

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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In the Matter of )  
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Schering-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)

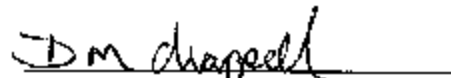
CX 166	AHP 13 00130 (only the handwritten portion)
CX 169	AHP 13 00158-84
USX 41	AHP 13 00025
USX 43	AHP 13 00115
USX 44	AHP 13 00117
USX 45	AHP 13 00118
USX 46	AHP 13 00158-84

*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