

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,)
)
and)
)
American Home Products Corporation,)
a corporation.)

Docket No. 9297

**RESPONDENTS' MOTION FOR LEAVE TO FILE JOINT REPLY IN SUPPORT
OF MOTION *IN LIMINE* TO LIMIT THE TESTIMONY OF PROFESSOR
BAZERMAN**

Pursuant to Rule 3.22(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(c), Respondents hereby respectfully request leave to file a brief reply to complaint counsel's opposition to Respondents' motion to exclude certain testimony of Timothy Bresnahan.

Respondents believe that this reply will be helpful to the Court in determining that Professor Bazerman's Testimony should be limited.

Respectfully submitted,

Charles A. Loughlin

John W. Nields, Jr.

Marc G. Schildkraut

Laura S. Shores

Charles A. Loughlin

HOWREY SIMON ARNOLD & WHITE LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

Attorneys for Respondent

Schering-Plough Corporation

Dated: January 16, 2002

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BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories,)
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American Home Products Corporation,)
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**SCHERING-PLOUGH CORPORATION'S REPLY IN SUPPORT OF
RESPONDENTS' JOINT MOTION
TO LIMIT THE TESTIMONY OF PROFESSOR MAX BAZERMAN**

Respondents do not argue that Professor Bazerman is not an accomplished individual, particularly in the field of negotiations. But his accomplishments--his expertise--do not qualify him to testify to areas beyond his expertise. And despite complaint counsel's hyperbole and vague assertions designed to bolster Professor Bazerman's qualifications, complaint counsel's opposition ultimately confirms that complaint counsel is attempting to have Professor Bazerman testify far beyond his actual area of expertise.

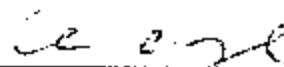
Thus, as complaint counsel admits, "Professor Bazerman is best known for his extensive empirical research on the judgments that people form during negotiations, and how these judgments affect the outcome of negotiations." Opposition at 2. Respondents made this same point. Respondent's Brief at 2-3, 12. But as Respondents showed, this expertise does not qualify Professor Bazerman to testify concerning the many other areas complaint counsel proposes to have him testify about. Thus, Professor Bazerman is not an economist or an antitrust expert. *Id.* at 9-10. He has no experience valuing

pharmaceutical products, has never conducted due diligence on a pharmaceutical product. *Id.* at 10-16. Accordingly, Professor Bazerman is not qualified to testify regarding competition issues, or antitrust policy, and he certainly is not qualified to testify as to the value of a pharmaceutical license, or the necessary or standard due diligence that should be done when evaluating a pharmaceutical license.

Professor Bazerman's research into negotiation psychology, and his related workshops with pharmaceutical business executives, do not qualify him to opine on the value of the Niacor-SR license, whether Schering conducted sufficient due diligence, or whether the structure of the payments to Upsher-Smith is appropriate. Indeed, as Respondents pointed out in their opening brief, Professor Bazerman *admitted* that he has no expertise in pharmaceutical licensing or evaluation. And he admitted that he has never worked on a settlement of litigation. Thus, Professor Bazerman's expertise in negotiation psychology does not qualify him to testify to areas outside that expertise.

Effectively conceding these problems, complaint counsel attempts to solve this problem by urging this Court to ignore Rule 702's standards for the admissibility of expert testimony. Fed. R. Evid. 702. Thus, complaint counsel argues that this Court should consider only Commission Rule 3.43(b), which, according to complaint counsel, "[does not] impose *any limitation* on the subjects of [expert] testimony." Opposition at 10 (emphasis added). Complaint counsel then quickly retreats from that overbroad statement, conceding that courts typically look to the federal rules to help interpret the Commission rules. *See* Opposition at 10, n.8. And in doing so, complaint counsel effectively concedes that Professor Bazerman's proposed testimony cannot meet the standards of Rule 702. Accordingly, because Professor Bazerman's proposed testimony goes far beyond his areas of expertise, and beyond the areas of proper expert testimony, Respondents request that this Court grant their motion to limit Professor Bazerman to proper and permissible rebuttal of Professor Mnookin and Mr. O'Shaughnessy.

Respectfully submitted,



John W. Nields, Jr.

Marc G. Schildkraut

Laura S. Shores

Charles A. Loughlin

HOWREY SIMON ARNOLD & WHITE LLP

1299 Pennsylvania Ave., N.W.

Washington, D.C. 20004

(202) 783-0800

Dated: January 16, 2002

Attorneys for Respondent

Schering-Plough Corporation

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 Respondents' Joint Motion for Leave to File and Joint Motion In Support of Respondents' Motion to Limit the Testimony of Professor Bazerman to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

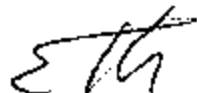
Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

David Pender
Assistant Director, Bureau of Competition
Federal Trade Commission
Room S-3115
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Karen Bokar
Federal Trade Commission
Room 3410
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
Washington, D.C. 20005



Erik T. Koons