

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

PUBLIC

UPSHER-SMITH'S REVISED UNOPPOSED MOTION FOR *IN CAMERA*
TREATMENT OF LEGAL DOCUMENTS UNDER SEAL

Upsher-Smith hereby moves for *in camera* treatment of documents identified as SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714, and SPX 774. These are confidential documents from the Key Pharmaceuticals/Upsher-Smith patent litigation, all of which are under seal in that litigation. These documents consist of proprietary and competitively sensitive material relating to Upsher-Smith's formulation of its Klor Con M20 product. On March 14, 2002 Your Honor granted Upsher-Smith's motion for *in camera* treatment for other similarly situated documents held under seal from the aforementioned patent litigation. This revised motion supplants Upsher-Smith's original unopposed motion for *in camera* treatment filed on March 19, 2002.

Both Schering-Plough and Complaint Counsel have indicated that they will not oppose this motion. The facts and authorities in support of this unopposed motion are set forth in the accompanying memorandum and declaration.

Dated: March 20, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

Robert D. Paul

J. Mark Gidley

Christopher M. Curran

Gustav P. Chiarello

601 Thirteenth Street, N.W.

Washington, D.C. 20005-3807

Telephone: (202) 626-3600

Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

**UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF ITS REVISED UNOPPOSED
MOTION FOR *IN CAMERA* TREATMENT OF LEGAL DOCUMENTS UNDER SEAL**

During the investigatory and discovery phases of this proceeding, Upsher-Smith authorized its counsel to turn over to Complaint Counsel documents prepared during the Key/Upsher-Smith patent litigation. Complaint Counsel designated and used certain of these documents during their cross examination of Dr. William Kerr. At that time, Upsher-Smith moved for and Your Honor granted provisional *in camera* treatment of the documents, pending the filing of a motion for *in camera* treatment. These documents have been designated as trial exhibits SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714, and SPX 774. All of these documents are under seal from the patent litigation between Schering and Upsher-Smith. They contain highly sensitive information proprietary to Upsher-Smith, and therefore, Upsher-Smith respectfully requests that this document be given *in camera* treatment.

STANDARD FOR *IN CAMERA* TREATMENT

Under Commission Rule 3.45(b) *in camera* protection should be afforded to documents upon a showing that “public disclosure will likely result in a clearly defined, serious injury to person, partnership or corporation requesting their *in camera* treatment.” 16 C.F.R. § 3.45(b); *see also In re Dura Lube Corp.*, 1999 FIC LEXIS 255 (Dec. 23, 1999) (same). An applicant faces serious injury “when the documents in question are *secret and material* to the applicant’s business . . .” *In the Matter of Bristol-Meyers*, 90 F.T.C. 455, 456 (1977) (articulating 6-factor test for determining secrecy and materiality). Further, “[t]he likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *Hoechst Marion Russell, Inc.*, 2000 F.T.C. LEXIS 138, *6 (2000). Pleadings and other documents created during the litigation between fierce competitors and held under protective seal fit squarely in these criteria.

THESE DOCUMENTS WARRANT *IN CAMERA* TREATMENT

The documents designated as SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714, and SPX 774 are under seal pursuant in the Key Pharmaceuticals/Upsher-Smith litigation, and all the documents received confidential treatment when produced to Complaint Counsel. The trade secrets and legal information contained in these documents have been carefully guarded by Upsher-Smith and this information is not publicly available. Robbins Dec. ¶ 3. Disclosure of Upsher-Smith’s litigation strategy would give competitors an unfair advantage *vis-a-vis* Upsher-Smith. These documents contain confidential trade secrets, legal advice, analysis and strategy for Upsher-Smith regarding addressing the intellectual property of another company. Robbins Dec. ¶3. Should the

documents be used in open court beyond that which they have been already, it is almost inevitable that Upsher-Smith's competitors will become aware of the contents of the document.

Id.

CONCLUSION

For the reasons set forth herein, Upsher-Smith respectfully requests *in camera* treatment for documents designated as SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714, and SPX 774 for an indefinite period of time.

Dated: March 20, 2002

Respectfully submitted,

WHITE & GASE LLP

By: 

Robert D. Paul

J. Mark Gidley

Christopher M. Curran

Gustav P. Chiarello

601 Thirteenth Street, N.W.

Washington, D.C. 20005-3807

Telephone: (202) 626-3600

Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

PUBLIC

**DECLARATION OF MARK S. ROBBINS
IN SUPPORT OF UPSHER-SMITH'S REVISED UNOPPOSED MOTION
FOR *IN CAMERA* TREATMENT OF DOCUMENTS HELD UNDER JUDICIAL SEAL**

MARK S. ROBBINS, declares as follows:

1. I am the Vice President of Scientific and Legal Affairs and inside counsel to Respondent Upsher-Smith Laboratories, Inc.

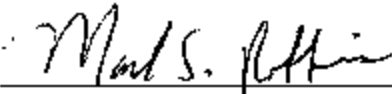
2. Based on my personal knowledge I submit this declaration in support of Upsher-Smith's application for *in camera* treatment of a highly confidential legal pleadings which Schering-Plough has identified SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714 and SPX 774.

3. *In camera* treatment for these documents is imperative. These documents consist of legal pleadings and hearing transcripts from the patent litigation between Key Pharmaceuticals, Inc. and Upsher-Smith Laboratories. All of the documents are non-public, and

contain proprietary and legally sensitive material which has been carefully guarded by Upsher-Smith. Moreover, these documents reference Upsher-Smith's product formulations, which are competitively sensitive trade secrets. Disclosure of these already protected documents would greatly prejudice Upsher-Smith, and give competitors an unfair advantage over Upsher-Smith with the disclosure of this secretive information.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 2002 in Washington, DC.



Mark S. Robbins, Esq.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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 GRANTING UPSHER-SMITH'S REVISED UNOPPOSED MOTION
FOR *IN CAMERA* TREATMENT OF LEGAL DOCUMENTS UNDER SEAL**

Upon consideration of Upsher-Smith's Consent Motion for *In Camera* Treatment of documents designated SPX 681, SPX 682, SPX 683, SPX 684, SPX 685, SPX 686, SPX 687, SPX 688, SPX 689, SPX 690, SPX 691, SPX 692, SPX 693, SPX 694, SPX 695, SPX 696, SPX 710, SPX 713, SPX 714, and SPX 774 it is hereby ORDERED that Upsher-Smith's Motion is GRANTED and that the above listed documents receive *in camera* treatment in this proceeding.

Dated: Washington, D.C.
March ____, 2002

D. Michael Chappel
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2002 I caused a paper original and one copy as well as an electronic version of the foregoing consent motion for *in camera* treatment and supporting papers to be filed with the Secretary of the Commission and two paper copies to be served by hand delivery upon:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

and one paper copy to be served upon the following counsel by hand delivery:

David R. Pender
Assistant Director of Health Care Products Division
Karen G. Bokat
Federal Trade Commission, 3115
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Laura S. Shores
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004



David R. Pender