

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 DENYING AHP'S MOTION SEEKING LEAVE
TO REQUIRE THAT ALL BRIEFING REGARDING ITS
MOTION FOR PROTECTIVE ORDER BE FILED UNDER SEAL**

I.

On September 17, 2001, Respondent American Home Products Corporation ("AHP") filed its Motion Seeking Leave to Require That All Briefing Regarding Its Motion for Protective Order Be Filed Under Seal. Complaint Counsel and other Respondents do not oppose the motion.

II.

AHP states that it recently discovered it had inadvertently produced to the staff of the Bureau of Competition during the Federal Trade Commission's pre-Complaint investigation of this matter several documents which it asserts are protected by the attorney client or work product privileges. AHP intends to file a motion for a protective order requiring Complaint Counsel to return these documents to AHP. In the instant motion, AHP seeks relief from the requirement in Rule 3.22(a) that it file such subsequent motion with the Office of the Secretary. For the reasons set forth below, that request is DENIED. However, pursuant to Rule 3.45(b), AHP may file two versions of its motion for a protective order: a public, redacted version; and a non-public, confidential version.

III.

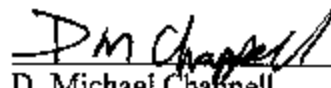
Rule 3.22(a) of the Commission's Rules of Practice requires that all written motions shall be filed with the Secretary of the Commission. 16 C.F.R. § 3.22(a). If a party includes in a motion information that is subject to confidentiality protections pursuant to a protective order, the party shall file two versions of the motion, a confidential, non-public version and a redacted, public version. 16 C.F.R. §§ 3.22(b); 3.45(b). Both the public and the non-public versions are filed with the Office of the Secretary. 16 C.F.R. §3.45(b). Only the redacted, public version is made available for inspection to the public.

To rule on a motion for a protective order seeking the return of documents for which inadvertent disclosure of privilege is claimed, two determinations must be made. First, whether the documents are privileged. Second, whether the privilege was waived through disclosure. Whether or not the privilege was waived can be determined not by looking at the documents, but by assessing the circumstances under which they were produced. *See In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *6-7 (Oct. 17, 2000) (*citing United States v. De Lajara*, 973 F.2d 746, 749 (9th Cir. 1992) ("In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered.")).

In *Hoechst Marion Roussel*, a balancing test which permits consideration of the totality of the circumstances surrounding disclosure was adopted for determining whether disclosure waives any privileges. 2000 FTC LEXIS 155, at *7. Five factors will be considered: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege. *Id.* at 6 (*citing Gray v. Gene Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996); *Allread v. Grenada*, 988 F.2d 1425, 1434-35 (5th Cir. 1993)).

AHP should be able to describe the circumstances under which the documents were produced without revealing any privileged information. To the extent Complaint Counsel or other Respondents dispute whether the documents are privileged, AHP should be able to describe sufficiently the context of the documents without revealing the privileged information. However, in the event that AHP feels it is necessary to attach documents which are subject to confidentiality protections pursuant to a protective order or to describe the documents in such detail that may reveal the contents, it may file two versions of its motion for a protective order with the Secretary: a non-public, confidential version and a public, redacted version. In addition, all subsequent briefing, i.e., responses and reply, if any, shall comport with Rule 3.45(b).

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: September 25, 2001

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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a corporation,)
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FIRST REVISED SCHEDULING ORDER

In consideration of the Motion of All Parties to Revise Scheduling Order, filed on September 21, 2001, the scheduling order previously entered in this matter on May 3, 2001, is hereby revised as set forth below.

- September 25, 2001 - Deadline for filing motions for summary decision.
- October 2, 2001 - Deadline for issuing document requests, requests for admission, interrogatories and *subpoenas duces tecum*.
- October 8, 2001 - Respondents' Counsel provide expert witness reports.
- October 18, 2001 - Deadline for filing responses to motions for summary decision.

- November 1, 2001 - Deadline for filing replies on motions for summary decision.
- Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit rebuttal expert reports on behalf of Respondents).
- Close of discovery, other than discovery permitted under Rule 3.24(a)(4) and depositions of experts.
- November 20, 2001 - Deadline for depositions of experts (including rebuttal experts).
- November 27, 2001 - Exchange, and serve courtesy copy on ALJ, final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness. The final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless good cause is shown.
- November 29, 2001 - Status conference to report on discovery and settlement negotiations, if requested by the parties.
- November 30, 2001 - Exchange copies of exhibits (except for demonstrative, illustrative or summary exhibits).
- December 7, 2001 - Deadline for filing motions *in limine* and motions to strike.
- Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- Exchange, and serve courtesy copy on ALJ, objections and designations in response to any designated deposition testimony and objections to final exhibit lists.
- December 11, 2001 - Exchange proposed stipulations of law, facts, and authenticity.

- December 14, 2001 - Deadline for filing responses to motions *in limine* and motions to strike.
- Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- December 18, 2001 - Exchange responses to proposed stipulations of law, facts, and authenticity.
- December 21, 2001 - Exchange demonstrative, illustrative or summary exhibits.
- January 3, 2001 - File pretrial briefs identifying the legal matters, supported by legal authority, and factual matters to be decided by the Administrative Law Judge.
- File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- January 4, 2002 - Final prehearing conference to be held at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. All trial exhibits will be admitted or excluded.
- January 8, 2002 - Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

All "Additional Provisions" of the Court's May 3, 2001 Scheduling Order shall remain in place.

ORDERED:


 D. Michael Chappell
 Administrative Law Judge

Date: September 25, 2001