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,	)	Docket No. 9297
and	)	
American Home Products Corporation, a corporation.	)	

RESPONDENTS' MOTION FOR LEAVE TO FILE JOINT REPLY IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF TIMOTHY BRESNAHAN

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 Timothy Bresnahan is unqualified to testify whether Schering paid a fair price for the Niacor-SR license and, therefore, that his testimony should be excluded as unreliable.

Respectfully submitted,

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Dated: January 16, 2002

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 Joint Reply in Support of Motion *In Limine* to Exclude Certain Testimony of Timothy Bresnahan and accompanying Reply in Support of Motion *In Limine* to Exclude Certain Testimony of Timothy Bresnahan 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.
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Erik T. Koons

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	)	
	)	

ORDER GRANTING RESPONDENTS' JOINT MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE CERTAIN TESTIMONY OF TIMOTHY BRESNAHAN

IT IS HEREBY ORDERED that Respondents' Motion for Leave to Submit a Joint Reply In Support of Motion *In Limine* To Exclude Certain Testimony of Timothy Bresnahan is hereby GRANTED.

D. Michael Chappell
Administrative Law Judge

Date: _____, 2002

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 **CONFIDENTIAL** **SUBJECT TO PROTECTIVE ORDER**

RESPONDENTS' JOINT REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE CERTAIN TESTIMONY OF TIMOTHY BRESNAHAN

Respondents Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories, Inc. ("Upsher-Smith") respectfully submit this reply brief in support of their motion *in limine* to exclude certain testimony of complaint counsel's expert economist, Timothy Bresnahan.

I. DR. BRESNAHAN IS NOT QUALIFIED TO TESTIFY WHETHER SCHERING PAID A FAIR PRICE FOR THE NIACOR-SR LICENSE

Complaint counsel's opposition to respondents' motion mounts a fervent defense of Dr. Bresnahan's qualifications as an economist. But this defense does not qualify Dr. Bresnahan to render "expert" testimony as to whether Schering's $60 million payment

was a fair price for the licenses for Niacor-SR and the other products, a question that calls for expertise that Dr. Bresnahan simply does not have.[1]

Complaint counsel acknowledges that the "critical question in this case" is whether Schering's payment to Upsher "was a bona fide payment for a license to six drugs (particularly Upsher's niacin product)." Opposition at 3. Dr. Bresnahan's background and experience as an economist simply do not qualify him to assist the Court in answering this question. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993) (specialized expert "'knowledge' connotes more than subjective belief or unsupported speculation").

An expert qualified to assess the value of the Niacor-SR license would possess scientific knowledge, such as the ability to understand and interpret the clinical data from the Niacor-SR clinical trials. Similarly, a qualified expert would be knowledgeable about cholesterol-reducing products and the market for these products. More specifically, a qualified expert would be knowledgeable about the market for sustained release niacin products in Europe, since that is the territory where Schering intended to focus its sales efforts. In addition, an expert qualified to opine on the value of the Schering-Upsher license would be well versed in pharmaceutical licensing, would have experience in valuing pharmaceutical products in large pharmaceutical companies, and would draw

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[1] Complaint counsel correctly points out that respondents' motion in limine does not "attack Professor Bresnahan's conclusion that Schering had market power or that Upsher was a threat to that market power." (Complaint Counsel's Opposition to Respondents' Joint Motion To Exclude Certain Testimony of Timothy F. Bresnahan ("Opposition") at 17). In contrast to the question of the value of Niacor-SR and the other licensed products, the subjects of market power and competitive threats to market power are at least within Dr. Bresnahan's economic expertise and, therefore, may be proper subjects for expert testimony. Of course, respondents' failure to challenge Bresnahan's opinion on these subjects in a motion in limine does not mean that respondents agree with Bresnahan's conclusions on these points.

upon this expertise in evaluting the licensing trasaction between Schering and Upsher. Dr. Bresnahan possesses none of these qualifications.

Complaint counsel asserts that "Professor Bresnahan is eminently qualified to assist the Court in identifying . . . the value each Respondent placed on [Niacor-SR]." Opposition at 11. But Dr. Bresnahan's own testimony tells a different story. Dr. Bresnahan admits that he is not an expert in pharmaceutical licensing.[2] He also concedes that he relied solely on Dr. Levy's clinical assessments of Niacor-SR and Niaspan.[3] Similarly, he does not have any expertise in the marketing of pharmaceuticals in Europe or elsewhere – he concedes that, prior to this case, he had never reviewed any drug company's effort to out-license a pharmaceutical product.[4] In short, Dr. Bresnahan does not possess any of the discrete qualifications that would permit him to testify with any degree of expertise regarding either the manner in which pharmaceutical companies in-license pharmaceuticals or the value of Niacor-SR and the other products in the Schering-Upsher license transaction.

As complaint counsel recognizes, courts have not hesitated to exclude expert testimony that does not apply specialized knowledge, but merely "plug[s] evidentiary holes in [the] plaintiff's case." *See* Opposition at 10 (quoting *In re Aluminum Phosphide*

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[2] Bresnahan Dep. at 92 ("Q. Do you consider your—do you hold yourself out as an expert on pharmaceutical valuation?" A. No, I do not believe that I am an expert in pharmaceutical valuation . . .").

[3] Bresnahan Dep. at 176 ("Q. How did Niaspan compare to Niacor-SR on the primary end point of Niacor's clinical trials, which was reduction of LDL? A. . . . I am not, when I write this, purporting to have an ability to make such comparisons myself. I am relying instead . . . on Dr. Levy's assessment of this").

[4] Bresnahan Dep. at 98-99 ("Q. Have you ever reviewed a drug marketing campaign designed to out-license a pharmaceutical product prior to your review of [Upsher's] effort? A. While I have reviewed other bidding markets, I do not believe I have ever before working on this case reviewed a drug licensing bidding market.").

Antitrust Litig., 897 F. Supp. 1497, 1506 (D. Kan. 1995)). Furthermore, Dr. Bresnahan certainly is not competent to review deposition testimony of the negotiators of the licensing transaction and interpret this testimony for the Court.

For the reasons set forth above and in respondents' opening brief, the Court should likewise exclude Dr. Bresnahan's unsubstantiated opinion that Schering's $60 million payment was "payment for delay" rather than a license payment for the fair market value.

II. DR. BRESNAHAN'S OPINION THAT THE SETTLEMENTS WERE ANTICOMPETITIVE IS UNRELIABLE AND SHOULD BE EXCLUDED

Nothing in Complaint Counsel's response can resurrect the 3-pronged decision rule proposed by Dr. Bresnahan for judging patent settlements "anticompetitive" – the Bresnahan Rule. (See Bresnahan Report at p. 22 "Test Criteria"). No case Complaint Counsel cites permits an economist to testify about test methods that he himself views as novel, untested and needing further empirical work. Bresnahan does not believe that his Rule is currently ready for adoption by the Federal Trade Commission without further empirical work. See, e.g., *Daubert*, 509 U.S. 579, 594 ("'a known technique which has been able to attract only minimal support within the community,' may properly be viewed with skepticism"). Thus, as set forth in respondents' opening brief, his testimony regarding the Bresnahan Rule and its application in this case should be excluded.

Respectfully submitted,

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Dated: January 16, 2002