

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

**MOTION OF AMERICAN HOME PRODUCTS CORPORATION FOR
INDEFINITE *IN CAMERA* TREATMENT**

Pursuant to Commission Rule 3.45(b), American Home Products Corporation ("AHP") respectfully requests this Court to grant indefinite *in camera* treatment to certain privileged documents that AHP inadvertently produced to the Commission during the pre-Complaint investigation. The documents designated as¹
.....².....

¹ The document identified as, a privileged document AHP inadvertently produced during the pre-Complaint investigation, and for which AHP requested a protective order to compel complaint counsel and Respondents to destroy or return to AHP.

² The document bates numbered AHP has not claimed privilege as to the of this document, and therefore, does not seek *in camera* treatment for the This document also contains a, which does reflect privileged attorney-client communications and constitutes work product. AHP therefore requests *in camera* treatment for the

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..... Although complaint counsel and Respondents have not included the documents identified with bates numbers.....³..... AHP respectfully requests the Court grant *in camera* status to these documents in the event that complaint counsel and/or Respondents use them at the administrative hearing. Because public disclosure of these privileged documents will result in a clearly defined, serious injury to AHP, and because the privileged and sensitive nature of these documents will not decrease over time, AHP asks this Court to afford them *in camera* treatment for an indefinite period of time.

I. Procedural Background

During the pre-Complaint investigation, AHP inadvertently disclosed to Commission staffdocuments AHP later discovered were protected by the attorney-client privilege and work-product doctrine. AHP requested this Court to issue a protective order, compelling complaint counsel to return or destroy these inadvertently-produced privileged documents. By Order of January 15, 2002, this Court denied AHP's

³ The pages bates numbered , for which AHP has claimed privilege. Neither complaint counsel nor Respondents have listed on their exhibit lists. However, if complaint counsel or Respondents attempt to use this document at the hearing, the Court should grantindefinite *in camera* status as well.

Motion for Protective Order, but expressly noted that its Order did not constitute a ruling on whether the documents will be afforded *in camera* treatment.

On January 16, 2002, AHP filed an emergency motion asking the Court to stay its Order denying AHP a protective order, or alternatively, to grant *in camera* status to any privileged document complaint counsel or Respondents use as exhibits at the administrative hearing, and to certify its Order for Commission review. By Order of January 18, 2002, this Court provisionally granted AHP's request for *in camera* treatment of the privileged documents, and directed AHP to file a motion seeking *in camera* treatment of these documents within twenty days.

II. Complaint Counsel and Respondents Intend to Use Certain of AHP's Privileged Documents as Exhibits at the Administrative Hearing

On December 20, 2001, complaint counsel notified counsel for AHP that they intended to use certain documents that AHP produced during the pre-Complaint investigation and adjudication as exhibits at the administrative hearing. See Letter from Yaa Apori to Cathy Hoffman, with attached exhibit list, attached hereto as Exhibit 1. Complaint counsel's exhibit list demonstrates that they intend to useprivileged documents as exhibits at the trial, identified with the following bates numbers:

.....⁴.....⁵.....

.....Upsher-Smith also notified counsel for AHP that it intended

⁴ As noted previously, the pages bates numbered

⁵ As noted previously, the document identified as

to useof AHP's privileged documents at the administrative hearing, including
.....
.....Sec Letter from Paul Stone to David Orta, dated December 21, 2001, attached
hereto as Exhibit 2.

Counsel for AHP inquired whether complaint counsel, counsel for Upsher-Smith or counsel for Schering would oppose AHP's motion for *in camera* treatment of these privileged documents, and each of these parties agreed not to oppose AHP's request for *in camera* treatment of its privileged documents. See Complaint Counsel's Opposition to AHP's Emergency Motion to Stay Order, for Certification for Interlocutory Appeal and Application for Full Commission Review at 5 n.21.

III. Legal Standard for Granting *In Camera* Treatment

According to Commission Rule 3.45(b), this Court may order materials offered into evidence to be placed *in camera* on a finding "that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their *in camera* treatment." 16 C.F.R. § 3.45(b); see also H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961). An application for *in camera* treatment must include (1) a description of the material; (2) a statement of the reasons for granting *in camera* treatment; and (3) a statement of the reasons for the date on which *in camera* treatment will expire. 16 C.F.R. § 3.45(b). The Commission has held that requests for *in camera* treatment by non-parties—like AHP—may be treated with more lenience than those made by parties to the proceeding. See In re Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500, 500 (1984); see also In re Schering-Plough et al., Dckt. No. 9297, Order on

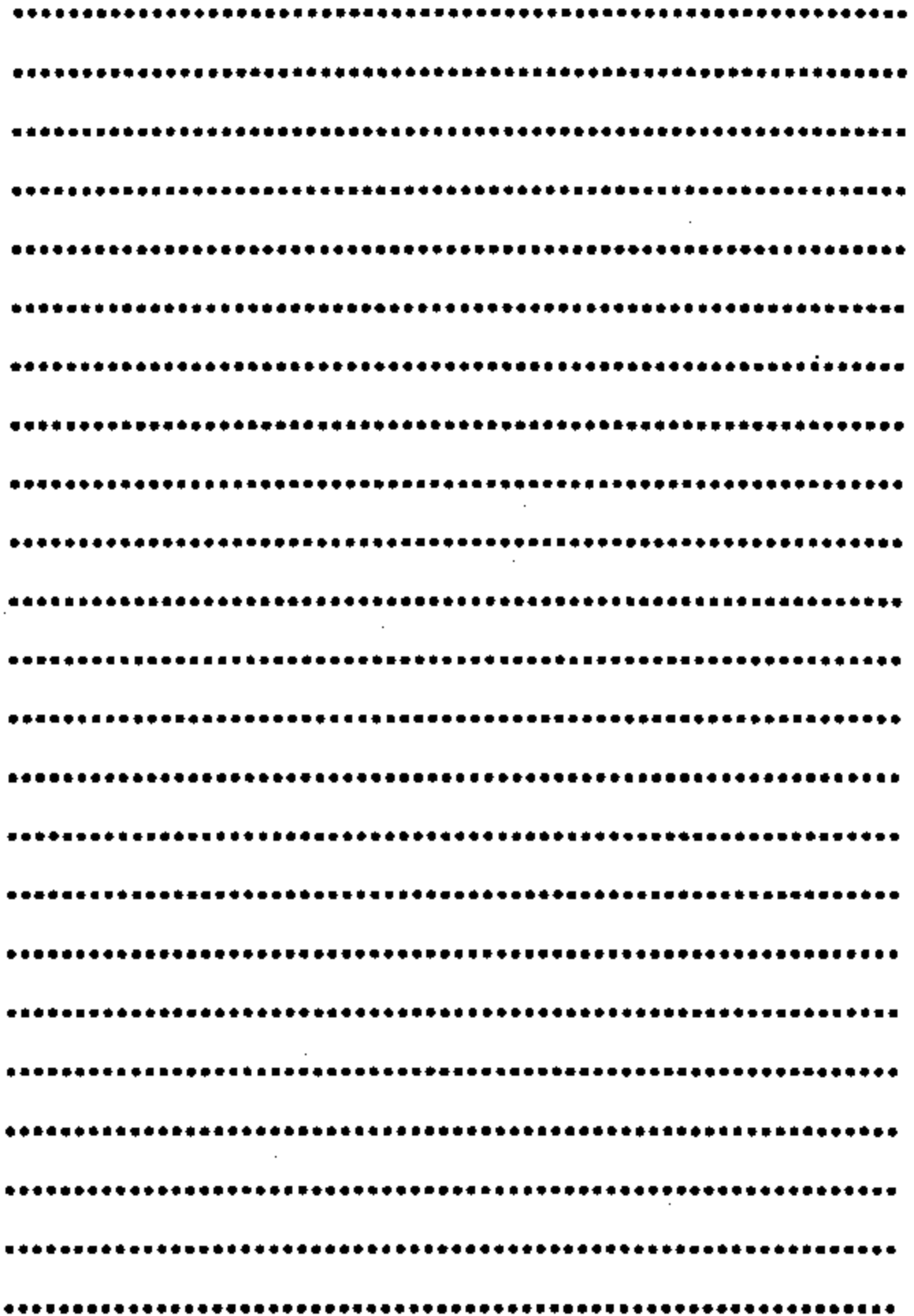
Motions for *In Camera* Treatment of Documents Listed on Parties' Exhibit Lists at 1 (Jan. 24, 2002), attached hereto as Exhibit 3.

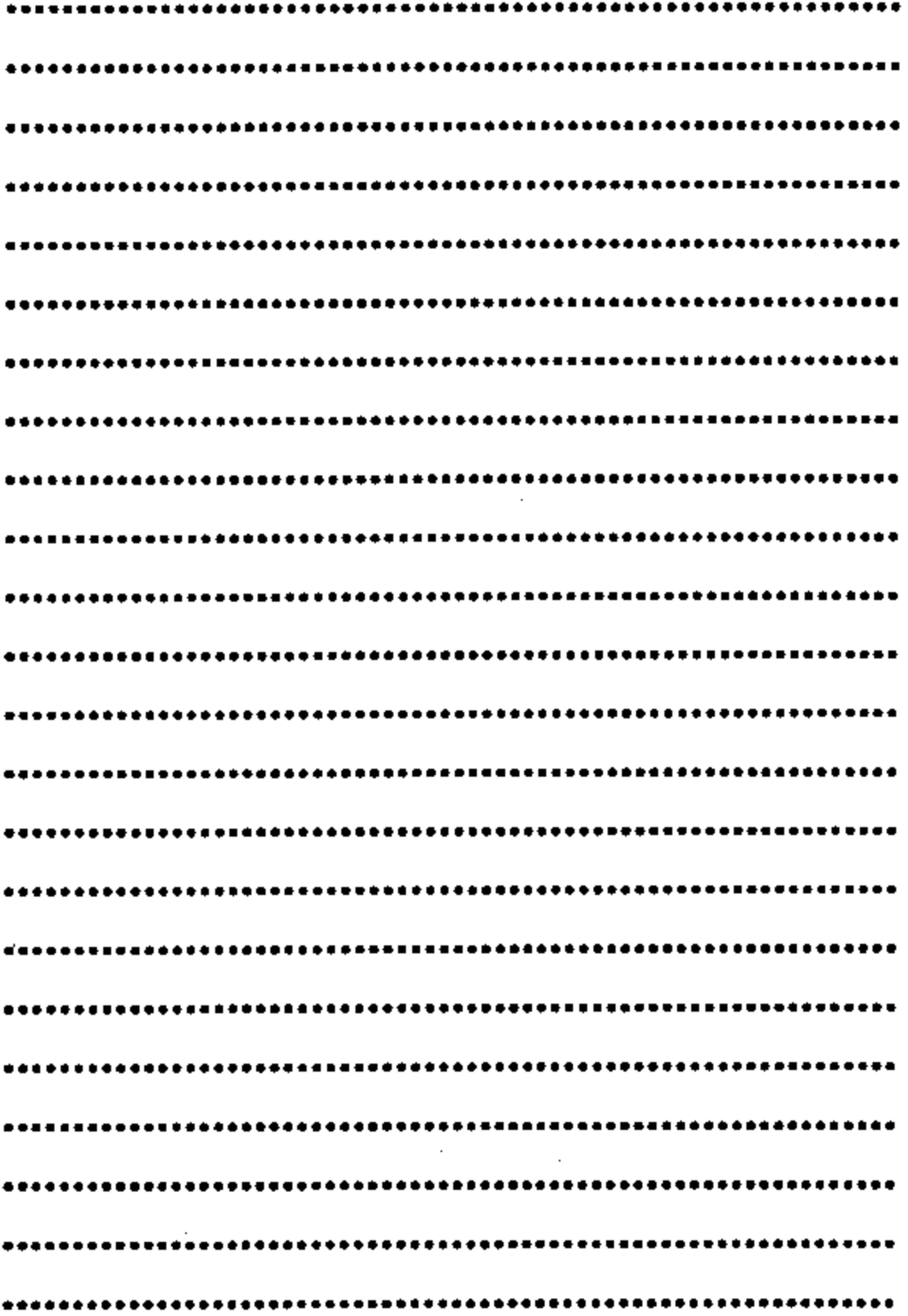
This Court has explained that an application for *in camera* treatment must demonstrate that "the information concerned is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury." In re Dura Luba Corp., 1999 FTC LEXIS 255, at *5-6 (Dec. 23, 1999) (internal quotations omitted). Additionally, the Court may infer injury from the nature of the documents themselves. See I.L.P. Hood & Sons, 58 F.T.C. at 1188.

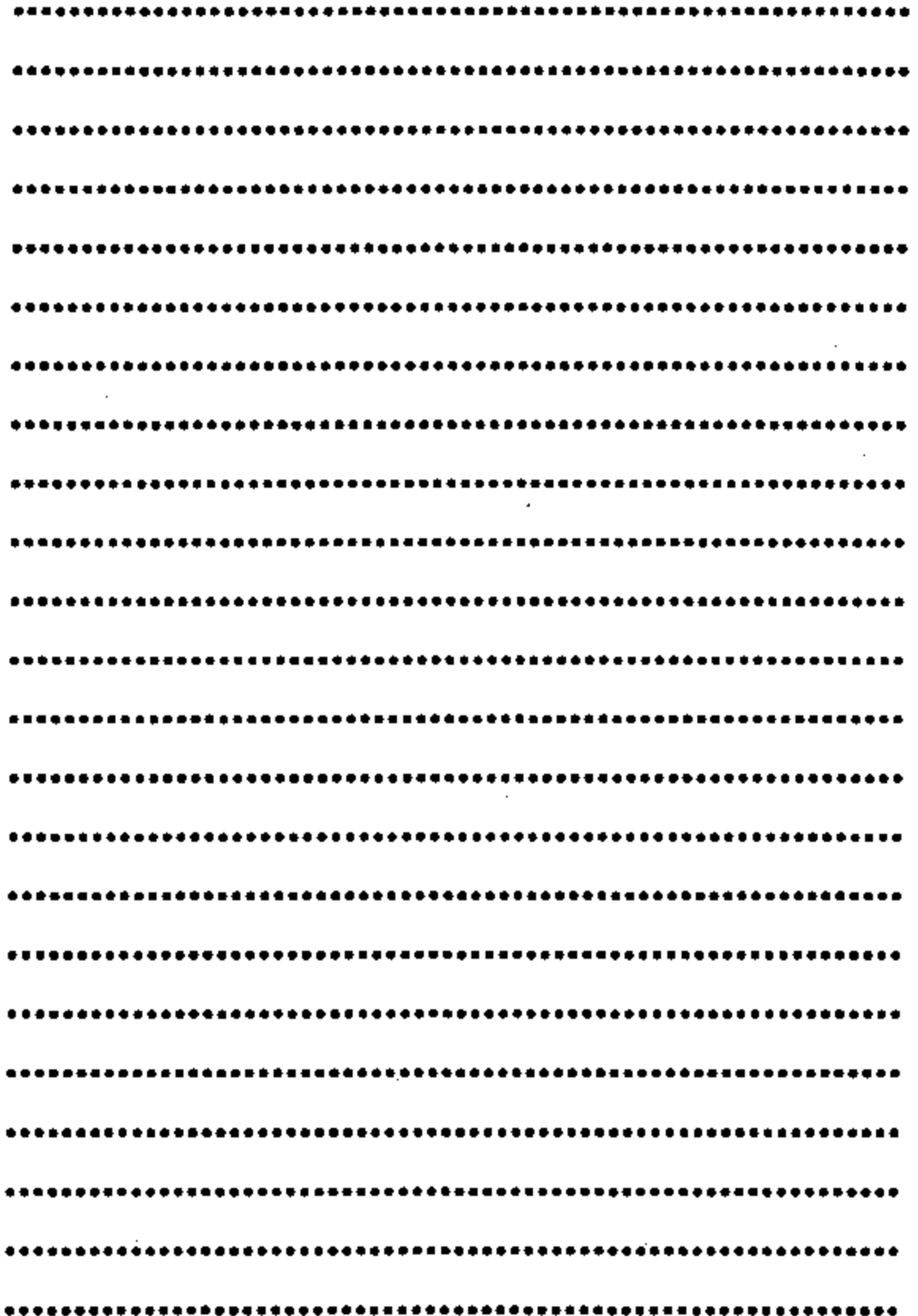
A. **Each Document Reflects Privileged and Confidential Communications Between AHP and its Counsel**

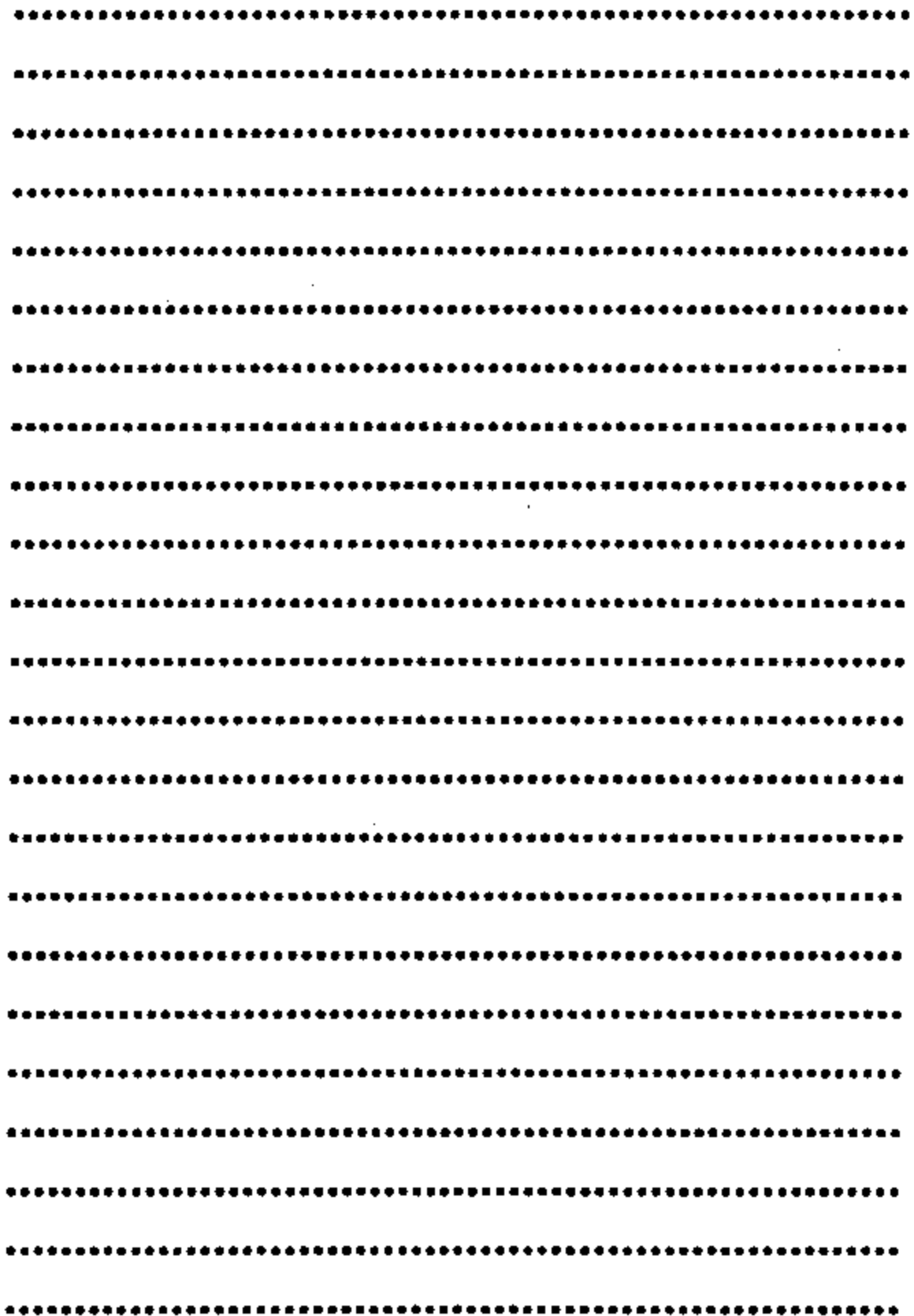
Each of the documents for which AHP seeks indefinite *in camera* status in the instant motion reflects privileged and confidential attorney-client communications between AHP/ESI and its counsel. As explained at length in AHP's Motion for Protective Order and Reply thereto, along with the declarations and supplemental declarations submitted in support of those briefs, all of the documents for which AHP seeks indefinite *in camera* treatment are protected from public disclosure by the attorney-client privilege and by the work-product doctrine. •••••of the documents also contain

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In short, each of the documents for which AHP seeks indefinite *in camera* treatment contains privileged attorney-client communications andof the documents

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attorney work product.

**B. Public Disclosure of these Privileged Documents Would
Cause AHP “Serious Injury”**

The linchpin for determining whether a document should be afforded *in camera* treatment is whether public disclosure of the document would inflict “a clearly defined, serious injury” on the producing party. See Kaiser, 103 F.T.C. at 500. Here, AHP inadvertently produceddocuments to the Commission during the pre-Complaint investigation, and now complaint counsel and Respondent Upsher-Smith intend to use, or have used already, certain of those privileged documents at the administrative hearing.

Courts have held in other contexts that the disclosure of privileged documents constitutes serious and irreparable injury. For example, in Ford Motor Co. v. Kelly, 110 F.3d 954, 963 (3d Cir. 1997), the Third Circuit allowed a party to seek interlocutory review of a district court’s decision to compel production of the party’s privileged material. The court recognized that disclosure of privileged material would cause the privilege holder irreparable injury. See id. The federal courts of appeal also have granted mandamus relief where a district court finds waiver and orders a party to produce its privileged documents. See, e.g., In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 641 (8th Cir. 2001); In re Occidental Petroleum Corp., 217 F.3d 293, 295 n.9 (5th Cir. 2000); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970). In

C. The Commission Has Afforded *In Camera* Status to Privileged Materials in the Past

The Commission previously has granted *in camera* treatment to documents protected from public disclosure by a claim of privilege or the work-product doctrine. For instance, the court in In re Kellogg Co. et al., 1979 FTC LEXIS 9, at *1 (Dec. 27, 1979), afforded *in camera* status to documents complaint counsel claimed were work product of Commission staff. The court concluded that complaint counsel waived any claim of privilege to the documents because they *voluntarily* produced them to Respondent General Foods. See id. The court found, however, that documents reflecting Commission staff work product should be granted *in camera* status, noting that “the policy arguments made by complaint counsel are valid in the context of public disclosure of these documents to persons not party to this proceeding.” Id. The court reasoned that “frank and open intra-agency discussion would be stymied if the participants could not be assured that their recommendations would remain confidential.” Id.

More recently, Judge Timony granted indefinite *in camera* status to two documents a respondent argued were privileged work product. See In re Textron, Inc., 1991 FTC LEXIS 94, at *1 (Mar. 22, 1991) (discussing the documents); In re Textron, Inc., 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991) (granting *in camera* treatment). In Textron, Judge Timony allowed complaint counsel to use in evidence documents containing respondent’s work product because complaint counsel demonstrated a substantial need for the documents. See 1991 FTC LEXIS 94, at *2. The court, however, granted the privileged documents *in camera* protection. See 1991 FTC LEXIS 135, at *1.

These cases demonstrate that privileged documents—•••••—should be granted *in camera* treatment. As the court in Kellogg recognized, privileged material should not be subject to public disclosure at an administrative hearing even though other parties in the proceeding have reviewed the privileged documents. 1979 FTC LEXIS 9, at *1. The rationale in Kellogg is applicable here. The court reasoned that the public disclosure of documents reflecting confidential work product of Commission staff might hinder intra-agency discussions in the future. See id. Granting *in camera* status to AHP's privileged documents is even more compelling here than in Kellogg because unlike in Kellogg, the documents at issue here are protected from public disclosure by both the attorney-client privilege and the work-product doctrine. Moreover, unlike in Kellogg, AHP did not voluntarily produce its privileged documents to its adversary; rather, the documents were inadvertently produced.

Furthermore, public disclosure of these privileged documents would result in a serious injury to AHP, without serving any countervailing public purpose. The need for public access varies greatly depending on the specific documents at issue and their role in the case. See United States v. Amodco, 71 F.3d 1044, 1048-49 (2d Cir. 1995). Here, the Court may rely on several documents, •••••
•••••
•••••in rendering its public decision in this case; it does not have to rely on AHP's privileged documents to do so.⁶ Stated

⁶ For instance, complaint counsel have included on their exhibit list the document designated as •••••
•••••. Complaint counsel also have listed on their exhibit list the documents designated as exhibits •••••. Upsher-Smith also has

“information that is *privileged*.” *Id.* at *6 (emphasis added). Additionally, the court in *Textron* granted documents protected by the work-product doctrine indefinite *in camera* status because the harm of disclosure of such information “does not diminish with time.” 1991 FTC LEXIS 135, at *1. Likewise, the privileged nature of the documents for which AHP seeks *in camera* treatment will not decrease with the passage of time, and therefore, indefinite *in camera* status is appropriate.

CONCLUSION

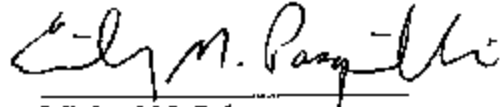
For the foregoing reasons and those set forth in the accompanying declaration, AHP respectfully requests that the Court enter an order granting indefinite *in camera* treatment to the following privileged documents discussed herein:

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Additionally, in the event that the Commission intends to disclose *in camera* AHP information in a final decision, AHP respectfully requests that the Commission notify AHP outside counsel, Cathy A. Hoffman of Arnold & Porter, 555 Twelfth Street, N.W., Washington, D.C. 20004, telephone (202) 942-5000.⁷

⁷ In the event that the Court is not inclined to grant *in camera* treatment to any of these documents, AHP respectfully requests that the Court continue provisional *in camera* treatment for a period of thirty days to allow AHP to seek protection for its documents in federal court.

Respectfully submitted,



Michael N. Sohn
Cathy A. Hoffman
David M. Orta
Emily M. Pasquinelli
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206

Counsel for American Home
Products Corporation

Elliot Feinberg
American Home Products Corporation
Five Giralda Farms
Madison, NJ 07940
(973) 660-5500

Dated: February 14, 2002

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

CERTIFICATE OF SERVICE

I, Emily M. Pasquinelli, hereby certify that on February 14, 2002, I caused a true and correct copy of *Motion of American Home Products Corporation For Indefinite In Camera Treatment* to be served upon the following as follows:

Two paper copies by hand delivery to:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (2 copies)

The paper original and one paper copy by hand delivery and one electronic copy to:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580 (original and 1 copy)

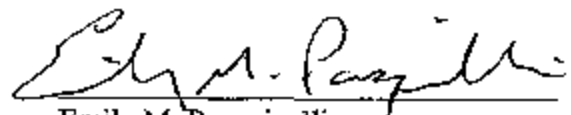
One paper copy by delivery to:

David R. Pender
Deputy Assistant Director,
Health Care Services and Products
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Room 3115
Washington, D.C. 20580

Karen G. Bokar
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Room 3115
Washington, D.C. 20580
Fax (202) 326-3384

Christopher Curran
White & Case, LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
Fax (202) 639-9355

Laura S. Shores
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Fax (202) 383-6610



Emily M. Pasquinelli
Arnold & Porter

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

**ORDER GRANTING AMERICAN HOME PRODUCTS CORPORATION'S
MOTION FOR INDEFINITE *IN CAMERA* TREATMENT**

Upon consideration of American Home Products Corporation's ("AHP") Motion for Indefinite *In Camera* Treatment, it is hereby ORDERED that AHP's Motion is GRANTED as set forth in this Court's ORDER of February __, 2002.

Accordingly, the following documents, or designated portions thereof, are accorded indefinite *in camera* treatment:

1. CX 35, bates page AHP 13 00025;
2. CX 164, bates pages AHP 13 00115, AHP 13 00117-18, and AHP 13 00121-25;
3. CX 165, bates pages AHP 13 00128-29 (only the handwritten portion on AHP 13 00129);
4. CX 166, bates page AHP 13 00130 (the handwritten portion);

5. CX 169, bates pages AHP 13 00158-84;
6. USX 41, bates page AHP 13 00025;
7. USX 43, bates page AHP 13 00115;
8. USX 44, bates page AHP 13 00117;
9. USX 45, bates page AHP 13 00118;
10. USX 46, bates pages, AHP 13 00158-84;
11. AHP 13 00149-51;
12. AHP 13 00131;
13. AHP 13 00089-93;
14. AHP 13 00094-96;
15. AHP 13 00097-99.

Dated: Washington, D.C.
February __, 2002

D. Michael Chappell
Administrative Law Judge



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

December 20, 2001

Via Facsimile and Federal Express

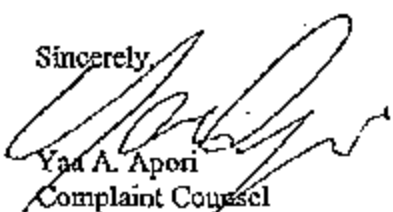
Cathy Hoffman, Esq.
Arnold & Porter
555 Twelfth Street, NW
Washington, D.C. 20004-1206

Re: In the Matter of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation, FTC Docket No. 9297.

Dear Ms. Hoffman:

As you know, the Federal Trade Commission issued an administrative complaint against Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation in March 2001. We are contacting you now because AHP produced documents to the Federal Trade Commission in this matter that complaint counsel have placed on our exhibit list and intend to offer in evidence. All exhibits admitted in evidence become part of the public record unless *in camera* status is granted. Under §4.10(g) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(g), AHP has "an opportunity to seek an appropriate protective or *in camera* order." Under Judge Chappell's December 6, 2001 Third Revised Scheduling Order, the deadline for *in camera* motions is December 27, 2001. For your convenience, I have attached a list of the AHP documents complaint counsel included on our exhibit list, a copy of Rule 4.10(g), and a copy of the Scheduling Order. Should you have any questions, please do not hesitate to contact me at (202) 326-2079.

Sincerely,

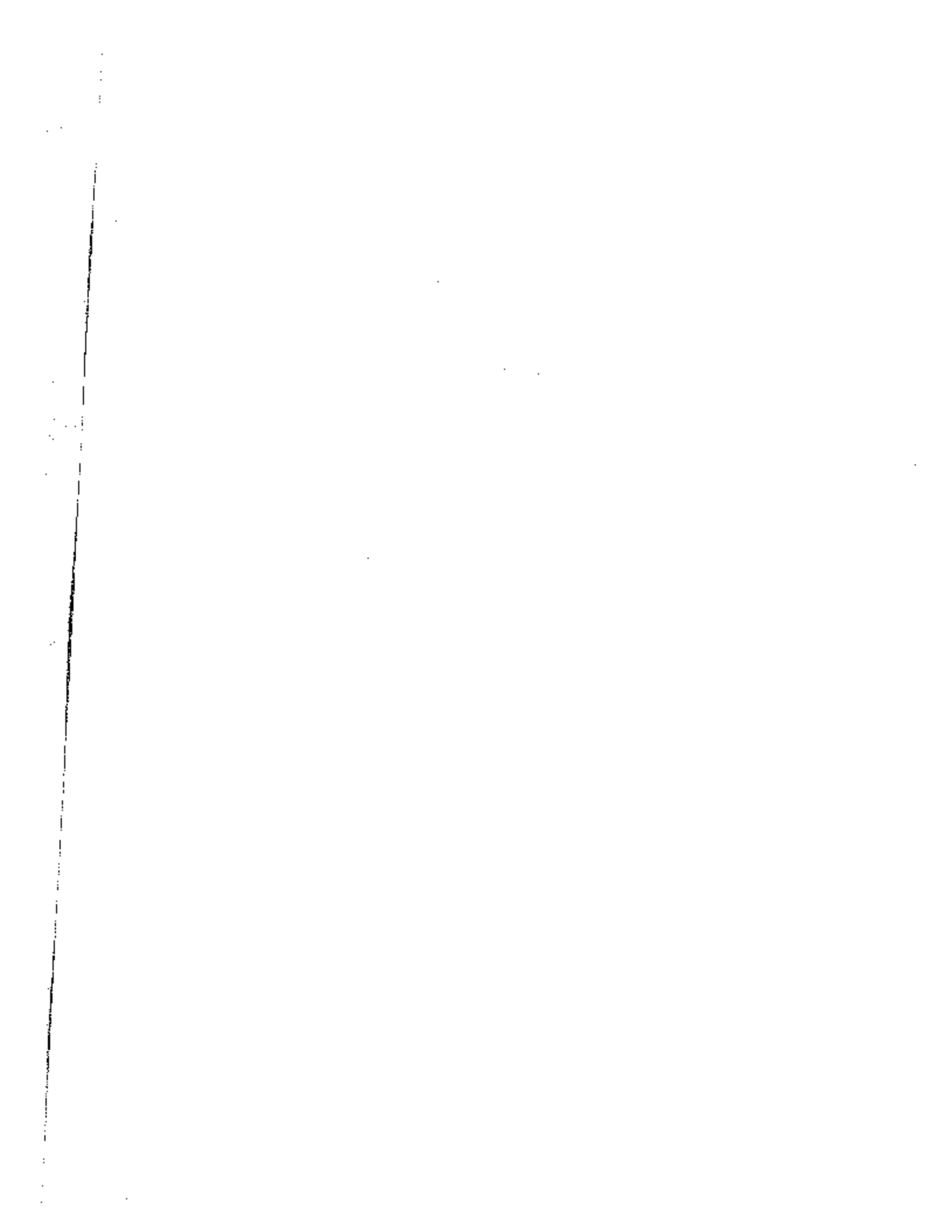


Yaa A. Apori
Complaint Counsel

Enclosures

American Home Products Documents on Complaint Counsel's Exhibit List

MATERIAL
REDACTED



LOS ANGELES
MIAMI
NEW YORK
PALO ALTO
WASHINGTON, D.C.

BERLIN
BRATISLAVA
BRUSSELS
BUDAPEST
DRESDEN
DÜSSELDORF
FRANKFURT
HAMBURG
HELSINKI
ISTANBUL
LONDON
MILAN
MOSCOW
PARIS
PRAGUE
ROME
STOCKHOLM
WARSAW

WHITE & CASE

LIMITED LIABILITY PARTNERSHIP

601 THIRTEENTH STREET, N.W.

SUITE 600 SOUTH

WASHINGTON, D.C. 20005-3807

TELEPHONE: (1-202) 626-3600

FACSIMILE: (1-202) 639-9355

ALMATY
ANKARA
BANGKOK
HO CHI MINH CITY
HONG KONG
JAKARTA
SHANGHAI
SINGAPORE
TOKYO

BAHRAIN
JEDDAH
RIYADH

MEXICO CITY
SÃO PAULO

JOHANNESBURG

December 21, 2001

AIR MAIL

David M. Orta
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004-1206

Re: Schering-Plough Corp., Upsher-Smith Laboratories, Inc.,
American Home Products Corporation, Docket No. 9297

Dear Mr. Orta:

White & Case represents Upsher-Smith Laboratories, Inc. in the above-captioned FTC administrative proceeding. Trial is presently scheduled to begin January 23, 2002. Upsher Smith has included on its list of trial exhibits certain documents produced by American Home Products to the Federal Trade Commission in this matter. This letter is to notify you that pursuant to 16 C.F.R. § 4.10(g), AHP may move for such documents to be afforded *in camera* treatment.

Attached is a list of the relevant documents and a copy of Section 4.10(g).

Very truly yours,



Paul F. Stone

Enclosures

In the Matter of Schering-Plough Corp. et al. / FIC Docket No. 9297

AHP NOTICE DOCUMENTS

**MATERIAL
REDACTED**

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

ORDER ON MOTIONS FOR *IN CAMERA* TREATMENT
OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS

I.

Pursuant to Commission Rule 3.45(b), Respondents Schering-Plough Corporation ("Schering") and Upsher-Smith Laboratories ("Upsher-Smith") and several non-parties have filed motions for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). Requests by non-parties may be treated with more lenience than those made by the parties. *Kaiser*, 103 F.T.C. at 500. Requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, *2 (April 25, 1990).

II.

Schering, on December 27, 2001, filed four separate motions for *in camera* treatment of certain documents. No oppositions have been filed.

Schering's first motion seeks *in camera* treatment for license, research and development, co-promotion, collaboration and distribution agreements between Schering and third parties. Schering provided a declaration from the Senior Antitrust Counsel for Schering to state that the documents contain extremely sensitive commercial and trade secret information concerning Schering's ongoing business efforts to design, research, develop, manufacture, sell, price, distribute, market and promote pharmaceutical products. Schering seeks indefinite *in camera* treatment for these documents.

Schering's second motion seeks *in camera* treatment for the New Drug Application for K-Dur and pages of a laboratory notebook. Schering provided a declaration from the Staff Vice President and Associate General Counsel for Patents and Trademarks for Schering to state that the documents contain trade secrets, such as chemical formulations, manufacturing control information, and information on laboratory and clinical testing performed on K-Dur. Schering seeks indefinite *in camera* treatment for these documents.

Schering's third motion seeks *in camera* treatment for documents relating to license agreements with third parties. Schering provided a declaration from the Vice President for Business Development to state that the documents contain extremely sensitive commercial, financial, and trade secret information pertaining to licensing, research and development, co-promotion, collaboration, equity and distribution agreements. Schering seeks indefinite *in camera* treatment for these documents.

Schering's fourth motion seeks *in camera* treatment for documents relating to products that are currently in development by Schering, its affiliated joint ventures, or its division. Schering provided a declaration from the Senior Antitrust Counsel for Schering to state that the documents describe sensitive and confidential information regarding Schering's ongoing clinical development, marketing, pricing, distribution, sale and profitability of these "pipeline" products. Schering seeks *in camera* treatment of five years for these documents.

Schering has tailored its requests for *in camera* treatment to only the documents which would cause Schering the most harm if made public. Schering has adequately demonstrated that public disclosure of these documents would result in injury to Schering without serving any countervailing public purpose. Accordingly, Schering's motions are GRANTED.

Indefinite *in camera* treatment will be granted to the documents listed in Schering's first, second and third motions. *In camera* treatment for a period of five years, to expire on January 1, 2007, will be granted to the documents listed in Schering's fourth motion. Schering is instructed to prepare an order for my signature that specifically identifies each document by exhibit number

and bates control number that has been granted *in camera* treatment and that indicates the length of time for which *in camera* treatment has been granted.

III.

Upsher-Smith, on December 27, 2001, filed a motion for *in camera* treatment of certain documents. No opposition has been filed. In addition, on January 22, 2002, Upsher-Smith filed a consent motion for *in camera* treatment of one confidential legal memorandum.

In support of its December 27, 2001 motion, Upsher-Smith has provided the Declaration of its Vice President of Scientific and Legal Affairs and inside counsel to Upsher-Smith. The motion seeks *in camera* treatment for portions of 79 documents falling into 4 categories: (1) trade secret and scientific information; (2) sensitive business and financial information; (3) manufacturing production capacity information; and (4) private and confidential shareholder information. Upsher-Smith seeks indefinite *in camera* treatment for its trade secret and scientific information and seeks *in camera* treatment for a period of five years from the date of the document for documents falling into the other three categories. Its January 22, 2002 motion seeks indefinite *in camera* treatment of a confidential legal memorandum containing trade secret information.

Upsher-Smith has tailored its requests for *in camera* treatment to only the documents which would cause Upsher-Smith the most harm if made public. Upsher-Smith has adequately demonstrated that public disclosure of these documents would result in injury to Upsher-Smith without serving any countervailing public purpose. Accordingly, Upsher-Smith's motion is GRANTED.

Indefinite *in camera* treatment will be granted to CX 716 and the documents listed as App. 1 through App. 18 in the declaration in support of Upsher-Smith motion. *In camera* treatment for a period of five years, to expire on January 1, 2007, will be granted to the documents listed as App. 19 through 78. Upsher-Smith is instructed to prepare an order for my signature that specifically identifies each document that it has described as App. 1 through App. 78 by its exhibit number and bates control number and, where applicable, specific paragraph numbers. The proposed order should indicate the length of time for which *in camera* treatment has been granted.

It appears that Upsher-Smith also seeks *in camera* treatment for the document attached as App. 79, identified as USX 702, a Declaration of Philip Vogt of ETIEX Corporation, a subsidiary of KV Pharmaceutical Company ("KV"). Upsher-Smith's request for *in camera* treatment for the Vogt declaration is DENIED. As set forth below, KV is given provisional *in camera* treatment for this declaration in order to allow KV to file a proper motion.

IV.

Non-party KOS Pharmaceuticals, Inc. ("KOS"), on December 26, 2001, filed a motion for protective order or in the alternative for *in camera* treatment for several documents listed by Complaint Counsel as potential trial exhibits. On January 10, 2002, KOS filed a second motion for protective order or in the alternative for *in camera* treatment for several documents listed by Upsher-Smith as potential trial exhibits. No oppositions to these motions have been filed.

In support of its motions, outside counsel for KOS states only that the documents contain confidential commercial and/or financial information of a sensitive nature. KOS has not provided an declaration or affidavit nor has it described the documents or demonstrated what harm might inure to it if the documents were disclosed. Apparently, KOS seeks *in camera* treatment for all the documents which the parties have listed as potential trial exhibits rather than conduct a review to determine whether any of the documents meet the Commission's stringent *in camera* standard.

KOS's motions are DENIED WITHOUT PREJUDICE. However, pursuant to 16 C.F.R. § 3.45(g), KOS's documents will be given a provisional grant of *in camera* status until February 13, 2002. KOS has until January 31, 2002 to file a motion for *in camera* treatment which meets the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999).

The parties are ORDERED to inform the Court of the exhibit numbers of KOS documents which have been granted provisional *in camera* treatment by this order.

V.

Non-party Andrx Corporation ("Andrx"), on December 27, 2001, filed a motion seeking *in camera* treatment for one document. On January 4, 2001, Andrx filed a supplemental motion seeking *in camera* treatment for nineteen documents. No oppositions to this motion have been filed.

In support of its motion, Andrx has provided the declaration of its in house counsel. Andrx asserts that the documents fall into two categories. The first category is of documents containing proprietary sales and marketing information concerning Andrx's proposed generic potassium chloride supplement which Andrx asserts would reveal Andrx's sales forecasts, assumptions and projected requirements for Andrx's generic potassium chloride product, a product that has not yet been approved by the FDA or brought to market. Andrx asserts that if this information were made public, it would cause significant competitive injury to Andrx. The second category is of documents consisting of communications with regulatory bodies concerning Andrx's Abbreviated New Drug Application (ANDA). ANDAs generally contain detailed scientific, manufacturing, and marketing information about the proposed drug product. Andrx asserts that the communications between it and the FDA about its ANDA contain

competitively sensitive information. Andrx seeks indefinite *in camera* treatment for documents in both categories.

Andrx has adequately demonstrated that public disclosure of these documents would result in injury to Andrx without serving any countervailing public purpose. Andrx has not demonstrated that the documents meet the even stricter standard for indefinite *in camera* treatment. Accordingly, Andrx's motions are GRANTED IN PART and DENIED IN PART. *In camera* treatment for a period of five years will be granted to the following documents:

ANDX-SP 001158	CX 54
ANDX-SP 001159-60	USX 48
ANDX-SP 001161	USX 49
ANDX-SP 005052-54	USX 51
ANDX-SP 005150-53	USX 52
ANDX-SP 005163-65	USX 53
ANDX-SP 005194-96	USX 55
ANDX-SP 005197-98	USX 56
ANDX-SP 005199	USX 57
ANDX-SP 005328-29	USX 58
ANDX-SP 005333-34	USX 59
ANDX-SP 005335-36	USX 60
ANDX-SP 005337-38	USX 61
ANDX-SP 005340-42	USX 62
ANDX-SP 005348	USX 63
ANDX-SP 005353-60	USX 64 (ANDX-SP 005353 only)
ANDX-SP 005593-98	USX 65
ANDX-SP 009802-03	USX 66
ANDX-SP 009804-05	USX 67

In camera treatment of such documents shall expire on January 1, 2007.

VI.

Non-party American Home Products Corporation ("AHP"), on January 7, 2002 filed a motion seeking *in camera* treatment for portions of one strategic planning document. No oppositions to this motion have been filed.

In support of its motion, AHP has provided the Declaration of the Vice President and General Manager of ESI-Lederle, a division of AHP. AHP asserts that the document (110 DOC 001283-1333), designated as USX 709 on Upsher-Smith's list of exhibits, contains commercial information pertaining to customer strategies, strategic planning regarding two drugs, currently marketed as brand drugs that are not the subject of this proceedings, and profit and loss projections. AHP seeks *in camera* treatment for only the most sensitive portions of its document.

AHP requests *in camera* treatment for five years.

AHP has adequately demonstrated that public disclosure of portions of this document would result in injury to AHP without serving any countervailing public purpose. Accordingly, AHP's motion is GRANTED. *In camera* treatment will be given to the particular portions of USX 709 designated by the following bates number ranges:

110 DOC 1297
110 DOC 1309-1311
110 DOC 1326-1329
110 DOC 1333

In camera treatment of these documents shall expire on January 1, 2007.

VII.

Non-party Merck-Medco Managed Care, L.L.C. ("Merck-Medco"), on January 11, 2002 filed a motion seeking *in camera* treatment for one document. No oppositions to this motion have been filed.

In support of its motion, Merck-Medco has provided the Declaration of the Senior Vice President of Sales. Merck-Medco asserts that the document (Merck-Medco 000117-143), designated as USX 121 on Upsher-Smith's list of exhibits, is a commercially sensitive business proposal template used by Merck-Medco's sales force for developing presentations and proposal to current and prospective clients. Merck-Medco seeks *in camera* treatment for ten years on the grounds that substantial competitive harm would result from public disclosure and could persist for years to come.

Merck-Medco has adequately demonstrated that public disclosure of portions of this document would result in injury to Merck-Medco without serving any countervailing public purpose. Merck-Medco's motion is GRANTED IN PART. *In camera* treatment will be given to USX 121 (Merck-Medco 000117-143). However, *in camera* treatment of such document shall expire on January 1, 2007.

VIII.

Non-party KV Pharmaceutical ("KV"), on January 16, 2002, filed a motion to enforce protective order. This motion seeks to prevent Upsher-Smith from introducing at trial the following documents: KV 1998-2004, KV 3916-3942, and the Declaration of Philip J. Vogt. In the alternative, KV requests *in camera* treatment for the documents. On January 22, 2002 Upsher-Smith filed an opposition to KV's motion for a protective order, but does not oppose KV's request for *in camera* treatment.

KV has not described the documents or provided a declaration to support its contention that the documents qualify for *in camera* treatment. KV's request for *in camera* treatment is DENIED WITHOUT PREJUDICE. However, pursuant to 16 C.F.R. § 3.45(g), KV's documents will be given a provisional grant of *in camera* status until February 13, 2002. KV has until January 31, 2002 to file a motion for *in camera* treatment which meets the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999).

The parties are ORDERED to inform the Court of the exhibit numbers of KV documents which have been granted provisional *in camera* treatment by this order.

IX.


Non-party Teva Pharmaceuticals USA, Inc. ("Teva"), on January 18, 2002, filed a motion seeking *in camera* treatment for one document. No oppositions to this motion have been filed.

In support of its motion, Teva has provided the Affidavit of the Senior Director of Legal Affairs of Teva. The document for which Teva seeks *in camera* treatment is a two page declaration of Marc Goshko, the Senior Director of Legal Affairs at Teva, which discusses one of Teva's Abbreviated New Drug Application. Teva requests *in camera* treatment for three years.

Teva has adequately demonstrated that the contents of the declaration would reveal highly confidential and commercially sensitive business strategy. Accordingly, Teva's motion is GRANTED.

The parties are ORDERED to inform the Court of the exhibit number of the Teva document which has been granted *in camera* treatment by this order.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: January 24, 2002

EXHIBIT HAS BEEN REDACTED IN FULL

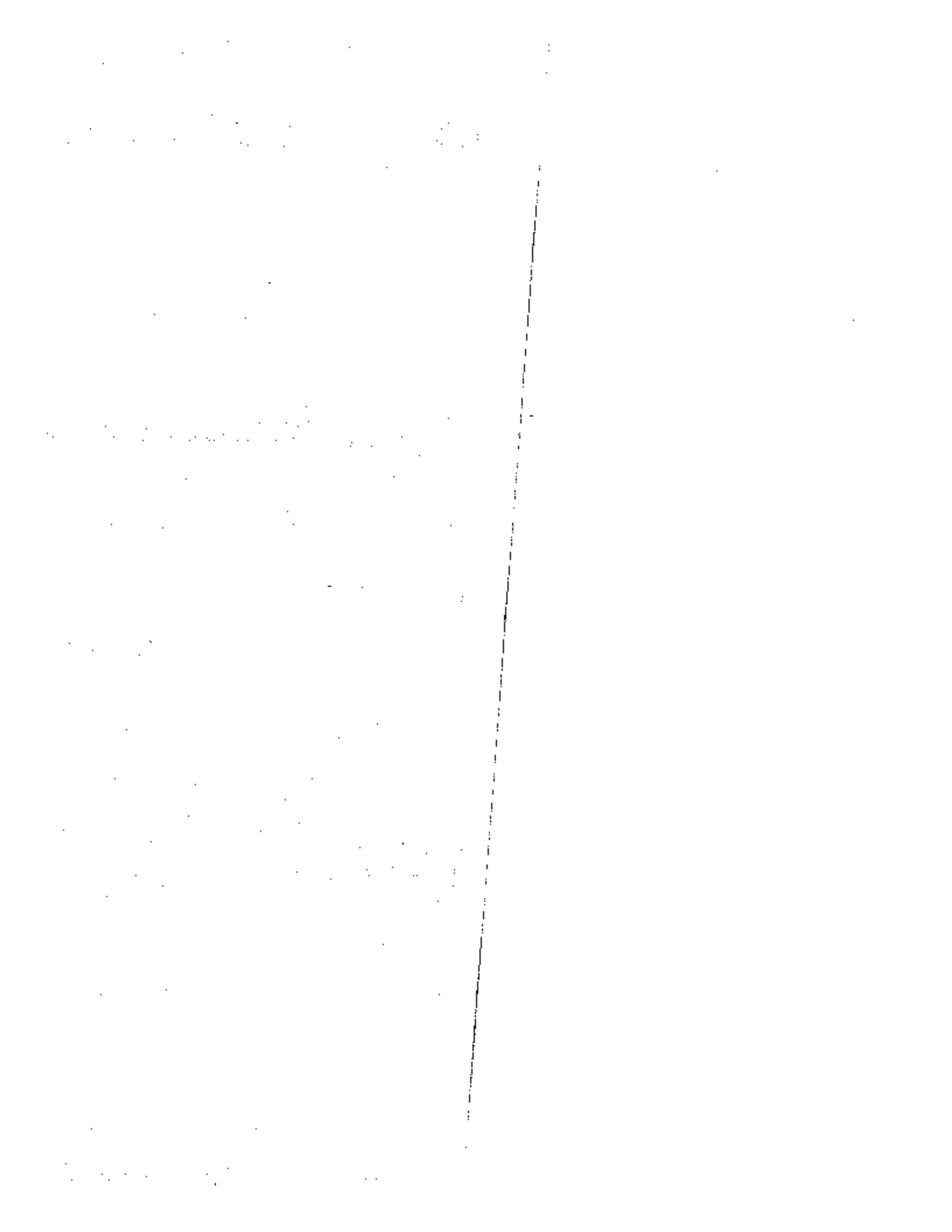


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IS OFFICE PRODUCTS

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

**DECLARATION OFIN SUPPORT OF MOTION
OF AMERICAN HOME PRODUCTS CORPORATION FOR INDEFINITE *IN*
CAMERA TREATMENT**

I,, declare as follows:

1. I am
..... My business address is
..... I have personal knowledge of the facts set forth herein.
2. I submit this declaration in support of AHP's motion for indefinite *in camera* treatment of certain documents complaint counsel and Respondent Upsher-Smith Laboratories, Inc. ("Upsher") may use at the administrative hearing in the above-captioned proceeding.
3. As noted in their exhibit list, complaint counsel have notified AHP that they intend to use the documents designated as

.....
.....at the administrative hearing. According to Respondent Upsher-Smith's
exhibit list, Upsher-Smith intends to use AHP's documents designated as
.....
.....at the hearing. Documents identified with bates numbers
.....may also be used by the parties at the hearing.

4. I have
.....
.....
.....
.....
.....
.....
.....
.....
.....

5. Each of the documents referenced in the above paragraph has been designated as
"Restricted Confidential" and "Attorney's Eyes Only" pursuant to the protective order
entered in the captioned matter.

6. Because each of the documents identified above reflect
.....,
public disclosure of these documents would cause AHP serious injury. It is important to
AHP that its
....., are

prevented from public dissemination. It is likewise important to

.....not

be made available to the public at large. Furthermore, thenature of the

documents referenced herein will not decrease over time.

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

Dated: February 5, 2002

.....

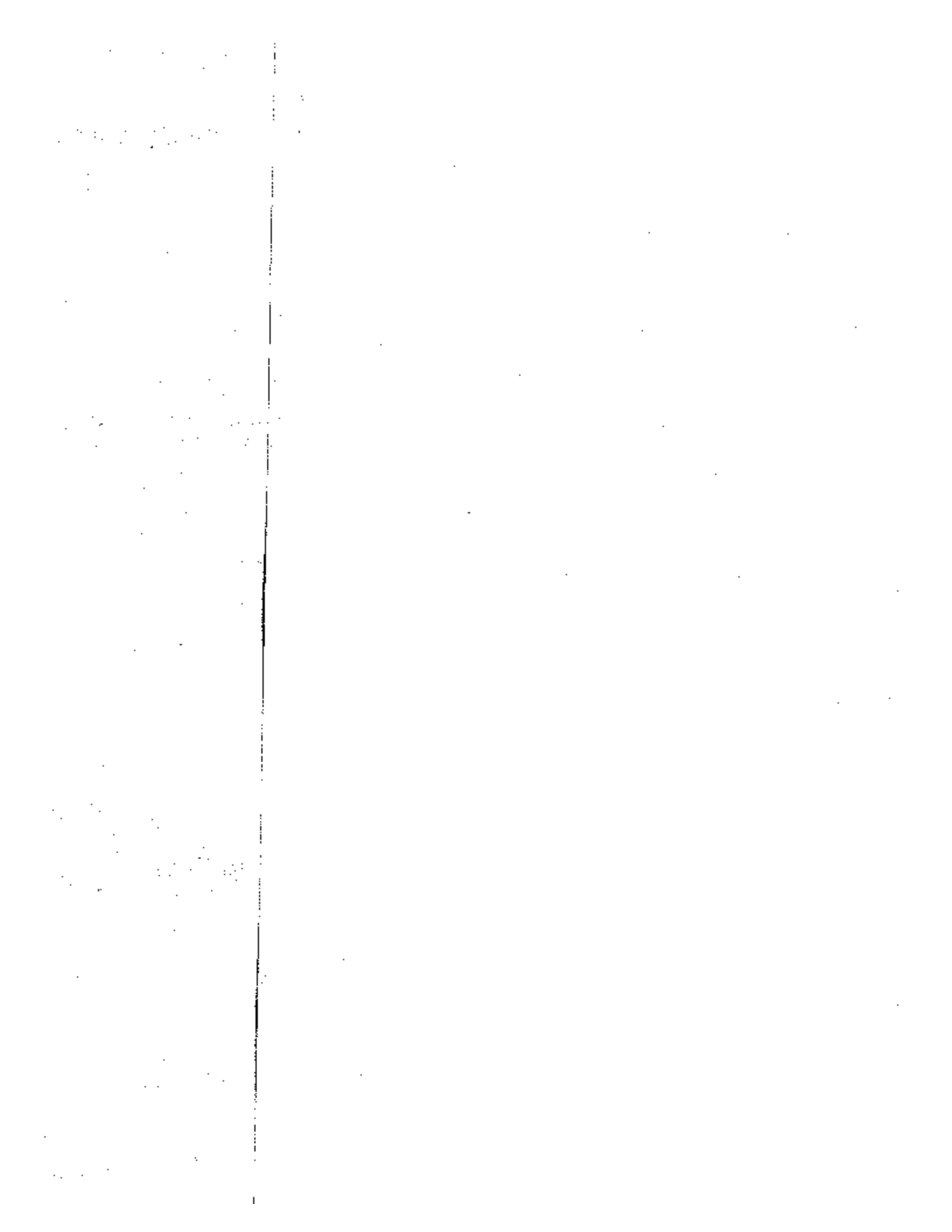


EXHIBIT HAS BEEN REDACTED IN FULL

EXHIBIT HAS BEEN REDACTED IN FULL