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## WHITE & CASE

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May 9, 2002



BY HAND

Donald S. Clark  
Secretary  
Federal Trade Commission - Office of the Secretary  
6<sup>th</sup> and Pennsylvania Avenue, N.W., Rm. 172  
Washington, D.C. 20580

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

Dear Secretary Clark:

Please find enclosed a copy of Upsher-Smith's Revised Unopposed Motion for *In Camera* Treatment of Portions Of Investigational Hearing Transcript, with the Memorandum in Support of the Motion attached. An electronic copy is also provided in the enclose diskette.

Sincerely,

A handwritten signature in black ink that reads "Gustav P. Chiarello".

Gustav P. Chiarello

Enclosures

cc: Laura S. Shores, Esq.  
Karen G. Bokar, Esq.  
David R. Pender, Esq.

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**

**UPSHER-SMITH'S REVISED UNOPPOSED MOTION FOR *IN CAMERA***  
**TREATMENT OF PORTIONS OF INVESTIGATIONAL HEARING TRANSCRIPT**

Upsher-Smith hereby moves for *in camera* treatment for portions of the transcript of the investigational hearing of Mark Robbins, which has been identified as CX 1523, USX 1534 and SPX 1254. The transcript refers in places to information contained in the sealed patent litigation pleadings and the transcript also contains references to competitively sensitive trade secret information relating to Upsher-Smith's formulation of its Klor Con M products. The Court has afforded this exact information *in camera* treatment in earlier orders.

This motion supplants and moots the motion filed yesterday which sought somewhat broader *in camera* treatment. Complaint Counsel and Counsel for Schering have reviewed this revised motion and do not oppose it.

The facts and authorities in support of this motion are set forth in the supporting memorandum and the accompanying declaration of Mr. Robbins.

Dated: May 9, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

Robert D. Paul

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*Attorneys for Upsher-Smith Laboratories, Inc.*

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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

**UPSHER-SMITH'S MEMORANDUM  
IN SUPPORT OF ITS REVISED UNOPPOSED MOTION FOR *IN CAMERA*  
TREATMENT OF PORTIONS OF INVESTIGATIONAL HEARING TRANSCRIPT**

Upsher-Smith moves for *in camera* treatment to be accorded to portions of the transcript of the investigational hearing of Mark Robbins, which the parties have designated as CX 1523, USX 1534 and SPX 1254. This motion supplants and moots the motion filed yesterday by Upsher-Smith. After further consultation with Complaint Counsel, Upsher-Smith has narrowed the scope of *in camera* treatment sought in the motion filed yesterday. Specifically, Upsher-Smith seeks *in camera* treatment for: (1) page 28, lines 17-23; (2) page 30, lines 24-25; (3) page 32, lines 21-24; (4) page 36, line 14 through page 37, line 19; (5) page 38, line 6 through page 40, line 5; and (6) page 94, line 25 through page 95, line 21. Complaint Counsel and Counsel for Schering have reviewed this motion and do not oppose it.

The above-noted portions of the transcript describe the contents of the sealed pleadings in the New Jersey patent litigation between Schering and Upsher-Smith and they also contain trade secret information regarding the formulation and development of Upsher-Smith's Klor-Con M

products. Throughout these proceedings Upsher-Smith has carefully sought, and the Court has afforded, *in camera* treatment to such information regarding the patent litigation and Upsher-Smith's formulation. In our earlier review of the thousands of exhibits for *in camera* treatment we overlooked these limited sections of Mr. Robbins's testimony. They were recently called to our attention in connection with the preparation of the public versions of post-trial pleadings.

No portion of Mr. Robbins's investigational hearing was read in open court, and it has only been referred to in the post-trial filings.

### **STANDARD FOR *IN CAMERA* TREATMENT**

Under Commission Rule 3.45(b) *in camera* protection should be afforded to documents upon a showing that "public disclosure will likely result in a clearly defined, serious injury to person, partnership or corporation requesting their *in camera* treatment." 16 C.F.R. § 3.45(b); *see also In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) (same). An applicant 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).

### **INVESTIATIONAL HEARING TRANSCRIPT EXCERPTS WARRANT *IN CAMERA* TREATMENT**

During his investigation hearing, Mr. Robbins was asked questions regarding the underlying patent action in New Jersey as well as questions regarding certain aspects of Upsher-Smith's Klor Con M formulation. His responses included information regarding certain of the components of Klor Con M and their use in Upsher-Smith's formulation, as well as information regarding Upsher-Smith's efforts to design around Schering's patent. Robbins Decl. ¶ 3. These

details regarding Upsher-Smith's product formulation are sensitive trade secrets that have been carefully guarded by Upsher-Smith. Robbins Dec. at ¶¶ 3, 4. This information is not publicly available — indeed, the information from the New Jersey patent pleadings is still under a court-ordered seal — and its disclosure would give competitors an unfair advantage *vis-à-vis* Upsher-Smith. Robbins Dec. ¶ 4. Should these portions of the documents be placed on the public record beyond that which they have been already, it is almost inevitable that Upsher-Smith's competitors will become aware of the contents of the document and gain an unfair advantage.

### CONCLUSION

For the reasons set forth herein, Upsher-Smith respectfully requests *in camera* treatment for the above-noted portions of Mark Robbins's investigative hearing transcript contained in CX 1523, USX 1534 and SPX 12544 for an indefinite period of time.

Dated: May 9, 2002

Respectfully submitted,

WHITE & CASE LLP

By: 

Robert D. Paul

J. Mark Gidley

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*Attorneys for Upsher-Smith Laboratories, Inc.*

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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

**DECLARATION OF MARK S. ROBBINS IN SUPPORT OF  
UPSHER-SMITH'S REVISED UNOPPOSED MOTION FOR PORTIONS  
OF *IN CAMERA* TREATMENT OF INVESTIGATIONAL HEARING TRANSCRIPT**

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 specific portions of my investigational hearing transcript, which the parties have designated as CX 1523, USX 1534 and SPX 1254.

Specifically, *in camera* treatment is requested for:

- a. Page 28, line 17 through line 23;
- b. Page 30, line 24 through line 25;
- c. Page 32, line 21 through line 24;
- d. Page 36, line 14 through page 37, line 19;
- e. Page 38, line 6 through page 40, line 5;
- f. Page 94, line 25 through page 95, line 21.

3. *In camera* treatment for these portions of the transcript is imperative. In their proposed findings of fact, Complaint Counsel cited to portions of the investigational hearing that refer to Upsher-Smith trade secret information, which is non-public, contains proprietary and legally sensitive material, and has been carefully guarded by Upsher-Smith. Specifically, the portions of the transcript noted above refer to Upsher-Smith's Klor-Con M product formulations, including by name certain components, they describe the steps Upsher-Smith took to design around patents, and, finally, they contain a description of the allegations in the underlying patent litigation which are sealed by court order. Disclosure of this sensitive information would greatly prejudice Upsher-Smith, and give competitors an unfair advantage over Upsher-Smith upon disclosure.

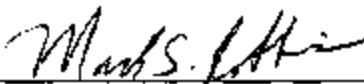
4. Upsher-Smith has diligently maintained the privacy and secrecy of the trade secret information and (other than as provided under seal in the New Jersey action) it is not available outside Upsher-Smith. Within Upsher-Smith this information is subject to strict safeguards that control this information, and it is shared only on a need-to-know basis among a limited number of employees, all of whom have signed confidentiality agreements with the company. In these proceedings, Upsher-Smith has assiduously maintained the confidentiality of this type of information by seeking *in camera* treatment where the information is cited in the record. Divulging such information, which is not otherwise publicly available, would directly impede Upsher-Smith's ability to compete with other pharmaceutical companies and would



cause serious and immediate competitive harm to Upsher-Smith.

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

Executed on May 9, 2002 in Plymouth, Minnesota.

  
\_\_\_\_\_  
Mark S. Robbins, Esq.

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

**ORDER GRANTING UPSHER-SMITH'S REVISED MOTION FOR *IN CAMERA***  
**TREATMENT OF PORTIONS OF INVESTIGATIONAL HEARING TRANSCRIPT**

Upon consideration of Upsher-Smith's unopposed revised motion for *in camera* treatment of specific portions of Mark Robbins's investigational hearing transcript, which has been designated by the parties as CX 1523, USX 1534 and SPX 1254, it is hereby ORDERED that Upsher-Smith's Motion is GRANTED. Specifically, the following portions of Mr. Robbins's Investigational Hearing have been GRANTED indefinite *in camera* status:

- (1) Page 28, lines 17-23;
- (2) Page 30, lines 24-25;
- (3) Page 32, lines 21-24;
- (4) Page 36, line 14 through page 37 line 19;
- (5) Page 38, line 6 through page 40, line 5;
- (6) Page 94, line 25 through Page 95, line 21.

Dated: Washington, D.C.  
May \_\_, 2002

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

### CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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  
Karen G. Bokar  
Federal Trade Commission, 3115  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

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Robert K. Mills