

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

**COMPLAINT COUNSEL'S MOTION
AND MEMORANDUM IN SUPPORT OF MOTION TO PRECLUDE
CERTAIN TESTIMONY OF RESPONDENTS' LAWYER WITNESSES**

Pursuant to Rule 3.43(b) of Commission Rules of Practice, complaint counsel respectfully request that the expected testimony of certain attorney witnesses of the respondents be precluded at trial as legally irrelevant and unfairly prejudicial. 16 C.F.R. §3.43(b).

Background

From the opening arguments of respondents' counsel, Mr. Nields and Mr. Curran, it has become apparent that respondents intend to argue that Schering and Upsher acted in conformance with advice given by in-house and outside counsel of Schering and Upsher concerning the legality under the antitrust laws of a branded drug company making payments to a generic drug company in return for agreeing to stay off the market with its competing product. This puts at issue communications between counsel and Schering's and Upsher's employees that respondents refused to disclose during discovery.

Specifically, according to Mr. Nields, Schering in-house counsel John F. Hoffman -- the first Schering witness Mr. Nields introduced during his opening -- is expected to testify that "in his discussions with Upsher-Smith and ESI, [he] laid down very clearly the rules that would govern any settlement that Schering would enter into. He told them that Schering would not pay for them to stay off the market." (Tr. at 40.)¹ This was necessary, as Mr. Nields observed, because Upsher and ESI had each "requested that Schering make a payment in return for which they would agree to stay off the market." (Tr. at 53.) Mr. Hoffman is Schering's in-house counsel in charge of litigation and antitrust, and he was the lawyer responsible for the settlement negotiations at issue in this case. (Tr. at 39.) Putting Mr. Hoffman's credibility as an antitrust lawyer directly at issue, Mr. Nields represented during the opening that "we think, Your Honor, after you have heard him, you will conclude that he is a good antitrust lawyer." (Tr. at 39.)

The second witness Mr. Nields introduced during his opening is Schering's outside antitrust counsel, Charles F. "Rick" Rule. According to Mr. Nields, Mr. Rule is expected to testify that with respect to Schering's settlement with ESI, he was brought in to explain to the U.S. magistrate judge overseeing the settlement negotiations "the antitrust issues raised by a settlement which included payment." (Tr. at 49.) Likewise, Mr. Rule's former law partner, Anthony Herman, who also was Schering's principal outside patent litigation counsel in the case against ESI, "will describe the conversations they had on offers and counteroffers, [and] on discussion of antitrust issues." (Tr. at 48.)

¹ All page references beginning with "Tr." are made to the Trial Transcript, Volume 1 (Jan. 23, 2002).

Any uncertainty about Mr. Nields's purpose for introducing the testimony of attorneys Hoffman, Rule, and Herman concerning their legal advice is dispelled by Mr. Curran. During his opening statement on behalf of Upsher, Mr Curran argued:

Upsher-Smith agrees with what Mr. Nields said, that Schering's counsel responsible for the negotiations, Mr. Hoffman, was ahead of his time in identifying antitrust sensitivities in a transaction like this, but you will hear from every witness in this case who participated in those negotiations that once Mr. Hoffman made clear that he viewed it as a problem if there was any discussion of monetary transactions as part of the settlement as opposed to part of the licensing transaction, that there would be antitrust issues, when he raised that point, Upsher-Smith engaged counsel, brought counsel into the settlement negotiations." (Tr. at 97.)

That counsel was Upsher's outside patent counsel, Nicholas M. Cannella. (Tr. at 97.)

Thus, from their opening statements it has become clear that Mr. Nields and Mr. Curran intend to argue that because Schering's and Upsher's lawyers were aware of the law, respondents did not violate the law. Otherwise, what is the possible relevance of the expected testimony of attorneys Hoffman, Rule, Herman, and Cannella? Any doubt that this is Mr. Nields and Mr. Curran's purpose is dispelled by respondents' opening arguments. Mr. Nields, in the first moments addressing the Court, made the point of reading from CX 283, a Schering document entitled "Executive Summary," which states under the "Goals for the Upsher-Smith Settlement" that "any agreement must pass all legal and regulatory constraints, e.g., FTC." (Tr. at 40.) And Mr. Curran argued that Upsher's settlement with Schering was a "legitimate transaction" because Upsher's CEO, Ian Troup, was "advised by counsel" about the antitrust risks and that Upsher acted on the good faith belief that its conduct was reasonable and legal:

Ian Troup in June of 1997 was a businessman negotiating a deal. He was advised by counsel. He's an honest businessman, and you'll have an opportunity to size him up yourself, Your Honor. Given all the facts and circumstances surrounding

the company at the time, this was a fair, honest, and legitimate transaction. (Tr. at 100.)

Respondents' argument that because they were aware of the law, they did not violate the law, is based on a series of necessary inferences that they have not spelled out. Respondents have thwarted, by invoking claims of privilege, all efforts by complaint counsel to gain legitimate discovery regarding the facts upon which such inference could be based.

Some of the intermediate steps from "we know the law" to "we obeyed the law" that Mr. Nields and Mr. Curran skip include:

- a. During the negotiations with Upsher and ESI, were John Hoffman and Rick Rule simply advocating their client Schering's position, or were their statements an accurate reflection about the possible application of the antitrust laws to the settlements?
- b. What did attorney John Hoffman actually tell the Schering businesspeople about the legality of making payments for delay?
- c. What, if anything, did attorneys Rick Rule or Tony Herman actually tell Schering businesspeople or Hoffman about the legality of making payments for delay?
- d. What did John Hoffman mean when he said that any licensing deal with Upsher must stand "on its own two feet"? (Tr. at 41.) By what standard would Hoffman make this assessment? For example, does that mean that Schering would have paid the same amount of money for the license without the settlement?
- e. Did the Schering businesspeople actually listen to and follow Hoffman's, Rule's, and Herman's legal advice -- assuming they were so advised?
- f. Recognizing the potential for antitrust problems, what did John Hoffman do to ensure that the settlement with Upsher actually "stood on its own two feet." That is, what did he do to make sure payments to Upsher for the license weren't really for delay? Did he monitor due diligence? Did he review the valuation of the Upsher products being in-licensed?
- g. What did Rick Rule or Tony Herman do to ensure that in the settlement with ESI the payments to ESI weren't really for delay? Did they even review the settlement before it was signed by Schering?

- h. What, if anything, did Schering legal counsel tell the Schering board about the Upsher and ESI settlements and the Niacor license?
- i. What, if anything, did the Schering board and management do to ensure that the payments to Upsher and ESI weren't actually for delay, assuming they were advised about the possible antitrust implications of settlements involving payment for delay?
- j. What, if anything, did Upsher's outside patent litigation counsel, Nick Cannella, tell Upsher's businesspeople about the legality of making payments for delay? Assuming he did so, what did he do to make sure payments from Schering to Upsher for the license weren't really for delay? Did he monitor due diligence? Did he review the valuation of the Upsher products being in-licensed?

Obviously, the best evidence of what was being said and done inside Schering and Upsher with respect to Hoffman's, Rule's, Herman's, and Cannella's legal advice are respondents' contemporaneous business records and testimony about internal company discussions and behavior at that time -- not the self-serving, selective testimony Mr. Nields and Mr. Curran now seek to present to Your Honor. At every step during discovery, however, Mr. Nields and Mr. Curran thwarted, through claims of privilege, complaint counsel's legitimate efforts to get information regarding these issues: in depositions, by withholding documents, and by selectively redacting certain business records that were produced.

For example, before complaint counsel's questioning began at the deposition of Mr. Hoffman, Mr. Nields laid down his rules for the inquiry:

I'd like to say something just at the beginning. I think we all know this, but Mr. Hoffman is an attorney and was acting as an attorney in connection with two patent litigations that are at issue in the case, and we have not objected to his deposition because he was present at meeting with opposing counsel, and conversations at meeting with opposing counsel are not privileged, and they are relevant to this matter, but we don't expect questions that stray beyond those meetings into privileged matter or into Mr. Hoffman's mental impressions, and

obviously if there are such questions, we'll object and direct the witness not to answer.²

Consistent with his warning, each time a question was asked that even came close to seeking information about what was actually going on inside Schering at the time of the Upsher and ESI settlement negotiations, Mr. Nields objected on claims of privilege and instructed Mr. Hoffman not to answer, and Mr. Hoffman refused to answer. This included questions about: discussions at Schering after a settlement meeting with Upsher in Minneapolis (p. 28), whether Schering considered other settlement options before entering the agreement with Upsher (p. 29), whether antitrust concerns about the Upsher settlement were discussed at Schering (pp. 32-33), whether Hoffman had discussions with Rule regarding the Upsher litigation (p. 35), whether there were discussions at Schering about whether the payments to Upsher would be contingent or non-refundable (p. 56), whether there were discussions at Schering about setting the date for Upsher's entry of September 1, 2001 (p. 63), and what discussions took place at Schering in preparation for meetings with ESI (p. 83).

As with the Hoffman deposition, Mr. Nields laid down similar rules at the start of the depositions of Mr. Rule and Mr. Herman, limiting complaint counsel's inquiry of these two attorneys.³ Here, too, Mr. Nields objected to questions on claims of privilege and instructed Mr. Rule and Mr. Herman not to answer -- and Rule and Herman refused to answer -- each time a question was asked that even came close to seeking information about what was actually going on inside Schering at the time of the ESI and Upsher settlement negotiations.

² CX 1509 (Hoffman Deposition) at 5 (Oct. 26, 2001).

³ Rule Deposition at 5 (Nov. 15, 2001) (Attachment A); Herman Deposition at 7 (Oct. 30, 2001) (Attachment B).

Mr. Curran made a similar statement limiting complaint counsel's scope of inquiry during the deposition of Upsher outside patent litigation counsel Nick Cannella: "I ask before we take this break, [that complaint counsel] consider focusing your questions to this witness on communications he was involved in with Schering and negotiations between Upsher and Schering in which this witness participated. On matters in those areas, we will not be asserting attorney-client privilege."⁴ During the deposition, Mr. Curran not only asserted objections to questions asked of Mr. Cannella, a third-party witness, on the basis of attorney-client privilege but (curiously) also on the grounds of "common interest arrangement" and "joint defense privilege."⁵ Mr. Cannella refused to answer questions about possible settlement of patent litigation that occurred at Upsher (pp. 34-35), and conversations with Upsher CEO Ian Troup relating to settlement of the patent litigation (pp. 52-53).

Respondents also have withheld numerous documents on claims of privilege that likely are relevant to determining whether the businesspeople at Schering and Upsher actually were advised about the antitrust laws and sought to abide by them. During the investigation of this matter, Schering produced a 17-page privilege log with 119 documents containing dozens of documents authored by or sent to attorneys John Hoffman, Susan Lee, Jeffrey Wasserstein, Rick Rule, and Anthony Herman, as well as key business people at Schering, including Raman Kapur, Marty Driscoll, James Audibert, regarding the settlement of the Upsher and ESI patent litigations.⁶

⁴ Cannella Deposition at 37 (Oct. 23, 2001) (Attachment C).

⁵ *Id.* at 10.

⁶ "Schering-Plough Corporation Log of Privileged Documents" (Feb. 22, 2000) (Attachment D).

Similarly, Upsher-Smith produced a five-page privilege log with 38 documents, including documents authored by Nick Cannella concerning the patent settlement.⁷

In addition to refusing to produce certain documents on claims of privilege, some internal Schering business plans were produced with redactions that appear to go to the heart of the kind of legal advice Schering and Upsher are now trying to selectively put at issue through the testimony of their lawyers at trial. The following are two examples. First, in 1995, Schering's K-Dur project manager advised company executives that "direct generic competition is expected" and "may come within 2 years" (i.e., 1997).⁸ Notwithstanding that Schering's patent covering K-Dur-20 would not expire until 2006, she characterized the issues, objectives, and strategies regarding how to deal with looming generic competition as follows:

Issue #3

Generic Competition to K-Dur 20 may come within 2 years.

Rationale

ANDRx is developing a 20 mEq formulation. While no known bioavailability studies have been initiated, product approval is possible in 1Q97.

Objectives

1. Maximize length of time to introduction.
2. Minimize market penetration.

Strategies to Address Issue #3

REDACTED

⁷ "Upsher-Smith Privilege Log" (undated) (Attachment E).

⁸ CX 13 (Memorandum from Andrea J. Pickett, Product Manager, K-Dur, Re: K-Dur Long Term Strategy (Mar. 8, 1995)).

Similarly, in a memorandum concerning the Schering Board of Directors Meeting of June 24, 1997, where the proposed license agreement with Upsher-Smith was to be considered, one paragraph discusses the fact that Upsber was “seeking an income stream to replace the income Upsher-Smith had anticipated earning if it were able successfully to defend against Key’s infringement claim.”⁹ The last sentence of this paragraph is selectively redacted, however, leaving only a clause which conveniently (for Schering) says “we informed them that any such deal should stand on its own merit independent of the settlement.”¹⁰

Complaint counsel were respectful of respondents’ claims of privilege throughout the discovery period. We did not seek to challenge Mr. Niels’s and Mr. Curran’s claims of privilege (as ill-founded as some of those claims were) nor did we file motions to compel. But to allow respondents to use advice of counsel as a defense at this point in the proceedings -- especially in light of the concerted efforts they made to deny us legitimate discovery -- would be unfairly prejudicial to complaint counsel. Prior to Mr. Niels’s and Mr. Curran’s opening arguments, we had little way of knowing that respondents intended to raise an advice of counsel defense and every reason to think they would not. A review of Schering’s final witness list filed on December 14, 2001, for example, shows that Mr. Hoffman was expected to testify only about:

conversations with Upsher representatives during settlement negotiations between Schering and Upsher . . . Schering also expects him to testify about communications with ESI representatives during the course of settlement negotiations between Schering and ESI . . . Mr. Hoffman is also expected to testify

⁹ CX 338 (Schering Memo re: “Board of Directors Meeting – June 24, 1997” (Jun. 19, 1997)).

¹⁰ *Id.*

about conversations with federal judicial officials during the course of those settlement negotiations.¹¹

The Schering Witness List provides similarly vague descriptions of the expected testimony of Mr. Rule and Mr. Herman.¹² Nowhere is any mention made that Hoffman, Rule, and Herman are expected to testify about concerns they may have had that making payments to Upsher or ESI for delay could violate the antitrust laws.

Upsher's description of the expected testimony of Mr. Cannella also is vague: "He will testify about the negotiations between Upsher-Smith and Schering related to the licensing agreement."¹³ This description stands in sharp contrast to Mr. Curran's opening that "once Mr. Hoffman made clear that he viewed it as a problem if there was any discussion of monetary transactions as part of the settlement as opposed to part of the licensing transaction, that there would be antitrust issues, when he raised that point, Upsher-Smith engaged counsel, brought counsel [Nick Cannella] into the settlement negotiations." (Tr. at 97.) Further, Mr. Curran argued that Upsher CEO Ian Troup "was advised by counsel" (Mr. Cannella) and "[g]iven all the facts and circumstances surrounding the company at the time, this was a fair, honest, and legitimate transaction." (Tr. at 100.)

During their opening arguments, Mr. Nields and Mr. Curran put the advice of legal counsel squarely at issue, with the apparent hope that Your Honor will infer from this that

¹¹ Respondent Schering-Plough Corporation's Witness List at 2-3 (Dec. 14, 2001).

¹² See Schering Witness List at 9 (expected testimony of Mr. Herman) and at 12-13 (expected testimony of Mr. Rule).

¹³ Upsher Smith's Final Witness List at 6 (Dec. 14, 2001).

respondents' conduct was reasonable and legal. But they only want to tell Your Honor part of the story, and this is unfair.

Legal Analysis

A long line of case law makes clear that allowing a party in litigation to use claims of privilege as both "a sword and a shield" is unfairly prejudicial and should not be permitted. *See, e.g., United States v. Bilzerian*, 926 F. 2d 1285, 1292 (2nd Cir. 1991) ("the attorney-client privilege cannot at once be used as a shield and a sword").¹⁴ This is precisely what Mr. Nields and Mr. Curran seek to do. Throughout the discovery phase of this proceeding they steadfastly have used claims of privilege as a shield, while now they seek to use advice of counsel as a sword. During his opening, Mr. Curran expressly stated that Upsher believes its actions in entering into the settlement with Schering are "legitimate" because of the "advice of counsel." (Tr. at 100.) Mr. Nields was more careful not to expressly mention the words "advice of counsel" during his opening. But if he did not intend to raise reliance on counsel as a defense, then why is it important for this Court to hear testimony about the legal advice of Messrs. Hoffman, Rule, and Herman, and to conclude that Mr. Hoffman "is a good antitrust lawyer"? *See, e.g., Recycling Solutions, Inc. v. Dist. of Columbia*, 175 F.R.D. 407, 409 n.3 (D.D.C. 1997) (if defendants were not raising advice of counsel as a defense then "reference to their consultation with him would be superfluous.")

¹⁴ Your Honor has recognized this same principle with regard to claims of work-product privilege. *See Order Denying Motion in Limine or For a Protective Order, Motor Up Corp.*, Dkt. 9291, 1999 FTC LEXIS 207 at *7 (Aug. 5, 1999) (work-product doctrine cannot be used "as both a sword and shield") (quoting *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)).

Once a party chooses to shield a matter from inquiry pursuant to a privilege, that party is barred from subsequently introducing evidence on that matter. *See Mobil Oil Corp. v. Amoco Chemicals Corp.*, 779 F. Supp. 1429, 1485 n. 43 (D. Del. 1991) (“Amoco’s failure to clearly waive the privilege before the close of discovery prevented Mobil from taking any appropriate discovery regarding the [attorneys’] opinions. [The Court] will not consider the contents of the opinions . . .”). “[T]he failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence.” *International Tel. & Tel. Corp.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (citing Fed. R. Civ. P. 37(b)(2)(B)).

Even if the proposed testimony itself does not directly refer to privileged evidence, a defendant must choose between introducing testimony and asserting privilege if cross-examination of the testifying witness must fairly intrude on privileged matters. In *Bilzerian*, for example, the criminal defendant sought a ruling that he could testify regarding his belief in the lawfulness of his actions -- without asserting a reliance on counsel defense or actually introducing the content or existence of privileged communications -- and not be subjected to cross-examination on relevant privileged communications that he had with his attorney. *See* 926 F.2d at 1291. The Court of Appeals for the Second Circuit affirmed the trial court’s refusal to permit the defendant to both offer his proposed testimony and assert privilege for related communications. The court of appeals held that when privileged communications are “directly relevant” to an opponent’s testing of issues affirmatively raised by a party, fairness prohibits allowing the party to both testify regarding those issues and use the attorney-client privilege to block discovery of those communications. *Id.* at 1292. *See also Pereira v. United Jersey Bank*, 1997 WL 773716, at * 3

(S.D.N.Y. 1997) (summarizing Second Circuit law as holding that a party cannot assert both a privilege and “a position ‘the truth of which can only be assessed by examination of the privileged communication’”). Thus, even if a party’s proposed testimony does not directly incorporate privileged information, “[a] defendant may not use the privilege to prejudice his opponent’s case” and still expect to testify freely. *Bilzerian*, 926 F.2d at 1292. See also *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (following *Bilzerian*).

While the expected direct examination testimony of Hoffman, Rule, Herman, and Cannella may not directly reveal privileged evidence, we cannot fairly probe their testimony on cross-examination without intruding on privileged matters that respondents have repeatedly shielded from discovery. Did Hoffman and Rule raise antitrust concerns with ESI in order to get ESI to lower its \$100 million demand for payments or because they believed it to be an accurate assessment of the law? Respondents refused to answer on the basis of privilege. Did Hoffman, Rule, Herman, and Cannella tell their businesspeople about the antitrust risks of entering settlements involving payment for delay? Respondents won’t say. Did the Schering and Upsher businesspeople actually listen to and follow the legal advice of their lawyers, assuming they were so advised? Did Hoffman, Rule, Herman, and Cannella take any action to prevent their clients from entering into a settlement involving payment for delay? What did they do to make sure payments to Upsher really were for the products licensed? Did they monitor due diligence? Did they review the valuation? They refused to tell us.

Respondents’ privilege claims not only obstruct complaint counsel’s discovery of information necessary for the cross-examination of Hoffman, Rule, Herman, and Cannella, but also serve to prevent this Court from being able to evaluate the veracity of their assertions. It

would be patently unfair to allow respondents to block any examination of the underlying evidence while simultaneously allowing respondents to present self-serving argument and selective testimony. Having chosen to assert privilege to prevent discovery of contemporaneous evidence, respondents should be precluded from presenting the untestable "testimony" of Messrs. Hoffman, Rule, Herman, and Cannella that is intended to suggest that the settlements were "fair, honest, and legitimate" (Tr. at 100) transactions based on the advice of counsel.

At this late date, it is no longer an option for this Court to deem respondents' privilege claims waived and to order them to provide discovery necessary for cross-examination. After discovery is closed and trial has begun, it is too late to wait for respondents to produce relevant documents and then repeat the depositions of Messrs. Hoffman, Rule, Herman, and Cannella, and still expect complaint counsel to be able to make any meaningful use of contemporaneous evidence concerning respondents' true purpose in negotiating and entering into their settlements. Therefore, the only appropriate remedy at this time is to order Schering and Upsher to abide by the choice they already knowingly have made, and to preclude the introduction of evidence by attorneys Hoffman, Rule, Herman, and Cannella with respect to issues on which they and others have asserted privilege.

* * * * *

For the reasons set forth above, we respectfully request that Your Honor preclude as irrelevant and unfairly prejudicial, under Commission Rule of Practice § 3.43(b), any testimony by

attorneys John Hoffman, Rick Rule, Tony Herman, and Nick Cannella regarding the discussions they had about the legal implications of Schering paying Upsher or ESI for delay.

Respectfully submitted



Karen G. Bokat

Markus H. Meier

Bradley S. Albert

Counsel Supporting the Complaint

Dated: February 5, 2002

Exhibit A

In The Matter Of:

*SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297*

*CHARLES F. (RICK) RULE
November 15, 2001*

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

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17 hopefully in a way that you do understand it.
18 If at any point during the deposition you
19 realize that an answer you gave me was either incorrect
20 or incomplete or needs amending in some fashion, just
21 let me know, and you'll be able -- I'll allow you to
22 amend your answer. If you need a bathroom break,
23 obviously we will be taking breaks periodically, I
24 don't expect this to be a very long deposition, but in
25 any event, whenever you need to go to the restroom,
26 just say so, and we will give you a break.

27 **MR. NIELDS:** We appreciate that, I'd like to
28 put something on the record now, too.

29 Mr. Rule is an attorney, and he was functioning
30 as Schering's attorney in connection with the
31 Schering-ESI patent litigation, and he was designated
32 as a witness by Schering because he had conversations
33 with the magistrate judge and representatives of ESI
34 that are not privileged and are relevant to the issues
35 in the case, but -- we don't expect this to happen, but
36 if your questions would stray into areas which are
37 calling for conversations he had with his client or
38 with other lawyers representing his client, obviously I
39 would interpose a privilege objection.

40 Similarly, if you stray into seeking his mental
41 impressions, I would also interpose such an objection

42 School from which I graduated in 1981.

43 **Q:** And any subsequent degrees after that?

44 **A:** No.

45 **Q:** Where are you currently employed?

46 **A:** Fried, Frank, Harris, Shriver & Jacobson.

47 **Q:** And how long have you been employed there?

48 **A:** Since mid-January of this year, 2001.

49 **Q:** What's your position there?

50 **A:** Partner and chair of the antitrust department.

51 **Q:** Are there any gradations of partnership?

52 **A:** No.

53 **Q:** What is your -- do you have an area of
54 expertise?

55 **A:** Antitrust and economic regulation generally.

56 **Q:** And could you generally describe the type of
57 work you do in those areas?

58 **A:** Sure. I counsel clients on antitrust issues. I
59 represent clients in connection -- generally on
60 antitrust matters. Most tend to be government
61 investigations, either of mergers or cartel behavior or
62 unilateral alleged monopolistic practices, and
63 represent clients both before the Department of Justice
64 and the Federal Trade Commission.

65 Also, I have represented clients from time to
66 time in private litigation and in connection with

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67 and direct him not to answer.

68 **BY MR. GIBBS:**

69 **Q:** One other thing I did want to add, is there
70 anything that inhibits your ability to testify today,
71 any medication, bad night out last night, something
72 like that?

73 **A:** No.

74 **Q:** Okay. Now, counsel indicated that you worked
75 on the ESI -- worked with Schering on the ESI
76 agreement. Did you have any involvement with the
77 Schering-Upsher agreement?

78 **MR. NIELDS:** I'm going to permit Mr. Rule to
79 answer that one question on that subject.

80 **THE WITNESS:** Yes.

81 **BY MR. GIBBS:**

82 **Q:** Okay. It would have been a little easier if
83 the answer was no, but...

84 Could you describe for me your educational
85 background from high school?

86 **A:** From high school, I went to public high school
87 in Nashville, Tennessee, graduated in 1973; then took a
88 year off between high school and college to work
89 construction in Florida; then returned to Nashville and
90 went to Vanderbilt University, where I got a BA in
91 1978; then went to the University of Chicago Law

67 investigations by state attorneys general and by the
68 European Commission.

69 **Q:** How long have you specialized in the areas of
70 antitrust and -- did you say business economics?

71 **A:** I said economic regulation.

72 **Q:** -- economic regulation?

73 **A:** Since I -- I suppose even in law school, but
74 certainly since I began practicing after clerkship.

75 **Q:** Could you -- where did you work prior to Fried
76 Frank?

77 **A:** Would you like me to go back over my work
78 history?

79 **Q:** Yes, please.

80 **A:** Okay. Well, going -- well, let me start from
81 1982. I -- after a clerkship, I was Special Assistant
82 to the Assistant Attorney General in the Antitrust
83 Division of the Department of Justice, who at the time
84 was Bill Baxter. Then in early 1983 -- or excuse me,
85 in early 1984, I became a Deputy Assistant Attorney
86 General at the time for policy planning and
87 legislation. Paul McGrath was the Assistant Attorney
88 General in charge of the Antitrust Division at that
89 point.

90 In -- let me see, in early 1985, I assumed the
91 responsibilities of the Regulatory Deputy at the

Exhibit B

In The Matter Of:

*SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297*

ANTHONY HERMAN

October 30, 2001

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

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PROCEEDINGS

Whereupon—

ANTHONY HERMAN

a witness, called for examination, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR
THE FEDERAL TRADE COMMISSION
BY MS. APORI:

Q: Please state your name and business address for the record.

A: Anthony Herman, Covington & Burling, 1201 Pennsylvania Avenue, Northwest, Washington, D.C. 20004.

Q: Good morning, Mr. Herman. My name is Yaa Apori. I'm an attorney with the FTC, and I will be asking you a series of questions related to the Commission's complaint against Schering Plough Corporation.

Before we get started, I'd like to go over a few instructions. If you do not hear a question that I have asked you, just say so and I will repeat the question. If you don't understand a question I have asked you, just say so and I

will try to clarify the question.

All questions must be answered audibly. This will greatly reduce the stress on the court reporter.

And to start, I wanted to let you know that I will be referring to Schering Plough Corporation as Schering Plough or Schering and Upsher-Smith Corporation as Upsher or Upsher-Smith and also ESI Lederle Incorporated as ESI but also to include AHP or American Home Products. Is that clear?

A: Yes.

Q: Okay. Please be aware that when I refer to Schering Plough Corporation, I also include Key Pharmaceuticals; is that clear?

A: No.

Q: Okay. Then I will refer to them separately. Key Pharmaceuticals, as I understand it, is a division or a business unit of Schering Plough Corporation. Are you aware of that?

A: No.

Q: Okay. Is there anything you need to make me aware of that might impair your ability to understand my questions or to answer them truthfully and completely?

A: I certainly can answer them truthfully and completely.

MR. NIELDS: I would like to just make a brief statement at the outset of the deposition. As I think you will bring out in a moment, Mr. Herman is an attorney with the law firm of Covington & Burling, and was acting as an attorney representing Schering/Key in the two patent litigations that, the settlement of which is involved in this case.

And he has been designated a witness by Schering because he had conversations with the adversary in the ESI litigation and also with the magistrate judge. And those conversations we believe are relevant to the case.

But if questions stray into areas such as privileged areas, such as conversations with his client or into his mental impressions, then we will be objecting and I will be directing him not to answer.

MS. APORI: Okay. Your statement has been noted.

BY MS. APORI:

Q: Are you represented by counsel here today?

A: Yes.

Q: And who is your counsel?

A: Mr. Nields.

Q: And Mr. Nields also represents Schering Plough Corporation in this matter, are you aware of that?

A: Yes.

Q: When did you make arrangements to have Mr. Nields represent you for this deposition?

A: I don't recall.

Q: Did you do anything to prepare for your deposition today?

A: Yes.

Q: What did you do?

A: I met with Mr. Nields and I thought about the case.

Q: Did you meet with anyone outside of, besides from Nields, to prepare for your deposition today?

A: Yes.

Q: Who else did you meet with?

A: Mark Lynch.

Q: And who is Mr. Lynch?

A: He is one of my partners at Covington & Burling.

Exhibit C

In The Matter Of:

*SCHERING-PLOUGH CORP. & UPSHER-SMITH LABS
MATTER NO. D09297*

NICHOLAS M. CANNELLA

October 23, 2001

CONFIDENTIAL

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

Original File 11023CANASC, 103 Pages
Min-U-Script® File ID: 1461250608

Word Index included with this Min-U-Script®

Page 37

(1) between Upsher-Smith and Schering Plough concerning the
(2) settlement of the '743 patent litigation?

(3) MR. CURRAN: Objection, vague, but you can
(4) answer.

(5) THE WITNESS: You know, I'm not entirely sure I
(6) understand the question, Mr. Narrow, but if I am
(7) interpreting it correctly, I believe I first became
(8) aware of discussions sometime in the late spring of
(9) 1997.

(10) BY MR. NARROW:

(11) Q: Okay, I am going to have a series of questions
(12) about that. Perhaps we should take a brief break
(13) before we begin on this.

(14) MR. CURRAN: That's fine, but I ask before we
(15) take this break, Mr. Narrow, you consider focusing your
(16) questions to this witness on communications he was
(17) involved in with Schering and negotiations between
(18) Upsher and Schering in which this witness participated.
(19) On matters in those areas, we will not be asserting
(20) attorney-client privilege. I must say I'm bewildered
(21) at your insistence so far in this deposition to focus
(22) expressly your questioning on communications between
(23) Upsher-Smith and its litigation counsel.

(24) Thank you.

(25) (A brief recess was taken.)

Page 38

(1) MR. NARROW: Would you read back the last
(2) question and answer, please.

(3) (The record was read as follows.)

(4) *QUESTION: When was your first involvement in
(5) any contact between Upsher-Smith and Schering Plough
(6) concerning the settlement of the '743 patent
(7) litigation?

(8) *MR. CURRAN: Objection, vague, but you can
(9) answer.

(10) *THE WITNESS: You know, I'm not entirely sure
(11) I understand the question, Mr. Narrow, but if I am
(12) interpreting it correctly, I believe I first became
(13) aware of discussions sometime in the late spring of
(14) 1997."

(15) BY MR. NARROW:

(16) Q: Were there a series of meetings and
(17) communications between representatives of Schering and
(18) Upsher-Smith in the spring of 1997 concerning
(19) settlement of the '743 patent litigation?

(20) A: I don't know.

(21) Q: You don't know.

(22) Do you recall attending any meetings between
(23) representatives of Schering and Upsher-Smith concerning
(24) settlement of that patent litigation?

(25) A: Yes, I recall attending one meeting.

Page 39

(1) Q: All right. Do you recall when that meeting
(2) was?

(3) MR. CURRAN: Objection as to form. I just want
(4) to clarify, by "meeting," you mean an in-person
(5) meeting, Mr. Narrow, as opposed to a telephone
(6) conference?

(7) MR. NARROW: Yes.

(8) THE WITNESS: And I answered the question in
(9) that way, that I recall attending one in-person
(10) meeting.

(11) Now your question is do I recall when ---

(12) BY MR. NARROW:

(13) Q: When the meeting was.

(14) A: My best recollection is that it was sometime in
(15) early June of 1997.

(16) Q: And where did that meeting occur?

(17) A: At Schering Plough's -- at what I understand to
(18) be Schering Plough's facility in New Jersey.

(19) Q: And who was present at that meeting?

(20) A: With respect to Upsher-Smith, Mr. Troup, a
(21) gentleman whose last name I do not recall whose first
(22) name was Andrew, who was not to my understanding an
(23) Upsher-Smith employee but a consultant, and I.

(24) With respect to Schering Plough, a senior
(25) business executive of Middle Eastern ancestry, I think

Page 40

(1) his name was something like Kapur. I have a faint
(2) recollection of one or two perhaps other less senior
(3) business people from Schering Plough, and an in-house
(4) Schering Plough lawyer whose name I believe is John
(5) Hoffman.

(6) Q: Do you recall if Martin Driscoll was at that
(7) meeting?

(8) A: As I say, there were two -- I believe two
(9) gentlemen in the room, but I don't recall that name. I
(10) don't recall the names of the other two gentlemen.

(11) Q: How did you come to attend that meeting?

(12) A: I was asked to.

(13) Q: By whom?

(14) A: Originally by my partner Bruce Haas.

(15) Q: Were you attending the meeting for Mr. Haas?

(16) A: I don't know that I would phrase it exactly
(17) that way, but I know that Bruce was busy and asked me
(18) if I could go to the meeting.

(19) Q: And that was the only meeting that you attended
(20) concerning settlement -- the only meeting between
(21) representatives of Upsher-Smith and Schering concerning
(22) the settlement of that patent litigation?

(23) A: The only face-to-face meeting, yes.

(24) Q: Do you recall what was discussed at that
(25) meeting?

Exhibit D

| 1 | 00-00-1996 | 3 | Hoffman, John | Handwritten Notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement negotiations. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 13 |
|----|------------|----|---------------|---|--------------------------------|--------------------------------------|----|
| 2 | 10-22-1997 | 2 | Hoffman, John | Memo with marginalia providing confidential legal advice of counsel RE: ESI-Lederle patent infringement lawsuit. | Attorney-Client | <input type="checkbox"/> Is Redacted | 13 |
| 3 | 09-00-1997 | 6 | Hoffman, John | Handwritten Notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement negotiations. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 13 |
| 4 | 01-02-1997 | 10 | Hoffman, John | Memo with marginalia and notes reflecting confidential legal advice and analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 25 |
| 5 | 00-00-1998 | 3 | Hoffman, John | Handwritten and Typed Notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 13 |
| 6 | 00-00-1997 | 1 | Hoffman, John | Handwritten Notes providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 12 |
| 7 | 01-21-1997 | 1 | Hoffman, John | Memo requesting confidential legal advice of counsel RE: Upsher-Smith patent infringement lawsuit settlement. | Attorney-Client | <input type="checkbox"/> Is Redacted | 5 |
| 8 | 06-25-1997 | 16 | Hoffman, John | Draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 12 |
| 9 | 11-16-1997 | 5 | Hoffman, John | Memo attaching summary reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: potential ESI-Lederle patent infringement lawsuit. | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted | 25 |
| 10 | 00-00-1996 | 1 | Lee, Susan | Summary providing confidential legal analysis of counsel (S-P Law Dept.) RE: ESI-Lederle patent infringement suit settlement negotiations. | Attorney-Client | <input type="checkbox"/> Is Redacted | 13 |

| | | | | | | | |
|----|------------|----|--------------|---|--|-------------------------------|---------|
| 11 | 09-18-1996 | 4 | Lee, Susan * | Lee, Susan * Comora, Joseph C. N/A. | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation Re: ESI-Ledette and Upsher-Smith patent infringement lawsuits. | Atorney-Client / Work Product | 21 / 25 |
| 12 | 09-00-1997 | 1 | Lee, Susan * | Law Department * N/A. N/A. | Summary providing confidential legal advice of counsel Re: Upsher-Smith patent infringement lawsuit settlement. | Atorney-Client / Work Product | 12 |
| 13 | 06-13-1997 | 12 | Lee, Susan * | Law Department * Thompson, Paul Ph.D. Board of Directors-- Sebring-Plough; Connor, Joseph C. Masaracain, Jeffrey Jeffrey *; Hoffman, John * | Memo attaching proposal providing confidential legal advice of counsel Re: Upsher-Smith patent infringement lawsuit settlement. | Atorney-Client / Work Product | 12 / 10 |
| 14 | 06-25-1997 | 5 | Lee, Susan * | Rule, Charles *; Herman, Anthony Tony *; Hoffman, John * | Memo providing confidential legal advice of counsel prepared in anticipation of litigation Re: Upsher-Smith patent infringement lawsuit settlement negotiations. | Atorney-Client / Work Product | 12 |
| 15 | 10-20-1997 | 8 | Lee, Susan * | N/A. Riccardi, Bill. Olasola, Chris; Driscoll, Martin; Hoffman, John *; Kapur, Ramany Lee, Susan *; Faganio, Paulo; Russo, Raymond; Masekstein, Jeffrey [Jeffrey] *. | Analysis prepared at the request of counsel (S-P Law Dept.) for the facilitation of confidential legal advice and in anticipation of litigation Re: ESI-Ledette patent infringement lawsuit settlement negotiations. | Atorney-Client / Work Product | 13 |
| 16 | 08-01-1998 | 3 | Lee, Susan * | N/A. Berman, Paul *; Herman, Anthony Tony *; Hoffman, John * | Advice letter providing confidential legal advice of counsel and prepared in anticipation of litigation Re: ESI-Ledette patent infringement lawsuit settlement. | Atorney-Client / Work Product | 13 |
| 17 | 08-12-1997 | 2 | Lee, Susan * | N/A. Hoffman, John *. Driscoll, Martin; Herman, Anthony Tony *; Kapur, Ramany Lee, Susan *; Russo, Raymond; Masekstein, Jeffrey Jeffrey *. N/A. | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation Re: Upsher-Smith patent infringement lawsuit settlement terms. | Atorney-Client / Work Product | 12 / 13 |

| | | | | | | | | | | |
|----|------------|----|-------------|--|------------------|--|--------------------------------------|---|--------------------------------|--------|
| 18 | 03-12-1997 | 8 | Lee, Susan* | Litigation Steering Committee * | Law Department * | Minutes providing confidential legal analysis of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 7 |
| 19 | 03-26-1997 | 13 | Lee, Susan* | Russo, Raymond, Lee, Susan * | N/A. | Analysis prepared at the request of counsel in anticipation of litigation RE: EST-Lederle patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 13 |
| 20 | 10-24-1997 | 31 | Lee, Susan* | Russo, Raymond, Lee, Susan * | N/A. | Analysis prepared at the request of counsel in anticipation of litigation RE: EST-Lederle patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 11, 13 |
| 21 | 12-16-1997 | 1 | Lee, Susan* | Russo, Raymond, Dilacchi, Chris, Hoffman, John * | N/A. | Filed memo reflecting confidential legal analysis of counsel to Hoffman's RE: EST-Lederle patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 13 |
| 22 | 02-09-1998 | 3 | Lee, Susan* | Lee, Susan *, Hoffman, John * | N/A. | Draft memo reflecting confidential legal advice of counsel RE: EST-Lederle patent infringement lawsuit settlement agreement. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 13 |
| 23 | 02-10-1998 | 63 | Lee, Susan* | Bayman, Paul *, Lee, Susan *, Hoffman, John * | N/A. | Draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: EST-Lederle patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 13 |
| 24 | 06-10-1997 | 3 | Lee, Susan* | Litigation Steering Committee * | Law Department * | Minutes reflecting confidential legal analysis of counsel RE: Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 7 |
| 25 | 04-13-1997 | 7 | Lee, Susan* | Litigation Steering Committee * | Law Department * | Minutes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 7 |
| 26 | 03-14-1996 | 3 | Lee, Susan* | Robert, Morgan N. A. | Law Department * | Minutes and memo reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: Upsher-Smith and EST-Lederle patent infringement lawsuits. | <input type="checkbox"/> Is Redacted | A | Attorney-Client / Work Product | 7 |

| 27 | 02-13-1996 | 3 | Lee, Susan* | Kaher, Norman M. * Law Department * N/A | Minutes and memo reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: Upsher-Smith and ESI-Lederle patent infringement lawsuits | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 7 |
|----|------------|---|---------------|---|--|--|-------------------|
| 28 | 02-10-1998 | 3 | Lee, Susan* | Lee, Susan * Hoffman, John * D'Andrade, Hugh A. Conroy, Joseph C. * Driscoll, Martin | Memo reflecting confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement and licensing proposals | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 13 |
| 29 | 12-15-1997 | 3 | Lee, Susan* | Hoffman, John * Conroy, Joseph C. * Cohen, Raul E. * D'Andrade, Hugh A. Driscoll, Martin Kapoor, Ganesh; Hulse, Raymond; Messersmith, Jeffrey Jeffrey * Zahn, Richard | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement settlement negotiations | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 13 |
| 30 | 05-18-1999 | 5 | Lee, Susan* | Derman, Paul * Lee, Susan * Hoffman, John * | Letter and memo reflecting confidential legal advice of counsel and prepared in anticipation of litigation RE: potential Amex patent infringement lawsuit | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 23 / 10 / 11 |
| 31 | 07-01-1999 | 5 | Lee, Susan* | Lee, Susan * Hoffman, John * Gao, Joseph Dilescia, Chris | Memo providing confidential legal advice of counsel and attaching memo providing confidential legal advice of outside counsel (P. Bernman) in preparation for litigation RE: potential Amex patent infringement lawsuit | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 21 |
| 32 | 08-25-1999 | 7 | Lee, Susan* | Bernman, Paul * Kuhlik, Bruce * Lee, Susan * | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit; ESI-Lederle patent infringement lawsuit; and potential Amex patent infringement lawsuit | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 21 / 19 / 11 / 15 |
| 33 | 02-12-1996 | 2 | Cason, Joseph | Lee, Susan * James R. * Goslin, Raul H. * D'Andrade, Hugh A. * Stolt, David M. * Conroy, Joseph C. * Driscoll, Martin * Zelman, Robert * | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: potential ESI-Lederle patent infringement lawsuit | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 25 / 9 |

| Case No. | Date | Case Name | Attorneys | Description | Product | Is Redacted |
|----------|------------|---------------------------------|---|---|---------|--|
| 34 | 02-12-1996 | Case, Joseph | Lee, Susan *; Nelson, James R. *; Connor, Joseph C. * D'Innocelli, Martin Trahner, Robert * | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: potential EST-Lederle patent infringement lawsuit. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 35 | 09-03-1999 | Case, Joseph | D'Innocelli, Chris, Zahn, Richard, Case, Joseph; Kauer, William, | Memo reflecting confidential legal analysis of counsel (S-P Law Dept *) and prepared in anticipation of litigation RE: potential Podex patent infringement lawsuit. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 36 | 09-15-1999 | Case, Joseph | Case, Joseph, Zahn, Richard, N/A. | Memo reflecting confidential legal advice of counsel (S-P Law Dept *) and prepared in anticipation of litigation RE: potential Podex patent infringement lawsuit. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 37 | 12-12-1995 | Case, Joseph | Hoffman, John *; Lee, Susan *; Nelson, James R. *; Case, Paul E. * D'Andrade, Hugh A. * Sznur, David X. * Connor, Joseph C. * D'Innocelli, Martin, Trahner, Robert * | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: potential Upsher-Smith patent infringement lawsuit. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 38 | 02-12-1998 | Case, Joseph | Reiman, Paul * N/A. | Draft letter providing confidential legal analysis of counsel and prepared in anticipation of litigation RE: potential EST-Lederle Patent infringement lawsuit. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 39 | 12-15-1997 | Wasserstein, Jeffrey ("Jeff") * | Hoffman, John *; Lee, Susan *; Connor, Joseph C. *; Case, Paul E. * D'Andrade, Hugh A. * D'Innocelli, Martin, Kaput, Ronan; Russo, Raymond; Wasserstein, Jeffrey ("Jeff") *; Zahn, Richard. | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 40 | 10-23-1997 | Wasserstein, Jeffrey ("Jeff") * | Wasserstein, Jeffrey ("Jeff") * N/A. N/A. | Minutes reflecting confidential legal analysis of counsel (A. Herman *) and prepared in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |
| 41 | 04-17-1998 | Hanley, Ken * | Hanley, Ken *; Covington & Burling * N/A; file. N/A. | Draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement. | 4653743 | <input type="checkbox"/> Is Redacted <input type="checkbox"/> Is Redacted |

Confidential - Unfiled Documents - Case No. 93-10740

| Case No. | Date | Author | Applicant | Description | Page Count | Category | Redacted |
|----------|------------|--------|---------------|---|---------------------------|-----------------------------------|--------------------------------------|
| 42 | 05-06-1998 | 55 | Hanley, Ken * | Berman, Paul * Hanley, Ken * | 437429; 418763; 501594 | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 43 | 05-06-1998 | 131 | Hanley, Ken * | Berman, Paul * Pile N/A | | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 44 | 06-12-1998 | 87 | Hanley, Ken * | Hanley, Ken * Bucko, Robert; Croce, Bem; D'Iscooll, Mertin; Denton, Anthony; Nichols, Tom; Rankin, Spencer; Hoffman, John * Kapur, Ramon | | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 45 | 01-18-1999 | 3 | Hanley, Ken * | Hanley, Ken * N/A Bucko, Robert; Faen, Joseph; Dilsaris, Charles; Quaceti, Anthony; Kapur, Ramon | | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 46 | 01-25-1999 | 42 | Hanley, Ken * | Berman, Paul * Hanley, Ken * Kapur, Ramon; D'Iscooll, Martin; Yvainot, Robert * Hoffman, John * | | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 47 | 01-02-1998 | 63 | Hanley, Ken * | Hanley, Ken * N/A N/A | 4863743 | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |
| 48 | 03-04-1998 | 7 | Hanley, Ken * | Berman, Paul * Kapur, Ramon; D'Iscooll, Martin; Hoffman, John * Hanley, Ken * N/A | 4863743 | Attorney-Client / Work Product | <input type="checkbox"/> Is Redacted |

| | Date | Page | Author | Description | Project # | Privileged | Spec. Information # |
|----|------------|------|---------------|---|------------------------------|--------------------------------------|---------------------|
| 49 | 03-04-1998 | 4 | Hanley, Ken * | Berman, Paul * Kapur, Ramon Driscoll, Martin Hoffman, John * Hanley, Ken * | | <input type="checkbox"/> Is Redacted | |
| | | | | Draft letter providing confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 50 | 03-19-1998 | 36 | Hanley, Ken * | Berman, Paul * Hanley, Ken * | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Draft memo with handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 51 | 03-16-1998 | 4 | Hanley, Ken * | Hanley, Ken * N/A. | | <input type="checkbox"/> Is Redacted | |
| | | | | Handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 52 | 03-30-1998 | 38 | Hanley, Ken * | Hanley, Ken * Berman, Paul * N/A. | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Draft agreement with handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 53 | 04-01-1998 | 43 | Hanley, Ken * | Berman, Paul * Kapur, Ramon Driscoll, Martin Hoffman, John * Hanley, Ken * | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Draft agreement with handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 54 | 04-15-1998 | 32 | Hanley, Ken * | Berman, Paul * Hanley, Ken * | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Draft agreement reflecting confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 55 | 04-17-1998 | 55 | Hanley, Ken * | Berman, Paul * Hanley, Ken * | 4374629; 4182765; 5015646 | <input type="checkbox"/> Is Redacted | |
| | | | | Draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| 56 | 04-16-1998 | 61 | Hanley, Ken * | Berman, Paul * Hanley, Ken * Kapur, Ramon Driscoll, Martin Hoffman, John N/A. | | <input type="checkbox"/> Is Redacted | |
| | | | | Letter attaching draft agreement with handwritten notes providing confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Ledevite patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |

| Case No. | Date | Page | Author | Description | Client | Product | Redacted |
|----------|------------|------|-----------------|--|--------------------------------|---------|--------------------------------------|
| 57 | 02-12-1996 | 2 | Dilascio, Chris | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation re: potential ESI-Lederle patent infringement lawsuit. | Attorney-Client / Work Product | 25 | <input type="checkbox"/> Is Redacted |
| 58 | 03-22-1996 | 8 | Dilascio, Chris | Memo reflecting confidential legal analysis of counsel and prepared in anticipation of litigation re: potential ESI-Lederle patent infringement lawsuit. | Attorney-Client / Work Product | 25 | <input type="checkbox"/> Is Redacted |
| 59 | 04-16-1996 | 16 | Hanley, Ken | Memo attaching draft with handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation re: ESI-Lederle patent infringement lawsuit settlement. | Attorney-Client / Work Product | 13 | <input type="checkbox"/> Is Redacted |
| 60 | 12-18-1995 | 10 | Dilascio, Chris | Handwritten notes reflecting confidential legal advice of counsel [E. Lee *; K. Hanley *; J. Nelson *; M. Chellus *; and Cowington & Burling *] re: potential Upsher-Smith and ESI Lederle patent infringement lawsuits and Upsher-Smith and ESI Lederle patent infringement lawsuit strategies. | Attorney-Client / Work Product | 23 | <input type="checkbox"/> Is Redacted |
| 61 | 11-19-1997 | 3 | Kapur, Ramon | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation re: ESI-Lederle patent infringement lawsuit. | Attorney-Client / Work Product | 13 | <input type="checkbox"/> Is Redacted |
| 62 | 05-18-1997 | 3 | Waryck | Draft prepared at the request of counsel (Scherer-Knox Legal Department *) for the facilitation of confidential legal advice in anticipation of litigation re: Upsher-Smith patent infringement lawsuit. | Attorney-Client / Work Product | 19; 23 | <input type="checkbox"/> Is Redacted |
| 63 | 08-12-1997 | 3 | Kapur, Ramon | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation re: ESI-Lederle patent infringement lawsuit settlement. | Attorney-Client / Work Product | 12 | <input type="checkbox"/> Is Redacted |

Attorney-Client
 Privileged
 Specified in 45

64 06-12-1996 1 Dilascio, Chris
 Spivey, Richard.
 Hanley, Ken *
 DeLuca, Bob.
 Russo, Raymond;
 DiScola, Martin;
 Chelimo, Maureen *;
 Boyle, MaryJane;
 Garofoli, Ronald;
 Giampino, Alexander;
 Zahn, Richard.

Electronic Mail with Handwritten Notes
 providing information requested by counsel
 for the provision of confidential legal
 advice re: Hanley* and M. Chelimo * re: K-
 cur position paper to the FDA.

Attorney-Client 20, 28
 Is Redacted

65 01-18-1999 1 Kapur, Ramon
 Hanley, Ken *
 Ingram, Rebekah.
 Bucko, Robert; Cano,
 Joseph; Dilascio,
 Cheryl; Sobers,
 Anthony; Kapur, Ramon.

Memo providing confidential legal advice of
 counsel and prepared in anticipation of
 litigation re: EST- Lederle patent
 infringement lawsuit settlement

Attorney-Client /
 Work Product 11
 Is Redacted

66 06-22-1998 1 Kapur, Ramon
 Hanley, Ken *
 Leckley, Jay.
 Case, Joseph;
 DiScola, Martin;
 Hoffman, John *;
 Kapur, Ramon; Moore,
 Kevin; Elin, Richard.

Memo providing confidential legal advice of
 counsel and prepared in anticipation of
 litigation re: EST- Lederle patent
 infringement lawsuit settlement.

Attorney-Client /
 Work Product 13
 Is Redacted

67 05-09-1996 2 Dilascio, Chris
 Dilascio, Chris.
 Aftine, Melton R.;
 Radfield, Chris
 Ph.D.; Barman, E.;
 Choliva, Maureen *;
 Olegienco, Alexander;
 Guchala, Richard;
 Hanley, Ken *;
 Kopp, Ou, Teddy; Lee,
 Susan *; Holkofe, Hal
 N. Ph.D.

Minutes providing confidential legal advice
 of counsel in: Chelimo *; K. Hanley *; S-
 Lee * re: potential white paper submission
 to the FDA concerning potassium supplements.

Attorney-Client P. 21, 23
 Is Redacted

68 12-00-1995 2 Dilascio, Chris
 Dilascio, Chris.
 N/A.
 N/A.

Handwritten notes reflecting confidential
 legal advice of counsel (J. Nelson *) re:
 litigation concerning Schering-Plough's X-
 Dnt 20 and Nitro Dur.

Attorney-Client 23, 25
 Is Redacted

69 02-17-1998 3 Kapur, Ramon
 Kapur, Ramon.
 Silbey, William *.
 N/A.

Memo attaching draft summary providing
 information requested by counsel (J. Hoffman
 * and S. Lee *) for the provision of
 confidential legal advice re: EST- Lederle
 patent infringement lawsuit settlement
 negotiations.

Attorney-Client 13
 Is Redacted

Attorney Work Product - Privileged Document File No. 88-10250

Author: _____
 Address: _____
 City: _____
 State: _____
 Zip: _____

Destination: _____
 Description: _____

Reference: _____

Priority: _____
 Synchronization: _____

| File No. | Date | Page | Author | Destination | Description | Reference | Priority | Synchronization |
|----------|------------|------|--------------------------|--|--|-----------|--------------------------------------|-----------------|
| 70 | 05-08-1998 | 2 | DiLascio, Chris | Martino, Marie | None providing information requested by counsel for the provision of confidential legal advice re: Upsher-Smith and ESI-Lederle patent infringement lawsuit. | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | Hanley, Ken | Cobert, Barry | | | | |
| | | | | Dilencola, Chris | | | | |
| | | | | Hollman, Virginia G. | | | | |
| 71 | 02-02-1998 | 40 | Kapur, Ramon | Borman, Paul | Letter attaching draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement. | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | Kapur, Ramon; Lee, Susan | | | | | |
| | | | | DiLascio, Martin | | | | |
| | | | | Masarestein, Jeffrey | | | | |
| 72 | 02-05-1998 | 57 | Kapur, Ramon | Conington & Burling | Draft agreement reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement. | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Bucko, Robert | | | | |
| | | | | DiLascio, John | | | | |
| | | | | Hoffman, John | | | | |
| | | | | Sweeny, Wassercstein, Jeffrey | | | | |
| | | | | Michols, Dan; Czoc, Ben; Deslmons, Eugene | | | | |
| 73 | 02-10-1998 | 69 | Kapur, Ramon | Berman, Paul | Letter attaching draft agreement providing confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement. | 4863743 | <input type="checkbox"/> Is Redacted | |
| | | | | Kapur, Ramon; Bucko, Robert; Deslmons, Eugene; DiLascio, Martin; Hoffman, John | | | | |
| | | | | Nees, Maria | | | | |
| | | | | Nichols, Dan; Wassercstein, Jeffrey | | | | |
| | | | | Czoc, Ben; Cobert, Barry | | | | |
| | | | | Lee, Susan | | | | |
| | | | | Giamunto, Alexander; Lawda, Tom; Lee, Ping | | | | |
| | | | | Ed. D. White; John, William; Richard | | | | |
| 74 | 08-19-1997 | 18 | Masarestein, Jeffrey | Museo, Raymond | Revised Summary and report providing information requested by counsel (S-P Dept.) for the provision of confidential legal advice and prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement negotiations. | | <input type="checkbox"/> Is Redacted | |
| | | | | Masarestein, Jeffrey | | | | |
| | | | | | | | | |
| | | | | | | | | |
| 75 | 08-19-1997 | 32 | Masarestein, Jeffrey | | Box Summary and charts reflecting confidential legal analysis of counsel (S-P Law Dept.) prepared in anticipation of litigation RE: ESI-Lederle patent infringement lawsuit settlement negotiation. | | <input type="checkbox"/> Is Redacted | |
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Attorney Work Product - Confidential

Case No. 99-026

Date: 08-06-1997
 Page: 13
 Author: N/A
 Address: N/A
 Copy: N/A
 Disposition: Deposition
 Patent:

08-06-1997 13 Masarestein, Jeffrey
 N/A
 N/A
 N/A
 Chart providing information requested by counsel (S-P Law Dept *) for the protection of confidential legal advice and prepared in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-13-1997 1 Kapur, Rama
 Thompson, Paul
 Ph.D.
 Audubert, James
 Kapur, Rama
 Masarestein, Jeffrey
 (*)
 Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations.

08-08-1997 10 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 Summary and charts prepared at request of counsel (S-P Law Dept *) in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-27-1997 2 Kapur, Rama
 Ceconi, Arthur
 Thompson, Paul
 Ph.D.
 Audubert, James
 Masarestein, Jeffrey
 (*)
 Cross, Ben; Kapur, Rama; Nichols, Dan.
 Memo prepared at the request of counsel for the facilitation of confidential legal advice in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations.

09-24-1997 14 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 Summary and charts prepared at request of counsel (S-P Law Dept *) in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

06-25-1997 16 Kapur, Rama
 Thompson, Paul
 Ph.D.
 Kapur, Rama
 Audubert, James
 Masarestein, Jeffrey
 (*)
 Hoffman, John
 Draft agreement reflecting confidential legal advice of counsel (P. Thompson *) and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations.

05-12-1997 5 Dilascia, Chris
 N/A
 N/A
 N/A
 Summary prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-29-1997 4 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 N/A
 Chart prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-13-1997 13 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 N/A
 Summary and charts prepared at request of counsel (S-P Law Dept *) in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-27-1997 2 Kapur, Rama
 Ceconi, Arthur
 Thompson, Paul
 Ph.D.
 Audubert, James
 Masarestein, Jeffrey
 (*)
 Cross, Ben; Kapur, Rama; Nichols, Dan.
 Memo prepared at the request of counsel for the facilitation of confidential legal advice in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations.

09-24-1997 14 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 Summary and charts prepared at request of counsel (S-P Law Dept *) in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

06-25-1997 16 Kapur, Rama
 Thompson, Paul
 Ph.D.
 Kapur, Rama
 Audubert, James
 Masarestein, Jeffrey
 (*)
 Hoffman, John
 Draft agreement reflecting confidential legal advice of counsel (P. Thompson *) and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations.

05-12-1997 5 Dilascia, Chris
 N/A
 N/A
 N/A
 Summary prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

08-29-1997 4 Masarestein, Jeffrey
 (*)
 N/A
 N/A
 N/A
 Chart prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations.

| | | | | | | | |
|----|------------|----|-----------------------------|-------------------------|--|--|--|
| 80 | 09-24-1997 | 14 | Masarestein, Jeffrey (*) | N/A | N/A | Summary and charts prepared at request of counsel (S-P Law Dept *) in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted Attorney-Client / Work Product 13; 22; 23; 24; 25 |
| 81 | 06-25-1997 | 16 | Kapur, Rama | Thompson, Paul Ph.D. | Kapur, Rama Audubert, James Masarestein, Jeffrey (*) Hoffman, John | Draft agreement reflecting confidential legal advice of counsel (P. Thompson *) and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted Attorney-Client / Work Product 13; 8 |
| 82 | 05-12-1997 | 5 | Dilascia, Chris | N/A | N/A | Summary prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted Attorney-Client / Work Product 9; 8 |
| 83 | 08-29-1997 | 4 | Masarestein, Jeffrey (*) | N/A | N/A | Chart prepared at the request of counsel (S-P Law Dept *) for the facilitation of confidential legal advice in anticipation of litigation RE: EST-Lederle patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted Attorney-Client / Work Product 13 |

Production Log of Confirmed Documents 11/14/99-12/31/99

| Case No. | Date | Page | Author | Recipient | Requester | Waiver # | Privilege / Specification # |
|----------|------------------------------|------------|--------|---|---|----------|--|
| 84 | SP 11 00001 - SP 11 00016 | 01-24-1997 | 26 | Masercstein, Jeffrey [Jeffrey] | M/A Covington & Burling M/A | | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted |
| 85 | SP 13 00773 - SP 13 00775 | 06-22-1998 | 3 | Hanley, Ken Ludwig, Jay Robert; Croce, Ben; Dashbom, Dyrene; Nichols, Dan; Beran, Paul Sherrin, Holtman, John Kapur, Ramon; Talmor, Robert Case, Joseph; Driscoll, Kevin; Hoffman, John Kapur, Ramon Moore, Kortel, Eahn, Richard Herron, Anthony [Tony], Rule, Charles Hoffman, John N/A | M/A Herron, Anthony [Tony], Rule, Charles Hoffman, John N/A | | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted |
| 87 | SP 13 00180 - SP 13 00234 | 08-13-1997 | 47 | Audliqerr, James Thompson, Paul - Ph.D. Amthart, James Kapur, Ramon; Masercstein, Jeffrey [Jeffrey] | M/A Thompson, Paul - Ph.D. Amthart, James Kapur, Ramon; Masercstein, Jeffrey [Jeffrey] | 48E3743 | Attorney-Client <input checked="" type="checkbox"/> Is Redacted |
| 88 | SP 06 00039 - SP 06 00043 | 09-10-1997 | 5 | Lee, Susan Hoffman, John M/A | Lee, Susan Hoffman, John M/A | | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted |
| 89 | SP 13 00776 - SP 13 00778 | 09-17-1997 | 3 | Masercstein, Jeffrey [Jeffrey] Lee, Susan Driscoll, Kevin; Hoffman, John Kapur, Ramon; Rasko, Raymond; Masercstein, Vittory [Jeffrey] N/A | Masercstein, Jeffrey [Jeffrey] Lee, Susan Driscoll, Kevin; Hoffman, John Kapur, Ramon; Rasko, Raymond; Masercstein, Vittory [Jeffrey] N/A | | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted |

CONFIDENTIAL - Patent Applications - 1985-1995

| SP No. | Date | Page | Author | Applicant | Product | Classification |
|--------|------------------------------|------------|--------|-----------------|--|----------------|
| 90 | SP 25 00025 - SP 25 00034 | 12-12-1985 | 30 | Lee, Susan * | Lee, Susan * Hoffman, Thomas Ph.D. * Raisson, James N. * | 25 |
| 91 | SP 21 00023 - SP 21 00025 | 00-00-1986 | 3 | Lee, Susan * | Cegan, Paul B. * D'Andrea, Hugh A. * Steak, David N. * Romora, Joseph C. * Driscoll, Arthur Valnor, Robert * | 21 |
| 92 | SP 13 00276 - SP 12 00277 | 05-17-1987 | 2 | Hoffman, John * | Lee, Susan * N/A. N/A. N/A. | 12 |
| 93 | SP 13 00667 - SP 13 00669 | 02-27-1987 | 3 | Lee, Susan * | Lee, Susan * N/A. N/A. | 13 |
| 94 | SP 13 00878 - SP 13 00879 | 12-23-1987 | 1 | Lee, Susan * | Hoffman, John * Lee, Susan * Driscoll, Arthur Kapur, Ramu Das, Susan * Russo, Raymond * Mascherstein, Jeffrey (Jaffee) * | 13 |
| 95 | SP 12 00278 - SP 12 00312 | 05-12-1987 | 35 | Hoffman, John * | DiMaecia, Chris. Russo, Raymond. Hoffman, John * N/A. | 12 |
| 96 | SP 23 00009 - SP 23 00013 | 11-00-1985 | 24 | DiMaecia, Chris | DiMaecia, Chris. N/A. N/A. | 23 |

Case No. 00001-10-16-1997

| Case No. | Date | Page | Author | Recipient | Subject | Object | Privileged | Specification # |
|----------|------------------------------|------------|--------|--|--------------|--|--------------------------|-----------------|
| 97 | SP 09 00001 - SP 09 00003 | 10-16-1997 | 3 | Masarestein, Jeffrey (Jeff) | Lee, Susan * | Electronic Mail attached to passed letter reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: EST-Redox patent infringement lawsuit. | <input type="checkbox"/> | 9, 13 |
| 98 | SP 25 00055 - SP 25 00078 | 12-01-1995 | 4 | Dilacchia, Chris Stout, David M. Deluca, Bob/ Susno, Raymond. | N/A. | Memo reflecting confidential legal advice of counsel (J. Nelson *; T. Hoffman *; Covington & Burling *) and prepared in anticipation of litigation RE: potential Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> | 25 |
| | | | | | | | | |
| 99 | SP 13 00729 - SP 13 00715 | 12-23-1997 | 7 | Masarestein, Jeffrey (Jeff) | N/A. | Memo reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: EST-Redox patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> | 13 |
| | | | | | | | | |
| 100 | SP 21 00026 - SP 21 00107 | 06-11-1996 | 83 | Lee, Susan * | N/A. | Letter providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Andex's ANDX applications with the FDA. | <input type="checkbox"/> | 21 |
| | | | | | | | | |
| 101 | SP 06 00044 - SP 06 00050 | 12-21-1997 | 7 | Kapur, Ramani | N/A. | Memo providing confidential legal advice of counsel and prepared in anticipation of litigation RE: EST-Redox patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> | 6, 13 |
| | | | | | | | | |
| 102 | SP 12 00313 - SP 12 00325 | 06-17-1997 | 13 | Hoffman, John * | N/A. | Orate agreement with handwritten notes providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> | 12, 15 |
| | | | | | | | | |
| 103 | SP 12 00238 - SP 12 00243 | 06-17-1997 | 6 | Hoffman, John * | N/A. | Orate agreement with handwritten notes providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> | 12 |
| | | | | | | | | |

| | | | | | | | | | |
|-----|------------------------------|------------|----|-----------------|---|--|---|-----------------------------------|--------------------------|
| 104 | SP 12 00226 - SP 12 00128 | 08-05-1997 | 3 | Kapur, Ramani | Hoffman, John Kapur, Ramani Oriscoll, Martin Massetstein, Jeffrey (3887) | Memo attached to letters providing information requested by counsel for the provision of confidential legal advice RE: Upsher-Smith patent infringement lawsuit settlement. | <input type="checkbox"/> Is Redacted | Attorney-Client | 12/ 25/ 5 |
| 105 | SP 05 00018 - SP 05 00020 | 08-05-1997 | 1 | Hoffman, John | Hoffman, John Kapur, Ramani Oriscoll, Martin Massetstein, Jeffrey (3887) | Faced memo attaching letters providing information requested by counsel for the provision of confidential legal advice RE: Upsher-Smith patent infringement lawsuit settlement. | <input checked="" type="checkbox"/> Is Redacted | Attorney-Client | 12/ 5/ 25 |
| 106 | SP 13 00786 - SP 13 00192 | 12-23-1997 | 7 | Hoffman, John | Hoffman, John Lee, Susan Oriscoll, Martin Kapur, Ramani Susan J. Russo Raymond Masserstein Jeffrey (3887) | Memo and handwritten notes reflecting nonidentical legal analysis of counsel and prepared in anticipation of litigation RE: GSI-Ledecle patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted | Attorney-Client / Work Product | 13 |
| 107 | SP 08 00697 - SP 08 00729 | 03-14-1997 | 31 | Dilascia, Chris | Lee, Susan Zabro, Richard Oriscoll, Martin Cahners, Joseph C. Hoffman, John Malson, James R. | Memo attaching report providing confidential legal advice of counsel and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit and potential Andy patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | Attorney-Client / Work Product | 01/ 19/ 24/ 25/ 21 |
| 108 | SP 11 00235 - SP 11 00237 | 05-01-1997 | 3 | Valero, D. | N/A N/A N/A | Handwritten notes reflecting confidential legal analysis of counsel (S-P Law Dept.) RE: Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | Attorney-Client | 12 |
| 109 | SP 13 00793 - SP 13 00820 | 05-13-1999 | 28 | Kanley, Ken | Lee, Susan Kanley, Ken Reynolds, Paul Hoffman, John | Memo reflecting confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Ledecle patent infringement lawsuit settlement negotiations. | <input type="checkbox"/> Is Redacted | Attorney-Client / Work Product | 4863793 13 |
| 110 | SP 23 00001 - SP 23 00008 | 12-00-1995 | 3 | Dilascia, Chris | N/A N/A N/A | Summary and chart reflecting confidential legal advice of counsel (S-P Law Dept.) and prepared in anticipation of litigation RE: Upsher-Smith patent infringement lawsuit. | <input type="checkbox"/> Is Redacted | Attorney-Client / Work Product | 23/ 25 |
| 111 | SP 11 00821 - SP 13 00840 | 06-18-1999 | 20 | Kanley, Ken | Kanley, Ken Siler, Ludwig, Jay N/A | Faced handwritten notes and faced memo reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Ledecle patent infringement lawsuit settlement negotiations. | <input checked="" type="checkbox"/> Is Redacted | Attorney-Client / Work Product | 13/ 6 |

| | | | | | | |
|-----|------------|---|--|---------|--|----------------|
| 112 | 02-25-1997 | Valero, D. | Memo reflecting confidential legal advice of counsel (S-P Law Dept.) and prepared in anticipation of litigation RE: ESI-Indevco and Upsher-Smith patent infringement lawsuit. | 4863743 | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted | 33, 22, 24, 25 |
| 113 | 02-10-1998 | Hoffman, John * Susan * | Memo attaching summary and report providing confidential legal advice of counsel and prepared in anticipation of litigation RE: ESI-Indevco patent infringement lawsuit settlement negotiations. | 4863743 | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted | 13 |
| 114 | 02-24-1999 | Lee, Susan Kortman, John * N/A. | Letter with handwritten memo attaching Settlement/License agreement reflecting confidential legal analysis of counsel RE: ESI-Indevco patent infringement lawsuit settlement. | 4863743 | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted | 13 |
| 115 | 06-19-1997 | Sillbey, William * Becherer, Nancy; O'Andrade, Hugh A.; Garfield, David C.; Berallinger, Regina B.; Kogon, Richard J.; Luciano, Robert P.; Kortley, M. Berclavi, Mandy, Carle E.; Osbourne, Richard; Schreyer, William A.; van Dorst, Robert; Wood, James, Lynne; Rudolke C.; Cesari, Paul E.; Connors, Joseph C.; Joseph C.; Myscambitzki, J.L. | Memo attaching presentation reflecting confidential legal advice of counsel (S-P Law Dept.) RE: Upsher-Smith patent infringement lawsuit settlement. | 4863743 | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted | 13 |
| 116 | 02-02-1998 | Hartley, Ken * | Draft with handwritten notes reflecting confidential legal analysis of counsel and prepared in anticipation of litigation RE: ESI-Indevco patent infringement lawsuit settlement. | 4863743 | Attorney-Client / Work Product <input type="checkbox"/> Is Redacted | 13 |
| 117 | 01-17-1996 | Cesari, Joseph Cesari, Paul E.; Connors, Joseph C.; Kogon, Richard J.; Wolson, James B.; Stout, David K.; Wolson, Robert * | Memo attaching letter providing confidential legal advice of counsel and prepared in anticipation of litigation RE: potential ESI-Indevco patent infringement lawsuit. | 4863743 | Attorney-Client / Work Product <input checked="" type="checkbox"/> Is Redacted | 6, 25 |

USPTO PATENT APPLICATION NO. 09/129,000

| Patent Range | Doc. No. | Page Count | Author | Address | Document Description | Patent No. | Priority | Specification No. |
|--------------|----------------------------|------------|-----------------------|---|---|------------|--|-------------------|
| 118 | SP 12 00284 SP 12 00253 | 10 | Kapur, Rama | Masorelein, Jeffrey Kapur, Rama | Prosecution reflecting confidential legal advice of counsel (S-P Law Dept *) Dysher-Smith patent infringement lawsuit settlement * | | <input type="checkbox"/> Is Client / <input type="checkbox"/> Work Product | 12 |
| 119 | SP 23 00087 SP 23 00110 | 24 | Di Lauro, Christopher | N/A. DiLauro, Chris. N/A. N/A. | Prosecution reflecting confidential legal advice of counsel (S-P Law Dept *) and prepared in anticipation of litigation RE: patent infringement lawsuit to enforce X-Per 20 patent rights * | | <input checked="" type="checkbox"/> Is Redacted <input type="checkbox"/> Is Client / <input type="checkbox"/> Work Product | 23 |

Exhibit E

| TRST PG | LAST PG | CUSTODIAN | DATE | AUTHOR/RECIPIENTS | DOCUMENT TITLE | PS | SS |
|----------|----------|-----------------|------------|--|--|----|----|
| JSLP0001 | USLP0005 | EVENSTAD, KEN | 06/17/1997 | Author: FITZPATRICK FIRM/CANNELLA*, N.M. Recipients: EVENSTAD, KEN | COUNSEL'S DRAFT OF SETTLEMENT AGREEMENT POINTS | 4 | 4 |
| JSLP0006 | USLP0022 | KRALOVEC, PAUL | 07/07/1997 | Author: HAAS*, BRUCE C. Recipients: TROUP, IAN CANNELLA*, N.M. | ATTORNEY-CLIENT COMMUNICATION RE: DRAFT REVISIONS TO PROPOSED AMENDMENT - MANUFACTURING AGREEMENT | 4 | 4 |
| JSLP0023 | USLP0025 | KRALOVEC, PAUL | 07/11/1997 | Author: HAAS*, BRUCE C. Recipients: KRALOVEC, PAUL D. | ATTORNEY-CLIENT COMMUNICATION RE: DRAFT REVISIONS TO PROPOSED REVISED AGREEMENT / MANUFACTURING AGREEMENT | 4 | 4 |
| JSLP0026 | USLP0029 | KRALOVEC, PAUL | 07/29/1997 | Author: EDSTROM*, DEAN Recipients: KRALOVEC, PAUL | ATTORNEY-CLIENT COMMUNICATION RE: LANGUAGE MODIFICATIONS FOR PROPOSED MANUFACTURING AGREEMENT | 4 | 4 |
| JSLP0030 | USLP0144 | O'NEILL, VICKIE | 05/08/1996 | Author: O'CONNELL*, THOMAS J. Recipients: ROBBINS*, MARK S. | INFRINGEMENT OPINION ON PATENT NO. 4,863,743 | 6 | 6 |
| JSLP0145 | USLP0148 | TROUP, IAN | 10/18/1996 | Author: TROUP, IAN Recipients: SELF | NOTES RE: REVIEW OF LEGAL POSITION WITH COUNSEL | 6 | 6 |
| JSLP0149 | USLP0151 | TROUP, IAN | 10/25/1996 | Author: TROUP, IAN Recipients: SELF | NOTES RE: REVIEW OF LEGAL POSITION WITH COUNSEL | 6 | 6 |
| JSLP0152 | USLP0153 | KRALOVEC, PAUL | 06/1997 | Author: KRALOVEC, PAUL Recipients: SELF | NOTES RE: STATUS CONFERENCE WITH COUNSEL | 6 | 6 |
| USLP0154 | USLP0155 | KRALOVEC, PAUL | 12/1997 | Author: KRALOVEC, PAUL Recipients: SELF | SUMMARY OF M-20 LAWSUIT COSTS | 6 | 6 |

CONFIDENTIAL

| FIRST PG | LAST PG | CUSTODIAN | DATE | AUTHOR/RECIPIENTS | DOCUMENT TITLE | PS | SS |
|----------|----------|-----------------|------------|--|---|----|----|
| USLP0156 | USLP0156 | KRALOVEC, PAUL | 08/18/1999 | Author: SMITH, SARAH M. Recipients: FOX*, EDWARD F. KRALOVEC, P. | CORRESPONDENCE WITH COUNSEL RE: M-20 LAWSUIT | 6 | |
| USLP0157 | USLP0157 | TROUP, IAN | 03/15/1995 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE WITH COUNSEL RE: KLOR-CON M20 MICROLEASE | 12 | |
| USLP0158 | USLP0159 | TROUP, IAN | 06/06/1995 | Author: BYRNE*, LINDA M. Recipients: CRAWFORD, JAN | CORRESPONDENCE WITH COUNSEL RE: KLOR-CON M20 MICROLEASE | 12 | |
| USLP0160 | USLP0161 | TROUP, IAN | 09/21/1995 | Author: BYRNE*, LINDA M. Recipients: CRAWFORD, JAN | CORRESPONDENCE WITH COUNSEL RE: KLOR-CON M20 MICROLEASE | 12 | |
| USLP0162 | USLP0162 | TROUP, IAN | 02/29/1996 | Author: BYRNE*, LINDA M. Recipients: CRAWFORD, JAN | LETTER FROM COUNSEL RE: TRADEMARK MATTER | 12 | 13 |
| USLP0163 | USLP0237 | ROBBINS, MARK | 07/03/1997 | Author: DAIGNAULT*, RONALD A. Recipients: O'NEILL, VICKI | INFRINGEMENT OPINION ON PATENT NO. 5,397,574 | 12 | 13 |
| USLP0238 | USLP0239 | O'NEILL, VICKIE | 02/12/1996 | Author: DORMER*, ROBERT A. Recipients: ROBBINS*, MARK S. | CORRESPONDENCE FROM COUNSEL RE: ANDA PETITION | 15 | |
| USLP0240 | USLP0274 | O'NEILL, VICKIE | 06/27/1997 | Author: SASINOWSKI*, FRANK SCARLETT*, THOMAS DAVIS*, JENNIFER Recipients: O'NEILL, VICKI HAAS*, BRUCE O'CONNELL*, TOM | COUNSEL'S LEGAL OPINION | 17 | |

| FIRST PG | LAST PG | CUSTODIAN | DATE | AUTHOR/RECIPIENTS | DOCUMENT TITLE | PS |
|----------|----------|-----------------|------------|---|---|----|
| USLP0275 | USLP0276 | ROBBINS, MARK | 10/18/1999 | Author: YINGLING*, GARY L. SWIT*, MICHAEL A. Recipients: ROBBINS*, MARK/NPA MEMBERS | COUNSEL'S LEGAL MEMORANDUM RE: PROPOSED RULES | 17 |
| USLP0277 | USLP0292 | HALVORSEN, MARK | 10/28/1999 | Author: DORMER*, BOB Recipients: POIRIER, MIKE ROBBINS*, MARK HALVORSEN, MARK FARNER, CINDY OAKINS, KIM SAUNDERS, WENDY | COUNSEL'S COMMUNICATION RE: PROPOSED RULES | 17 |
| USLP0293 | USLP0293 | HALVORSEN, MARK | 11/11/1999 | Author: SWIT*, MICHAEL A. Recipients: POIRIER, MICHAEL J. | CORRESPONDENCE WITH COUNSEL RE: PROPOSED RULES | 17 |
| USLP0294 | USLP0296 | TROUP, IAN | 05/17/1994 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE FROM COUNSEL RE: NIACOR MARK | 20 |
| USLP0297 | USLP0299 | TROUP, IAN | 06/13/1994 | Author: CLAYTON, LINDA J. Recipients: BYRNE*, LINDA | CORRESPONDENCE TO COUNSEL RE: NIACOR MARK | 20 |
| USLP0300 | USLP0301 | TROUP, IAN | 07/06/1994 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE WITH COUNSEL RE: NIACOR-SR MARK | 20 |
| USLP0302 | USLP0302 | TROUP, IAN | 08/19/1994 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE WITH COUNSEL RE: NIACOR MARK | 20 |
| USLP0303 | USLP0304 | TROUP, IAN | 09/29/1994 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE FROM COUNSEL RE: NIACOR MARK | 20 |

Upsner-Smith Privilege Log

| FIRST PG | LAST PG | CUSTODIAN | DATE | AUTHOR/RECIPIENTS | DOCUMENT TITLE | PS | SS |
|----------|----------|-----------------|------------|--|--|----|----|
| USLP0305 | USLP0306 | TROUP, IAN | 10/04/1994 | Author: BYRNE*, LINDA M. Recipients: CLAYTON, LINDA J. | CORRESPONDENCE WITH COUNSEL RE: NIACOR-SR MARK | 20 | 20 |
| USLP0307 | USLP0307 | TROUP, IAN | 10/04/1994 | Author: CLAYTON, LINDA J. Recipients: BYRNE*, LINDA | CORRESPONDENCE TO COUNSEL RE: NIACOR MARK | 20 | |
| USLP0308 | USLP0308 | TROUP, IAN | 12/05/1995 | Author: BYRNE*, LINDA M. Recipients: CRAWFORD, JAN | CORRESPONDENCE WITH COUNSEL RE: NIACOR MARK | 20 | |
| USLP0309 | USLP0309 | O'NEILL, VICKIE | 02/11/1997 | Author: DAIGNAULT*, RONALD A. Recipients: O'NEILL, VICKI | CORRESPONDENCE WITH COUNSEL RE: NIACOR PATENT | 20 | |
| USLP0310 | USLP0316 | TROUP, IAN | 07/16/1997 | Author: DAIGNAULT*, RONALD A. Recipients: O'NEILL, VICKIE | CORRESPONDENCE WITH COUNSEL RE: KOREAN PATENT APPLICATION | 20 | |
| USLP0317 | USLP0320 | TROUP, IAN | 07/29/1997 | Author: SCHMIDT*, CECIL C. Recipients: KRALOVEC, PAUL | CORRESPONDENCE WITH COUNSEL RE: DRAFT LETTER | 20 | 21 |
| USLP0321 | USLP0321 | KRALOVEC, PAUL | 08/15/1997 | Author: KRALOVEC, PAUL D. Recipients: SCHMIDT*, CECIL C. | LETTER TO COUNSEL RE: NIACOR/EUROPEAN LICENSEES | 20 | 21 |
| USLP0322 | USLP0327 | TROUP, IAN | 08/27/1998 | Author: DAIGNAULT*, RONALD A. Recipients: O'NEILL, VICKI | CORRESPONDENCE WITH COUNSEL RE: EUROPEAN PATENT APPLICATION | 20 | |
| USLP0328 | USLP0331 | TROUP, IAN | 10/06/1998 | Author: O'NEILL, VICKIE Recipients: DAIGNAULT*, RONALD | CORRESPONDENCE WITH COUNSEL RE: NIACOR SR | 20 | |
| USLP0332 | USLP0334 | TROUP, IAN | 10/08/1998 | Author: DAIGNAULT*, RONALD A. Recipients: VAILLANT, JEANNE O'NEILL, VICKIE | CORRESPONDENCE WITH COUNSEL RE: EUROPEAN PATENT APPLICATION | 20 | |

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|-----------------------------|----------------------------|--------------------------------|---------------------------|---|---|-----------------|
| FIRST PG USLP0335 | LAST PG USLP0335 | CUSTODIAN TROUP, IAN | DATE 07/12/1999 | AUTHOR/RECIPIENTS Author: DAIGNAULT*, RONALD A. Recipients: O'NEILL, VICTORIA A. | DOCUMENT TITLE CORRESPONDENCE WITH COUNSEL RE: 21 NIACOR-SR | PS SS |
| USLP0336 | USLP0357 | KRALOVEC, PAUL | 02/16/1998 | Author: EDSTROM*, DEAN R. Recipients: KRALOVEC, PAUL D. | ATTORNEY-CLIENT COMMUNICATION 23 RE: DRAFT MANUFACTURING AGREEMENT | |
| USLP0358 | USLP0401 | KRALOVEC, PAUL | 07/16/1998 | Author: SCHMIDT*, CECIL Recipients: KRALOVEC, PAUL | ATTORNEY-CLIENT COMMUNICATIONS 27 RE: DRAFT MANUFACTURING AGREEMENT | |

CERTIFICATE OF SERVICE

I, Clifton L. Smith, hereby certify that on February 5, 2002:

I caused two copies of Complaint Counsel's Memorandum in Support of Motion to Preclude Certain Testimony by Respondent's Lawyer Witness to be served upon the following person by hand delivery-

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

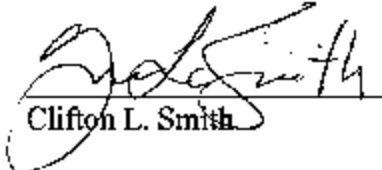
I caused one original and one copy of Complaint Counsel's Memorandum in Support of Motion to Preclude Certain Testimony by Respondent's Lawyer Witness to be served by hand delivery and one copy to be served by electronic mail upon the following person-

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused copies of Complaint Counsel's Memorandum in Support of Motion to Preclude Certain Testimony by Respondent's Lawyer Witness to be served upon the following persons by electronic mail and hand delivery-

Laura S. Shores, Esq.
Howrey Simon Arnold & White
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402

Christopher M. Curran, Esq.
White & Case LLP
601 13th Street, N.W.
Washington, D.C. 20005


Clifton L. Smith