

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

COMPLAINT COUNSEL'S OPPOSITION TO AHP'S MOTION FOR INDEFINITE *IN CAMERA* TREATMENT

Complaint counsel continue to have no objection to *in camera* treatment at trial for certain documents that were produced by American Home Products Corporation while AHP seeks review of Your Honor's January 15, 2002, ruling that any possible claim of privilege concerning those documents has been waived.¹ However, complaint counsel have not, and do not, consent to AHP's request for indefinite *in camera* treatment. AHP has offered no adequate basis for the indefinite *in camera* treatment it now seeks. *In camera* treatment pending appeal is sufficient.

As Your Honor has observed, requests for indefinite *in camera* treatment must provide evidence showing "why the documents should be withheld from the public's purview in

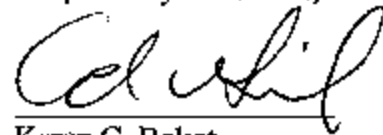
¹ See Complaint Counsel's Opposition And Response To The Emergency Motion Of American Home Products Corporation To Stay Order, For Certification For Interlocutory Appeal And Application For Full Commission Review (Jan. 23, 2002) at 6 (*in camera* treatment during trial will protect AHP's rights).

perpetuity.”² The only justification AHP has offered, however, is its repeated claim the documents are privileged. But, unless Your Honor’s carefully-considered finding of waiver were set aside on appeal, and the documents in question were determined to be privileged, there is no basis for withholding them from public scrutiny.

As we explained in our opposition to AHP’s request for an order precluding any use of the documents at trial, AHP is unlikely to succeed on appeal. The waiver issue was extensively briefed and Your Honor’s finding of waiver was based on application of a legal test advocated by AHP to facts that were not in dispute. And in any case, in the unlikely event of a reversal of that ruling, an extension of *in camera* treatment could be ordered at that time.

In sum, an order granting *in camera* treatment while AHP pursues Commission review would fully protect AHP’s interests. Such an order would facilitate appropriate use of the documents as this litigation progresses, and would avoid any interference with the Commission’s prerogative to cite the documents publicly in its opinion in this case. The indefinite *in camera* treatment that AHP now seeks, however, is unwarranted.

Respectfully submitted,



Karen G. Bokan
David R. Pender
Elizabeth Hilder
Andrew S. Ginsburg
Counsel Supporting the Complaint

Dated: February 8, 2002

² Order On Motions For *In Camera* Treatment Of Documents Listed On Parties’ Exhibit Lists (Jan. 24, 2002) at 1.

CERTIFICATE OF SERVICE

I, Andrew S. Ginsburg, hereby certify that on February 8, 2002:

I caused two copies of Complaint Counsel's Opposition To AHP's Motion For Indefinite *In Camera* Treatment to be served upon the following person by hand delivery-

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused one original and one copy of Complaint Counsel's Opposition To AHP's Motion For Indefinite *In Camera* Treatment to be served by hand delivery and one copy to be served by electronic mail upon the following person-

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused copies of Complaint Counsel's Opposition To AHP's Motion For Indefinite *In Camera* Treatment to be served upon the following persons by hand delivery or by electronic mail and Federal Express-

Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Laura S. Shores, Esq.
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Christopher M. Curran, Esq.
White & Case LLP
601 13th Street, N.W.
Washington, D.C. 20005


Andrew S. Ginsburg