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August 28, 2002

BY HAND

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 104
Washington, DC 20580

FEDERAL TRADE COMMISSION
02 AUG 28 PM 4:42
DOCUMENT PROCESSING

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

Dear Mr. Clark:

We enclose for filing on behalf of Upsher-Smith in the above-captioned proceeding the original and 12 paper copies of (1) Upsher-Smith's Motion For Leave To File Reply Memorandum In Support Of Its Motion To Strike and (2) Upsher-Smith's Reply Memorandum In Support Of Its Motion To Strike. We are also providing an electronic copy via electronic mail.

If you have any questions, please do not hesitate to contact me.

Sincerely,

J. Mark Gidley

JMG:jad
Enclosures

cc: Karen G. Bokat, Esq.
David R. Pender, Esq.
Laura S. Shores, Esq.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

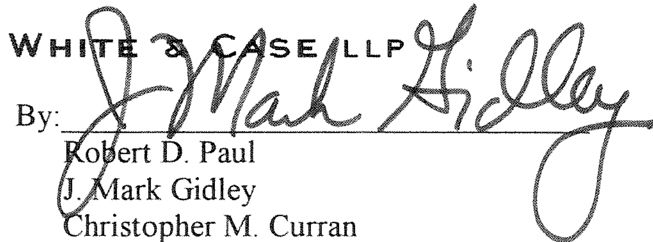
In the Matter of	)	
	)	
Schering-Plough Corporation,	)	
a corporation,	)	
	)	**Docket No. 9297**
Upsher-Smith Laboratories, Inc.,	)	**PUBLIC**
a corporation,	)	
	)	
and	)	
	)	
American Home Products Corporation,	)	
a corporation.	)	
	)	

UPSHER-SMITH'S MOTION FOR LEAVE TO FILE
<u>REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO STRIKE</u>

Pursuant to Commission Rule 3.22(c), Upsher-Smith hereby respectfully moves for leave to file the attached Reply Memorandum. Complaint Counsel's Opposition to Upsher-Smith's Motion to Strike raises new issues of law and provides a misleading description of trial testimony regarding certain exhibits. Upsher-Smith is compelled to respond to Complaint Counsel's assertions and believes its comments will be helpful and informative to the Commission.

Dated: August 28, 2002

Respectfully submitted,



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Attorneys for Upsher-Smith Laboratories, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

UPSHER-SMITH'S REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION TO STRIKE

Complaint Counsel's Opposition to the Motion to Strike fails to support the submission in their appeal brief of new economic analyses not presented at trial, but presented for the first time months after the close of the Record:

1. Complaint Counsel do not dispute that Commission Rule 3.44(c) requires that "upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record." Complaint Counsel do not dispute that Judge Chappell formally ***closed*** the record on March 28, 2002 after the parties had had a full opportunity to submit all exhibits including demonstrative exhibits into the record. Nor do Complaint Counsel dispute that they never sought to reopen the record to introduce Figure 1 or Table 1.

2. Complaint Counsel also do not dispute that Figure 1 and Table 1 were created months ***after*** the close of the record and that they do not form part of the Commission's record. Specifically, Complaint Counsel do not dispute that: (a) Figure 1 and Table 1 were ***never*** part of the joint stipulation negotiated by the parties; (b) Figure 1 and Table 1 were ***never*** included in

Complaint Counsel's index of exhibits pursuant to Commission Rule 3.46(b); (c) Figure 1 and Table 1 were ***never*** admitted into evidence; (d) Figure 1 and Table 1 were ***never*** sponsored or authenticated by any fact or expert witness; and (e) Figure 1 and Table 1 were ***never*** subject to cross-examination or rebuttal.

3. Complaint Counsel do not deny that the numbers appearing in Table 1 were never presented to Judge Chappell. In fact, ***none of the numbers presented in Table 1*** are found anywhere in the record. The new numbers appearing in Table 1 apparently are themselves derivative of new average price calculations performed three months after the trial by an unidentified statistician working from CX 40 and CX 41. (The intermediate average price calculations appear nowhere in the record or in Complaint Counsel's appeal brief.) According to the skimpy methodological note at page 52 of Complaint Counsel's appeal, this extrajudicial statistician then — without explanation or defense — culled out products described by Complaint Counsel as having sales of less than "10,000 units." *Id.* at 52, n.52. Then, a price differential was apparently calculated by the unknown statistician using the average prices he or she derived. *Id.*

4. Complaint Counsel attempt to downplay their newfound statistical analysis set forth in Table 1 by conceding that this table of new figures merely "incorporates division, multiplication and subtraction," minimizing this new presentation as "basic arithmetic." *See* Opp. at 2. Complaint Counsel present no authority for submitting new post-trial statistical calculations. In fact, the "basic arithmetic" exception that Complaint Counsel seek to graft onto the closed record has been expressly rejected — appellate courts refuse to consider new post-trial calculations even if only involving "simple math." The Seventh Circuit in *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), rejected the attempt of the Equal Employment

Opportunity Commission to make a new post-trial calculation by combining two survey question results. There the Commission argued that new statistics should be considered on appeal because the analysis was merely "simple mathematics that is fully explained." *Id.* at. 337. Even though at trial a Sears witness even suggested that the EEOC's new approach might be the best measurement, the Seventh Circuit rejected the Commission's extracurricular statistical analysis: "we may not consider statistics on appeal because they were not presented to the trial court. . . . ***Even the results of simple math*** are inappropriate for this court to consider on appeal, however, if the results were not initially presented to the district court." *Id.* (emphasis supplied).

5. Similarly, in *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*, 776 F.2d 646, 650 n.1 (7th Cir. 1985), the court rejected the new appendices that plaintiff-appellee filed with its appeal brief. Just as Complaint Counsel claim here (Opp. at 2), plaintiff-appellee claimed that the "appendices simply reflect summaries of the voluminous evidence in the district court record . . . and mathematics." *Id.* The court rejected this claim:

> Evidence not presented to the trial court may not be offered on appeal. . . . ***If Ohio-Sealy thought these summaries were so helpful and important, it should have submitted them to the district court.*** Then the defendant could have contested those portions of the tables that it claims are inconsistent with the record, and the district court could have made a factual finding. The motion to strike is granted.

Id. (emphasis supplied). *See also Rebuck v. Vogel*, 713 F.2d 484, 486 (8th Cir. 1983) (holding that "the presentation of new exhibits or other material at the time of oral argument are simply improper because they were not presented to the district court").

6. While Complaint Counsel downplay the significance of the calculations that appear in Table 1, the new "division, multiplication, and subtraction" is the ***only*** statistical analysis of pricing presented in this entire case. In fact, Complaint Counsel's industrial

organization expert, Professor Bresnahan — the only logical sponsor of a pricing differential analysis — expressly disavowed conducting any statistical analysis of pricing data at trial. *See* Tr: 8131:12-13 ("No, I didn't present Judge Chappell with ***any statistical analysis***" — referring to pricing differences) (emphasis supplied); 811:24-812:5 ("I have not done any econometric analysis in this matter.") (Bresnahan). Professor Bresnahan testified that he did not make any calculation of pricing differentials between K-Dur 20 and the dozens of potassium supplements:

> Q: Sir, you haven't ***precisely quantified or calculated*** the ***pricing differential*** between K-Dur 20 and equivalent doses of these various brands have you, sir, for 1997?
>
> A: ***No, I have not done a quantitative analysis of that***.

Tr: 1071:15-20 (emphasis supplied). And Professor Bresnahan testified that he did not have Schering or competitor pricing data available to him at the time of trial. Tr. 834:13-835:5 (Bresnahan had no pricing data set for K-Dur 20, K-Dur 10, Upsher's Klor Con products, or other manufacturer's potassium products).

7. Complaint Counsel also do not dispute that Professor Bresnahan never reviewed CX 40 or CX 41 — the exhibits purportedly supporting Table 1 — and that these exhibits were never part of his analysis of product market offered at trial. Confronted with the failure of their economist to review even the underlying data of Table 1, Complaint Counsel feebly assert that "Complaint Counsel ***used*** exhibits CX 40 and 41 with Upsher's primary fact witness" citing the cross-examination of Ian Troup. Opp. at 3 (emphasis supplied). But Complaint Counsel neglect to inform the Commission what the "use" of CX 40 and CX 41 amounted to: questions to Ian Troup who expressly ***disavowed*** any ability to sponsor the data contained in CX 40 or CX 41 because he had ***no knowledge*** of the sales data underlying CX 40:

> Q: Let me restate the question. You were asked about — you were asked by Ms. Bokat concerning some figures set forth in

> Exhibit CX 40 concerning sales of Schering products. All I'm asking you is whether you have any personal knowledge concerning the specific sales transactions that underlie this data.
>
> A: No, I don't.

Tr: 5631:4-11 (Troup). In fact, no witness at all testified to the new numbers calculated and presented in Table 1, nor to the intermediate average price figures that were used in those calculations but are presented nowhere in this proceeding — not even in Complaint Counsel's appeal brief. No witness at all vouched for the data in CX 40 or CX 41. In short, no foundation for the new numbers presented in Table 1 exists in this record.

8. Notably, Complaint Counsel primarily rely on two cases to support their opposition. In fact, both cases support striking Table 1 and Figure 1. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) upheld allowing defendant's damage chart containing calculations made by trial witnesses on the witness stand before the close of the record. *Id.* The Fifth Circuit also upheld the trial court's denial of defendant's requests to provide those exhibits to the jury during their deliberation. *Id.* In contrast to Table 1 and Figure 1, in *Pierce* the charts in question "were prepared on an easel during trial [before the close of the record], while witnesses were testifying, to illustrate their testimony." *Id.* at 430. Also unlike here, in *Pierce*, trial witnesses testified regarding the figures and calculation in the charts. *Id.* at 430 (noting "Pierce testified to these figures" and holding "[t]he other figures on the chart simply summarize [expert] Entwistle's calculations, ***about which he testified in court***.") (Emphasis supplied). *Pierce* simply does not support Complaint Counsel's claim that the Commission may now consider the post-trial calculations that Complaint Counsel has conjured. Moreover, *Pierce* also undermines Complaint Counsel's opposition because, as *Pierce* notes, the un-admitted

summaries created during trial were included in the appellate record ***only by stipulation of the parties.*** *Id.* at 430 n.16. Obviously, there is no such stipulation here.

9. Complaint Counsel's other case, *United States v. Crockett,* 49 F.3d 1357 (8th Cir. 1995), stands for the unremarkable proposition that a lawyer may present cull-outs of trial testimony to the jury in closing argument. *Crockett* does not deal with computations. *Id.* at 1362. *Crockett* does not deal with an exhibit manufactured after trial on appeal. Moreover, as with *Pierce*, it was the trial court that allowed the use of the demonstrative exhibit before the close of the record. *Id.* Here, however, Judge Chappell was never given an opportunity to consider Table 1 and Figure 1, and Complaint Counsel made no effort to introduce those demonstrative exhibits before the close of the record.

10. Figure 1 is just as new, unsupported and untimely as Table 1. Complaint Counsel, however, claim that the pricing data relationships presented in Figure 1 are just a numeric version of "prose" arguments they made earlier. Opp. at 3. But Figure 1 — containing new and untested economic analyses — is a far cry from Complaint Counsel's unsubstantiated "prose." Antitrust trials are conducted to test numerical and pricing relationships. Complaint Counsel, however, failed to present Figure 1 for testing during the 37 days of trial. As already discussed, courts simply do not allow new statistical data or relationships — such as those contained in Figure 1 — to be created after trial for consideration on appeal.

11. Complaint Counsel do not deny that (a) Professor Bresnahan never testified about Figure 1; (b) Professor Bresnahan never relied on any of the exhibits used in Figure 1; (c) Professor Bresnahan never testified about any of the prices used in Figure 1 — nor could he; and (d) Professor Bresnahan testified that he did not have a pricing data set for Schering's K-Dur 20 at all. *See* Tr: 834:13-16 ("Q: Do you have a complete pricing data set for K-Dur 20 from 1995

to 2001? A: I do not."). Now, some five months after trial after the record has closed, no witness can testify about the pricing data that appears in Figure 1.

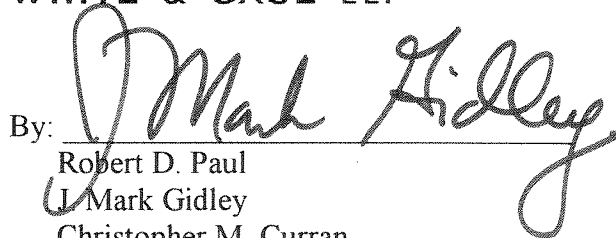
12. The remainder of Complaint Counsel's Opposition is approximately three pages of improper re-hash of the purported merits of its appeal. If the Commission denies Upsher-Smith's motion, Upsher-Smith will address those merits arguments as needed in its answering brief on the merits and expose the factual misstatements in Table 1 despite the prejudice.

13. Basic fairness prevents Complaint Counsel from creating a new economics case on appeal when at trial Complaint Counsel's case regarding economic analysis of product market was utterly lacking. The motion to strike should be granted.

August 28, 2002

Respectfully submitted,

WHITE & CASE LLP



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Attorneys for Upsher-Smith Laboratories, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2002, I caused a paper original and twelve copies as well as an electronic version of (1) Upsher-Smith's Motion For Leave To File Reply Memorandum In Support Of Its Motion To Strike and (2) Upsher-Smith's Reply Memorandum In Support Of Its Motion To Strike to be filed with the Secretary of the Commission:

Office of the Secretary
Federal Trade Commission, Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one copy to be served by hand delivery upon:

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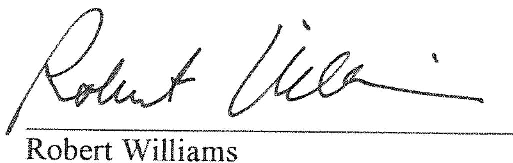

Robert Williams