

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

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

ORDER RE UPSHER-SMITH'S MOTION TO STRIKE DEMONSTRATIVE EXHIBITS
THAT ARE NOT IN THE RECORD AND MOTION FOR LEAVE TO FILE REPLY

This matter is before the Commission on the Motion of Upsher-Smith to Strike Demonstrative Exhibits That are Not in the Record. Upsher-Smith has also filed a Motion for Leave to File Reply Memorandum in Support of its Motion to Strike. The Commission grants the Motion to Strike in part and denies it in part. The Motion for Leave is granted.

Commission rules provide that "Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a). The Commission's review of the Initial Decision is *de novo*. Coca-Cola Bottling Co., 118 F.T.C. 452, 534 (1994).

Upsher-Smith argues in its Motion to Strike that Complaint Counsel's appeal brief contains a "Figure 1" and a "Table 1" which present brand new economic analyses and which

were never admitted into evidence. Upsher-Smith contends that because these exhibits are not part of the record in this case, they must be stricken from Complaint Counsel's appeal brief. Complaint Counsel opposes the Motion to Strike, countering that the two exhibits describe admitted evidence and present no new economic analysis.

It is well-settled law that "trial courts have discretionary authority to permit counsel to employ. . . pedagogical-device 'summaries'¹ to clarify and simplify complex testimony or other information or to assist counsel in the presentation of argument to the court or jury." United States v. Bray, 139 F.3d 1104 at 1111 (6th Cir. 1998). Although the above-captioned matter is before the Commission on appeal from the Administrative Law Judge's Initial Decision, pursuant to Commission rules, the Commission has the same broad discretionary powers as does the initial trier of fact. 16 C.F.R. § 3.54(a).

Figure 1 is a chart that depicts graphically the total number of K-Dur prescriptions written between 1995 and 2001, the price per tablet, and the price range for the tablets at certain periods of time. After careful review of the chart and the trial exhibits cited by Complaint Counsel as supporting it, the Commission finds that Figure 1 is, in essence, a summary of evidence contained in the record compiled by the Administrative Law Judge.² Further, the illustration of this evidence in graphic form may be an effective aid to the presentation and understanding of the evidence adduced in this case. Accordingly, the Commission denies Upsher-Smith's Motion to Strike with respect to Figure 1.

Table 1 is a chart that depicts the results of calculations performed using data purported to be contained in the trial record. The resulting figures are claimed by Complaint Counsel to represent "K-Dur 20's Price Premium Over Generic 8 and 10mEq Products, 1995-1999." Upsher-Smith disputes this conclusion, challenging both the legitimacy of the analysis and the underlying data on which the calculations were based. Complaint Counsel do not dispute that the information contained in the table was derived through a mathematical analysis appearing for the first time in their Appeal Brief; they do contend that the calculations involved were "basic."

After careful consideration of Table 1 and the underlying data, the Commission finds that the chart is not merely a compilation or re-formatting of evidence already in the record in a form

¹A pedagogical-device summary or illustration is described to include "chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify, or simplify testimonial or other evidence that has been admitted in the case, but which are themselves not admitted, instead being used only as an aid to the presentation and understanding of the evidence." U.S. v. Bray at 1112.

² While Figure 1 does involve simple math calculations (e.g., the bottle price divided by the number of tablets in the bottle to arrive at the per tablet price) these calculations are both simple and secondary to the demonstrative value of the exhibit, which summarizes cumbersome data in graphic form.

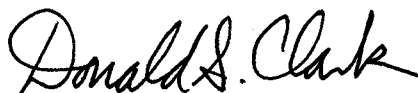
that aids in the presentation or understanding of that evidence. Although the analysis may indeed be basic, the figures presented in Table 1 are new. And while, as Complaint Counsel assert, the Commission may be "more than adequately equipped to determine the accuracy and relevancy of the information in Table 1", ascertaining the validity of Complaint Counsel's analysis and the underlying data is a function that would have been more appropriately undertaken within the bounds of the administrative trial. Accordingly, the Commission grants Upsher-Smith's Motion to Strike with respect to Table 1.

Accordingly,

IT IS ORDERED that Table 1 be, and it hereby is, stricken from Complaint Counsel's Appeal Brief; and

IT IS FURTHER ORDERED that Upsher-Smith's motion to file a reply brief be, and it hereby is, granted.

By the Commission.


Donald S. Clark
Secretary

ISSUED: September 27, 2002