

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
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Schering-Plough Corporation,)
a corporation,)
)

Upsher-Smith Laboratories,)
a corporation,)
)

and)
)

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

Docket No. 9297

**ORDER GRANTING SCHERING-PLOUGH CORPORATION'S
MOTION FOR LEAVE TO SUBMIT ONE ADDITIONAL EXPERT REPORT**

I.

On November 8, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for leave to submit one additional expert report. Schering filed a supplement and correction to this motion on November 13, 2001. On November 20, 2001, Complaint Counsel filed an opposition to Schering's motion. On November 23, 2001, Schering filed a motion for leave to file a reply brief and its reply brief.

Schering's motion to file a reply brief is GRANTED. For the reasons set forth below, Schering's motion for leave to submit an additional expert report is GRANTED.

II.

The Second Revised Scheduling Order, agreed to by the parties, establishes November 6, 2001, as the date for Complaint Counsel to provide certain of its rebuttal expert reports and states:

[a]ny such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal

expert reports or seeking leave to submit rebuttal expert reports on behalf of Respondents).

Schering asserts that the rebuttal expert report of Dr. Pitt submitted by Complaint Counsel is outside the scope of fair rebuttal. Schering argues that Pitt's opinion on the question whether Niacor-SR was likely to be approved by the Federal Food and Drug Administration (FDA) raises issues that were not addressed in Complaint Counsel's original expert reports or in Schering's expert reports. Schering therefore requests leave to submit a report from Dr. Davidson on whether the FDA would have approved a New Drug Application for Niacor-SR in order to rebut the opinion rendered by Dr. Pitt.

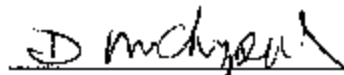
Complaint Counsel responds by asserting that Pitt's opinion on this question is not outside the scope of fair rebuttal. Complaint Counsel points out that two of Schering's experts addressed the issue of whether Niacor-SR would be approved by the FDA. Thus, Complaint Counsel asserts, Schering is not entitled to submit an additional expert report.

Schering replies, asserting that its two experts mentioned FDA approvability issues only in passing. By contrast, Pitt squarely addressed the question whether Niacor-SR was likely to be approved by the FDA. Accordingly, Schering argues that it would be prejudiced if precluded from presenting testimony of an expert specially qualified to refute Pitt's opinion.

III.

Based on a review of the pleadings, when Schering submitted its expert reports to Complaint Counsel, it did not submit an "FDA approval expert" opinion addressing the issue of whether Niacor-SR would be approved by the FDA. The opinion rendered by Dr. Pitt as an "FDA approval expert" is outside the scope of fair rebuttal. Accordingly, Schering may submit the rebuttal expert report of Dr. Davidson. Schering's motion for leave to submit an additional expert report is GRANTED. The parties have until December 10, 2001, to complete the deposition of Dr. Davidson.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: November 28, 2001