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.	)	

RESPONDENT SCHERING-PLOUGH CORPORATION'S MOTION FOR *IN CAMERA* TREATMENT OF COMPLAINT COUNSEL'S DESIGNATED EXHIBITS RELATING TO SCHERING'S AGREEMENTS WITH THIRD PARTIES

Respondent Schering-Plough Corporation ("Schering") moves pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), for an order directing *in camera* treatment for highly confidential documents that Complaint Counsel has identified as trial exhibits, which have been identified as CX-690, CX-691, CX-696, CX-698, CX-703, CX-704, CX-753, CX-787 to CX-790, CX-1148 to CX-1164, CX-1168, CX-1170 to CX-1172, CX-1174, CX-1193, CX-1205, CX-1208, CX-1243 to CX-1355, CX-1384, and CX-1392 to CX-1468.

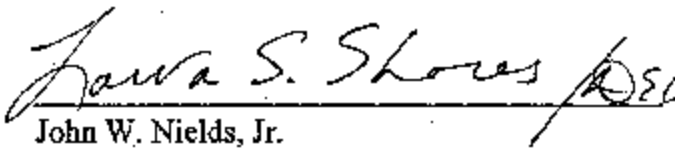
The exhibits designated by Complaint Counsel for which Schering seeks *in camera* treatment are license, research and development, co-promotion, collaboration and distribution agreements between Schering and third parties. These documents contain extremely sensitive commercial, financial, and trade secret information. Specifically, the

documents reveal agreement terms, business data such as pricing, cost and sales forecasts, and proprietary data regarding Schering's ongoing and future design, development, marketing and promotion strategies. This information is extremely valuable to Schering and cannot be duplicated or acquired by any third party.

Public disclosure of the information contained in these documents will improperly reveal not only the precise terms and conditions of Schering's ongoing business collaborations with third parties, but also the full details of Schering's business development practices, including its negotiation tactics, financial and clinical evaluations of a wide range of products and strategic plans. Such disclosures would result in serious and irreparable competitive injury to Schering, without serving any countervailing public purpose. Further, the agreements reflected in these documents contain confidentiality provisions restricting the public release of proprietary information, and each of these agreements remains in effect today. Finally, indefinite *in camera* protection is required to ensure that these highly confidential materials are protected for as long as they would reasonably provide competitive advantage to Schering's competitors .

For the foregoing reasons and those set forth in the accompanying memorandum, Schering respectfully requests that the Court grant the motion for an order directing *in camera* treatment for documents relating to contracts between Schering and third parties.

Respectfully submitted,



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Schering-Plough Corporation

Dated: December 27, 2001

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT SCHERING-PLOUGH CORPORATION'S MOTION FOR *IN CAMERA* TREATMENT OF COMPLAINT COUNSEL'S DESIGNATED EXHIBITS RELATING TO SCHERING'S AGREEMENTS WITH THIRD PARTIES

Respondent Schering-Plough Corporation ("Schering") moves pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), for an order directing *in camera* treatment for highly confidential documents that Complaint Counsel has identified as trial exhibits. These documents reflect the negotiations for and terms of Schering's licensing, security, research and development, co-promotion, collaboration and distribution agreements and contain extremely sensitive commercial and trade secret information. Public disclosure of the information designated by Complaint Counsel will result in serious and irreparable competitive injury to Schering.

As described *infra* and in the accompanying declaration of Jonathan Wasserman (attached as Exhibit A to this memorandum), the exhibits subject to this motion are identical, or similar in all relevant respects, to the confidential agreements that are the subject of Respondent's Motion for *In Camera* Treatment of License Agreements. Thus, arguments

advanced in that motion, supporting memorandum, and declaration of David Poorvin are equally applicable to these trial exhibits designated by Complaint Counsel. Respondent therefore incorporates by reference the arguments advanced in that motion and supporting papers and respectfully requests *in camera* treatment of Complaint Counsel's trial exhibits CX-690-691, 696, 698, 703-704, 753, 787-790, 1148-1164, 1168, 1170-1172, 1174, 1193, 1205, 1208, 1243-1355, 1384, 1392-1468.[1]

Each of these documents discloses some of the most sensitive and confidential material maintained by Schering. For example, Complaint Counsel's exhibits CX-1254, 1335-1348 and 1353 reveal virtually every confidential detail of Schering's license agreement with British Biotech ("British Biotech") Pharmaceuticals Ltd. for Marimastat, an anticancer drug. Included in these documents is the license agreement, profit and loss forecast, cost and earnings impact statements and a Clinical Development Summary that includes a discussion of Schering's clinical and regulatory strategies. Also included amongst these exhibits are detailed confidential assessments by the Schering-Plough Research Institute, which contains sensitive technical and clinical information, and a confidential licensing opportunity document presented to the Schering-Plough Operating Committee with clinical data, marketing information and cost and profit projections to 2012.

Schering also seeks *in camera* treatment for Complaint Counsel's exhibits CX-1251, 1295-1310 and 1352. Not unlike the British Biotech exhibits, these documents provide explicit detail of Schering's license agreement with AtheroGenics, Inc. for butanedioic acid, another cholesterol drug. The AtheroGenics documents include the license agreement, sales forecasts to

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[1] Schering is not unmindful of the quantity of Complaint Counsel's exhibits that are the subject of this motion or of the strict standards that must be met by motions seeking *in camera* treatment. *See. e.g., Hoechst Marion Russel, Inc.*, 2000 F.T.C. LEXIS 157 (2000). Schering has made every effort to limit the number of its own exhibits for which it seeks *in camera* treatment. However, as submitted herein, Complaint Counsel's designated exhibits that are part of this motion are identical in all relevant respects to the Schering exhibits discussed in Schering's motion regarding its own exhibits relating to agreements with third parties. Due to the highly sensitive and confidential nature of each of Complaint Counsel's exhibits referenced herein, and the irreparable competitive harm that will result from their public disclosure, Schering is compelled to seek *in camera* treatment Complaint Counsel's referenced exhibits as well as for its own exhibits relating to third party agreements.

2013, development cost estimates, information regarding the size and structure of licensing fees and milestone payments, extensive clinical data and testing information, market share analyses, research and development data and marketing strategies. These documents, like the others, are a road map to Schering's present and future development, marketing and sales efforts, the revelation of which will seriously impair Schering's ability to compete.

Complaint Counsel's exhibits regarding Schering's agreement with Zonagen for the drug Vasomax similarly exemplify the sensitive and confidential nature of the exhibits referenced in this motion. Complaint Counsel has identified a large number of exhibits relating to Zonagen (CX-1311 through CX-1334). These exhibits reflect Schering's commercial assessments, negotiations, sales, profits and earnings impact statements as well as its clinical, regulatory and marketing strategies – all information that every business seeks to guard from its competitors. Like the foregoing exhibits, these documents have been prepared for Schering's top management, including its Board of Directors and the Schering-Plough Operating Committee.

The balance of Complaint Counsel's exhibits at issue in this motion reveal the same type and degree of confidential details found in the foregoing exhibits – they illustrate for every competitor, in detail, Schering's business methods and its efforts to bring particular pharmaceutical products to market. Even a cursory review of the documents reveals their similarity (*see, e.g.,* CX-1251-1283) and the confidential information within. Though the names of the drugs and business partners change throughout these remaining exhibits, the fundamental justification for *in camera* protection remains the same – each document contains highly sensitive and confidential information, each is material to Schering's business and their public availability will have a serious and injurious effect on Schering's competitiveness.

As set forth in Schering's memorandum of law in support of its Motion For *In Camera* Treatment Of Documents Relating To License Agreements With Third Parties, Commission precedent establishes that *in camera* treatment is warranted for documents such as these exhibits, which reveal proprietary information relating to Schering's current and future business development efforts and ongoing business affiliations with third parties. *See* Memorandum of

Law in Support of Schering's Motion For *In Camera* Treatment Of Documents Relating To License Agreements With Third Parties at 6-10. Furthermore, indefinite *in camera* protection is justified in light of the facts that many of these agreements may remain in effect indefinitely, and the documents at issue reveal detailed information concerning Schering's general business and licensing strategies and methods. *Id.* at 10-11. This information would be extremely valuable to competitors even after the expiration of the subject agreements. In sum, the competitive harm that would result to Schering if these documents were publically disclosed would be substantial, pervasive and irreparable.

CONCLUSION

For the foregoing reasons and as set forth in Schering's Motion For *In Camera* Treatment Of Documents Relating To License Agreements With Third Parties, Schering respectfully requests that the Court grant the motion directing *in camera* treatment for the designated Complaint Counsel exhibits referenced herein.

Respectfully submitted,

Laura S. Shores /DEB

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Attorneys for Respondent
Schering-Plough Corporation

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DECLARATION OF JONATHAN WASSERMAN IN SUPPORT OF SCHERING-PLOUGH CORPORATION'S MOTION FOR IN CAMERA TREATMENT OF COMPLAINT COUNSEL'S EXHIBITS RELATING TO SCHERING LICENSE AGREEMENTS WITH THIRD PARTIES

I, Jonathan Wasserman, do solemnly and sincerely declare as follows:

1. I am over the age of eighteen and competent to give testimony. The information set forth below is based on my own personal knowledge, information, and/or belief.

2. I am the Senior Antitrust Counsel for Schering-Plough Corporation ("Schering").

3. I make this declaration in Support of Schering's Motion for *In Camera* Treatment of Complaint Counsel's Trial Exhibits Relating to Schering Agreements with Third Parties, which have been identified as CX-690-691, 696, 698, 703-704, 753, 787-790, 1148-1164, 1168, 1170-1172, 1174, 1193, 1205, 1208, 1243-1355, 1384, and 1392-1468.

4. Each of these documents contain confidentiality provisions within them, have been designated "Confidential" internally within Schering and/or have been marked "Confidential" or "Restricted Confidential" pursuant to the protective order. No objection has ever been made by any party to Schering's designation of these documents as "Confidential" or "Restricted Confidential."

5. The documents that are the subject of this motion and declaration are identical, and/or substantially similar in all relevant respects, to the confidential documents that are the subject of Schering's Motion for *In Camera* Treatment of Documents Relating to Schering License Agreements with Third Parties. The declaration of Dr. Poorvin regarding the necessity for *in camera* protection of license agreements and related documents appearing on Schering's exhibit list apply with equal force and effect to the confidential documents identified by Complaint Counsel as trial exhibits.

6. Each of the documents at issue contain extremely sensitive commercial and trade secret information concerning Schering's ongoing business efforts to design, research, develop, manufacture, sell, price, distribute, market and promote pharmaceutical products. The public disclosure of these documents will cause serious and irreparable injury to Schering and result in a substantial loss of business advantage.

7. For example, Complaint Counsel's exhibits CX-1254, 1335-1348 and 1353 reveal confidential details of Schering's license agreement with British Biotech Pharmaceuticals Ltd. ("British Biotech") for Marimastat, an anticancer drug. Included in these documents are the license agreement, profit and loss forecast, cost and earnings impact statements and a Clinical Development Summary that discusses Schering's clinical and regulatory strategies. Also included amongst these exhibits are detailed confidential assessments by the Schering-Plough Research Institute, which contains sensitive technical and clinical information, and a confidential licensing opportunity document presented to the Schering-Plough Operating Committee with clinical data, marketing information and cost and profit projections to 2012.

8. Schering also seeks *in camera* treatment exhibits CX-1251, 1295-1310 and 1352. Not unlike the British Biotech exhibits, these documents provide explicit detail of Schering's license agreement with AtheroGenics, Inc. for another cholesterol drug. Like the foregoing documents, these exhibits include the license agreement, sales forecasts, development cost estimates, information regarding the size and structure of licensing fees and milestone payments, marketing strategies and other highly confidential information.

9. Complaint Counsel has also identified 23 exhibits regarding Schering's agreement with Zanogen (CX-1311 through CX-1334). These documents contain, in full detail, Schering's commercial assessments, negotiations, sales, profits and earnings impact statements and other confidential material. Like the other exhibits, these documents were prepared for Schering's top management, including its Board of Directors and the Schering-Plough Operating Committee.

10. The balance of Complaint Counsel's exhibits for which Schering seeks *in camera* protection (see ¶ 3 supra) reveal the same type of confidential information of Schering's business relationships with third parties as that found in the foregoing exhibits. They provide details for every competitor regarding Schering's business and financial methods, negotiating strategies and ongoing efforts to bring pharmaceutical products to market. Even a cursory review of the documents reveals their similarities and the necessity for each to receive *in camera* protection. Each document is material to Schering's business and their public availability will have a serious and injurious effect on Schering's competitiveness.

11. The information within these documents is known only to the contracting parties and, within Schering, is known only by top management, the Board of Directors and Schering's Operating Committee. Pursuant to the confidentiality provisions of each agreement, Schering maintains strict controls to prevent both internal and external dissemination of confidential information. Furthermore, the agreements reflect Schering's great effort and expense to negotiate the subject agreements and research, develop, manufacture and sell pharmaceutical products. The information is extremely valuable both to Schering and competitors and could not be reproduced by any other means.

12. As such, the documents contain secret information that is material to Schering business, competitiveness and profitability. Release of this information will cause the loss of business advantage and serious and irreparable injury to Schering.

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

Dated: December 27, 2001

Jonathan Wasserman

CERTIFICATE OF SERVICE

I hereby certify that this 27th day of December, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondent Schering-Plough Corporation's Motion for *In Camera* Treatment of Confidential Agreements Designated as Trial Exhibits by Complaint Counsel, supporting Memorandum and Declaration 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:

Karen Bokat
Bureau of Competition
Federal Trade Commission
Washington, D.C.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
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