

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

**UPSHER-SMITH'S MEMORANDUM IN SUPPORT OF ITS UNOPPOSED
MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS**

Upsher-Smith moves for *in camera* treatment to be accorded for portions of three trial exhibits which contain trade secret information regarding Upsher-Smith's Klor-Con M products: SPX 1271, SPX 1272, and SPX 1294. Only one of the exhibits, SPX 1271, Dr. Banker's written direct testimony, was discussed at trial and was not admitted at the time, in order to allow Upsher-Smith to address *in camera* issues. The discussion of the exhibit during trial was conducted during an *in camera* session. (Tr. 5260). The content of the other two exhibits, the witness statement of Charles E. Miller (SPX 1272) and Mr. Miller's deposition transcript (SPX 1294), were not discussed at trial. Upsher-Smith respectfully requests that the portions of these exhibits specified below be afforded *in camera* treatment. The sensitive and proprietary nature of the information discussed in the designated portions of these exhibits is described in the accompanying declaration Mark S. Robbins, Upsher-Smith's Vice President of Scientific and Legal Affairs.

STANDARD FOR *IN CAMERA* TREATMENT

Under Commission Rule 3.45(b) *in camera* protection should be afforded to documents upon a showing that “public disclosure will likely result in a clearly defined, serious injury to person, partnership or corporation requesting their *in camera* treatment.” 16 C.F.R. § 3.45(b); *see also In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) (same). An applicant faces serious injury “when the documents in question are *secret and material* to the applicant’s business...” *In the Matter of Bristol-Meyers*, 90 F.T.C. 455, 456 (1977) (articulating 6-factor test for determining secrecy and materiality). Further, “[t]he likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *Hoechst Marion Russell, Inc.*, 2000 F.T.C. LEXIS 138, *6 (2000). Pleadings and other documents created during the litigation between fierce competitors and held under protective seal fit squarely in these criteria.

THESE DOCUMENTS WARRANT *IN CAMERA* TREATMENT

During Dr. Banker’s testimony in Court on February 25, 2002, Schering offered SPX 1271 for admission into evidence. Tr. 5202:9-5204:21, 5260:3-5261:2. At that time, Upsher-Smith requested the opportunity to review the exhibit to address *in camera* issues, and its admission into evidence was deferred. The ensuing discussion relating to SPX 1271 at trial was done during an *in camera* session. (Tr. 5260). The content of the other two exhibits SPX 1272 and SPX 1294, Mr. Miller’s statement and deposition, were not discussed at trial. On March 14, 2002, SPX 1271, SPX 1272 and SPX 1294 were admitted along with several other exhibits in JX 5. Tr. 7783:25 – 7784:23.

Upsher-Smith requests *in camera* treatment for the specific portions of each of the exhibits which discusses trade secret information regarding the formulation of Upsher-Smith's Klor Com M products. With respect to SPX 1271, Upsher-Smith requests *in camera* treatment for paragraphs 22-49 and paragraphs 51-52, and all of their subparts. With respect to SPX 1272, Upsher-Smith requests *in camera* treatment for paragraphs 5, 6, 47, 48, 50-52, 55, and 59-62. As to SPX 1294, Upsher-Smith requests *in camera* treatment for testimony given at 40:10-12, 43:18-44:24, 46:13-48:11, 50:3-18, and 52:11-25.

These limited portions of SPX 1271, SPX 1272, and SPX 1294 all involve details regarding Upsher-Smith's patents that constitute trade secrets that have been carefully guarded by Upsher-Smith. Robbins Dec. at ¶3. Moreover, this information is not publicly available and its disclosure would give competitors an unfair advantage *vis-à-vis* Upsher-Smith. Robbins Dec. ¶ 3. These documents contain confidential trade secret regarding addressing the intellectual property of Upsher-Smith. Robbins Dec. ¶3. Should these portions of the documents be used in open court or placed on the public record beyond that which they have been already, it is almost inevitable that Upsher-Smith's competitors will become aware of the contents of the document.

CONCLUSION

For the reasons set forth herein, Upsher-Smith respectfully requests *in camera* treatment for documents designated as SPX 1271, SPX 1272 and SPX 1294 for an indefinite period of time.

Dated: May 3, 2002

Respectfully submitted,

WHITE & CASE LLP
By: 

Robert D. Paul

J. Mark Gidley

Christopher M. Curran

Peter J. Carney

Gustav P. Chiarello

601 Thirteenth Street, N.W.

Washington, D.C. 20005-3807

Telephone: (202) 626-3600

Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

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

PUBLIC

**UPSHER-SMITH'S UNOPPOSED MOTION FOR
IN CAMERA TREATMENT OF CERTAIN TRIAL EXHIBITS**

Upsher-Smith hereby moves for *in camera* treatment of specific portions of documents identified as SPX 1271, SPX 1272, and SPX 1294, all of which were admitted into evidence with JX 5 on March 13, 2002. The portions for which *in camera* treatment is sought are identified in the accompanying memorandum and include competitively sensitive trade secret information relating to Upsher-Smith's formulation of its Klor Con M20 products.

The facts and authorities in support of this unopposed motion are set forth in the accompanying memorandum and declaration.

Dated: May 3, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

Robert D. Paul

J. Mark Gidley

Christopher M. Curran

Peter J. Carney

Gustav P. Chiarello

601 Thirteenth Street, N.W.

Washington, D.C. 20005-3807

Telephone: (202) 626-3600

Facsimile: (202) 639-9355

Attorneys for Upsher-Smith Laboratories, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2002, I caused an original, one paper copy and one electronic copy of the foregoing consent motion for *in camera* treatment and supporting papers to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

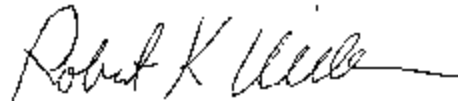
Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand-delivered upon:

David R. Pender
Assistant Director of Health Care Products Division
Federal Trade Commission
Room 3115
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Karen Bokat
Federal Trade Commission
Room 3115
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Laura S. Shores
Howrey Simon Arnold & White LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004



**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

PUBLIC

**DECLARATION OF
MARK S. ROBBINS IN SUPPORT OF UPSHER-SMITH'S
MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN DOCUMENTS**

MARK S. ROBBINS, declares as follows:

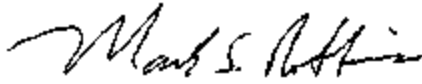
1. I am the Vice President of Scientific and Legal Affairs and inside counsel to Respondent Upsher-Smith Laboratories, Inc.

2. Based on my personal knowledge I submit this declaration in support of Upsher-Smith's application for *in camera* treatment of specific portions of exhibits which Schering-Plough has identified as SPX 1271, 1272, and 1294 and which were admitted into evidence under JX 5 on March 13, 2002. With respect to SPX 1271, Upsher-Smith requests *in camera* treatment for paragraphs 22 – 49 and 51-52, and all of their subparts. With respect to SPX 1272, Upsher-Smith requests *in camera* treatment for paragraphs 5, 6, 47, 48, 50-52, 55, and 59-62. As to SPX 1294, Upsher-Smith requests *in camera* treatment for testimony given at 40:10-12, 43:18-44:24, 46:13-48:11, 50:3-18, and 52:11-25.

3. *In camera* treatment for the specified portions of these documents is imperative. All of the documents are non-public, and contain proprietary and legally sensitive material, which has been carefully guarded by Upsher-Smith. Specifically, these documents reference Upsher-Smith's product formulations, which constitute competitively sensitive trade secrets. Disclosure of these already protected documents would greatly prejudice Upsher-Smith, and give competitors an unfair advantage over Upsher-Smith with the disclosure of this secretive information.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 2, 2002 in Plymouth, Minnesota.



Mark S. Robbins, Esq.

**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

**ORDER GRANTING UPSHER-SMITH'S MOTION
FOR *IN CAMERA* TREATMENT OF CERTAIN TRIAL EXHIBITS**

Upon consideration of Upsher-Smith's Consent Motion for *In Camera* Treatment Of Patent Expert Opinion and Testimony within specific portions of the exhibits designated SPX 1271, SPX 1272, and SPX 1294 it is hereby ORDERED that Upsher-Smith's Motion is GRANTED. The following portions of the above listed documents receive *in camera* treatment in this proceeding:

- (1) For SPX 1271: ¶¶ 22 – 49 and 51-52
- (2) For SPX SPX 1272: ¶¶ 5, 6, 47, 48, 50-52, 55, and 59-62.
- (3) For SPX 1294: 40:10-12, 43:18-44:24, 46:13-48:11, 50:3-18, and 52:11-25.

Dated: Washington, D.C.
May _____, 2002

D. Michael Chappell
Administrative Law Judge