

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



**RESPONDENT SCHERING-PLOUGH CORPORATION'S MOTION FOR IN
CAMERA TREATMENT OF DOCUMENTS RELATING TO LICENSE
AGREEMENT WITH ICN PHARMACEUTICALS, INC.**

Respondent Schering-Plough Corporation ("Schering") moves pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), for an order directing *in camera* treatment for documents relating to a highly confidential contract between Schering and ICN Pharmaceuticals, Inc. ("ICN"), which have been identified as complaint counsel exhibits CX 1613 through 1652.

The exhibits for which Schering seeks *in camera* treatment are commercially sensitive documents related to a confidential license agreement with ICN. These documents are identical in all material respects to other ICN documents already afforded *in camera* status in the Court's Order of January 24, 2002. The documents contain extremely sensitive commercial, financial and trade secret information pertaining to licensing and supply issues for the drug Ribavirin. Specifically, the documents contain the terms of license agreements, business data such as pricing, cost and sales forecasts,

and proprietary data regarding Schering's ongoing and future design, development, marketing and promotion strategies. This information is extremely valuable to Schering and cannot be duplicated by any other means.

Public disclosure of the information contained in these documents will reveal not only the precise terms and conditions of Schering's ongoing business collaboration with ICN, but also the full details of Schering's business development practices, including its negotiation tactics, financial and clinical evaluation methods. Such disclosures would result in serious and irreparable competitive injury to Schering, without serving any countervailing public purpose. Further, the ICN agreement contains confidentiality provisions restricting the public release of proprietary information, and the ICN agreement remains in effect today. Finally, indefinite *in camera* protection is required to ensure that these highly confidential materials are protected for as long as they would reasonably provide competitive advantage to Schering's competitors.

For the foregoing reasons and those set forth in the accompanying memorandum and declaration, Schering respectfully requests that the Court grant the motion for an order directing *in camera* treatment for documents relating to its agreement with ICN for the drug Ribavirin.

Respectfully submitted,

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Attorneys for Respondent
Schering-Plough Corporation

Dated: January 31, 2002

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In the Matter of)

Schering-Plough Corporation,)
a corporation,)

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a corporation,)

and)

American Home Products Corporation,)
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Docket No. 9297

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT
SCHERING-PLOUGH CORPORATION'S MOTION FOR IN CAMERA TREATMENT
OF DOCUMENTS RELATING TO LICENSE AGREEMENT WITH ICN
PHARMACEUTICALS, INC.**

Respondent Schering-Plough Corporation ("Schering") moves pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), for an order granting *in camera* treatment for documents relating to its highly confidential contract with ICN Pharmaceuticals, Inc. ("ICN"), for the license and supply of the drug Ribavirin. Significantly, these documents are identical in all relevant respects to exhibits SPX 858 through 861, which have already been granted indefinite *in camera* treatment pursuant to the Court's January 24, 2002 order.¹

These documents contain extremely sensitive commercial, financial, and trade secret information pertaining to licensing, research and development, supply and distribution of Ribavirin. The agreement that is the subject of each of these documents contains a confidentiality provision strictly restricting the disclosure of information related to the subject

¹ Exhibits SPX 858 through 861 are the Exclusive License and Supply Agreement with ICN Pharmaceuticals, Inc., a stock purchase agreement between Schering and ICN, and two documents summarizing the confidential terms of the Ribavirin agreement. These exhibits were the subject of Schering's December 27, 2001 Motion For *In Camera* Treatment of Documents Relating to License Agreements with Third Parties.

deal. Furthermore, Schering's agreement with ICN remains in effect today and will likely govern the parties until at least 2010. Public disclosure of the information contained in these documents will reveal detailed terms and conditions of Schering's ongoing business collaborations with ICN as well as the intimate details of its business development practices, including its negotiation tactics, financial and clinical evaluations and strategic plans. Clearly, such disclosure would result in serious and irreparable competitive injury to Schering, without serving any countervailing public purpose.

I. THE AGREEMENT AND RELATED DOCUMENTS AT ISSUE

Schering seeks *in camera* treatment for exhibits CX 1613 through CX 1652 on complaint counsel's list of exhibits. These documents, as discussed herein and in the supporting declaration by Jonathan Wasserman, reveal the details of Schering's business collaboration with ICN Pharmaceuticals for the Ribavirin pharmaceutical.

License and Supply Agreement with ICN Pharmaceuticals, Inc.

Like the ICN documents that were the subject of Schering's December 27, 2001 motion, the exhibits that are the subject of this motion contain extremely sensitive and highly confidential information regarding the financial details of the ICN deal, the size and structure of royalty payments, as well as product pricing data. *See, e.g.,* CX 1615-1617, 1624, 1632, 1640, 1649-50. These documents also describe the parties' marketing and distribution strategies, rights and responsibilities and provide confidential clinical specifications for the Ribavirin drug. *See* CX 1641-1646. Further, the subject exhibits contain comprehensive and highly confidential reports that were created exclusively for Schering's Board of Directors and top level employees. *See* CX 1649-1650. These reports provide detailed summaries of virtually every confidential and commercially sensitive aspect of the Ribavirin deal including deal terms, negotiations, pricing, development and marketing plans and product profile data. As discussed in Schering's earlier *in camera* motion, Article 9 of the agreement with ICN contains a confidentiality provision that restricts disclosure of proprietary information relating to the agreement. Finally, the ICN license agreement remains in effect and will likely govern the parties until at least 2010.

II. ARGUMENT

A. Legal Standard For *In Camera* Treatment.

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). Demonstrating "serious injury" requires the moving party to establish that the 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); see also *Hoechst Marion Russel, Inc.*, 2000 F.T.C. LEXIS 138 (2000). The Commission has articulated six factors that are relevant to a determination of secrecy and materiality: (1) the extent to which the information is known outside of the movant's business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the movant and competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See *Bristol-Myers*, 90 F.T.C. at 456; *Hoechst*, 2000 F.T.C. LEXIS 138, at *6. Finally, "[t]he likely loss of business advantages is a good example of a 'clearly defined, serious injury.'" *Hoechst*, 2000 F.T.C. LEXIS 138, at *6 (citing *General Foods*, 95 F.T.C. at 355).

B. The Documents At Issue Qualify For *In Camera* Treatment Because Disclosure Of These Highly Confidential Documents Would Result In Irreparable Competitive Injury To Schering.

Schering's request for *in camera* treatment is not exceptional, as the Commission previously has recognized the need to maintain the confidentiality of contracts and related documents. See *International Assoc. of Conference Interpreters*, 1996 FTC LEXIS 298, at *10 (June 26, 1996). The disclosure of these sensitive and confidential documents would reveal intimate details of Schering's licensing strategies and methods for analyzing potential products from commercial and clinical viewpoints. Furthermore, as a consequence of the obvious

competitive injury that will occur from disclosing the information to competitors, the Commission has recognized that information such as pricing, cost and sales forecasts is sensitive business data that should be afforded *in camera* status. See, e.g., *Conference Interpreters*, 1996 F.T.C. LEXIS 298 (*in camera* treatment of contract where terms, including rates of remuneration, permitted competitors to mimic negotiations and price lower than movant). Many of the documents at issue contain the types of pricing, sales and cost information previously deemed confidential by the Commission – and by this Court in its January 24, 2002 Order granting *in camera* status to other Ribavirin documents. In addition, the documents also contain sensitive and proprietary data regarding Schering's ongoing and *future* design, development, marketing and promotion strategies. As such, the case in favor of *in camera* treatment for the subject documents is even more compelling. See, e.g., *Conference Interpreters*, 1996 F.T.C. LEXIS 298, at *5.

Further, the subject agreements, summaries and related documents are clearly both secret and material to Schering's business. First, the information contained in the documents is known only to the contracting parties. And within Schering, the information is only known by members of the Board of Directors, the Operating Committee or top management. As discussed, the agreement contains a confidentiality provision limiting dissemination of confidential or proprietary information.

Second, the information contained in these documents is extremely valuable to Schering. Revealing the confidential information would destroy the competitive edge gained by Schering as a result of the agreement and would devalue the significant investments that Schering has already made in the agreement. Furthermore, based on the competitive edge gained by Schering as a result of this important agreement, and the consequent disadvantage to competitors if the documents remain confidential, the information is also extremely valuable to Schering's competitors.

Finally, the information contained in the subject documents could not be reproduced, therefore compounding the value of maintaining the secrecy of the information and the irreparable injury to Schering should the information become available to competitors.

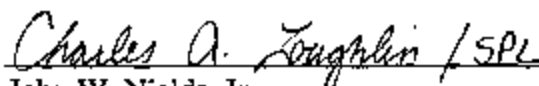
C. The Highly Sensitive Nature Of The Documents At Issue Justifies Indefinite Or Long-Term *In Camera* Treatment.

Schering seeks indefinite *in camera* protection for these documents relating to its ongoing licensing agreements and strategic business development efforts. As demonstrated above and in the accompanying declaration of Jonathan Wasserman, these documents are highly confidential and of critical importance to Schering. And they are identical in all relevant respects to the ICN documents already afforded *in camera* treatment. Thus, Schering submits that indefinite *in camera* protection is required to ensure that these highly confidential materials are protected for as long as they would reasonably provide competitive advantage to Schering's competitors.

III. CONCLUSION

For the foregoing reasons and those set forth in the accompanying motion and declaration, Schering respectfully requests that the Court grant *in camera* treatment for the documents discussed herein.

Respectfully submitted,



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Attorneys for Respondent
Schering-Plough Corporation

Dated: January 31, 2002

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DECLARATION OF JONATHAN A. WASSERMAN

I, Jonathan A. Wasserman, do solemnly and sincerely declare as follows:

1. I am over the age of eighteen and am competent to give testimony. The information set forth is based on my own personal knowledge, information and/or belief.
2. I am the Senior Antitrust Counsel for Schering-Plough Corporation ("Schering").
3. I make this declaration in support of Schering's Motion for *In Camera* Treatment of Documents Relating to License Agreement With ICN Pharmaceuticals, Inc., which have been identified as complaint counsel exhibits CX 1613 through CX 1652.
4. Each of these documents has been designated "Confidential" internally within Schering and/or has been marked "Confidential" or "Restricted Confidential" pursuant to the protective order.
5. No objection has ever been made by any party to Schering's designation of the subject documents as "Confidential" or "Restricted Confidential."

6. The documents that are the subject of this motion are identical in all material respects to other ICN documents for which *in camera* status has already been granted by the Court in its January 24, 2002 Order.

7. The documents that are the subject of this motion all relate to the license and supply agreement with ICN regarding the pharmaceutical Ribavirin.

8. The ICN agreement remains in effect today and will likely bind the parties until at least 2010. Furthermore, the ICN agreement contains a strict confidentiality provision that prohibits the public disclosure of deal terms and related information.

9. Each of the documents at issue contains extremely sensitive commercial and trade secret information concerning virtually every aspect of Schering's business to design, research, develop, manufacture, sell, price, distribute, market and promote pharmaceutical products. The public disclosure of these documents will cause serious and irreparable injury to Schering and result in a substantial loss of business advantage.

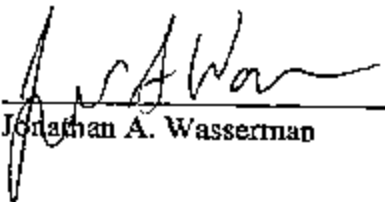
10. Release of the information contained in the foregoing documents will have serious and adverse competitive impacts on Schering. The documents provide a virtual blueprint to Schering's development, licensing, commercial and marketing activity.

11. The information within these documents is known only to the contracting parties and, within Schering, is known only by top management, the Board of Directors and Schering's Operating Committee. Pursuant to the confidentiality provision, Schering maintains strict controls to prevent both internal and external dissemination of confidential information. Furthermore, the documents reflect Schering's great effort and expense to negotiate the subject agreement and subsequent efforts to sell the Ribavirin product. The information is extremely valuable both to Schering and competitors and could not be reproduced.

12. As such, the documents contain secret information that is material to Schering business, competitiveness and profitability. Release of this information will cause the loss of business advantage and serious and irreparable injury to Schering.

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

Executed on January 31, 2002



Jonathan A. Wasserman

CERTIFICATE OF SERVICE

I hereby certify that this 31st day of January 2002, I caused an original, one paper copy and an electronic copy of Respondent Schering-Plough Corporation's Motion for *In Camera* Treatment of Documents Relating to License Agreement with ICN Pharmaceuticals, Inc., supporting Memorandum and Declaration of Jonathan A. Wasserman 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 Pender
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