

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,)
)
and)
)
American Home Products Corporation,)
a corporation.)

Docket No. 9297

**NON-PARTY KOS PHARMACEUTICALS, INC.'S MOTION FOR
IN CAMERA TREATMENT OF CERTAIN CONFIDENTIAL DOCUMENTS**

Non-Party KOS PHARMACEUTICALS, INC. ("Kos"), by and through undersigned counsel, moves pursuant to Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. §3.45(b), for an order directing *in camera* treatment for highly confidential documents which both Complaint Counsel and Respondent Upsher-Smith Laboratories have identified as trial exhibits, specifically AAA0000001, AAA0000003, AAA0000005 to AAA0000006, AAA0000010, AAA0000011 to AAA0000015, AAA0000016 to AAA0000020, AAA0000021 to AAA0000022, AAA0000023, AAA0000024 to AAA0000026, AAA0000027 to AAA0000028, AAA0000029, AAA0000030 to AAA0000032, AAA0000033, AAA0000034 to

AAA0000036, AAA0000039 to AAA0000041, AAA0000042 to AAA0000044, AAA0000151 to AAA0000152, AAA0000158, AAA0000159, AAA0000160, AAA0000161 to AAA0000162, AAA0000163, AAA0000164, AAA0000165, AAA0000166 to AAA0000167, AAA0000168 to AAA0000170, AAA0000171, AAA0000172 to AAA0000174, AAA0000217 to AAA0000259, AAA0000346 to AAA0000347, and USX 22 (the "Confidential Documents").

The Confidential Documents for which Kos now seeks *in camera* treatment contain information regarding co-promotion, collaboration and partnership arrangements between Kos and unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s). Thus, the Confidential Documents are highly competitive and, as such, extremely valuable to Kos.

Kos is a relatively small company competing in the pharmaceutical market dominated by huge pharmaceutical companies and multi-national conglomerates. Kos' competitive position in this volatile market place is vulnerable to competition from these large, well staffed and funded companies. Kos' ability to successfully compete demands a premium on its intellectual property and a variety of business transactions, which allow a small company to compete. Sometimes smaller companies must partner with other sometimes larger companies. The terms and conditions of those arrangements or proposed arrangements are highly sensitive and confidential.

For Kos to successfully compete in this market it needs to maintain the confidentiality of its business plans and the terms of its negotiations with other players in the market. Kos is clearly entitled to maximize its competitive advantages resulting from its size, flexibility and the quality of its products and work force. The documents in question are examples of Kos' attempt to meet the competitive challenges it faces through potential partnerships, contractual ties and proposed profit sharing arrangements. The success or failure of these proposed business relationships, their terms, and the attendant disclosures they contain, are the essence of the competitive information contained in the documents and testimony Kos seeks to shield from public disclosure. The unnecessary public disclosure of Kos' competitive information will negatively impact its ability to compete and cause it serious economic injury in the marketplace.

Moreover, there is no countervailing public interest that militates against maintaining Kos' confidences. Kos is not a party to this monopolization case, it is a mere witness who may possibly assist the fact finder's understanding of the marketplace the government believes was subjected to anti-competitive behavior by the defendant companies. Whatever the merits of those claims, no public purpose will be advanced by disclosing Kos' negotiations and contractual arrangements with other companies in the market. Such disclosure will only serve to impede Kos' ability to compete and impair its flexibility to meet the challenges of the marketplace.

Public disclosure of any of the information contained in the Confidential Documents will unfairly reveal competitive, marketing and promotional strategies, partnership alliances and internal financial information. For example, document AAA0000217 to AAA0000259 is a business presentation made by Kos to a third party in an effort to establish a strategic partnership. The presentation reveals information concerning clinical studies which detail efficacy as well as clinical benefits, medical safety results, chemical breakdown, market studies, marketing strategies, projected sales and overall strategy for producing and marketing the subject product. Likewise, document AAA0000172 to AAA0000174, entitled "Proposed Principal Terms of License and Co-Promotion Agreement for Nicostatin," between Kos and an unrelated third party reveals negotiated responsibilities, confidential financial terms and the general scope of the agreement. Document AAA0000168 to AAA0000170, entitled "Principal Terms Joint Development and Commercialization Niaspan-Fluvastatin Combination," similarly details the confidential terms of an agreement between Kos and an unrelated third party, specifically the responsibilities of the parties, confidential financial terms and the general scope of the agreement. Much like these examples, Kos submits to this Court for *in camera* treatment a host of other documents which reveal similar confidential information.

Disclosure of any of the Confidential Documents would result in serious and irreparable competitive injury to Kos without serving any countervailing public purpose. In addition, several of the Confidential Documents were originally

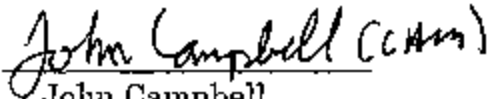
stamped "confidential," while others contain confidential provisions understood by the relevant parties as confidential and have already received confidential treatment via the Freedom of Information Act. Finally, the Confidential Documents qualify for *in camera* protection for a period of five (5) years. The Confidential Documents disclose information that will not only seriously impair Kos' ability to compete now, but also seriously injure Kos' future business, planning and marketing strategies.

To the extent that any of the parties intend to introduce any testimony evidence from either Mr. Dan M. Bell and/or Mr. Mukash Patel, Kos likewise seeks *in camera* treatment for such testimony evidence as any such evidence similarly reveals confidential and proprietary information belonging to Kos.

For the foregoing reasons and those set forth in the accompanying Memorandum of Law in Support of Non-Party Kos Pharmaceuticals, Inc.'s Motion for *In Camera* Treatment of Certain Confidential Documents, Kos respectfully requests that this Court grant the motion for an order directing *in camera* treatment for the Confidential Documents.

Respectfully submitted,

HOLLAND & KNIGHT LLP
Attorneys for Kos
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
Telephone: (305) 374-8500
Facsimile: (305) 789-7799

By:  (cc Ramos)
John Campbell
Florida Bar No.: 443972
E-mail: jcampbel@hklaw.com
Eduardo A. Ramos
Florida bar No.: 0189944
E-mail: earamos@hklaw.com

UNITED STATES OF AMERICA
BEFORE THE 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

**MEMORANDUM OF LAW IN SUPPORT OF
NON-PARTY KOS PHARMACEUTICALS, INC.'S MOTION FOR
IN CAMERA TREATMENT OF CERTAIN CONFIDENTIAL DOCUMENTS**

Non-Party KOS PHARMACEUTICALS, INC. ("Kos"), by and through undersigned counsel, moves pursuant to Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. §3.45(b), for an order directing *in camera* treatment for highly confidential documents which both Complaint Counsel and Respondent Upsher-Smith Laboratories have identified as trial exhibits, specifically AAA0000001, AAA0000003, AAA0000005 to AAA0000006, AAA0000010, AAA0000011 to AAA0000015, AAA0000016 to AAA0000020, AAA0000021 to AAA0000022, AAA0000023, AAA0000024 to AAA0000026, AAA0000027 to AAA0000028, AAA0000029, AAA0000030 to AAA0000032, AAA0000033, AAA0000034 to

AAA0000036, AAA0000039 to AAA0000041, AAA0000042 to AAA0000044, AAA0000151 to AAA0000152, AAA0000158, AAA0000159, AAA0000160, AAA0000161 to AAA0000162, AAA0000163, AAA0000164, AAA0000165, AAA0000166 to AAA0000167, AAA0000168 to AAAD000170, AAA0000171, AAA0000172 to AAA0000174, AAA0000217 to AAA0000259, AAA0000346 to AAA0000347, and USX 22 (the "Confidential Documents").

I. INTRODUCTION

During a pre-complaint investigation by the Federal Trade Commission ("FTC") of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation (collectively, the "Defendants"), the FTC requested that Kos produce certain documents relevant to their investigation. Accordingly, in compliance with the FTC's request, Kos produced the responsive documents. Since the production of such documents, both the FTC and Respondent Upsher-Smith Laboratories have designated certain exhibits both intend to offer, some of which are the Confidential Documents.

As more specifically addressed below, the Confidential Documents contain information regarding co-promotion, collaboration and partnership arrangements between Kos and unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s), all of which are highly competitive and extremely valuable to Kos.

II. LEGAL ARGUMENT

Pursuant to Rule 3.45, a party may obtain *in camera* treatment for materials offered into evidence if their public disclosure "will likely result in a clearly defined, serious injury to the . . . corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). The moving party must demonstrate "serious injury" by establishing that the subject documents are both secret and material to the movant's business. See *Bristol-Myers Co.*, 90 F.T.C. 455 (1977); *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has outlined six factors to be considered and weighed when determining materiality and secrecy: "(1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) (citing *Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977)). One good example of what is considered a "clearly defined, serious injury" is the likely loss of business advantages. *Id.* (citing *General Foods*, 95 F.T.C. 352, 355 (1980)).

Considering the factors outlined by the Commission, a proper application for *in camera* treatment should include the following: (1) a description of the materials proposed for *in camera* treatment; (2) reasons for granting *in camera* status; (3)

specific time period for which *in camera* treatment is requested for each document; and (4) copies of the actual documents for which *in camera* treatment is sought attached as exhibits. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *4.

A. THE CONFIDENTIAL DOCUMENTS ARE ENTITLED TO *IN CAMERA* TREATMENT BECAUSE ANY DISCLOSURE WOULD RESULT IN A LIKELY LOSS OF KOS' BUSINESS ADVANTAGES CAUSING A CLEARLY DEFINED SERIOUS INJURY TO KOS.

As set forth below and further supported by the attached declaration of Daniel M. Bell, the Confidential Documents contain information regarding co-promotion, collaboration and partnership arrangements between Kos and third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s), all of which are highly competitive and extremely valuable to Kos. Given their value to Kos' ongoing business operations, these documents are deserving of *in camera* treatment.

The first set of Confidential Documents reveal strategic, collaboration and partnership arrangements between Kos and third parties. (AAA0000001, AAA0000003, AAA0000010, AAA0000016 to AAA0000019, AAA0000021 to AAA0000022, AAA0000023, AAA0000024 to AAA0000026, AAA0000027 to AAA0000028, AAA0000029, AAA0000030 to AAA0000032, AAA0000033, AAA0000034 to AAA0000036, AAA0000039 to AAA0000041, AAA0000042 to AAA0000044, AAA0000151 to AAA0000152, AAA0000158, AAA0000159, AAA0000160, AAA0000161 to AAA0000162, AAA0000163, AAA0000164, AAA0000165, AAA0000166 to AAA0000167, AAA0000168 to AAA0000170,

AAA0000171, AAA0000172 to AAA0000174, AAA0000217 to AAA0000259, and USX 22). These documents identify solicitation efforts by Kos to license their products, reveal communications commenting on Kos' products and disclose terms and obligations for proposed licensing partnerships.

If these documents are not afforded *in camera* protection, Kos will likely lose its business advantage in the pharmaceutical industry. Kos is a small business in a highly competitive market dominated by much larger corporations, rich in resources which are unavailable to Kos at this time. In such a tight, competitive environment it is critical for a corporation to wisely select its partners in business. The proper selection of the appropriate partner is a strategic maneuver which, if disclosed, may reveal future marketing strategies and future development opportunities, critical to survival in the pharmaceutical industry.

In addition, Kos believes that the information detailed in these documents is known only by Kos and those third parties with whom such communications were made. Within Kos' own corporate structure, this information is circulated to only a small number of its employees, specifically only those who are involved in negotiating and structuring the potential partnership. Kos' strict confidentiality policies prevent the dissemination of any of the information contained in these documents to external sources. If disseminated to Kos' competitors, the confidential information could frustrate Kos' attempts to develop critical, strategic partnerships for the licensing of its products. Accordingly, Kos takes great steps and expends considerable sums of money in protecting this information.

Moreover, that fact that some of these documents date back to 1997 does not minimize their need for protection. In the small and highly competitive market of pharmaceuticals, the fact that Kos attempted to strike a licensing deal five years ago with perhaps a current partner's competitor is troublesome and may damage the existing relationship between Kos and their existing partner.

A consideration of all of these factors weighed together clearly demonstrate that these documents are not only material but should remain secret. If revealed, Kos will most likely suffer a "clearly defined, serious injury," namely the loss of its business advantage in the pharmaceuticals industry.

In addition to the above referenced documents, document AAA0000346 is likewise entitled to *in camera* protection. Like the above referenced documents, AAA0000346 reveals a strategic, collaboration and partnership arrangement between Kos and a third party. However, this document is entitled to even further protection. The parties to this subject document agreed that the royalty amount detailed would never be disclosed by either party. Moreover, this document has already been afforded confidential treatment via the Freedom of Information Act.

Similarly, documents AAA0000016 to AAA0000019, in addition to revealing a strategic, collaboration and partnership arrangement between Kos and a third party, also discloses sales activity. Release of any internal reports containing confidential sales activity will have a serious and adverse competitive result on Kos as it will disclose to its competitors current market share, projected growth and overall current sales status for Kos.

Documents AAA0000013 to AAA0000015 (stamped "confidential"), AAA0000024 to AAA0000025, AAA0000030 to AAA0000031, and AAA0000043 to AAA0000044, also identify a strategic, collaboration and partnership arrangement between Kos and specific third parties. As part of these documents, the interested parties entered into a Confidential Disclosure Agreement wherein the parties agreed to maintain all written and oral information obtained during the business relationship confidential. In fact, the subject agreements provide that they will "supersede and prevail over any other previous or contemporaneous arrangements, either oral or written as to the Confidential Information." Public disclosure of these agreements would be in complete contradiction of their own terms.

Likewise, documents AAA0000168 to AAA0000170 and AAA0000172 to AAA0000174 will disclose the principal terms and obligations for both the joint development of a combination product as well as the license and co-promotion. Disclosure of these agreements will seriously disadvantage Kos against its competitors by revealing Kos' terms and obligations and thereby restricting any future negotiations of such terms and obligations. In other words, a Kos competitor, prior to perhaps any future negotiations with Kos, will already be familiar with Kos' previously agreed to terms and obligations.

Document AAA0000217 to AAA0000259 equally qualifies for *in camera* treatment in that it reveals a presentation made by Kos to a third party in an effort to solicit and engage in a partnership in the development and promotion of a product. The presentation includes information concerning clinical studies, which

detail efficacy as well as clinical benefits, medical safety results, chemical breakdowns, market studies, marketing, projected sales, and overall strategy for producing and selling the product. All of the information contained in this document is proprietary to Kos and should be protected as such. Allowed disclosure of any of the information in this document will cause Kos to lose its business advantage in the pharmaceutical industry thereby causing Kos a clearly defined, serious injury.

Finally, to the extent that any of the parties intend to introduce any testimony evidence from either Mr. Dan M. Bell and/or Mr. Mukash Patel, Kos likewise is entitled to *in camera* treatment for such testimony evidence as any such evidence similarly reveals confidential and proprietary information belonging to Kos.

As the foregoing clearly demonstrates, Kos has effectively established that the subject documents are both secret and material to Kos' business and that any disclosure of the Confidential Documents will seriously injure Kos. Moreover, Such disclosures would result in serious and irreparable competitive injury to Kos without serving any countervailing public purpose. A substantial majority of these documents simply identify an existing or potentially existing relationship between Kos and specific third parties. This information is of marginal, if any relevance, to the issues in the proceeding. "If disclosure of confidential business information is likely to cause serious competitive injury, the principle countervailing considerations weighing in favor of disclosure should be the importance of the

information in explaining the rationale of our decisions." *General Foods Corp.*, 95 F.T.C. at 355. Here, public disclosure of the Confidential Documents will not assist the public in understanding the resolution of this matter.

B. THE MATERIAL IMPORTANCE OF THESE CONFIDENTIAL DOCUMENTS AND IMPACT ON KOS FUTURE BUSINESS EFFORTS JUSTIFIES *IN CAMERA* TREATMENT FOR A PERIOD OF FIVE (5) YEARS.

Kos seeks *in camera* protection for the Confidential Documents for a period of five (5) years. As demonstrated above as well as in the accompanying declaration of Mr. Dan M. Bell, these documents reveal co-promotion, collaboration and partnership arrangements between Kos and unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s). Disclosure of such information now will seriously impair Kos' future business, planning and marketing strategies.

III. CONCLUSION

For the foregoing reasons, Kos respectfully requests that this Court grant the motion directing in camera treatment for the Confidential Documents discussed herein.

Respectfully submitted,

HOLLAND & KNIGHT LLP
Attorneys for Kos
701 Brickell Avenue
Suite 3000
Miami, Florida 33131
Telephone: (305) 374-8500
Facsimile: (305) 789-7799

By: John Campbell (C.A.M.)
John Campbell
Florida Bar No.: 443972
E-mail: jcampbel@hklaw.com
Eduardo A. Ramos
Florida bar No.: 0189944
E-mail: earamos@hklaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 9th day of February, 2002, I caused an original, one paper copy and an electronic copy of the foregoing Kos Pharmaceuticals, Inc.'s Motion for In Camera Treatment of Certain Confidential Documents together with the Memorandum of Law in Support of Non-Party Kos Pharmaceuticals, Inc.'s Motion for In Camera Treatment of Certain Confidential Documents to be filed with the Secretary of the Commission, and that two paper copies were served by Federal Express 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 mailed to:

David Pender, Esquire
Assistant Director
Federal Trade Commission
Bureau of Competition, Health Care Division
601 Pennsylvania Avenue, N.W.
S-3115
Washington, D.C. 20580

Yaa Apori, Esquire
Federal Trade Commission
Bureau of Competition, Health Care Division
601 Pennsylvania Avenue, N.W.
S-3115
Washington, D.C. 20580

John W. Nields, Jr., Esquire
Howrey Simon Arnold & White
1299 Pennsylvania Avenue N.W.
Washington, D.C. 20004

Chris Curran, Esquire
White & Case LLP
601 13th Street N.W.
Suite 600 South
Washington, DC 20005

Eduardo A. Ramos (CJM)

Eduardo A. Ramos

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF DANIEL M. BELL

I, Daniel M. Bell, 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 Chairman for Kos Pharmaceuticals, Inc. ("Kos").

3. I have been involved in the pharmaceutical industry for 18 1/2 years. The pharmaceutical industry is a small yet highly competitive industry.

4. I make this declaration in support of Non-Party Kos Pharmaceuticals, Inc.'s Motion for *In Camera* Treatment of Certain Confidential Documents relating to co-promotion, collaboration and partnership arrangements between Kos and

unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s) which have been identified as AAA0000001, AAA0000003, AAA0000005 to AAA0000006, AAA0000010, AAA0000011 to AAA0000015, AAA0000016 to AAA0000020, AAA0000021 to AAA0000022, AAA0000023, AAA0000024 to AAA0000026, AAA0000027 to AAA0000028, AAA0000029, AAA0000030 to AAA0000032, AAA0000033, AAA0000034 to AAA0000036, AAA0000039 to AAA0000041, AAA0000042 to AAA0000044, AAA0000151 to AAA0000152, AAA0000158, AAA0000159, AAA0000160, AAA0000161 to AAA0000162, AAA0000163, AAA0000164, AAA0000165, AAA0000166 to AAA0000167, AAA0000168 to AAA0000170, AAA0000171, AAA0000172 to AAA0000174, AAA0000217 to AAA0000259, AAA0000346 to AAA0000347, and USX 22 (the "Confidential Documents").

5. The Confidential Documents are highly competitive and extremely valuable to Kos.

6. The first set of Confidential Documents reveal strategic, collaboration and partnership arrangements between Kos and third parties. (AAA0000001, AAA0000003, AAA0000010, AAA0000016 to AAA0000019, AAA0000021 to AAA0000022, AAA0000023, AAA0000024 to AAA0000026, AAA0000027 to AAA0000028, AAA0000029, AAA0000030 to AAA0000032, AAA0000033, AAA0000034 to AAA0000036, AAA0000039 to AAA0000041, AAA0000042 to AAA0000044, AAA0000151 to AAA0000152, AAA0000158, AAA0000159,

AAA0000160, AAA0000161 to AAA0000162, AAA0000163, AAA0000164, AAA0000165, AAA0000166 to AAA0000167, AAA0000168 to AAA0000170, AAA0000171, AAA0000172 to AAA0000174, AAA0000217 to AAA0000259, and USX 22) by identifying documented solicitation efforts by Kos to license their products, revealing communications commenting on Kos' products and disclosing terms and obligations for proposed licensing partnerships.

7. The selection of an appropriate partner in the pharmaceutical industry is a strategic maneuver which determines future marketing strategies and future development opportunities, critical to maintaining a solid business advantage in the pharmaceutical industry.

8. The information detailed in these documents is known only by Kos and, to the best of Kos' knowledge, those third parties with whom such communications were made.

9. Within Kos' own corporate structure, this information is circulated to only a small number of its employees, specifically only those who are involved in negotiating and structuring the potential partnership.

10. Kos' enforces a strict confidentiality policy and aggressively attempts to prevent the dissemination of any of the information contained in these documents to external sources. In pursuing these efforts, Kos takes great steps and expends considerable sums of money in protecting its confidential information.

11. Specifically, document AAA0000346 reveals a strategic, collaboration and partnership arrangement between Kos and a third party. The parties to this

subject document agreed that the royalty amount detailed would never be disclosed by either party. Moreover, this document has already been afforded confidential treatment via the Freedom of Information Act.

12. Similarly, documents AAA0000016 to AAA0000019, in addition to revealing a strategic, collaboration and partnership arrangement between Kos and a third party, also discloses sales activity which is information maintained confidential by Kos.

13. Documents AAA0000013 to AAA0000015, AAA0000024 to AAA0000025, AAA0000030 to AAA0000031, and AAA0000043 to AAA0000044, also identify a strategic, collaboration and partnership arrangement wherein Kos and specific third parties agreed to maintain all written and oral information obtained during the business relationship confidential.

14. Documents AAA0000168 to AAA0000170 and AAA0000172 to AAA0000174 address the principal terms and obligations for both the joint development of a combination product as well as the license and co-promotion, all of which are confidential.

15. Document AAA0000217 to AAA0000259 is a presentation made by Kos to a third party in an effort to solicit and engage in a partnership in the development and promotion of a product. The presentation includes information concerning clinical studies, which detail efficacy as well as clinical benefits, medical safety results, chemical breakdowns, market studies, marketing, projected sales,

and overall strategy for producing and selling the product. All of the information contained in this document is proprietary to Kos.

16. Disclosure of any of the Confidential Documents would allow Kos' competitors to analyze and study Kos' co-promotion, collaboration and partnership arrangements with unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos' product(s) and identify Kos' future business, planning and marketing strategies.

17. As such, the Confidential Documents contain secret information that is material to Kos' business, competitiveness and profitability. Release of this information will cause the loss of business advantage and serious and irreparable injury to Kos.

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

Dated: February 8, 2002

Daniel M. Bell

MIAI #1111347 v2