

UNITED STATES OF AMERICA
BEFORE 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 RECORD

**MOTION OF WYETH FOR INDEFINITE *IN CAMERA* TREATMENT FOR
PORTIONS OF THE DEY INVESTIGATIONAL HEARING TRANSCRIPT AND
PROFESSOR BRESNAHAN'S REPORT**

On February 8, 2002, this Court granted indefinite *in camera* treatment to several privileged documents that Wyeth, formerly known as American Home Products Corporation, inadvertently produced to Commission staff during the pre-Complaint investigation. Complaint counsel has designated as exhibits in this proceeding two documents – the investigational hearing transcript of Wyeth employee Dr. Michael Dey and the expert report of Professor Timothy Bresnahan – that explicitly discuss several of Wyeth's privileged *in camera* documents. Wyeth believes that the Court's February 8th Order granting indefinite *in camera* status to the privileged documents requires that the relevant portions of the Dey transcript and Bresnahan report also be afforded indefinite *in camera* status. Out of abundance of caution, however, Wyeth respectfully requests that

the Court explicitly grant indefinite *in camera* treatment to those portions of the Dey transcript and Bresnahan report that discuss the privileged *in camera* documents. Counsel for Wyeth has consulted with FTC complaint counsel, Respondents Schering-Plough Corporation (“Schering-Plough”) and Upsher-Smith Laboratories, Inc. (“Upsher-Smith”), and, in light of this Court’s Order of February 8th granting indefinite *in camera* treatment to certain Wyeth documents, the parties do not oppose this motion.

BACKGROUND

On September 27, 2001, Wyeth filed a motion for a protective order concerning a handful of privileged documents that Wyeth inadvertently produced to Commission staff during the pre-Complaint investigation.¹ During the pendency of this motion, complaint counsel and Respondent Upsher-Smith notified Wyeth that they intended to use certain of these privileged documents at trial. *See* Letter from Yaa Apori to Cathy Hoffman, dated December 20, 2001, with attached exhibit list, attached hereto as Exhibit 1; Letter from Paul Stone to David Orta, dated December 21, 2001, with attached exhibit list, attached hereto as Exhibit 2. The exhibit lists complaint counsel and Upsher-Smith sent to Wyeth were not complete exhibit lists, but only showed those documents produced by Wyeth that these parties intended to use as exhibits. These exhibit lists did not include Dr. Michael Dey’s investigational hearing transcript or Professor Bresnahan’s expert report.

¹ Specifically, Wyeth requested this Court to grant a protective order for the documents identified with the following bates numbers: AHP 13 00025, AHP 13 00115, AHP 13 00117, AHP 13 00118, AHP 13 00158-184, AHP 13 00089-93, AHP 00097-99, AHP 13 00130-131, and AHP 13 000121-125. Wyeth’s Motion for Protective Order also requested that the Court order complaint counsel and Respondents Schering-Plough and Upsher-Smith to return the investigational hearing transcript of Dr. Michael Dey, dated October 5, 2001, so that Wyeth could redact those portions of the transcript that relate to the privileged documents.

On January 15, 2002, the Court denied Wyeth's Motion for Protective Order. However, pursuant to Commission Rule 3.45(g), the Court granted provisional *in camera* status to Wyeth's privileged documents and any testimony relating to these documents by Order of January 18, 2002, attached hereto as Exhibit 3. On February 7, 2002, Wyeth filed a motion asking the Court to grant indefinite *in camera* treatment for those privileged documents that complaint counsel and Respondent Upsher-Smith intended to use as exhibits at trial. On February 8, 2002, the Court afforded indefinite *in camera* treatment to Wyeth's inadvertently-produced privileged documents that the parties listed on their exhibit lists, including: CX 35 (AHP 13 00025), CX 164 (AHP 13 00115, AHP 13 00117-18, AHP 13 00121-125), CX 165 (AHP 13 00128-129) (only the handwritten portion on AHP 13 00129), CX 166 (AHP 13 00130) (only the handwritten portion), CX 169 (AHP 13 00158-184), USX 41 (AHP 13 00025), USX 43 (AHP 13 00115), USX 44 (AHP 13 00117), USX 45 (AHP 13 00118), USX 46 (AHP 13 00158-184). See Order of February 8, 2002, attached hereto as Exhibit 4.

ARGUMENT

A. Those Portions of Dr Michael Dey's Investigational Hearing Transcript that Discuss *In Camera* Documents Should Be Afforded Indefinite *In Camera* Treatment

Complaint counsel have listed the investigational hearing transcript of Dr. Michael Dey on their exhibit list, designated as CX 1492. As this Court is aware, Respondents Schering-Plough and Upsher-Smith moved to exclude the Wyeth investigational hearing transcripts, and it is our understanding that those exhibits, including CX 1492, have been only "conditionally" admitted. See Pretrial Hearing Transcript, Vol. 4, Jan. 23, 2002, at 295-97.

Wyeth believes that this Court's Order of February 8, 2002, necessarily extends to those portions of Dr. Dey's investigational hearing transcript that relate to the privileged documents, as well as any other testimony relating to those inadvertently-produced privileged documents. However, Wyeth is concerned that without an Order specifically covering those portions of Dr. Dey's investigational hearing transcript relating to Wyeth's privileged *in camera* documents, the transcript may inadvertently be placed on the public record. As this Court's February 8, 2002 Order recognized, "[p]ublic disclosure of these documents would result in a clearly defined, serious injury to AHP," and the "privileged nature of these documents will not decrease over time." Order at 2.

Therefore, Wyeth respectfully requests the Court to grant the following portions of the Dey investigational hearing transcript indefinite *in camera* treatment:

32:17 to 35:25

77:20 to 95:6

100:1 to 100:3

103:15 to 120:22

Each of these portions of the Dey investigational hearing transcript discusses CX 35 (AHP 13 00025), CX 164 (AHP 13 00115, AUP 00117, AHP 13 00118), or CX 169 (AHP 13 00158-184), all exhibits to which this Court already has granted indefinite *in camera* treatment. See Dr. Michael Dey investigational hearing transcript, attached hereto as Exhibit 5. Therefore, any testimony relating to these *in camera* documents also should be afforded *in camera* status because public disclosure of such privileged information would seriously injure Wyeth.

B. Those Portions of Professor Bresnahan's Expert Report that Discuss *In Camera* Documents Should Be Granted Indefinite *In Camera* Treatment

Complaint counsel also have listed the expert report of Professor Timothy Bresnahan on their exhibit list, identified as CX 751. It is Wyeth's understanding that complaint counsel have not yet moved to admit Bresnahan's report into evidence. Nevertheless, in case any party seeks to admit Bresnahan's report into evidence before the close of the record, Wyeth requests indefinite *in camera* treatment for portions of the report.

Professor Bresnahan's report includes appendices that discuss in detail Wyeth's privileged documents that have been granted indefinite *in camera* status. See Expert Report of Professor Bresnahan, attached hereto as Exhibit 6. Specifically, endnote c on page 42 of Bresnahan's report discusses CX 169 (AHP 13 00158-184), which has been granted indefinite *in camera* status. Likewise, Figure 11 on Appendix A10 refers to CX 169. Figure 12 on Appendices A11-A13 explicitly describes CX 169 and CX 164 (AHP 13 00115, AHP 13 00117-18), to which this Court also granted indefinite *in camera* treatment. Lastly, Figure 13 on Appendix A14 also discusses CX 164 and CX 169.

Again, Wyeth believes that this Court's February 8, 2002 Order applies to these references to Wyeth's privileged documents in Professor Bresnahan's report. Wyeth requests, however, that the Court specifically grant these portions of Professor Bresnahan's report indefinite *in camera* treatment. Because public disclosure of these privileged documents would cause Wyeth a "clearly defined, serious injury" that will not

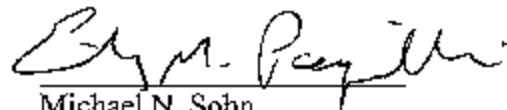
decrease over time, public disclosure of explicit descriptions of these documents in Professor Bresnahan's report also would result in such injury to Wyeth.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Wyeth respectfully requests that this Court grant indefinite *in camera* treatment to portions of the Dr. Michael Dey investigational hearing transcript (32:17 to 35:25, 77:20 to 95:6, 100:1 to 100:3 and 103:15 to 120:22) and to portions of Professor Bresnahan's expert report (endnote c on page 42 relating to CX 169; Figure 11 relating to CX 169; Figure 12, relating to CX 169 and CX 164; and Figure 13 relating to CX 169 and CX 164).

Respectfully submitted,

Elliot Feinberg
Wyeth
Five Giralda Farms
Madison, NJ 07940
(973) 660-5500



Michael N. Sohn
Cathy A. Hoffman
David M. Orta
Emily M. Pasquinelli
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Counsel for Wyeth

Dated: March 29, 2002

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

CERTIFICATE OF SERVICE

I, Emily M. Pasquinelli, hereby certify that on March 29, 2002, I caused a true and correct copy of the public version of *Motion of Wyeth For Indefinite In Camera Treatment for Portions of the Dey Investigational Hearing Transcript and Professor Bresnahan's Report* to be served upon the following as follows:

Two paper copies by hand delivery to:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (2 copies)

The paper original and one paper copy by hand delivery and one electronic copy to:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (original and 1 copy)

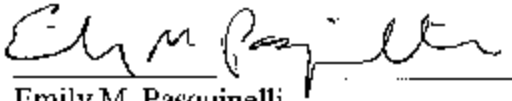
One paper copy by delivery to:

David R. Pender
Deputy Assistant Director,
Health Care Services and Products
Federal Trade Commission
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Room 3115
Washington, D.C. 20580

Karen G. Bokar
Federal Trade Commission
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Howrey Simon Arnold & White, LLP
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Washington, D.C. 20004
Fax (202) 383-6610


Emily M. Pasquinelli
Arnold & Porter

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

**ORDER GRANTING WYETH'S MOTION FOR INDEFINITE *IN CAMERA*
TREATMENT FOR PORTIONS OF THE DEY INVESTIGATIONAL HEARING
TRANSCRIPT AND PROFESSOR BRESNAHAN'S REPORT**

Upon consideration of Wyeth's Motion for Indefinite *In Camera* Treatment for Portions of the Dey Investigational Hearing Transcript and Professor Bresnahan's Report, it is hereby ORDERED that Wyeth's Motion is GRANTED.

Accordingly, the following documents, or designated portions thereof, are accorded indefinite *in camera* treatment:

1. CX 1492 (32:17 to 35:25, 77:20 to 95:6, 100:1 to 100:3 and 103:15 to 120:22)
2. CX 751 (page 42, endnote c, relating to AHP 13 00158-184; Figure 11 on Appendix A10, relating to AHP 13 00158-184; Figure 12 on Appendices A11-A13, relating to AHP 13 00158-184 and AHP 13 00115,

AHP 13 00117-18; Figure 13 on Appendix A14, relating to
AHP 13 00158-184 and AHP 13 00118).

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

D. Michael Chappell



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

December 20, 2001

Via Facsimile and Federal Express

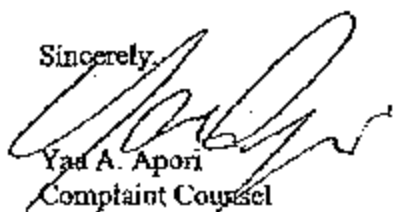
Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004-1206

Re: In the Matter of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation, FTC Docket No. 9297.

Dear Ms. Hoffman:

As you know, the Federal Trade Commission issued an administrative complaint against Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation in March 2001. We are contacting you now because AHP produced documents to the Federal Trade Commission in this matter that complaint counsel have placed on our exhibit list and intend to offer in evidence. All exhibits admitted in evidence become part of the public record unless *in camera* status is granted. Under §4.10(g) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(g), Andrx has "an opportunity to seek an appropriate protective or *in camera* order." Under Judge Chappell's December 6, 2001 Third Revised Scheduling Order, the deadline for *in camera* motions is December 27, 2001. For your convenience, I have attached a list of the AHP documents complaint counsel included on our exhibit list, a copy of Rule 4.10(g), and a copy of the Scheduling Order. Should you have any questions, please do not hesitate to contact me at (202) 326-2079.

Sincerely,


Yaa A. Apori
Complaint Counsel

Enclosures

The remaining portions of this exhibit have been removed from the public record.

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LIMITED LIABILITY PARTNERSHIP

601 THIRTEENTH STREET, N.W.

SUITE 600 SOUTH

WASHINGTON, D.C. 20005-3807

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December 21, 2001

AIR MAIL

David M. Orta
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1206

Re: Schering-Plough Corp., Upsher-Smith Laboratories, Inc.,
American Home Products Corporation, Docket No. 9297

Dear Mr. Orta:

White & Case represents Upsher-Smith Laboratories, Inc. in the above-captioned FTC administrative proceeding. Trial is presently scheduled to begin January 23, 2002. Upsher Smith has included on its list of trial exhibits certain documents produced by American Home Products to the Federal Trade Commission in this matter. This letter is to notify you that pursuant to 16 C.F.R. § 4.10(g), AHP may move for such documents to be afforded *in camera* treatment.

Attached is a list of the relevant documents and a copy of Section 4.10(g).

Very truly yours,



Paul F. Stone

Enclosures

The remaining portions of this exhibit have been removed from the public record.

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

ORDER ON AMERICAN HOME PRODUCTS CORPORATION'S
MOTION TO STAY ORDER, FOR CERTIFICATION FOR INTERLOCUTORY
APPEAL AND APPLICATION FOR FULL COMMISSION REVIEW

On January 15, 2002, an Order Denying American Home Products Corporation's ("AHP") Motion for Protective Order and to Compel Return of Materials was issued. The January 15, 2002 Order held that, to the extent any privileges attached to the nine documents and testimony thereto for which AHP sought a protective order and the return thereof, any such privileges were waived by AHP's inadvertent disclosure of the documents and failure to protect any privileges it may have had.

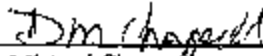
On January 16, 2002, AHP filed a Motion to Stay Order, For Certification for Interlocutory Appeal and Application for Full Commission Review. AHP's motion seeks the following relief: (1) the stay of the Order denying AHP's motion for protective order and to prohibit Complaint Counsel or Respondents from using the disputed documents in any manner pending appeal; (2) in the alternative, AHP seeks *in camera* treatment for each of the contested documents Complaint Counsel or Respondents intend to use as exhibits at the administrative hearing; (3) certification of the January 15, 2002 Order to the Commission for interlocutory review; (4) shortening of Complaint Counsel's time to respond to AHP's motion for certification; and (5) a ruling on AHP's request to stay or request for *in camera* treatment of AHP's documents by January 18, 2002.

Pursuant to Commission Rule 3.23(b), Complaint Counsel has five days for filing its opposition. 16 C.F.R. § 3.23(b). Complaint Counsel opposition is due by 12:00 p.m. on January 24, 2002. A ruling on AHP's motion for certification will not be entered until Complaint Counsel has filed its opposition.

Pursuant to Commission Rule 3.45(g), AHP's request for *in camera* treatment for the documents and testimony thereto is provisionally granted. 16 C.F.R. § 3.45(g). AHP is required to file a motion for *in camera* treatment of the documents within twenty days. Such motion must meet 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). AHP's documents will be treated as *in camera* until a final ruling on whether *in camera* treatment of the material is appropriate pursuant to § 3.45(b).

Accordingly, AHP's request for a stay of the Order denying AHP's motion for protective order and to prohibit Complaint Counsel or Respondents from using the documents is DENIED WITHOUT PREJUDICE pending a determination on AHP's motion for *in camera* treatment.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: January 18, 2002

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)

Schening-Plough Corporation,)
a corporation,)

Upsher-Smith Laboratories,)
a corporation,)

and)

American Home Products Corporation,)
a corporation.)

Docket No. 9297

**ORDER ON MOTION OF AMERICAN HOME PRODUCTS
CORPORATION FOR *IN CAMERA* TREATMENT**

Pursuant to Commission Rule 3.45(b), on February 7, 2002, non-party American Home Products Corporation ("AHP") filed a motion for indefinite *in camera* treatment for materials that AHP asserts are privileged and were inadvertently produced. Respondents do not oppose AHP's motion. Complaint Counsel, by response filed on February 8, 2002, does not oppose AHP's request for *in camera* treatment for the documents during the pendency of AHP's motion for interlocutory review of the Order issued January 15, 2002, which held that AHP waived any privileges it may have held. However, Complaint Counsel does oppose AHP's request that *in camera* treatment be extended indefinitely.

For the reasons set forth below, AHP's motion is GRANTED IN PART and DENIED IN PART.

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). Requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should

be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, *2 (April 25, 1990).

Commission precedent establishes that *in camera* treatment may be granted to protect from public disclosure documents protected by the attorney-client privilege or the work product doctrine. In *In re Kellogg Co.*, 1979 FTC LEXIS 9, *1 (Dec. 27, 1979), *in camera* treatment was granted for documents complaint counsel claimed were work product of Commission staff. Although complaint counsel had waived any claim of privilege because they produced them to respondent, the documents reflecting work product were given *in camera* status to avoid harm from public disclosure. See also *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157, *6 (Nov. 22, 2000) (examples of documents which qualify for indefinite *in camera* treatment include information that is privileged); *In re Textron, Inc.*, 1991 FTC LEXIS 135, *1 (Apr. 26, 1991) (granting *in camera* treatment to privileged document).

AHP asserts that the documents for which it seeks *in camera* treatment are privileged documents. In support of its motion for *in camera* treatment, the Declaration of Lawrence Alaburda, Litigation Counsel for AHP, states that, to the best of his knowledge, the following documents reflect privileged attorney-client privilege communications between Alaburda and/or Paul Heller, AHP's outside patent counsel, and Dr. Michael Dey, former President of ESI Lederle: (1) AHP 13 00025; (2) AHP 13 00115; (3) AHP 13 00117; (4) AHP 13 00118; (5) AHP 13 00121-125; (6) AHP 13 00130-131; (7) AHP 13 00158-184; (8) AHP 13 00089-93; and (9) AHP 13 00097-99. For purposes of a motion for *in camera* treatment, this declaration is sufficient to establish the privileged nature of these documents.

Public disclosure of these documents would result in a clearly defined, serious injury to AHP. Further, the privileged and sensitive nature of these documents will not decrease over time. Complaint Counsel's opposition does not assert that the sensitive nature of this material is likely to diminish in time. Accordingly, AHP's motion for indefinite *in camera* treatment is GRANTED IN PART and DENIED IN PART.

Commission Rule 3.45(b) requires a party or non-party to file a motion for "*in camera* treatment for material, or portions thereof, offered into evidence." Not all of the documents for which AHP seeks *in camera* treatment have been listed as potential trial exhibits to be offered into evidence in this matter. *In camera* treatment is granted only for materials or portions thereof that the parties have used or intend to use at trial. Accordingly, indefinite *in camera* treatment is granted for the following documents:

<u>Exhibit numbers</u>	<u>Bates page numbers</u>
CX 35	AHP 13 00025
CX 164	AHP 13 00115, AHP 13 00117-18, AHP 13 00121-25
CX 165	AHP 13 00128 29 (only the handwritten portion on 13 00129)

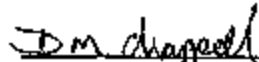
CX 166	AHP 13 00130 (only the handwritten portion)
CX 169	AHP 13 00158-84
USX 41	AHP 13 00025
USX 43	AHP 13 00115
USX 44	AHP 13 00117
USX 45	AHP 13 00118
USX 46	AHP 13 00158-84

In camera treatment is not granted for the following documents because no party has indicated that these documents will be offered into evidence:

AHP 13 00149-51
AHP 13 00131
AHP 13 00089-93
AHP 13 00094-96
AHP 13 00097-99

In the event that any party uses AHP 13 00149-51, AHP 13 00131, AHP 13 00089-93, AHP 13 00094-96, or AHP 13 00097-99 at trial, provisional *in camera* treatment will be granted at that time pursuant to Commission Rule 3.45(g), in order to prevent public disclosure.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: February 8, 2002

In The Matter Of:

*SCHERING-PLOUGH & UPSHER-SMITH
MATTER NO. 9910256*

MICHAEL S. DEY, Ph.D

October 5, 2000

*For The Record, Inc.
Court Reporting and Litigation Support
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Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333*

Original File 01005DEY.ASC, 179 Pages
Min-U-Script® File ID: 1738939488

Word Index included with this Min-U-Script®

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UNITED STATES OF AMERICA
BEFORE THE 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

EXPERT REPORT OF
PROFESSOR TIMOTHY BRESNAHAN

Restricted Confidential
Attorney's Eyes Only

The remaining portions of this exhibit have been removed from the public record.