

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)
)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories, Inc.,)
a corporation,)
)
and)
)
American Home Products Corporation,)
a corporation.)

Docket No. 9297
PUBLIC VERSION

UPSHER-SMITH'S CONSENT MOTION FOR *IN CAMERA*
TREATMENT OF CONFIDENTIAL LEGAL MEMORANDUM

Upsher-Smith hereby moves for *in camera* treatment of a confidential legal memorandum containing trade secret information regarding its Klor Con M product, trial exhibit CX 716. All parties have indicated their consent to *in camera* treatment for CX 716. The facts and authorities in support of this motion are set forth in the accompanying memorandum and declaration.

Dated: January 24, 2002

Respectfully submitted,

WHITE & CASE LLP

By:

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Attorneys for Upsher-Smith Laboratories, Inc.

faces serious injury “when the documents in question are *secret and material* to the applicant’s business . . .” *In the Matter of Bristol-Meyers*, 90 F.T.C. 455, 456 (1977) (articulating 6-factor test for determining secrecy and materiality). Further, “[t]he likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *Hoechst Marion Russell, Inc.*, 2000 F.T.C. LEXIS 138, *6 (2000).

CX 716 PLAINLY WARRANTS *IN CAMERA* TREATMENT

The information in the CX 716 regarding the formulation and manufacturing for Klor Con M information is both secret and material such that it squarely meets the requirements for *in camera* treatment under Rule 3.45.¹ The memorandum contains trade secret information that is fundamental to the development and formulation of Upsher-Smith’s branded generic product Klor-Con M — its most valuable product line. See Dec. of Mark S. Robbins ¶ 4 (Ex. A). Specifically, the memorandum discloses detailed information relating to [

] the Klor Con M [] chemicals that are [] Klor Con M. *Id.* It also sets forth the specific chemical ingredients and percentages of composition. *Id.* This is exactly the type of information which warrants *in camera* treatment: “the disclosure of a secret formula will almost invariably result in injury”. See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961) (affording *in camera* treatment).

The trade secret and legal information contained in this document has been carefully guarded by Upsher-Smith. Robbins Dec. ¶ 5. This information is not publicly available. In fact, apart from this proceeding, only a small handful of Upsher-Smith employees have access to this

¹ Consistent with the Third Revised Scheduling Order Upsher-Smith reviewed thousands of potential trial exhibits and filed on December 27, 2001, a motion for *in camera* treatment for several specific exhibits. At that time CX 716 was not identified for *in camera* treatment. Upsher-Smith files this motion for *in camera* treatment of CX 716 after obtaining the consent of all parties in this matter.

information. *Id.* ¶ 6. Public disclosure would greatly prejudice Upsher-Smith by destroying much of the value of its most important product, Klor Con M. *Id.*

This competitive information regarding Upsher-Smith's core product line is proprietary, and retains its value as a trade secret throughout the life cycle — even after the expiration of Schering's patent for K-Dur. *Id.* ¶ 8. Therefore, *in camera* treatment for an indefinite period of time is warranted for this document to ensure that the formulations and manufacturing processes of Klor Con M remain a protectable trade secret. *Id.*

Finally, this document contains confidential legal advice, analysis and strategy for Upsher-Smith regarding []. Robbins Dec. ¶ 7. Disclosure of Upsher-Smith's litigation strategy [], and [

], an unfair advantage *vis-a-vis* Upsher-Smith. Should the document be used in open court, it is almost inevitable that Upsher-Smith's competitors will become aware of the contents of the document. *Id.*

CONCLUSION

For all the reasons set forth herein, Upsher-Smith respectfully requests *in camera* treatment for this memorandum, CX 716, for an indefinite period of time.

Dated: January 24, 2002

Respectfully submitted,

WHITE & CASE LLP

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Attorneys for Upsher-Smith Laboratories, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2002 I caused a paper original and one copy as well as an electronic version of the foregoing motion for *in camera* treatment and supporting papers to be filed with the Secretary of the Commission and two paper copies to be served by hand delivery upon:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

and one paper copy to be served upon the following counsel by hand delivery:

David R. Pender
Assistant Director of Health Care Products Division
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Washington, DC 20004



David R. Pender

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Docket No. 9297
PUBLIC VERSION

**DECLARATION OF MARK ROBBINS IN SUPPORT OF UPSHER-SMITH'S
APPLICATION FOR *IN CAMERA* TREATMENT OF A LEGAL OPINION LETTER**

MARK S. ROBBINS, declares as follows:

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

2. Based on my personal knowledge I submit this declaration in support of Upsher-Smith's application for *in camera* treatment of a highly confidential [], bates numbered [] through [], from []. This document, [], [].

Complaint Counsel have designated it as CX 716 and apparently plan to offer it at trial.

3. *In camera* treatment is imperative for this document. [] contains trade secret information as well as a highly confidential and sensitive legal []—[]

[]. It is my understanding that []

].

4. This [] contains highly detailed trade secret information regarding the formulation, composition, and manufacturing process of Klor-Con M. Upsher-Smith invested millions of dollars in the research, development, and launch of Klor-Con M and is entitled to protection of its proprietary trade secret information. The entire document, from pages [] through [] contains such detailed trade secret information. This includes information relating to the purpose or role of several of the Klor-Con M components as well as [] Klor-Con M (the key to its effective sustained release mechanism). For example, page three of the document [

]. Moreover, Klor Con M's specific chemical ingredients and percentages of composition are explicitly discussed throughout the document. This highly confidential trade secret information constitutes the main value of Klor Con M, and the public disclosure of this information would result in severe prejudice to Upsher-Smith.

5. Upsher-Smith relies on such technical data for the very success of the company. This trade secret information is critical to Upsher-Smith's product development efforts, which sustain the company's growth and strategic development. Therefore, Upsher-Smith asserts tight controls to safeguard such information very carefully — it is shared only on a need-to-know basis with a limited number of employees all of whom have signed confidentiality agreements with the company. Divulging such information which is not otherwise available to the public, including Upsher-Smith's competitors would directly impede Upsher-Smith's ability to compete with other pharmaceutical companies — brand and generic alike — and would cause serious and immediate competitive harm to Upsher-Smith.

6. To the extent this information is contained in pleadings, exhibits and reports in the underlying patent litigation, it was all filed under seal and remains under seal to this day. Accordingly, Upsher-Smith seeks *in camera* treatment for this legal opinion letter, relating to the non-infringement of Klor Con M, which if disclosed publicly would divulge highly sensitive trade secret information.

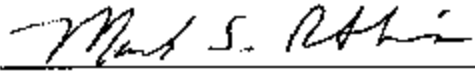
7. Especially where [], *in camera* treatment of [] is necessary. The substantive portion of this document, spanning pages { } through [], contains []. See []. This information is highly sensitive and confidential, and Upsher-Smith only discusses this type of detailed legal information internally, with a few high-level Upsher-Smith employees. []. Public disclosure of the document would []. Indeed, [].

8. *In camera* treatment is necessary beyond 2006. Although Schering-Plough's patent underlying its K-Dur product expires in 2006, the expiration of the patent does not diminish the value of Upsher-Smith's trade secret information. This competitive information regarding one of Upsher-Smith's core products is proprietary to Upsher-Smith and retains its value as a trade secret throughout the product life cycle. Therefore, this trade secret information is so sensitive that *in camera* treatment for an indefinite period is warranted in order to ensure

that Upsher-Smith's formulations and manufacturing processes remain protectable trade secret information.

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

Executed on January 24 2002 in Washington, DC.



Mark S. Robbins, Ph.D., J.D.