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August 14, 2002

### BY HAND

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

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 twelve paper copies of Upsher-Smith's Motion To Strike Complaint Counsel's Demonstrative Exhibits That Are Not In The Record. We are also providing an electronic copy via electronic mail.

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

Sincerely,

  
Christopher M. Curran

### Enclosures

cc: Joseph J. Simons, Esq.  
Karen G. Bokar, Esq.  
Laura S. Shores, Esq.  
David R. Pender, Esq.

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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

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**UPSHER-SMITH’S MOTION TO STRIKE COMPLAINT COUNSEL’S  
DEMONSTRATIVE EXHIBITS THAT ARE NOT IN THE RECORD**

Some four months after the close of the record in this action, Complaint Counsel’s appeal brief contains a “Figure 1” and a “Table 1” presenting brand new economic analyses. Not having been presented at trial, Figure 1 and Table 1 were never sponsored or authenticated by any witness, never admitted into evidence, and never subject to cross-examination or rebuttal. Under Commission Rule 3.44(c), Figure 1 and Table 1 must be disregarded and stricken as outside the record.<sup>1</sup>

**I. Complaint Counsel Have Introduced A New Figure And Table Four Months After The Close Of The Record In This Action And After Ample Notice That The Record Would Close**

After nearly 40 days of trial, over 8600 pages of transcript, and the admission of over 2500 exhibits, on March 28, 2002 Judge Chappell closed the record in this action in accordance

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<sup>1</sup> In filing this motion, Upsher-Smith expressly does not waive its rights under the pending Respondents’ Motion To Dismiss The Appeal.

with Commission Rule 3.44(c). That Rule provides:

Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the discretion to permit or order correction of the record as provided in §3.44(b).

Rule 3.44(c) was added by the Commission in 1996 as one of the regulatory reforms designed to assure that Part III adjudications were procedurally fair and streamlined. In promulgating Rule 3.44(c), the Commission stated: “The Commission believes that little, if any, useful purpose is served by allowing the record to remain open after completion of the trial, and believes that it may contribute to adjudicatory delay.” Federal Trade Commission, Rules of Practice Amendments, 61 Fed. Reg. 50640, 50644 (Sept. 26, 1996).

During the trial here, Complaint Counsel received ample notice of the impending close of the record. Judge Chappell issued repeated warnings to all parties that the record would be closing. On March 18, 2002, Judge Chappell stated:

Rule 3.44(c), C as in Charlie, requires me to close the hearing record immediately upon completion of the evidentiary hearing. What I intend to do, after the last witness, I’ll leave the record open for a few days to allow the parties to let me know if you need to correct something regarding exhibits or the transcript or some out of the blue in camera issue, because once I close it, I intend to leave it closed.

(Tr. 34:8244). Judge Chappell similarly warned the parties on March 21, 2002 that all exhibits were due upon the close of the record, including “*demonstrative exhibits, [and] charts.*” (Tr. 35:8428) (emphasis added). Again, on March 22, 2002, the last day of testimony, Judge Chappell warned the parties that he was “giving everyone a few days to look over the transcript and to look over the exhibits” so that the record could be closed once and for all. (Tr. 36:8614).

Aware the record would close, between March 22 and March 28, the parties worked diligently to review the record and include all exhibits, including demonstrative exhibits. Indeed, at that time the parties negotiated a joint stipulation in which they agreed to the admission of

certain demonstrative exhibits — only those that had been discussed at trial by a witness. *See* JX 7 (“Documents Offered As Demonstratives Only”) (attached hereto as Exhibit 1). Then, on March 28, 2002, Judge Chappell convened a special hearing with the sole purpose of closing the record. After literally calling “last chance” and receiving into the record the parties’ joint stipulation, the exhibits and demonstratives included in the stipulation, and marking for identification Complaint Counsel’s proffers, Judge Chappell finally closed the record. (Tr. 37:8628).

By the time the record closed, Judge Chappell had received more than 2760 exhibits, including approximately 1,006 exhibits from Complaint Counsel. Between that date and the date of the Initial Decision, Complaint Counsel did not move to re-open the record to introduce any new exhibits or demonstratives.

Moreover, as required by Commission Rule 3.46(b), on April 15, 2002 each of the parties had to submit an index listing each exhibit that was offered by the party and received into evidence, as well as transcript pages at which the exhibit was admitted or discussed. Complaint Counsel included in their index all their demonstratives exhibits, such as CX 1582 (Figure 8 in brief), with the notation that the exhibit was admitted for demonstrative purposes only. (Index at 103).

Notwithstanding the close of the record, Complaint Counsel’s appeal brief of August 6, 2002 includes and places substantial reliance upon a number of new demonstrative exhibits — labeled as “figures” or “tables” presumably because most were not “exhibits” at trial — presenting economic analyses that are not part of the record. Specifically, Figure 1 and Table 1 appear for the first time at any point in the litigation in Complaint Counsel’s appeal brief (at

pages 5 and 52 respectively).<sup>2</sup> They were never submitted at trial, never sponsored by any witness, and never subject to cross-examination or rebuttal. For this reason, neither Table 1 nor Figure 1 appears anywhere in Complaint Counsel's Rule 3.46 index of exhibits. Table 1 and Figure 1 are not part of the record in this case — even as demonstrative exhibits — they are untimely, and were neither considered nor admitted into evidence by Judge Chappell. Accordingly, Table 1 and Figure 1 should be stricken from Complaint Counsel's brief and not be further considered by the Commission.

Basic notions of fairness necessitate that administrative agencies exclude new exhibits after the close of the record. *See, e.g., Mademoiselle Knitwear, Inc.*, 297 N.L.R.B. 272, n.1 (1989) (granting motion to strike “[b]ecause the material in Appendix A to the Respondent’s brief was not made part of the record”); *Baker Mine Services, Inc.*, 279 N.L.R.B. 609, 611 n.1 (1986) (granting motion to strike attachments to brief because exhibits were not admitted into evidence as part of the record and “considerations of these documents would deny the parties the opportunity for voir dire and cross-examination and would violate the Board’s Rules and Responsibilities.”); *Admin. v. Jesse Frank Putnam*, 1976 WL 19054, \*4 (N.T.S.B.) (declining to consider additional exhibit because “[t]he record . . . is closed, and respondent was given sufficient opportunity to present all his evidence at the hearing.”); *Bibby v. Dep’t of Transp.*, 33 M.S.P.R. 88, 89-90 (1987) (excluding report furnished after close of record); *Avasino v. U.S. Postal Serv.*, 3 M.S.P.B. 308, 310 (1980) (refusing to consider documentary evidence submitted after close of record).

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<sup>2</sup> Upsher-Smith does not challenge new demonstratives appearing as Figures 2 and 6 only because these are substantially similar (but not identical) to demonstratives used before Judge Chappell.

## II. The New Analyses Incorporated By Figure 1 And Table 1 Lack A Proper Foundation

The new exhibits submitted by Complaint Counsel are not simple summaries or restatements of evidence admitted at trial. Table 1 (Br. at 52) presents a brand new series of *price-differential* calculations. Not a single one of the calculations that appear in Table 1 was presented by Complaint Counsel at trial. In fact, at trial Complaint Counsel never presented any calculations based on average prices. Moreover, while Table 1 cites as its source CX 40 and CX 41, the underlying average price calculations do not appear on the face of CX 40 or CX 41, and those calculations were never moved into evidence by Complaint Counsel. *See* Br. at 52, n.52. Indeed, none of the figures appearing in Table 1 are in the record.

In fact, none of the normal requirements and procedural safeguards for the admission and consideration of demonstrative exhibits have been observed here. With respect to Table 1, no witness at trial — fact or expert — sponsored, authenticated, testified about or defended any of the numbers that Table 1 contains. More specifically:

- At trial, the only industrial organization economics expert called by Complaint Counsel, and its sole expert witness on the issue of relevant product market, Professor Bresnahan, never testified about Table 1, its underlying data (CX 40 and CX 41), or any of Table 1's calculations.
- Professor Bresnahan's expert report, dated August 15, 2001, does not identify the underlying AHP documents that are CX 40 (AHP 0000117-127) or CX 41 (AHP 0000128-140) as among the documents he reviewed or relied upon. *See* Document Log, Aug. 15, 2001 (attached hereto as Exhibit 2).
- In fact, Professor Bresnahan never reviewed or relied upon CX 40 (AHP 0000117-127) or CX 41 (AHP 0000128-140) in preparing his rebuttal report. *See* Document Log Addendum, Bresnahan Rebuttal Report, Nov. 15, 2001 (attached hereto as Exhibit 3).
- At trial, Table 1 was never provided to counsel for respondents prior to Professor Bresnahan's testimony under the 72-hour witness rule in effect during trial. Indeed, Table 1 did not surface at all during trial.

If Table 1 had been put through the crucible of trial, Respondents would have been able to expose and highlight its unreliability. For example, Table 1 artificially limits the number of potassium manufacturers. By artificially limiting the number of manufacturers, Table 1 fails to identify potassium products that did have a price premium over K-Dur 20, such as Micro-K 8 and Micro-K 10.

Like Table 1, Figure 1 (Br. at 5) was not subject to the normal protections or procedures regarding the admission of demonstrative exhibits:

- No fact or expert witness testified about the specific price-to-sales relationship found in Figure 1. Indeed, no witness for Complaint Counsel testified at trial about the underlying exhibits and the analysis that the data combined with the sales data appear to present.
- Specifically, Professor Bresnahan did not rely upon the exhibits that underlie Figure 1.
- Although Figure 1 recites that it is based on CX 81-82, CX 62-65, CX 1480, CX 40 and USX 626, none of these documents are among the documents in Professor Bresnahan's document logs for his initial report or rebuttal report.
- At trial, Professor Bresnahan expressly testified that he did not have access to a pricing data set for Schering's K-Dur 20 for the years 1995-2001. (Tr. 5:834). Thus, he could not have plotted the purported range of K-Dur 20 prices found in Figure 1.
- Professor Bresnahan testified that he did not have a pricing data set for other potassium products. (Tr. 5: 834-35).

Also like Table 1, Figure 1 is unreliable on its face. Even without an opportunity to probe the foundation for the exhibit, its deficiencies are manifest. For example, Figure 1 lacks any indication of whether the prices listed are gross prices, net prices or average prices. One cannot tell whether rebates and discounts — important variables in pharmaceutical pricing — have been factored in computing the prices. Moreover, the purported price ranges inexplicably stop in 2000 and no price ranges are provided for 2001. Finally, the red line in Figure 1

indicating total prescriptions begins to fall months in advance of Upsher-Smith's September 2001 Klor Con M20 launch. No explanation is provided for the fall in prescriptions prior to Upsher-Smith's launch of Klor Con M20. These are just some of the flaws that Respondents would have had an opportunity to bring out on cross-examination or to rebut through Respondents' experts.

In short, Complaint Counsel never presented the analyses contained in Table 1 and Figure 1 through any witness or under any rule of evidence, and Judge Chappell never admitted them into the record. As a result, Table 1 and Figure 1 have never been subject to the searching scrutiny and questioning to which the other analyses presented at trial were subjected, and which constitute the very hallmarks of the adversary system: authentication, cross-examination and rebuttal by other fact and expert witnesses. Basic notions of fundamental fairness — as well as Commission Rule 3.4(c) — necessitate these protections. Complaint Counsel's effort to skirt these protections must be firmly rejected.



CONCLUSION

For the foregoing reasons, the Commission should not consider and should strike Table 1 and Figure 1 contained in Complaint Counsel's appeal brief. Depending on the Commission's disposition of this motion, Upsher-Smith may have to dedicate considerable time and resources to counter Complaint Counsel's Table 1 and Figure 1. Consequently, Upsher-Smith respectfully requests that the Commission act upon this motion as expeditiously as possible before the deadline for Upsher-Smith's answering brief.

August 14, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

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*Attorneys for Upsher-Smith Laboratories, Inc.*

# Exhibit 1

UNITED STATES OF AMERICA  
BEFORE THE 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 )  
\_\_\_\_\_)

**JOINT STIPULATION OF EXHIBITS TO BE OFFERED INTO EVIDENCE**

Respondent Schering-Plough Corporation (“Schering”), Upsher-Smith Laboratories (“Upsher”) and complaint counsel offer the following exhibits to be admitted into evidence:

**Schering Exhibits**

SPX 1331, 1340-1341.

**Upsher Exhibit**

USX 1664.

**Complaint Counsel Exhibits**

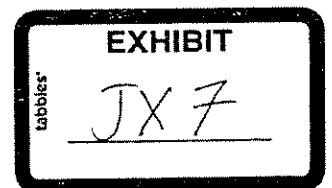
CX 1724-1727.

**Documents Offered As Demonstrative Exhibits Only**

Offered by Schering: SPX 2016-2024, 2026-2032, 2036, 2062, 2065, 2067, 2076, 2081, 2141-2151, 2209, 2232-2236, 2239, 2241-2245, 2247, 2249, 2251, 2264-2267, 2291, 2294-2295, 2338, 2345-2347.

Offered by Upsher: USX 1556-1557, 1590-1598, 1601-1604.

Offered by Complaint Counsel: CX 1568-70, 1572, 1574, 1576-82, 1584-86, 1599, 1604, 1606-07, 1738, 1759-60, 1765-66, SPX 2069.



**Deposition Designations and Counter-Designations**

Complaint Counsel Designations: CX 1495A and 1509A.

Schering Counter-Designations: SPX 1240A.

Upsher Counter-Designations: USX 1520A and 1546A.

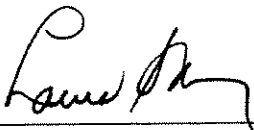
**Investigational Hearing Designations and Counter-Designations**

Further, the investigational hearing transcript excerpt designations and counter-designations identified as CX 1494A, 1492A and 1529A, SPX 1258A and USX 1539A are offered on the condition that they are admitted subject to the Court's prior ruling regarding the admission of other portions of that investigational hearing transcript. (See Pretrial Hearing Transcript at 295-299). Complaint counsel specifically reserve the right to seek a clarification or reconsideration of the Court's ruling regarding the use of investigational hearing transcripts.

**Patent Document**

Finally, SPX 1305 is offered into evidence for the purpose of setting forth the contentions of the parties in the underlying patent litigations, and the evidence relied on therein. Complaint counsel does not waive the objection regarding the relevance of patent documents, and Schering agrees that the Court will subsequently address the relevance of the patent exhibits.

Respectfully submitted,



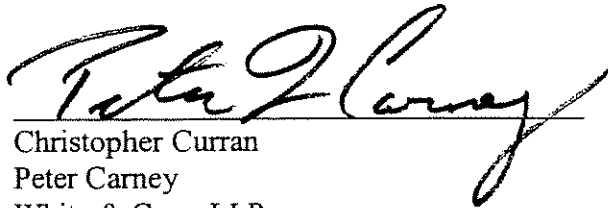
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Counsel Supporting Complaint  
Bureau of Competition  
Federal Trade Commission  
Washington, D.C. 20580



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Peter Carney  
White & Case, LLP  
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Washington, DC 20005  
Counsel for Upsher-Smith Laboratories, Inc.

Date: March 28, 2002

# Exhibit 2

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

SCHERING-PLOUGH CORPORATION,  
a corporation

UPSHER-SMITH LABORATORIES, Inc.  
a corporation; and

AMERICAN HOME PRODUCTS  
CORPORATION,  
a corporation

Docket No. 9297

**EXPERT REPORT OF  
PROFESSOR TIMOTHY BRESNAHAN**

Restricted Confidential .  
Attorney's Eyes Only

**DOCUMENT LOG**  
**PROFESSOR TIMOTHY BRESNAHAN**

Description of Unnumbered Documents	Start Dates	Stop Dates
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	Pharmacia0000002	
	Moreton0000165	Moreton0000166 (including 165A)
	Moreton0000308	
	Moreton0000323	
	Moreton0000327	
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	FTC0016011	FTC0016012
	FTC0016013	FTC0016019
	FTC0016020	FTC0016024
	FTC0016025	FTC0016028
	FTC0016029	FTC0016035
Alaburda investigational hearing transcript and exhibits		
Audibert investigational hearing transcript and exhibits		
Bell investigational hearing transcript and exhibits		
Dey investigational hearing transcript and exhibits		
Driscoll investigational hearing transcript and exhibits		
Hoffman investigational hearing transcript and exhibits		
Kapur investigational hearing transcript and exhibits		
Kralovec investigational hearing transcript and exhibits		
Lauda investigational hearing transcript and exhibits		
O'Neill investigational hearing transcript and exhibits		
Patel investigational hearing transcript and exhibits		
Robbins investigational hearing transcript and exhibits		

Troup investigational hearing transcript and exhibits		
Wasserstein investigational hearing transcript and exhibits		
Dolan deposition transcript and exhibits		
Drisas deposition transcript and exhibits		
Egan deposition transcript and exhibits		
Hirschberg deposition transcript and exhibits		
Answer to complaint from AHP		
Answer to complaint from Uphser		
Answer to complaint from Schering		
Complaint filed against respondents Schering, Upsher, and AHP		
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Complaint Counsel's Response to Schering-Plough's Motion for Partial Dismissal of the Complaint		
Respondent Schering-Plough's Memorandum in Support of its Motion for Partial Dismissal of the Complaint		
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All white papers including appendices submitted by respondents		
Annotated outline of settlement agreement between Schering and Upsher		
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Hatch-Waxman Amendments to the FDA Act 21 USC § 355		
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Moody's, Investment reports 1998		
IMS data on potassium chloride market. Summary chart prepared by BE	ABT000016	ABT000055
Expert Report of Joel S. Hoffman		
Expert Report of Dr. Nelson L. Levy, Ph.D., M.D.		

# Exhibit 3

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

SCHERING-PLOUGH CORPORATION,  
a corporation

UPSHER-SMITH LABORATORIES, Inc.  
a corporation; and

AMERICAN HOME PRODUCTS  
CORPORATION,  
a corporation

Docket No. 9297

**REBUTTAL EXPERT REPORT OF  
PROFESSOR TIMOTHY BRESNAHAN**

**DOCUMENT LOG ADDENDUM  
PROFESSOR TIMOTHY BRESNAHAN**

Description of Unnumbered Documents	Start Bates	Stop Bates
	501DOC000647	
	SP018282	SP018834
	SP020696	SP020702
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	SP058801	SP058810
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	SP058857	
	SP059710	SP059715
	SP059774	SP059776
	SP059783	SP059796
	SP059860	SP059865
	SP059877	SP059884
	SP060155	SP060162
	SP060174	SP060178
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	USL00964	USL01001
	USL06734	USL06735
	USL06745	USL06746
	USL08682	USL08683
	USL13715	USL13718
Expert Report of Sumanth Addanki		
Expert Report of Dean Gilbert S. Banker		
Expert Report of Gerald H. Bjorge, Esq.		
Expert Report of Walter Bratic		
Expert Report of Richard DiCicco		
Expert Report of Zola P. Horovitz		



Expert Report of William O. Kerr	
Expert Report of Robert S. Langer, Jr.	
Expert Report of Kenneth W. McVey	
Expert Report of Charles E. Miller, Esq.	
Expert Report of Robert H. Mnookin	
Expert Report of Janusz A. Ordover	
Expert Report of James P. O'Shaughnessy	
Expert Report of Robert D. Willig	
Deposition Transcript and Exhibits: Robert Coleman	
Deposition Transcript and Exhibits: Martin Driscoll	
Deposition Transcript and Exhibits: Paul Kralovec	
Deposition Transcript and Exhibits: Raman Kapur	
Deposition Transcript and Exhibits: Ian Troup	
Critique of Kerr Calculations, Using Miller's Conservative Date for End of Litigation (October 1998)	

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2002 I caused a paper original and twelve copies as well as an electronic version of the foregoing Upsher-Smith's Motion To Strike Complaint Counsel's Demonstrative Exhibits That Are Not In The Record 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:

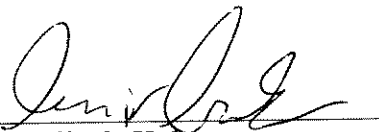
Hon. D. Michael Chappell  
Administrative Law Judge  
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