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 VERSION

UPSHER-SMITH'S OPPOSITION
TO COMPLAINT COUNSEL'S MOTION
***IN LIMINE* TO LIMIT "CUMULATIVE" EXPERT TESTIMONY**

Complaint Counsel's motion exposes a fundamental weakness in their case. They had great difficulty identifying experts who were willing to support the novel theories underlying the Complaint. Thus they were forced to engage plainly unqualified "experts," such as Nelson Levy, or qualified experts, such as Timothy Bresnahan, who were willing to create new and untested rules and theories for this proceeding or who were willing to venture opinions far beyond the areas of their expertise. The Respondents, on the other hand, had no trouble identifying a stable of qualified experts to ***undermine*** the Complaint's theories, based upon established principles within the expertise of each respective expert. Even Complaint Counsel does not dispute that the overwhelming majority of Respondents' experts are qualified and provide opinions sufficiently reliable to withstand *Daubert* scrutiny. Complaint Counsel simply contend that Respondents have too many experts. As explained below, however, Upsher-Smith has voluntarily reduced the

number of its experts as this proceeding has progressed, and none of its remaining experts is cumulative.

Upsher-Smith initially designated three licensing experts, four medical experts, two economic experts and one FDA/Hatch-Waxman expert. Upon Complaint Counsel's importuning, Upsher-Smith agreed to relinquish two of the licensing experts and two of the medical experts. Upsher-Smith's remaining experts testify as to discrete subject areas with, at the very most, only incidental overlap. Any legitimate concerns about cumulative testimony can be dealt with most appropriately at trial.

Notably, one of the experts Upsher-Smith has already relinquished, licensing expert Richard DiCicco, is a subject of Complaint Counsel's present motion. Thus, as to Upsher-Smith's licensing experts, Complaint Counsel's motion was partially moot even before it was filed. Mr. Walter Bratic will be Upsher-Smith's sole licensing expert at trial.

As to Upsher-Smith's economists, Dr. William O. Kerr and Dr. Janusz Ordover, Complaint Counsel's motion should be denied because the superficial comparison therein ignores key differences in their areas of testimony and their approaches regarding various economic and valuation issues. In contrast to Dr. Ordover's Dr. Kerr's, rebuts different aspects of the overbroad opinion submitted by Timothy Bresnahan, Complaint Counsel's economist.

Likewise, the motion must be denied as to Upsher-Smith's medical experts, Dr. Robert H. Knopp and Dr. Joseph M. Keenan. Although their testimony, when taken together, refutes Dr. Levy's analysis of Niacor-SR, each physician addresses the medical value and market for

Niacor-SR in different patient populations (severe vs. mild dyslipidemia) and distinct geographic markets (United States vs. overseas).

ARGUMENT

As detailed below, Complaint Counsel bear the burden of establishing that any purported "cumulative" evidence substantially outweighs the probative value of the evidence. Complaint Counsel cannot meet that high burden here. Consistent with *Daubert* and *Kumho*, Upsher-Smith's remaining experts will testify as to discrete subject areas and will greatly assist the Court in sorting through complex issues of pharmaceutical licensing, economics and medicine.[1]

Even before addressing Complaint Counsel's failure to meet its burden, it must be stated that the motion is fundamentally flawed to the extent it ignores that each Respondent is a separate party in this adjudicative proceeding.[2] As required by Commission Rule 3.41(c), each party must be allowed to put on the evidence and experts necessary to support its case and affirmative defenses: "***Every party . . . shall have the right*** of due notice, cross-examination, ***presentation of evidence***, objection, motion, argument and all other rights ***essential to a fair***

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[1] Upsher-Smith's presentation of expert testimony through several experts with specific and discrete areas of expertise, rather than through all-purpose experts such as Drs. Levy or Bresnahan, is the proper approach. "[T]here are many different kinds of experts, and many different kinds of expertise." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). "The fact that a proposed witness is an expert in one area does not *ipso facto* qualify him to testify as an expert in all related areas." *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 391 (D. Md. 2001). "The days of the all-purpose expert may be coming to an end." R. Badal, E. Slizewski, *Preparing for Daubert Challenges in Antitrust Cases*, Economic Committee Newsletter, Vol 1:1 at 9 (ABA Antitrust Section 2001).

[2] *See, e.g.*, Memo. at 2 (totaling experts: "nineteen experts," "Six expert witnesses to explain why the Court should believe Schering's $60 million payment was a fair market price for the licenses held by Upsher," "four 'licensing' experts who will provide their valuation of Niacor-SR," "four 'economic' experts to analyze the economic aspects of the settlement"); *id.* at 3 ("sixteen overlapping experts").

hearing." Rule 3.41(c) (emphasis added). Due Process requires nothing less. Upsher-Smith is a separate party from Schering. Upsher-Smith has no control over which fact or expert witnesses Schering actually calls at trial, and accordingly Upsher-Smith has had to designate its own experts. With regard to Upsher-Smith, the only question is whether its two economists or its two medical experts are "cumulative." The answer is a resounding no.

A. Complaint Counsel's Motion Fails to Articulate The Relevant Standard And Is Contrary To Precedents Favoring Admission Of Probative Evidence

Commission Rule 3.43(b) provides that the Court "may exclude" otherwise relevant evidence if its "probative value is ***substantially outweighed*** by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Commission Rule 3.43(b) (emphasis added). This rule was amended in 1996 to track the language of Rule 403 of the Federal Rules of Evidence, which applies the same standard with regard to cumulative evidence.[3] *See* Fed. R. Evid. 403; WEINSTEIN'S FEDERAL EVIDENCE § 403.06[1] (2nd Ed. 2001) ("[R]elevant evidence may be excluded if its probative value ***is substantially outweighed*** by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Complaint Counsel, through artful quotation of Rule 3.43(b), omit any mention of this "substantially outweighed" standard. Mem. at 3-4.

Under both rules the movant challenging purportedly cumulative evidence has the burden to demonstrate that the potential ***unfair*** prejudice ***substantially*** outweighs the probative value of the evidence.[4] Tellingly, the cases cited by Complaint Counsel articulate this same standard.[5]

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[3] 1996 FTC Rules of Practice Amendments, 61 Fed. Reg. 50,644 (1996).

[4] *See, e.g., Pacific Employers Ins. Co. v. P.B. Hoidale Co., Inc.*, 782 F. Supp. 564, (D. Kan. 1992) (denying in part motion *in limine* to exclude as cumulative testimony of five experts on competency of attorney's representation because movant failed to articulate why evidence was (continued...)

Moreover, exclusion of purportedly cumulative evidence is disfavored where the challenged evidence does not concern an ancillary matter, but rather is crucial or central to a party's case: "Rule 403 does not mean that a court may exclude evidence that will cause delay regardless of its probative value. If the evidence is crucial, the judge would abuse his discretion in excluding it." *Johnson v. United States*, 780 F.2d 902, 904 (11th Cir. 1986) (*quoting* WEINSTEIN § 403[06]).[6] Here Complaint Counsel does not address this balancing standard, let alone meet it.

The only ***potential*** prejudice alleged here is that the record may include "duplicative testimony" or that trial might be delayed or protracted. Mem. at 5. Given the Court's ability to decide at trial what is duplicative, such potential prejudice is not sufficient to exclude — before a trial even begins — testimony relevant to the core of a party's defense.

(...continued)

cumulative or "what 'possible prejudice' may result from this probative evidence"); *Doe v. Tag*, 1993 WL 484212 (N.D. Ill. Nov. 8, 1993) (denying motion to exclude expert testimony as cumulative because "Rule 403 permits the court to exclude relevant evidence only if its probative value is 'substantially outweighed by the risk of unfair prejudice.'").

[5] *See, e.g., In re Taxable Municipal Bond Securities Litigation*, 1994 WL 594270, *2 (E.D. La. Oct. 28, 1994) (noting that unfairly prejudicial evidence may be excluded if "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1558 n.10, 1558-59 (N.D. Ill. 1983) ("Rule 403 mandates a major showing of prejudice ('substantially outweighs') to overcome low threshold of admissibility represented by Rule 401").

[6] The 1996 Amendments to Rule 3.43(b) confirm that, as with Federal Rule of Evidence 403, the importance and probative value of the challenged evidence must be considered by the Court — "the ALJ is empowered to exclude ***unduly*** repetitious, cumulative, ***and marginally relevant materials*** that ***merely burden*** the record and delay the trial." 61 Fed. Reg. 50,644. (emphasis added).

B. Testimony By Numerous Experts On Related Or Overlapping Topics Is Commonplace And Not Cumulative In Complex Cases

Contrary to Complaint Counsels' assertions, in complex litigation it is common for a party to rely on numerous experts who offer overlapping or complementary testimony relating to the same overarching issue — especially where that issue is at the crux of the case.[7] *See, e.g. Doe v. Tag, Inc.*, 1993 WL 484212, *1 (Nov. 18, 1993, N.D. Ill) (denying motion to exclude because "although the two experts may present some identical testimony, it would be to the jury's benefit to hear both doctors testify, particularly because their 1989 report is of central concern in the case"); *Industrial Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (expert testimony not cumulative where, one expert to testify regarding the design and manufacture of a device while the other expert to testify about its operation; holding these to be "different aspects," "different areas" and "separate issues"); *see also Johnson*, 780 F.2d at 906 (abuse of discretion in bench trial not to allow a second expert to testify that treatment of patient met the standard of care). Thus, the law is clear — experts who use different methodologies, rely on different evidence or approaches, or reach similar conclusions generally do not present the type of cumulative evidence that Federal Rule 403 guards against.[8]

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[7] Not one of the cases cited by Complaint Counsel involves an antitrust case, let alone a complex antitrust case such as this one, involving not only FDA regulatory issues but the settlement of not one, but two separate pharmaceutical patent disputes. Mem. at 4-6. Instead, Complaint Counsel rely principally on cases involving civil rights (*Davis, Elwood*), torts (*Wetherill*), personal injury (*Leefe*) and contracts (*Upsher-Smith Labs., Inc.*).

[8] The cases Complaint Counsel cite regarding this point are inapposite. In *Weatherill*, 565 F. Supp. at 1565-66, the Court declined to exclude any of the three overlapping expert witnesses whom plaintiffs sought to exclude as cumulative; rather it allowed all three to testify consistent with the descriptions of their testimony set forth in defendant's opposition to the motion *in limine*. In the unpublished *Taxable Municipal Bond Sec. Litig.* case the court never addressed plaintiff's argument regarding different backgrounds. Instead, after reviewing the reports and (continued...)

As Complaint Counsel is forced to acknowledge (Mem. at 6 n.13), Commission precedents confirm that a respondent's experts will not lightly be limited on grounds that they are cumulative. In *In re Natural Organics*, 2001 WL 1478370 *1 (F.T.C. April 5, 2001), the two related respondents (a corporation and its officer) designated 14 experts, 12 of them as "scientific experts." Nonetheless, Judge Timony denied Complaint Counsel's motion to limit expert witnesses. Judge Timony held that the case was complex, the expert testimony appeared to be relevant and to have probative value, and Complaint Counsel could not meet their burden under Rule 3.43(b). *Id.*; *see also In re R.J. Reynolds Tobacco Company*, 1998 FTC LEXIS 182 (Oct. 16, 1998) (Judge Timony denying Complaint Counsel motion to limit experts). In light of these precedents it is surprising that Complaint Counsel place such emphasis on the number of experts Respondents here intend to call.

C. Upsher-Smith's Expert Witnesses Are Not Cumulative — Each Provides Distinct Testimony Necessary To Upsher-Smith's Defense

Through their motion, Complaint Counsel seek to require Upsher-Smith to strike (i) Mr. DiCicco or Mr. Bratic, (ii) Drs. William Kerr or Janusz Ordover and (iii) Drs. Joseph Keenan or Robert Knopp. Mem. at 8-9, 9-10, 21-22; Proposed Order. Upsher-Smith has already agreed not to call Mr. DiCicco at trial. The remaining experts are not cumulative.

(...continued)

finding only one point on which the second expert differed, the Court limited that expert's testimony to that single point. 1994 WL 594270 at *3.

1. The Motion Is Moot As To Richard DiCicco Because Walter Bratic Is Upsher-Smith's Sole Testifying Licensing Expert

Complaint Counsel's motion with regard to Richard DiCicco and Robert Bratic was moot before it was even filed. Upsher-Smith has already indicated that it does not intend to call Mr. DiCicco at trial. *See* Upsher-Smith's Final Witness List of Dec. 14, 2001.[9]

This oversight by Complaint Counsel underscores the fashion in which they gloss over Upsher-Smith's efforts to pare down its list of experts to the current handful. Upsher-Smith initially identified ten expert witnesses it expected to call at trial. Upsher-Smith's Expert Witness List of Aug. 31, 2001. That list included three licensing experts, Walter Bratic, Richard DiCicco and Beat Leber. Upsher-Smith voluntarily cut those three to a single licensing expert — Mr. Bratic. Further, the initial list included four physicians, Donald Hunnighake, Joseph Keenan, Robert Knopp and Richard Pasternak. Upsher-Smith voluntarily cut that list in half to just two — Drs. Knopp and Keenan, whose testimony is complementary, as described below.

Oddly, Complaint Counsel seem to suggest that their reliance upon only three case-in-chief experts somehow should constrain Upsher-Smith and Schering to a similarly small number of experts. But one party's unwillingness — or inability — to identify competent experts to support its case cannot limit an adverse party. There is no authority to support Complaint Counsel's suggestion, and such a rule would unfairly hamstring the adverse party's right to present evidence. Nor can Complaint Counsel prevent Upsher-Smith and Schering from

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[9] "As to expert witnesses, Upsher-Smith hereby confirms that it intends to call the following previously disclosed experts: Walter Bratic, Dr. Joseph Keenan, William O. Kerr, Dr. Robert H. Knopp, Janusz A. Ordover and Robert W. Pollock." Upsher-Smith's Final Witness List at 1-2.

presenting their own experts. Upsher-Smith and Schering did not choose to be sued in the same proceeding.

2. Dr. Ordover's Expert Testimony Regarding The Informational And Business Concerns Of Settlement Is Not Cumulative Of Dr. Kerr's Testimony On The Economic Theory Underlying The Negotiation And Valuation Of Patent Settlements

Complaint Counsel make no serious effort to compare in detail the precise topics that Upsher-Smith's economic experts, Drs. Kerr and Ordover will address. Instead, Complaint Counsel merely present pithy snippets or paraphrases from the two expert's reports. These snippets are not probative. In fact these two experts address very different economic aspects of this case.

Dr. William O. Kerr: Dr. Kerr is an economist who specializes in the economics and valuation of patent licensing, patent litigation, and related intellectual property issues. Dr. Kerr has lectured widely on the subjects of both the likely outcomes and the economics of patent litigation. His specialty, under *Daubert*, permits Dr. Kerr to answer quantitatively many of the hard questions this case poses that are simply not addressed by Dr. Bresnahan. Specifically, unlike Dr. Ordover, Dr. Kerr uses his extensive database of patent licenses and litigation outcomes to analyze *inter alia* the following issues, which must be considered in evaluating the pro-competitive timing and nature of the settlement and the value of the licensed products:

- Dr. Kerr analyzes

- Dr. Kerr also

[10]

- Dr. Kerr also

- Dr. Kerr employs his economic valuation work to take head-on the expectations and outcome of the model posed by Dr. Bresnahan.
  Dr. Kerr's work makes him singularly skilled to opine and present data on the reasonableness of the entry date actually agreed to by the parties in the June 17, 1997 Agreement, an analysis not conducted by Dr. Bresnahan.

- Dr. Kerr also

Dr. Janusz Ordover: Dr. Ordover is the former chief economist of the U.S. Department of Justice's Antitrust Division. Dr. Ordover's analysis differs dramatically in approach and method from Dr. Kerr's. Dr. Ordover uses his background in industrial organization, antitrust

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[10] Over a ten year horizon, the remaining products licensed to Schering in the June 17, 1997 Agreement, other than Niacor-SR,

enforcement, and his background in the economics of bargaining and litigation settlements to discuss the

Dr. Ordover takes on Dr. Bresnahan's simplistic assumption that

For example, contrary to Dr. Bresnahan's assumptions,

See Ordover Rep. ¶¶

For this reason, Dr. Ordover

Upsher-Smith has not retained a separate bargaining expert, so Dr. Ordover's opinion based on his own work in the area of litigation settlements is very important to rebut this portion of the economic model of Complaint Counsel's expert.

Further, at the core of Complaint Counsel's case is

.[11] Using his background in industrial organization, Dr. Ordover challenges this . Contrary to this , Dr. Ordover

. *See, e.g.*, Ordover Rep. ¶¶ (

). Dr. Ordover carefully

11

. *See* Ordover Rep. at ¶¶

. Specifically, Dr. Ordover's report discusses

(Ordover Rep. ¶¶),

Dr. Ordover's report and testimony focus

(Ordover Rep. at ¶)

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In sum, Dr. Kerr draws from his many years of patent litigation and licensing expertise and

In contrast, Dr. Ordover, an industrial organization economist, provides Upsher-Smith's

Both experts go to the heart of Upsher-Smith's defense and tackle the leading issues addressed by Complaint Counsel's untested legal challenge, using their different approaches and methods.

3. Upsher-Smith's Medical Experts Present Distinct Testimony Regarding Different Patient and Geographic Markets Which Disproves Any Suggestion That Niacor-SR Was Medically Worthless As Of June 1997

Complaint Counsel have claimed that Niacor-SR, Upsher-Smith's prescription niacin product, was a worthless product and that Schering's payment to Upsher-Smith for the Niacor-SR license was a mere sham — this despite the sworn testimony of every participant in the transaction, despite extensive record evidence that

, and despite compelling evidence that at the time of the licensing agreement, analysts were expecting a similar extended release niacin product (manufactured by Kos) to gross hundreds of millions of dollars in sales annually. To counter Complaint Counsel's untenable position that Niacor-SR was worthless, Upsher-Smith has designated two leading medical experts, Drs. Robert H. Knopp[12] and Joseph M. Keenan,[13] to testify about niacin generally, and to opine about Niacor-SR's medical safety and efficacy.

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[12] Dr. Knopp — one of the world's leading lipidologists — is Professor of Medicine at the University of Washington, Chief of Harborview Medical Center's Division of Metabolism, Endocrinology and Nutrition, and most notably, Director of the renowned Northwest Lipid Research Clinic at the University of Washington. For over 30 years now, Dr. Knopp has conducted cutting-edge research in the field of lipidology and has been extensively published in the most prestigious medical journals, including the *New England Journal of Medicine* and the *Journal of the American Medical Association*.

[13] Dr. Keenan is one of the leading family practice specialists in the country. He is currently serving as Interim Departmental Head of the Department of Family Practice and Community Health at the University of Minnesota Medical School — one of the largest and oldest family practice departments in the nation. He has been affiliated with the Department since 1973. Dr. Keenan has been published extensively in leading medical journals including the *Journal of the American Medical Association*, the *Archives of Internal Medicine*, and the *Journal* (continued...)

Both of these leading medical experts were involved in the clinical trials relating to Niacor-SR and can testify about their differing experience using Niacor-SR. While Complaint Counsel are correct that both of these leading experts share certain conclusions — (1) that niacin is an extremely useful product to combat dyslipidemia and (2) that Niacor-SR seemed to be especially successful in clinical trials — each of these experts has approached his evaluation from a very different perspective and reached different underlying conclusions regarding niacin treatment generally. Further, while Dr. Knopp's testimony will relate primarily to the medical use of niacin in the United States, Dr. Keenan has particular experience regarding the use, price and market for niacin outside the United States — including, numerous countries included in Upsher-Smith's license to Schering. Their testimony is complementary and each will differently assist the Court determine the true value of Niacor-SR.

Drs. Knopp and Keenan each treats very different patient populations and each will present distinct testimony regarding the therapeutic value of extended-release niacin. Dr. Knopp, for example, treats mainly patients with ***severe lipid and coronary disorders***. As Dr. Knopp explained at his deposition, the substantial majority of his patients have "extreme levels of lipid elevation, unexplained heart disease with normal cholesterol levels, you know, or concurrent illnesses that are too complicated to deal with." Knopp Dep. at 95. In fact, Dr. Knopp and his Clinic do not ordinarily treat patients with moderate lipid abnormalities: "[Fifteen] years ago we were referred patients with simple hypercholesterolemia mainly physicians weren't even very experienced with that. Now they're quite familiar with the day to day management of a —

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of Family Practice. Dr. Keenan has published a number of scholarly articles on dyslipidemia and its treatment — an area of special attention in his practice and research.

hypercholesterolemia with statins, and so we don't . . . see those patients at all unless it's by some accident." *Id.* at

Dr. Keenan, on the other hand, . As he testified, most of his patients present with moderate dyslipidemia: "I would say 75, 80 percent of my patients that present, you know, with a lipid problem are within, let's say, 30 percent above — 30 or 40 percent above the normal range or the healthy range ..." Keenan Dep. at 48-49. In fact, unlike Dr. Knopp, Dr. Keenan has a particular interest in cases of mild or borderline dyslipidemia: "I actually do a fair amount of research in diet and nutritional supplements to manage cholesterol," and so "I have a great interest frankly in the borderline and moderate cholesterol patients because that's typically the one where those interventions can actually allow a person to avoid being on drugs if they're successful." *Id.* at 50.

In addition to his testimony regarding the use of niacin among patients with mild and moderate dyslipidemia, Dr. Keenan will also testify about the marketability of niacin in foreign markets. Dr. Keenan has conducted "research and clinical consulting in Russia, Egypt, South Africa, Brazil, Mexico, China and South East Asia." Keenan Report at 10; *see also* Keenan Tr. at 19. His experience in foreign markets has led him to conclude that because niacin "is relatively inexpensive as lipid drugs," it is "an excellent option for many countries that are trying to combat the enormous cost of [cardiovascular disease]." Keenan Rep. at 10; *see also* Keenan Dep. at 19-20. Dr. Keenan has "discussed the benefits of [niacin] with the national pharmacy committees (equivalent to our FDA) in Russia, South Africa, and Sri Lanka. All of those countries have undertaken steps to license prescription formulations of US produced [slow-release niacin]." Keenan Rep. at 11; *see also* Keenan Tr. at 20. In short, Dr. Keenan will be the

only witness in the case-in-chief with first-hand experience on the receptivity of niacin in foreign markets.

CONCLUSION

For all of the foregoing reasons, Complaint Counsel's motion to limit the testimony of Upsher-Smith's experts should be denied.

Dated: January 10, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2002 I caused a paper original and one copy as well as an electronic version of the foregoing public version of Upsher-Smith's opposition to be filed with the Secretary of the Commission and one paper copy to be served upon the following counsel by hand delivery:

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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

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation*, Docket Number 9297, pending before the Federal Trade Commission, and all subsequent appellate or other review

proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for the purposes of this Matter.

3. "Schering-Plough" means Schering-Plough Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at Kenilworth, New Jersey.

4. "Upsher-Smith" means Upsher-Smith Laboratories, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business located at Plymouth, Minnesota.

5. "AHP" means American Home Products, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Madison, New Jersey.

6. "Party" means either the FTC, Schering-Plough, Upsher-Smith, or AHP.

7. "Respondents" means Schering-Plough, Upsher-Smith, and AHP.

8. "Outside Counsel" means the law firms that are counsel of record for Respondents in this Matter and their associated attorneys; or other persons regularly employed by such law firms, including legal assistants, clerical staff, and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondents. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

9. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

10. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys and agents.

11. "Expert/Consultant" means experts or other persons who are retained to assist Complaint Counsel or Respondents' counsel in preparation for trial or to give testimony at trial.

12. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, envelope, telegraph meeting minute, memorandum statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation, including all drafts of all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono record, tape, compact disk, video tape, and other data compilations from which information can

be obtained, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

13. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

14. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondents or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal

Confidential Discovery Material.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose, except that with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided, however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event, the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. This paragraph concerns the designation of material as "Confidential" and "Restricted Confidential, Attorney Eyes Only."

(a) Designation of Documents as CONFIDENTIAL - FTC Docket No. 9297.

Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "CONFIDENTIAL - FTC Docket No. 9297" (or other similar notation containing a

reference to this Matter) to the first page of a document containing such Confidential Discovery Material, or, by Parties by instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as "Confidential." Such designations shall be made within fourteen days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains "Confidential Discovery Material."

(b) Designation of Documents as "RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY – FTC Docket No. 9297."

In order to permit Producing Parties to provide additional protection for a limited number of documents that contain highly sensitive commercial information, Producing Parties may designate documents as "Restricted Confidential, Attorney Eyes Only, FTC Docket No. 9297" by placing on or affixing such legend on each page of the document. It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, business plans, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and limited proprietary personnel information; and that this particularly restrictive designation is to be utilized for a limited number of documents. Documents designated Restricted Confidential, Attorney Eyes Only may be disclosed to Outside Counsel, Complaint Counsel, in-house counsel (designated pursuant to paragraph 5, hereof), and to Experts/Consultants (paragraph 4(c), hereof) that are not current officers, directors or employees of pharmaceutical companies (other than in-house counsel designated pursuant to paragraph 5 hereto). Such materials may not be disclosed to Experts/Consultants or to witnesses or deponents at trial or deposition (paragraph 4(d) hereof),

where the Experts/Consultants, deponents or witnesses are current officers, directors, or employees of pharmaceutical companies (other than in-house counsel designated pursuant to paragraph 5 hereto), except in accordance with subsection (c) of this paragraph 2. In all other respects, Restricted Confidential, Attorney Eyes Only material shall be treated as Confidential Discovery Material and all references in this Protective Order and in the exhibit hereto to Confidential Discovery Material shall include documents designated Restricted Confidential, Attorney Eyes Only.

(c) Disclosure of Restricted Confidential, Attorney Eyes Only Material to Experts/Consultants, Deponents or Witnesses Who Are Current Officers, Directors, or Employees of Pharmaceutical Companies (other than in-house counsel designated pursuant to paragraph 5 hereto).

If any Party desires to disclose Restricted Confidential, Attorney Eyes Only material to any Expert/Consultant, deponent or witness that is a current officer, director, or employee of a pharmaceutical company, other than in-house counsel designated pursuant to paragraph 5 hereto, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific individual to whom the Restricted Confidential, Attorney Eyes Only material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the identified individual. The Producing Party may object to the disclosure of the Restricted Confidential, Attorney Eyes Only material within five business days of receiving notice of an intent to disclose the Restricted Confidential, Attorney Eyes Only material to an individual by providing the disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the disclosing Party

shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the identified individual within five business days, the disclosing Party may disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual.

(d) Disputes Concerning Designation or Disclosure of Restricted Confidential, Attorney Eyes Only Material

Disputes concerning the designation or disclosure of Restricted Confidential, Attorney Eyes Only material shall be resolved in accordance with the provisions of paragraph 7.

(e) No Presumption or Inference

No presumption or other inference shall be drawn that material designated Restricted Confidential, Attorney Eyes Only is entitled to the protections of this paragraph.

(f) Due Process Savings Clause

Nothing herein shall be used to argue that a Party's right to attend the trial of, or other proceedings in, this Matter is affected in any way by the designation of material as Restricted Confidential, Attorneys Eyes Only.

3. All documents heretofore obtained by the Commission through compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, that were obtained during the pre-complaint stage of this Matter shall be treated as "Confidential," in accordance with paragraph 2(a) on page five of this Order. Furthermore, Complaint Counsel shall, within five business days of the effective date of this Protective Order, provide a copy of this Order to all Parties or Third Parties from whom the Commission obtained documents during the pre-Complaint investigation and shall notify those Parties and Third Parties that they shall have thirty days from the effective date of this Protective Order to determine whether their materials qualify for the higher protection of Restricted Confidential, Attorney Eyes Only and to so designate such documents.

4. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) Complaint Counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel;

(c) Experts/Consultants (in accordance with paragraph 6 hereto);

(d) witnesses or deponents at trial or deposition;

(e) the Administrative Law Judge and personnel assisting him;

(f) court reporters and deposition transcript reporters;

(g) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter; and

(h) any author or recipient of the Confidential Discovery Material (as indicated on the face of the document, record or material), and any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received.

5. In addition to the above-described persons, certain named designated individuals and in-house counsel, not to exceed two attorneys per corporate party, who do not have day to day business responsibilities, shall be provided with access to Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential, Attorney Eyes Only"on the condition that each such in-house counsel or designated executive signs a declaration in the form attached hereto as Exhibit "A," which is incorporated herein by reference. For Respondent Schering-Plough the designated individuals are John Hoffman, Staff Vice President and Associate General Counsel; and Jonathon Wasserman, Senior Antitrust Counsel. For Respondent Upsher-Smith, the designated individual is Mark Robbins, Director of Scientific Affairs. For Respondent AHP, the designated individuals are Louis L. Hoynes, Jr., Executive Vice President and General Counsel; and Elliot Feinberg, Assistant General Counsel, Antitrust.

6. Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential, Attorney Eyes Only," shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant, whether or not that Expert/Consultant is currently an officer, director, or employee of a pharmaceutical company, unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in separate locked rooms or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to Complaint Counsel or

Respondents' Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) to not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

7. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Disclosure of Confidential Discovery Material to Experts Who Are Current Officers, Directors or Employees of Pharmaceutical Companies (other than in-house counsel designated pursuant to paragraph 5 hereto).

If any Party desires to disclose Confidential Discovery Material to any Expert who may testify and who is a current officer, director or employee of a pharmaceutical company (other than in-house counsel designated pursuant to paragraph 5 hereto), the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific expert who may testify to whom the Confidential Discovery Material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the proposed expert who may testify, and a current curriculum vitae of such expert identifying all other present and prior employees and/or firms in the pharmaceutical industry for which or on behalf of which the identified expert has been employed or done consulting work in the preceding four years. The Producing Party may object to the disclosure of

the Confidential Discovery Material within five business days of receiving notice of an intent to disclose the Confidential Discovery Material to the identified expert by providing the disclosing Party with a written statement of the reasons for the objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Confidential Discovery Material to the identified expert, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified expert. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not object to the disclosure of Confidential Discovery Material to the identified expert within five business days; the disclosing Party may disclose the Confidential Discovery Material to the identified expert.

(b) Challenges to Confidentiality Designations

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation within five business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties to this action with a written statement of the reasons for the

designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party, preserving its rights, and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not preserve its rights within five business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Parties to this action of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, and excerpts from published books and public documents filed with the Securities and Exchange Commission may be used by any Party without reference to the procedures of this subparagraph.

(c) Resolution of Disclosure or Confidentiality Disputes

If negotiations under subparagraphs 7(a)-(b) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Party, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations

have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five business days to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the proprietary of a requested disclosure or change in designation.

8. Confidential Discovery Material shall not be disclosed to any person described in subparagraphs 4(c) and 4(d) and paragraph 5 of this Protective Order until such person has executed and transmitted to Respondent's counsel or Complaint Counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which in incorporated herein by reference. Respondents' counsel and Complaint Counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL – FTC Docket No. 9297."

9. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraphs 4 and 5 above. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as

Confidential from the time the Producing Party advises Complaint Counsel and Respondents' counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

10. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

11. If any person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Producing Part at least five business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the

Administrative Law Judge or the Commission.

12. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45.

13. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)-(e).[1]

Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter. An application for *in camera* treatment must met the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999).

14. At the conclusion of this Matter, Respondents' counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material which have not been made part of the public record in this Matter. Complaint Counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

15. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party

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[1] The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

16. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

17. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not automatically be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery Material within twenty days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control—including all copies in the possession of experts, consultants, or others to

whom the Discovery Material was provided—unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the Discovery Material, or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking return of the Discovery Material may thereafter move for an order compelling the return of the Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

18. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provisions of this Protective Order.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: May 10, 2001

UNITED STATES OF AMERICA
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.	)	

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" (Protective Order") issued by Administrative Law Judge D. Michael Chappell on May 10, 2001, in connection with the above captioned matter. I understand the restrictions on my use of any Confidential Discovery Material (as this term is used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidential Discovery Material include:

   a. that I will use such Confidential Discovery Material only for the purposes of preparing for this proceedings, and hearing(s) and any appeal of this proceeding and for no other purpose;

   b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

   c. that upon the termination of my participation in this proceeding I will

promptly return all Confidential Discovery Material, and all notes, memoranda, or other papers containing Confidential Discovery Material, to Complaint Counsel or Respondent's counsel, as appropriate.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation:

a. to maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

b. to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention; and

c. to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this matter, including providing testimony in judicial or administrative proceedings arising out of this matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature