." *Id.*; *see also* 16 C.F.R. § 3.43(b) (authorizing this Court to exclude evidence, even if relevant, if presentation of the evidence might cause "undue delay, waste of time, or needless presentation of cumulative evidence"); 16 C.F.R. § 3.43(b)(ii) (further authorizing the "exercise of reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . [a]void needless consumption of time").

As in *Bowman*, Complaint Counsel seek to call witnesses in their rebuttal case simply to "rehash [Complaint Counsel's] basic theory." 427 F. Supp. at 240. These witnesses should be excluded from Complaint Counsel's rebuttal case.

A. None Of Complaint Counsel's Proposed Fact Witnesses Are Proper Rebuttal Witnesses And All Four Should Be Excluded

The four fact witnesses identified by Complaint Counsel address no issues first raised by Respondents' cases in chief. All of the fact witnesses should be excluded from Complaint Counsel's rebuttal case for the reasons set forth below.

1. Kos Witnesses Bell and Patel: Complaint Counsel have designated witnesses from Kos Pharmaceuticals to testify as rebuttal witnesses on certain matters. These witnesses, however, are not proper rebuttal witnesses.

Complaint Counsel have designated Daniel Bell, former president and CEO of Kos, and Mukesh Patel, former vice-president of licensing for Kos, to testify "generally about the negotiations between Kos and Schering-Plough Corporation" relating to "Kos's Niaspan product." Wit. List at 2-3. But these matters were not "first presented" during the Respondents' cases in chief. They were presented during Complaint Counsel's case in chief. As Your Honor will recall, Complaint Counsel's expert economist, Professor Bresnahan, specifically addressed the negotiations between Kos and Schering when discussing his "revealed preference" test. *See* Trial Tr. at 578:14-579:4, 580:1-6, 581:19-582:13 (including "Q. Professor Bresnahan, what is your understanding as to the deal that Schering and Kos were negotiating? A. That deal didn't come to fruition. My understanding is that it would give Schering the opportunity to market the Kos extended release niacin product in exchange for payments to Kos.") Likewise, Complaint Counsel's licensing expert, Dr. Nelson Levy addressed at length the negotiations between Kos and Schering. Trial Tr. at 1317:5-1318:20 (including "in the very early and essentially preliminary negotiations or discussions that went on between the — between Kos and Schering-Plough, Kos was indicating that it wanted, in order to give the license to Schering for the U.S., it wanted what they referred to as a primary detailing"). Additionally, in their testimony, Bresnahan and Levy shared a chart comparing Schering's Niaspan and Niacor SR marketing opportunities.

Extensive documentary evidence introduced by Complaint Counsel during its case in chief also addressed the negotiations between Kos and Schering regarding Niaspan. *See, e.g.*, CX 520 (phone call log indicating Schering "had looked at [Niaspan] some years ago, we would be interested in considering it again."); CX 529-31 (phone call logs indicating Schering "called to inquire about the availability of Niaspan"); CX 533-35 (phone call logs indicating Schering's

receipt of Niaspan materials and requesting additional materials); CX 537-46 (series of communications indicating Schering's review of Niaspan materials); CX 548-551 (Niaspan financial analysis by Schering); CX 555 (fax communicating draft of Kos/Key deal proposal); CX 557-66 (communications between Key and Kos regarding payment, co-promotion, marketability, and final agreement for Niaspan).

Complaint Counsel also intend to call Bell and Patel to address "issues relating to marketing Niaspan in Europe." Wit. List at 2-3. The relevance of that issue, if any, relates solely to the marketability and ultimately the license value of Niacor-SR — a topic Dr. Levy testified about at length in the first prong of his opinion. Complaint Counsel also introduced documents regarding Upsher-Smith's efforts with David Pettit of Moreton to market Niacor SR in Europe, and Dr. Bresnahan testified as to these efforts, certain of the documents, and his *ex parte* communications with David Pettit. Trial. Tr. at 602:24-606:24. Furthermore, Respondents in their case in chief did not introduce any evidence on the marketing of Niaspan in Europe. Since the Respondents did not first introduce evidence relating to the marketing of Niaspan in Europe (and in fact the Respondents introduced no such evidence), that issue falls outside the scope of proper rebuttal.

Finally, Complaint Counsel have stated that they will call Mr. Bell "to testify about the cross-licensing agreement between Upsher-Smith Laboratories and Kos related to patents for extended-release niacin." This issue also was not raised for the first time in the Respondents' cases. Complaint Counsel first raised it in their case in chief. Complaint Counsel designated deposition testimony on the issue from several witnesses from both Upsher-Smith and Schering, including Upsher-Smith's President and Schering's directors. *See, e.g.*, CX 1530 (Troup Dep. 13:24-24 and 14:4-5) (including "Q. Do you recall whether under the agreement with Kos

Upsher-Smith had the right to sublicense Kos' patent?"); CX 1518 (Morley Dep. 75:16-25); CX1485 (Becherer Deposition 45:15-45:19). Moreover, the issue featured prominently in Dr. Levy's expert report (*see* Rep. at 11-12, 17) and Complaint Counsel also moved into evidence the cross-licensing agreement itself and related correspondence in their case in chief. *See, e.g.*, CX 566, 568. In short, the Kos witnesses address no new point and will only prolong this trial unduly.

2. James Egan: Complaint Counsel have designated as a potential rebuttal witness James Egan, a former executive of a third-party corporation, Searle. Complaint Counsel indicate that they expect him to testify about ***Searle's*** "procedures for evaluating products for licensing" and about negotiations between Searle and Upsher-Smith regarding Niacor SR as well as Searle's negotiations with Kos regarding Niaspan. Wit. List at 3.

Complaint Counsel have established no basis for the relevance of ***Searle's*** procedure for evaluating products for licensing. Further, to the extent the "evaluation of products for licensing" may be relevant generally, this exact topic constituted a significant portion of Dr. Levy's direct examination wherein he outlined in prong two of his opinion what he believed to be the proper level of due diligence and his procedure for in-licensing a pharmaceutical. *See* Trial Tr. 1341-1379 and 1451-1528 (in camera). Likewise, Professor Bresnahan in describing his "market test" and in his demonstrative (CX 1584) testified about how 49 companies (and he specifically referenced Searle) were evaluating Upsher-Smith's Niacor SR product and its license value. *See* Trial Tr. 598:16-604:9.

Similarly, Complaint Counsel raised the issue of Upsher-Smith's negotiations with Searle in its case in chief through the introduction of documents on this subject (*see, e.g.*, CX 885 and CX 886 (Upsher-Smith Niacor SR slide presentations to Searle)) as well as through the

designation of deposition testimony on the topic. *See, e.g.,* CX 1499 (Freese dep. re May 28, 1997 meeting with Searle); CX 1505 (Halvorsen dep. re same); CX 1521 (O'Neill dep. re same). Further, at no time did Respondents raise the issue of Kos's negotiations with Searle, so there is nothing to rebut on that point.

This, it appears that Complaint Counsel is seeking to present Mr. Egan as a surrogate expert on licensing or due diligence based on his experience at Searle. However, Mr. Egan was not designated as an expert and Complaint Counsel called Dr. Levy for exactly those topics in their case in the case in chief; Mr. Egan may not "buttress" Dr. Levy's testimony. *See Heatherly*, 1993 WL at *2. Complaint Counsel could have called Mr. Egan as a fact witness in their case in chief but they chose not to.

3. Mike Valazza: Complaint Counsel have designated Mr. Valazza, vice-president of business development at IPC, as a rebuttal witness to "testify generally regarding International Processing Corporation's contact with Upsher-Smith Laboratories regarding Upsher-Smith's Klor Con 20mEq product." Wit. List. 3. This area was well tread in Complaint Counsel's case in chief such that it is not a proper area for rebuttal testimony.

Complaint Counsel moved in evidence numerous documents regarding Upsher-Smith's communications with IPC, work done by IPC for Upsher-Smith on Klor Con M20, and Upsher-Smith's negotiations and eventual efforts to upgrade IPC's facilities to make commercial quantities of Klor Con M. *See, e.g.,* CX 266, CX 389-396. Further, Professor Bresnahan in his direct testimony explicitly raised the issue of Upsher-Smith's Klor Con M20 launch efforts in 1997 and the steps it took with regard to IPC and he cited documents on the topic. Trial Tr. 506-511 (citing CX 256, CX 266 (e-mails between Upsher-Smith and IPC)). Finally, Complaint Counsel designated and moved in evidence deposition testimony in its case in chief from several

witnesses on exactly this topic, including from Upsher-Smith's Director of Purchasing, Scott Gould, and its Vice President of Operations, Chuck Woodruff. *See* CX 1502 and CX 1534. Accordingly, rebuttal testimony on this issue, which was already treated in Complaint Counsel's case in chief, is foreclosed.

B. Two Of Complaint Counsel's Expert Witnesses Are Improper Rebuttal Witnesses And Must Be Excluded

Two of Complaint Counsel's "rebuttal" witnesses are being offered improperly. The improper nature of the proposed "rebuttal" testimony of each of these experts is set forth below.

1. Nelson Levy: Although Dr. Levy testified at length during Complaint Counsel's case-in-chief, Complaint Counsel designated him in their rebuttal case to "Comment upon the Expert Report of Walter Bratic." Levy Report at 1. Upsher-Smith, however, did not call Mr. Bratic as a witness in its case in chief. Therefore, Dr. Levy's rebuttal testimony is neither necessary nor proper.

2. Max Bazerman: Complaint Counsel have designated Professor Max Bazerman, ostensibly to rebut the testimony of Schering witnesses O'Shaughnessy and Mnookin.

Professor Bazerman's proposed testimony has been controversial since day one. As the Court is aware, Professor Bazerman's proposed testimony is the subject of a pending motion in limine. Moreover, it involves a belated and entirely improper supplemental report handed to Respondents on January 14, 2002, on the eve of trial and some two months after the Court-set deadline for rebuttal expert report.[2]

[2] After the Respondents' motion in limine underscored the defects in Professor Bazerman's expert opinion Complaint Counsel served upon the Respondents a surprise Supplemental Rebuttal Expert Report of Professor Max Bazerman. This "supplemental" report is entirely new and was not even available to the Respondents until after expert discovery was over. Respondents have never had the opportunity to examine Professor Bazerman about this belated "supplemental" report. If the Court allows Professor Bazerman to testify at all, Respondents request that the Court grant the motion in limine and limit the scope of Professor Bazerman's testimony. Additionally, Upsher-Smith requests that the Court strike Professor Bazerman's illegal "supplemental" report and prohibit any testimony related to that "supplement" as the report was submitted in flagrant violation of this Court's scheduling order.

These issues aside, in his rebuttal report Professor Bazerman offers essentially a book review of the Bresnahan Report. While book reviews are a common feature of academic literature, they are not proper rebuttal. For example, at page 4 of Professor Bazerman's initial report he states he "carefully read" Professor Bresnahan's report and finds Professor Bresnahan's credentials "impressive" and that Professor Bresnahan's report is a "thorough assessment" of some issues in the case. *Id.* These opinions are far beyond Professor Bazerman's expertise, as he is not even an antitrust economist. Later, the Bazerman report describes Bresnahan as "exhibit[ing] careful analysis." *Id.* at 6. Such testimony is not proper rebuttal, and indeed is not even competent expert testimony. Furthermore, the use of one expert to endorse another is improper. For a variety of sound reasons, the Federal Rules of Evidence do not provide for character witnesses to support an expert witness's analysis. Such testimony rebuts nothing. In short, Professor Bazerman's "analysis" is simply a paid endorsement of Professor Bresnahan, by an unqualified endorser.

The Bazerman report states that Complaint Counsel will call him to testify about two "portions" of the reports of O'Shaughnessy and Mnookin: (1) the "impact of the settlement processes" "on the competitiveness of K-Dur 20 market place," and (2) "the type of settlement processes that should be allowed between a branded pharmaceutical monopolist and generic entrants." Rebuttal Report of Professor Max Bazerman at 2. But these two issues were not first raised during Schering's case in chief. Rather, they were raised by Complaint Counsel in its case in chief, and O'Shaughnessy and Mnookin were responding to the issues and evidence first introduced by Complaint Counsel through Dr. Bresnahan's testimony. *See, e.g.*, Trial Tr. 447:21-464:15, 452:10-23, 512:16-513:13, 520:7-524:20, 639:16-24.

All said and done, Professor Bazerman merely purports to evaluate the reports of the case-in-chief witnesses on both sides. This is not proper rebuttal. Professor Bazerman does not address new matters raised for the first time by Respondents. In fact, the largest section of the Bazerman report is devoted to evaluating Professor Bresnahan's opinions. This type of "buttressing" a case in chief witness is plainly foreclosed by *Heatherly* and other case law on the proper scope of rebuttal.

In Professor Bazerman, Complaint Counsel apparently intend to present a summation witness who will comment on all preceding experts. This supplants the judicial function and is not proper rebuttal.

CONCLUSION

For the foregoing reasons, Complaint Counsel's rebuttal case should be limited to their patent experts.

Dated: March 8, 2002

Respectfully submitted,

WHITE & CASE LLP

By: _____

Robert D. Paul
J. Mark Gidley
Christopher M. Curran
Jaime M. Crowe
Peter J. Carney
601 Thirteenth Street, N.W.
Washington, D.C. 20005-3807
Telephone: (202) 626-3600
Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2002, I caused a paper original and one copy as well as an electronic version of the foregoing motion, supporting memorandum and proposed order to be filed with the Secretary of the Commission and two paper copies to be provided by hand delivery to:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

and one paper copy to be served upon the following counsel by hand delivery:

David R. Pender
Assistant Director of Health Care Products Division
Federal Trade Commission, 3115
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Karen G. Bokat
Federal Trade Commission, 3115
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Laura S. Shores
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004

_____

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ORDER

Upon consideration of Respondent Upsher-Smith's Motion To Exclude Improper Rebuttal Witnesses and accompanying papers, Complaint Counsel's response thereto and oral argument on the matter, it is hereby:

ORDERED, that Upsher-Smith's motion is GRANTED; and it is

FURTHER ORDERED, that Complaint Counsel's rebuttal case shall be limited to the patent experts they have designated, Umesh Banakar and Martin Adelman, in addition to expert economist Timothy Bresnahan.

Dated: _____

_____
D. MICHAEL CHAPPELL
ADMINISTRATIVE LAW JUDGE