

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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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 ON UPSHER SMITH'S MOTION FOR *IN CAMERA*  
TREATMENT OF LEGAL DOCUMENTS FILED UNDER SEAL**

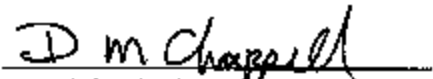
Pursuant to Commission Rule 3.45(b), on March 12, 2002, Respondent Upsher-Smith Laboratories ("Upsher-Smith") filed a motion to obtain *in camera* treatment of confidential documents from the Key Pharmaceuticals/Upsher-Smith patent litigation, all of which are under seal in that litigation. The documents consist of proprietary and competitively sensitive material relating to Upsher-Smith's formulation of its Klor Con M20 product. Complaint Counsel does not oppose the motion. Provisional *in camera* treatment was granted for these documents on March 6, 2002, pursuant to Commission Rule 3.45(g).

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 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).

In support of its motion, Upsher-Smith has submitted the Declaration of Vice President of Scientific and Legal Affairs and inside counsel to Upsher-Smith. Through this declaration, Upsher-Smith has demonstrated that the trade secrets and legal information relating to Upsher-Smith's formulation of its Klor Con M20 product have been carefully guarded by Upsher-Smith and that public disclosure would cause it substantial injury without serving any countervailing public purpose.

*In camera* treatment, for an indefinite period, is hereby GRANTED to the following exhibits: CX 1668, CX 1705, and CX 1706.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: March 14, 2002