

2(a), (b). Under the Protective Order, "Restricted Confidential" documents may not be disclosed to anyone other than the specific individuals listed in the Protective Order. *Id.* at ¶ 2(b), 4. It is clear that these provisions restrict the parties' ability to use Confidential documents during trial (as well as at all other times), since the Protective Order specifically restricts which "witnesses . . . at trial" may view "Restricted Confidential" documents. *Id.*, ¶ 2(b), (c).

After Christmas, 2001, KV received notice from Upsher that Upsher intended to use certain "Restricted Confidential" KV documents at the upcoming merits hearing, but that Upsher had no intention of seeking *in camera* treatment of KV's documents. Subsequent communications with Upsher's counsel confirmed that Upsher intends to place "Restricted Confidential" KV documents in the public record, notwithstanding the provisions of the Protective Order.

This breach of the Protective Order will harm KV. KV has produced documents that reveal some of the company's most sensitive confidential information. The documents listed by Upsher as possible evidence would reveal analysis of competing products, product development plans (including plans regarding the development of specific products), research and development plans (including plans regarding specific technologies to be developed), confidential sales data (including both overall sales and sales to certain specific customers), sales forecasts, market analysis, and customer negotiations (including price terms). Such information should not be disclosed generally, and in particular should not be revealed to KV's competitors, including the private parties to this proceeding. KV does not object to its information being used if afforded *in camera* treatment. (Indeed, for the reasons stated the KV documents in question merit *in camera* treatment if they are to be used at all.) However, KV objects strongly to any use

of KV's Confidential information that does not strictly comply with the dictates of the Protective Order.

Therefore, KV requests an order prohibiting Upsher's counsel from placing in the public record, revealing to their client, or revealing to any other person or entity not authorized in the Protective Order any Confidential document or information provided by KV, including the following documents: KV 1998-2004, KV 3916-3942, and the Declaration of Philip J. Vogt.

In the alternative, KV requests an order providing that any Confidential document or information provided by KV, including those listed above, shall be afforded *in camera* treatment, and may not be proffered at any hearing in any manner inconsistent with the Protective Order.

DATED: January 16, 2002

Respectfully submitted,


Jonathan Berman

(D.C. Bar No. 445169)

Jones, Day, Reavis & Pogue

51 Louisiana Ave., N.W.

Washington, D.C. 20001-2113

TEL: (202) 879-3669

FAX: (202) 626-1700

E-MAIL: JBerman@JonesDay.com

Attorney for Non-Party KV
Pharmaceutical Company

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
)
SCHERING-PLOUGH CORPORATION,)
a corporation,)
)
UPsher-SMITH LABORATORIES,)
a corporation,)
)
and)
)
AMERICAN HOME PRODUCTS)
CORPORATION,)
a corporation.)

Docket No. 9297

ORDER

Respondent Upsher-Smith Laboratories has stated its intention of using the following documents as evidence at the upcoming hearing: KV 1998-2004, KV 3916-3942, and the Declaration of Philip J. Vogt. These documents have been designated by the producing entity, non-party KV Pharmaceutical Company, as "Restricted Confidential, Attorney Eyes Only." These documents contain proprietary, non-public information, the disclosure of which would injure KV Pharmaceutical Company. Other documents produced in discovery by KV Pharmaceutical Company have likewise been designated "Confidential" or "Restricted Confidential, Attorney Eyes Only." Upon the motion of KV Pharmaceutical Company, and for good cause shown, **IT IS HEREBY ORDERED** that:

(1) Upsher-Smith Laboratory's counsel may not place in the public record (by proffering as evidence or otherwise), reveal to their client, or reveal to any other person or entity

not authorized in the Protective Order any Confidential or "Restricted Confidential, Attorney Eyes Only" document or information provided by KV Pharmaceutical Company, including the documents listed above; and

(2) the documents listed above may be included in the *in camera* portion of the record, but may not be used at any hearing in any manner inconsistent with the Protective Order's limitations regarding to whom such documents may be disclosed, and may not be used in any manner inconsistent with *in camera* treatment.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that today I caused a copy of the attached document, entitled Motion to Enforce Protective Order to be delivered by facsimile and U.S. Mail to:

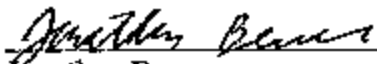
Laura Shores, Esq.
Howrey Simon Arnold & White
1299 Pennsylvania Ave., N.W.
Washington, DC 10004-2402

Christopher M. Curran, Esq.
White & Case
601 13th St., N.W.
Washington, DC 20005

Karen Bokor, Esq.
FTC
601 Pennsylvania Ave., N.W.
Rm. 3112
Washington, DC 20580

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

David Pender
Assistant Director,
Bureau of Competition
Room S-3115
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580


Jonathan Berman
Jones, Day, Reavis & Pogue

DATED: January 16, 2002