

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 OPPOSITION TO NON-PARTY  
KV PHARMACEUTICAL'S MOTION TO ENFORCE PROTECTIVE ORDER**

The FTC Rules of Practice do not impose an obligation on a party intending to use confidential documents at trial to move for *in camera* treatment. The FTC Rules specifically provide that a party wishing to use confidential materials at trial need only "demonstrate that the third party has been given at least ten (10) days notice of the proposed use of such material." Rule 3.45(b), FTC Rules of Practice. The party so notified may then move for *in camera* treatment of that material. *See id.* These provisions have been followed by every party to this case and by every producing party, other than KV Pharmaceutical.

KV Pharmaceutical apparently misreads this Court's May 10, 2001 Protective Order as altering Rule 3.45(b). In fact, the Protective Order expressly states that nothing in it shall be construed to conflict with the provisions of Rule 3.45 and that the Order "governs the disclosure of information *during the course of discovery* and does not constitute an *in camera* order . . . ." *Id.* at 16, ¶ 12-13 (emphasis added). The Protective Order, indeed, confirms that requests for *in camera* treatment conform with the requirements of Rule 3.45 and the standards of *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Paragraphs 2(b) and (c) of the Protective

Order, which KV Pharmaceutical cites, apply to, among other things, the disclosure of documents shown before trial to persons who may be witnesses at depositions or trial, but not to exhibits disclosed *at trial*.

Upsher-Smith takes no position on KV Pharmaceutical's alternate request that its materials be treated *in camera*, except to point out that its motion is deficient under the standards of Rule 3.45 and *Dura Lube*. Under those standards the movant has the burden of proof to provide the Court reasons for granting its confidential materials *in camera* status, specify the time period for *in camera* treatment, attach the specific documents for which treatment is sought, and attach proper evidence to support all factual issues. See *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 at \*4.

#### CONCLUSION

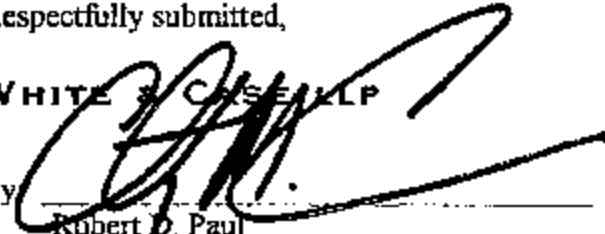
For all of the foregoing reasons, Non-Party KV Pharmaceutical Company's Motion To Enforce Protective Order should be denied.

Dated: January 22, 2002

Respectfully submitted,

WHITE & CASE LLP

By



Robert D. Paul  
J. Mark Gidley  
Christopher M. Curran  
Rajeev K. Malik  
601 Thirteenth Street, N.W.  
Washington, D.C. 20005-3807  
Telephone: (202) 626-3600  
Facsimile: (202) 639-9355

*Attorneys for Upsher-Smith Laboratories, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of January 2002 I caused an original, one paper copy and an electronic copy of Upsher-Smith's Opposition To Non-Party KV Pharmaceutical Company's Motion To Enforce Protective Order to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

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

and one paper copy was hand delivered upon:

Jonathan Berman  
Jones, Day, Reavis & Pogue  
51 Louisiana Ave., N.W.  
Washington, D.C. 20001-2113

Karen Bokat  
Federal Trade Commission  
Room 3410  
601 Pennsylvania Ave, N.W.  
Washington, D.C. 20580

David R. Pender, Assistant Director  
Health Care Products Division  
Federal Trade Commission  
Room 3410  
601 Pennsylvania Ave, N.W.  
Washington, D.C. 20580

Laura S. Shores  
Howrey Simon Arnold & White LLP  
1299 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

  
Paul F. Stone