

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 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 ETHEX 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:

  
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D. Michael Chappell  
Administrative Law Judge

Date: January 24, 2002