

UNITED STATES OF AMERICA
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

**ORDER ON KV'S MOTION FOR *IN CAMERA* TREATMENT
OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS**

Pursuant to Commission Rule 3.45(b), non-party KV Pharmaceutical Company ("KV"), on January 31, 2002, filed a motion for *in camera* treatment for documents that Respondent Upsher-Smith Laboratories ("Upsher-Smith") has indicated it may use at the trial in this matter. In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). Requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, *2 (April 25, 1990).

In support of its motion, KV has provided the declaration of the president of KV's largest subsidiary. KV seeks *in camera* treatment for five documents, falling into three categories: development plans and capabilities, forecasts, and product approval and launch information. KV has adequately demonstrated that public disclosure of portions of these documents would result

in injury to KV without serving any countervailing public purpose. KV has not demonstrated that the forecasts for which it seeks *in camera* treatment meet the even stricter standard for indefinite *in camera* treatment. Accordingly, KV's motion is GRANTED IN PART and DENIED IN PART.

In camera treatment for an indefinite period is granted for KV's documents containing formulations of a specific proprietary drug delivery technology. These documents are:

KV-1998-2004;
KV-3916.

In camera treatment for a period of five years, to expire on January 1, 2007, is granted for KV's documents containing sales forecasts, including assumptions regarding shares and prices. These documents are:

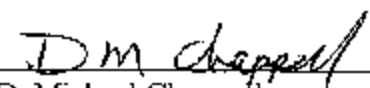
KV-3937-3938;
KV-3941-3942.

In camera treatment for a period of three years, to expire on January 1, 2005, is granted for KV's documents regarding product development and launches. These documents are:

KV-3922;
Declaration of Philip J. Vogt, November 7, 2001.

The parties are ORDERED to inform the Court of the exhibit numbers of the KV documents which have been granted *in camera* treatment by this order.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: February 5, 2002