

The bases of this motion are contained in the accompanying Memorandum in Support of Joint

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)

Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories, Inc.,)
a corporation,)

and)

American Home Products Corporation)

Docket No. 9297

PUBLIC

RESPONDENTS' MEMORANDUM IN SUPPORT

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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anticompetitive. I

1. This article contains several errors. "1. 1. 1." 1. 1. 1.

inability upon becoming a shareholder to exercise the right to elect directors.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

Nor does [] plan to publish his opinion regarding reverse payments, even though no economics papers on the subject have been published. [

] Expert opinion is routinely excluded when — as here — the methods applied have not been adopted and tested by others in the relevant field of expertise. *See Blue Dawn Simmental Corp. v. Am. Simmental Ass'n*, 178

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Measure, while Dworkin indicates that the "general acceptability" of a theory can be

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[* *Id.* at 183-85. Moreover, FTC-retained rebuttal expert [] has only read the “[] Rule” for the first time in the context of this case, ([]), and testified: []

[]. By contrast, [] cites no other sources for the “[] Rule” and does not suggest any other economists that supported his rule in published articles. Thus, because the “[] Rule” has clearly not “been generally accepted in the scientific community,” (Rule 702 Advisory Committee Notes)—indeed it has not

been offered as evidence in this case.

[REDACTED]

[REDACTED]

[REDACTED]

] Rule 702 and *Daubert*,

however, require that [] work out these issues outside the courtroom and obtain peer review before presenting them in this action. See e.g., *Crate*, 2000 U.S. Dist. LEXIS 19240 at

*674

[REDACTED]

[REDACTED]

[REDACTED]

person to undertake such a study. It would not have a preceding part as I

Y. 100-100-11

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

even by firms with market power.⁷ In the bargaining and litigation settlement arena, Richard Posner described twenty-six years ago how risk aversion on the part of a litigant alters the litigation settlement bargaining outcome. A risk-averse litigant may accept a negotiated outcome that is less favorable than the one the litigant *expects* the litigation to produce. As Posner notes: "If one or both parties are risk averse, the range within which settlement will be preferred to litigation will be greater than if they were risk neutral"⁸

In short, Dr. [] report does not adequately support the simplistic assumption that parties in litigation are not risk-averse. []

[REDACTED]

[REDACTED]

[REDACTED]

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] at 27-31) is subdivided

into three divisions: (1) (2) (3)

(4) (5) (6)

[REDACTED]

licensing, offers several bases that allegedly support his opinion that [

] attempts to rely on the

[

] states that, after interviewing [

] Rep. at 27. But [], who lacks the expertise or ability to

evaluate [], really can only assume that

[] opinion is valid. Courts have excluded the testimony of an expert who relies blindly on

the opinion of another expert. See *TK 2 Corp. v. Estate of Roswell*, 602 F.2d 700, 720 (10th

(10/23/03) former to exclude expert testimony of Roswell who based his opinion in part on

] Once again, [] simply lacks any

~~background in industry or medical background to understand the~~

17

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

] See

United States v. Benson, 941 F.2d 598, 604 (7th Cir. 1991) (excluding proffered expert opinion of

Internal Revenue Service agent which consisted of "a list of names of persons who had been

marketing efforts relating to [] or the value that companies are likely to pay for that product in the market when he is completely unfamiliar with marketing and valuation practices within the pharmaceutical industry. *See In re International Rectifier Securities Litig.*, 1997 U.S. Dist. LEXIS 23966, *22 (C.D. Cal. Apr. 2, 1997) (financial expert who lacks first-hand knowledge or background regarding securities law or industry custom and practice pertaining to underwriters' due diligence is not qualified under Rule 702 to render opinion that underwriters' due diligence was inadequate).

3. [] Finally, []

Significantly, no expert witness is permitted to testify on matters that are outside of

[REDACTED]

[REDACTED]

witness testimony, rather than proper expert testimony. "As support for these opinions, Malkiel

...ing must be excluded as it would impermissibly invade the ... of the ... of the ...

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[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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→ 1. 2. 3. 4. 5. 6. 7. 8. 9. 10.

11. 12. 13. 14. 15. 16. 17. 18. 19. 20.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2002, I caused copies of the public version of Respondents' Joint Motion to Exclude Certain Testimony of Timothy F. Bresnahan to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

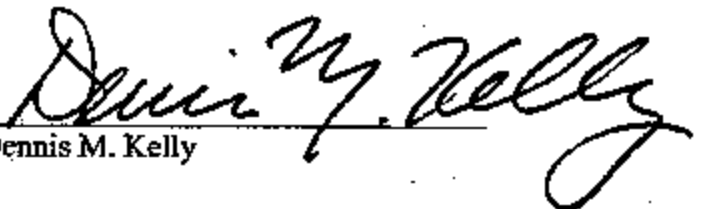
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