

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
) Docket No. 9297
Upsher-Smith Laboratories, Inc.,)
a corporation,)
)
and) PUBLIC RECORD
)
American Home Products Corporation,)
a corporation.)

**AMERICAN HOME PRODUCTS CORPORATION'S
MOTION FOR *IN CAMERA* TREATMENT OF PORTIONS
OF A CERTAIN STRATEGIC PLANNING DOCUMENT**

Pursuant to Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.45(b), American Home Products Corporation ("AHP") respectfully moves for an order directing *in camera* treatment for portions of a document relating to highly confidential strategic plans. The document, designated as USX 709 (110 DOC 001283-1333) on Upsher-Smith Laboratories' ("Upsher's") list of exhibits, contains commercial information pertaining to customer strategies, strategic planning regarding two drugs, currently marketed as brand drugs, that are not the subject of this proceeding, and profit and loss projections. Public disclosure of portions of this document would result in injury to AHP, without serving any countervailing public purpose. The grounds for this motion are set forth in the attached memorandum and declaration of Ronald Warner.

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Respectfully submitted,



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Dated: January 11, 2002

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BEFORE FEDERAL TRADE COMMISSION**

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Schering-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories,)
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American Home Products Corporation,)
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Docket No. 9297

PUBLIC RECORD

**MEMORANDUM OF LAW IN SUPPORT OF AMERICAN HOME
PRODUCTS CORPORATION'S MOTION FOR *IN CAMERA* TREATMENT
OF PORTIONS OF A CERTAIN STRATEGIC PLANNING DOCUMENT**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), American Home Products Corporation ("AHP") moves for an order directing *in camera* treatment for portions of a document relating to highly confidential strategic plans. This document contains commercial information pertaining to customer strategies, strategic planning regarding two drugs, currently marketed as brand drugs, that are not the subject of this proceeding, and profit and loss projections. Public disclosure of portions of this document would result in injury to AHP, without serving any countervailing public purpose.

I. INFORMATION AT ISSUE

AHP seeks *in camera* treatment for certain portions of exhibit USX 709 on Upsher Smith Laboratories' ("Upsher's") list of exhibits that it may introduce at the hearing of this matter. The document is a strategic options presentation for the year 2000 for the ESI

Lederle Oral Segment (USX 709, 110 DOC 001283-1333). See Exhibit A.¹ AHP seeks *in camera* treatment for the portions of USX 709 designated by the following bates ranges: 110 DOC 1297, 110 DOC 1309-1311, 110 DOC 1326-1329, and 110 DOC 1333. These portions of the document, described in the Declaration of Ronald Warner ("Warner Decl."), see Exhibit B ¶¶ 5-8, reveal details of AHP's customer strategies, assessments of generic impact and strategies regarding two drugs that AHP continues to market as brand drugs, and profit and loss projections regarding a business unit with respect to which AHP currently is exploring strategic options.

II. ARGUMENT

A. Legal Standard for *In Camera* Treatment

Under the Commission's Rules, a party may obtain *in camera* treatment for materials offered into evidence if their public disclosure "will likely result in a clearly defined, serious injury to the . . . corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). To demonstrate "serious injury," the moving party must establish that the documents are both secret and material to the movant's business. See In re Bristol-Myers Co., 90 F.T.C. 455 (1977); In re General Foods Corp., 95 F.T.C. 352 (1980); see also In re Hoechst Marion Roussel, Inc., 2000 F.T.C. LEXIS 138 (2000). The Commission has identified six factors that are relevant to a determination of secrecy and materiality: (1) the extent to which the information is known outside of the company's business; (2) the extent to which the information is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the movant and competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See Bristol-Myers, 90 F.T.C. at 456; Hoechst, 2000 F.T.C. LEXIS

¹ Exhibit A is included in the non-public version only.

138, at *6. "The likely loss of business advantages is a good example of a 'clearly defined, serious injury.'" *Id.* (citing *General Foods*, 95 F.T.C. at 355). See also *In re E.I. DuPont de Nemours & Co.*, 96 F.T.C. 116, 117 (1981) (stating that it is proper to infer, without a specific showing, how a competitor would use the information); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961) (injury may be inferred from the nature of the documents themselves).

B. The Portions of the Document at Issue Qualify for *In Camera* Treatment Because Disclosure of this Highly Confidential Information Would Likely Result in Serious Competitive Injury to AHP

The portions of the document at issue contain sensitive commercial information concerning AHP's customer strategies, AHP's forecasts and strategy related to certain drugs, not implicated in the current proceeding, which AHP continues to produce and market as brand drugs, and profit and loss forecasts for a business unit with respect to which AHP currently is exploring strategic options. Release of such information likely would have serious and adverse competitive impacts on AHP as it will effectively advertise AHP's forward-looking plans regarding its customer strategies, its work product and strategies regarding two drugs that AHP currently markets, and its confidential profit and loss forecasts.

Page 110 DOC 1297 provides sensitive confidential information regarding customer strategies of ESI. Because these customers continue to be customers of divisions of AHP other than ESI, publicly revealing AHP's confidential strategies would likely disadvantage AHP by interfering with ongoing customer relations. See Warner Decl. ¶ 6. Pages 110 DOC 1309-1311 and 110 DOC 1326-1329 reveal AHP's intelligence regarding generic entry, as well as forecasts and long-term strategy regarding two drugs, not the subject of this litigation, that are currently marketed as brand drugs by divisions of AHP other than ESI. Public

disclosure of such sensitive commercial information would provide competitors with insight into AHP's confidential business strategies, thereby disadvantaging AHP's brand drug business. See id. ¶ 7. Page 110 DOC 1333 provides profit and loss projections for ESI Lederle, including ESI Lederle's injectable generic pharmaceutical business. AHP is currently exploring strategic options regarding ESI Lederle's injectable generic pharmaceutical business. If AHP were to sell this business, public disclosure of these profit and loss projections could cause substantial harm to that process and/or to the prospective purchaser of the business. See id. ¶ 8.

The subject portions of USX 709 are both secret and material to AHP's business. First, the contents of the strategic planning document at issue were known only by senior management and by key employees in the marketing department of ESI-Lederle. See id. ¶ 9. This information has not been shared outside of limited employees in the company. See id. ¶ 9. The document has been treated as confidential and has only been produced marked as "Restricted Confidential" and "Attorney's Eyes Only" under the protective order in this case. See id. ¶ 3; Exhibit A. Moreover, competitors and customers would not otherwise be able to acquire this secret information which reflects ESI's/AHP's work product, thought processes, and strategies regarding customers, the effects of generic entry on certain brand drugs, and profit and loss projections. See Warner Decl. ¶ 9. As such, competitors or customers of AHP could not reproduce the confidential information contained in the subject document.

The Commission previously has recognized the need to maintain the confidentiality of strategic planning information similar to that involved here. See, e.g., In re Coca-Cola Co., 1990 F.T.C. LEXIS 364 (Oct. 17, 1990) (granting *in camera* treatment for third party market research and strategy documents, even though the documents were several years

old.); In re Kaiser Aluminum & Chemical Corp., 1977 F.T.C. LEXIS 1, at *5-6 (Dec. 30, 1977) (*in camera* treatment granted for documents that revealed company's future marketing strategy). Similarly, in this case, because the public release of AHP's secret and material strategic information regarding customers, currently marketed products, and profit and loss projections would likely cause the loss of business advantage and serious injury to AHP, see Warner Decl. ¶ 10, *in camera* treatment is warranted.

Finally, *in camera* treatment is particularly appropriate where, as here, the designated information is of marginal, if any, relevance to the issues in this proceeding. See International Assoc. of Conference Interpreters, 1996 F.T.C. LEXIS 298, at *6-7. As the Commission has explained, "[i]f disclosure of confidential business information is likely to cause serious competitive injury, the principle countervailing consideration weighing in favor of disclosure should be the importance of the information in explaining the rationale of our decisions." General Foods Corp., 95 F.T.C. at 355. See also Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984) (threat of competitive injury to be balanced against the "importance of the information in explaining the rationale of [the Commission's] decisions"); Bristol-Myers, 90 F.T.C. at 457 (stating that the judge should consider the strength of the policies favoring public disclosure in the particular factual context—that different treatment for similar information may be warranted "depending upon the importance of the information to an understanding of the Commission's decisionmaking process"). Here, the information for which AHP seeks *in camera* protection—AHP strategies regarding specific customers, two drugs not at issue in this case, and profit and loss projections—appears to be irrelevant to the issues in this case. Therefore, disclosure of AHP's confidential business information would not materially aid public understanding of the resolution of this matter. See International Assoc. of Conference Interpreters, 1996 F.T.C. LEXIS 298, at *7.

C. The Highly Sensitive Nature of the Portions of the Documents at Issue Justifies *In Camera* Treatment for Five Years

AHP seeks *in camera* protection for the above-specified portion of USX 709 for a period of five years. As demonstrated above and in the accompanying declaration of Ronald Warner, this information is highly confidential and currently material to AHP's customer relations, brand drug marketing efforts, and exploration of options regarding a generic pharmaceutical business unit. Similar types of forward-looking strategic planning and marketing documents have been granted *in camera* status for a similar period of time. See, e.g., International Assoc. of Conference Interpreters, 1996 F.T.C. LEXIS 298, at *13 (granting five years' *in camera* treatment for forward-looking business plans); Kaiser Aluminum, 1977 FTC LEXIS 1, at *5-6 (granting *in camera* status for additional three years to documents, several years old, that revealed future marketing strategy).

III. CONCLUSION

For the foregoing reasons and those set forth in the accompanying motion, AHP respectfully requests that the Court order *in camera* treatment for the portions of the strategic planning document discussed herein.

Respectfully submitted,



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Elliot Feinberg
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CORPORATION
Five Giralda Farms
Madison, NJ 07940
973-660-5500

Dated: January 11, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of January 2002, I caused a true and correct original, one paper copy and an electronic copy of the Public Version of American Home Products Corporation's Motion for *In Camera* Treatment of Portions of a Certain Strategic Planning Document and Memorandum in Support of AHP's Motion to be filed with the Secretary of the Commission, and that two paper copies were served by hand delivery upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-104
Washington, D.C. 20580

and that one paper copy was served by hand delivery upon each of the following persons:

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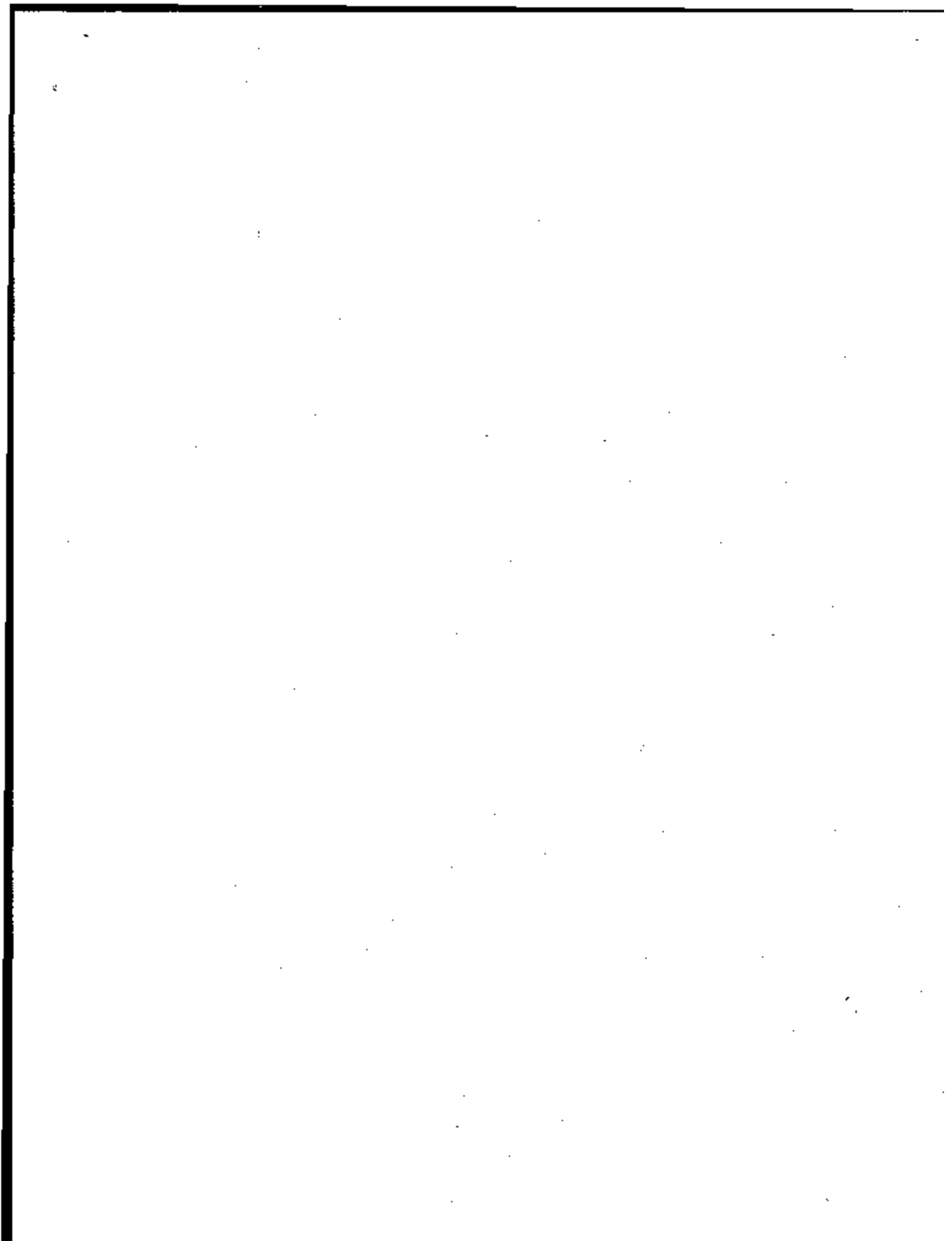


EXHIBIT
REDACTED

UNITED STATES OF AMERICA
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Schering-Plough Corporation,)
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Docket No. 9297

PUBLIC RECORD

DECLARATION OF RONALD WARNER

I, Ronald Warner, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am Vice President and General Manager of ESI-Lederle ("ESI"), a business unit of Wyeth-Ayerst Pharmaceuticals, Inc., a division of American Home Products Corporation ("AHP").

2. I make this declaration in support of AHP's motion for *in camera* treatment of portions of a certain strategic planning document, which has been identified as Upsher-Smith Laboratories exhibit USX 709 (110 DOC 001283-001333).

3. I have reviewed 110 DOC 001283-001333, which has been designated "Restricted Confidential" and "Attorney Eyes Only" pursuant to the protective order entered in the captioned matter.

4. Certain pages of the document at issue contain sensitive commercial information concerning AHP's customer strategies and AHP's forecasts and strategy related to certain drugs, not implicated in the current proceeding, which AHP continues to produce and market as brand drugs. The public disclosure of these portions of USX 709 before five years from now would

likely cause serious competitive injury to AHP and could result in a substantial loss of business advantage.

5. The particular portions of USX 709 for which AHP seeks confidential *in camera* treatment are designated by the following bates number ranges: 110 DOC 1297, 110 DOC 1309-1311, 110 DOC 1326-1329, and 110 DOC 1333.

6. 110 DOC 1297 provides sensitive confidential information regarding customer strategies of ESI. These customers have been and continue to be customers of divisions of AHP other than ESI. Publicly revealing AHP's confidential customer strategies would likely disadvantage AHP by interfering with ongoing customer relations.

7. Pages 110 DOC 1309-1311 and 110 DOC 1326-1329 reveal AHP's intelligence regarding generic entry, as well as forecasts and long-term strategy regarding two drugs, not the subject of this litigation, that are currently marketed as brand drugs by divisions of AHP other than ESI. Public disclosure of this extremely sensitive commercial information would provide competitors with insight into AHP's confidential business strategies, thereby disadvantaging AHP's brand drug business.

8. Page 110 DOC 1333 reveals profit and loss projections for ESI Lederle, including ESI Lederle's injectable generic pharmaceutical business. AHP currently is in the process of exploring strategic options regarding ESI Lederle's injectable generic pharmaceutical business. If AHP were to sell this business, public disclosure of these projections could cause substantial harm to that process and/or to the prospective buyer of the business.

9. The contents of the strategic planning document at issue were known only by senior management and by key employees in the marketing department of ESI-Lederle. The information has not been shared outside of limited employees in the company. Competitors and customers would not otherwise be able to acquire this secret information which reflects AHP's work product, thought processes, and strategies regarding customers and the effects of generic entry on brand drugs.

10. As such, the documents contain secret information whose public release would cause the loss of business advantage and serious injury to AHP.

I declare under penalty of perjury that the foregoing is true and correct.

January 7, 2002

Ronald Warner 1/7/02
Ronald Warner