

FEDERAL TRADE COMMISSION

SECRETARY

In the Matter of

Upsher's motion is without merit and should be denied because:

- Whether Schering's payments totaled \$60 million and were non-contingent are factual issues in dispute and we are entitled to prove our position; and

The evidence confirms that the payments totaled \$60 million and were non-

ARGUMENT

experts should be precluded from asserting that Schering made "\$60 million in non-contingent payments" because based on "the record in this case" and "as a matter of fact," we are wrong.³

Statement Number is "assuming that the court should not be bound by the testimony of the experts."

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even if Upsher "did not inform Schering" that it had done so.¹² In fact, Schering admits that it continued to pay installments on the \$60 million despite making virtually no sales of the

.....¹⁹ During his testimony, Schering's chairman and chief executive officer, Richard Kogan, made it perfectly clear that the \$60 million in payments were

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Expert Witness Testimony. Each of the five licensing expert witnesses in this case conclude that the payments totaled \$60 million and were non-contingent.²¹ Not even Upsher's own experts deny these obvious facts. One of Upsher's licensing experts testified that the

to make the \$60 million payments non-contingent and that

.....24

Complaint counsel's licensing expert corroborates the testimony of respondents' experts.

Dr. Nelson Levy, based on his two decades of pharmaceutical industry experience, analyzed the

[REDACTED]

a minimum, it shows that there is a material dispute of fact as to these issues, which "cannot be determined on a motion *in limine*."²⁸

III. Upsher's Factual Arguments are Unpersuasive

Upsher throws out various explanations for why the payments did not total \$60 million or were contingent. These explanations are either irrelevant or unpersuasive. First, Upsher disputes what it perceives is our characterization of a single \$60 million payment, on the basis that Schering actually made the payments in three installments. Upsher misses the point. Whether

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[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

I hereby certify that this 22nd day of January, 2002, I caused a copy of the foregoing Public Version of Memorandum in Opposition to Upsher-Smith's Motion to Bar Complaint Counsel from Asserting that Schering-Plough Made "A \$60 Million Non-Contingent Payment" to be served upon the following person by hand delivery:

Honorable D. Michael Chappell

ATTACHMENT A

This document has been redacted.

ATTACHMENT B

UNITED STATES OF AMERICA
BEFORE 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

**RESPONDENT SCHERING-PLOUGH CORPORATION'S
OBJECTIONS AND RESPONSES TO COMPLAINT COUNSEL'S
REVISED SECOND REQUEST FOR ADMISSIONS**

Pursuant to Federal Trade Commission ("FTC") Rule of Practice Section 3.32,
respondent Schering-Plough Corporation ("Schering") submits these objections and

Request No. 70: *Under the Schering/Unsher Agreement, if Unsher abandoned*

Request No. 82: *Since June 1997, Schering has made no sales of Klor CON products pursuant to the license obtained in the Schering/Upsher Agreement.*

Answer: Admitted.

Request No. 83: *Schering had no intention, as of September 2001, to sell the Klor CON products pursuant to the license obtained in the Schering/Upsher Agreement.*

Answer: Schering admits that, by September 2001, it no longer had plans to sell Klor-Con products.

Request No. 84: *Since June 1997, Schering has made no sales of Niacor-SR pursuant to the license obtained in the Schering/Upsher Agreement.*

Answer: Admitted.

Document No. 470: [obscured text]

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Request No. 418: *Schering decided not to enter into a license agreement with Kos for Niaspan in part because of clinical data demonstrating a flushing side effect resulting from taking Niaspan.*

Answer: Denied. Schering never sought to enter into a license agreement with Kos for Niaspan. However, Schering did consider a proposal to enter into a co-marketing/detailing agreement with Kos for Niaspan.

Request No. 420: *Schering decided not to enter into a license agreement with Kos for Niaspan in part because of the size of the potential sales of Niaspan.*

ATTACHMENT C

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ATTACHMENT D

This document has been redacted.

ATTACHMENT E

SECRET

IN THE MATTER OF

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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ATTACHMENT F

In The Matter Of:

*SCHERING-PLOUGH CORP., UPSHER-SMITH
LABORATORIES AND AMERICAN HOME PRODUCTS CORP.*

PATRICIA A. RUSSO

August 21, 2001

*For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
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(301) 870-8025 FAX: (301) 870-8333*

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The conclusions reached in the investigation have been indicated

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ATTACHMENT G

In The Matter Of:

[REDACTED]

[REDACTED]

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APPLIED QUALITY CONTROL

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In The Matter Of:

SCHERING-PLOUGH & UPSHER-SMITH

MATTER NO. D09297

The remaining pages of the transcript have been redacted.

ATTACHMENT I

In The Matter Of:

*SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297.*

RICHARD L. DiGICCO

November 27, 2001

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The remaining pages of the transcript have been redacted.

ATTACHMENT J

In The Matter Of:

SCHEIDING DILOLOU & FISHER SMITH

The remaining pages of the transcript have been redacted.

ATTACHMENT K

In The Matter Of:

*SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297*

*ZOLA P. HOROVITZ
November 14, 2001*

CONFIDENTIAL

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ATTACHMENT I



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The remaining pages of the expert report have been redacted.

ATTACHMENT M

In The Matter Of:

*SCHERING-PLOUGH & UPSHER-SMITH
MATTER NO. 9910256*

*IAN TROUP
May 25, 2000*

*For The Record, Inc.
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