PUBLIC RECORD

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

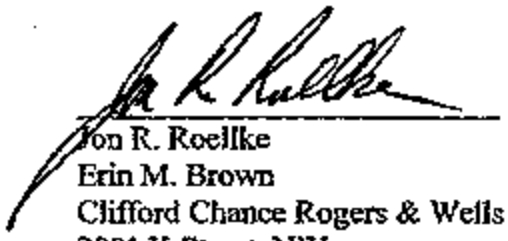
In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation.	DOCKET No. 9297

MOTION OF MERCK-MEDCO MANAGED CARE, L.L.C. FOR *IN CAMERA* TREATMENT OF DOCUMENT DESIGNATED AS A TRIAL EXHIBIT

Non-party Merck-Medco Managed Care, L.L.C. ("Merck-Medco") moves, pursuant to Rule 3.45 of the Rules of Practice of the Federal Trade Commission, 16 C.F.R. §3.45(b), for an order placing *in camera* a single, confidential Merck-Medco document designated as a trial exhibit by Upsher-Smith Laboratories as Exhibit USX 121. The document, a copy of which is attached to the non-public version of this motion as Confidential Exhibit 1, is a commercially sensitive business proposal template used by Merck-Medco's sales force for developing presentations and proposals to current and prospective clients. Merck-Medco submits that good cause exists for *in camera* treatment for USX 121 because, as detailed more fully in the accompanying memorandum and the declaration attached hereto as Exhibit 2, public disclosure of this document would cause serious business injury to Merck-Medco. Counsel for the parties in this proceeding have advised Merck-Medco that they have no objection to this request for *in camera* treatment.

In further support of this motion, Merck-Medco submits the accompanying memorandum of law. A proposed order is attached hereto.

Respectfully submitted,



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Counsel for Non-party
Merck-Medco Managed Care, L.L.C.

Dated: January 11, 2002

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corp., a corporation.	DOCKET NO. 9297

PROPOSED ORDER RE MERCK-MEDCO MANAGED CARE, L.L.C.'S APPLICATION FOR *IN CAMERA* TREATMENT OF DOCUMENT DESIGNATED AS TRIAL EXHIBIT

Non-party Merck-Medco Managed Care, L.L.C. ("Merck-Medco") has sought *in camera* treatment of a document designated by Respondent Upsher-Smith Laboratories as Trial Exhibit USX 121. Merck-Medco designated USX 121 as "Restricted Confidential, Attorney Eyes Only" pursuant to the May 10, 2001 Protective Order entered in this matter. No party to this proceeding has challenged that designation and Merck-Medco's present motion is unopposed.

Merck-Medco has submitted a declaration in support of its motion in which it asserts that USX 121 contains highly sensitive information, such as detailed descriptions of customized services and programs that distinguish Merck-Medco as a competitor. Merck-Medco also asserts that the risk of substantial competitive harm that would result from public disclosure of USX 121 could persist for years to come. For this reason, Merck-Medco requests that this document be held *in camera* for a period of no less than ten years.

Having considered the memorandum of law and the accompanying declaration submitted by Merck-Medco in support of its motion, and the entire record herein, it is hereby

ORDERED that Merck-Medco's motion is GRANTED and that Upsher-Smith Laboratories Exhibit USX 121 be given *in camera* treatment until January 15, 2012.

_____
D. Michael Chappell
Administrative Law Judge

Dated: January ____, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of January 2002, I caused an original, one paper copy and an electronic copy of the foregoing Non-Party Merck-Medco Managed Care, L.L.C.'s Motion for *In Camera* Treatment of Document Designated as Upsher-Laboratories Exhibit USX 121, and the supporting Memorandum and Declaration 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, DC 20580

and one paper copy was hand delivered upon:

Karen Bokat
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
Washington, DC 20005

Laura Shores
Howrey Simon Arnold & White LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004

David Pender
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Erin Brown

A PRESCRIPTION DRUG PROGRAM PROPOSAL

FOR

COMPANY

SUBMITTED BY:

MERCK-MEDCO MANAGED CARE, L.L.C.
100 PARSONS POND ROAD
FRANKLIN LAKES, NJ 07417

PRIMARY CONTACT:

Name
Title
Phone

PREPARED:

Date

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UPSHER-SMITH LABORATORIES
EXHIBIT USX 121

[REDACTED: *IN CAMERA* TREATMENT REQUESTED.]

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

DECLARATION OF BRIAN GRIFFIN

Brian Griffin hereby declares as follows:

1. I am the Senior Vice President of Sales for Merck-Medco Managed Care, L.L.C. ("Merck-Medco"). I am responsible for, among other things, developing, maintaining, and monitoring the programs, policies, and practices of Merck-Medco's sales operations and personnel. I am submitting this declaration in support of Merck-Medco's motion for a protective order or, in the alternative, an in camera order with respect to the document bearing production numbers Merck-Medco 000117 – 00143 (the "Proposed Trial Exhibit"), a proposed trial exhibit in the above-captioned matter. I have personal knowledge of the matters described herein.

2. Merck-Medco, an independently managed subsidiary of Merck & Co., Inc., provides pharmacy benefits management services to many types of clients, including employers, unions, health

maintenance organizations, Blue Cross/Blue Shield plans, insurance carriers, local and state employee programs as well as a federal employees program. Merck-Medco's services are designed to help control total health costs, improve quality of care and increase member satisfaction.

3. Merck-Medco competes with other pharmacy benefit managers ("PBMs") providing similar services, including, but not limited to, Advance PCS, Express Scripts, Caremark, NPA, Anthem, Wellpoint, and Prime Therapeutics. Merck-Medco strives to distinguish itself from its competitors by, among other things, providing innovative and highly customized services and programs, many of which are unique to Merck-Medco. The Proposed Trial Exhibit contains detailed descriptions of many of these innovative and unique programs and services and, for that reason, Merck-Medco carefully maintains the confidentiality of this type of document and restricts the scope and manner in which this type of document (and the information contained in it) is disseminated. Public disclosure of this document would cause serious and substantial competitive injury to Merck-Medco by, among other things, revealing to Merck-Medco's competitors the policies, practices, business methods, and operational details of many of the innovative programs and services that Merck-Medco has independently developed and relies on in distinguishing itself from its competitors.

4. I understand that Merck-Medco provided a copy of the Proposed Trial Exhibit in response to a subpoena from one of the parties in the above-referenced matter. In providing this document, Merck-Medco made clear, pursuant to a protective order, that it considers the information contained in it to be competitively sensitive and each page of the document was clearly labeled: "Restricted Confidential, Attorney Eyes Only." Specifically, the Proposed Trial Exhibit is a portion of a Merck-Medco Prescription Drug Program Proposal that Merck-Medco uses as its template in drafting actual proposals sent to current and prospective clients considering new or additional PBM benefits and services. The portions of this template contained in the Proposed Trial Exhibit include various and detailed descriptions of Merck-Medco's policies, practices, and programs pertaining to competitively sensitive areas such as formulary management, eligibility determinations, drug utilization review, disease

management and education, customer-specific services and benefits, formulary management programs, and pricing practices, generally.

5. Because the information contained in the Proposed Trial Exhibit is competitively sensitive and because its disclosure to a competing PBM would cause serious and substantial competitive injury to Merck-Medco, our sales force takes numerous precautions to ensure the confidentiality of its client proposals and contracts so that this information is not conveyed to any competitors or other third parties. For example, at the beginning of every Prescription Drug Program Proposal is a restrictive confidentiality provision which reads:

> ***"All of the materials in this proposal and any materials subsequently disclosed that relate to this proposal ("Proposal Materials") are confidential and the sole and exclusive property of Merck-Medco Managed Care, L.L.C. ("Merck-Medco"), and all rights, titles and interests are vested in Merck-Medco. The Proposal Materials are provided for your exclusive use, and for the sole purpose, to evaluate Merck-Medco's prescription drug program. The Proposal Materials may not be distributed, copied or made available for review or use to any other party without prior written authorization of Merck-Medco."***

This language appears at the beginning of the Proposed Trial Exhibit at Merck-Medco 000118.

6. In addition, Merck-Medco's client contracts typically contain a confidentiality provision similar to that set forth in the Prescription Drug Program Proposal which reads: "Each party will not disclose any information or knowledge concerning any other party's operations or procedures, which is hereby deemed confidential information, except as otherwise required by law. Each party also will keep the terms of this Agreement confidential. If confidential information of a party is disclosed to or otherwise acquired by another party, such information will be held in confidence and surrendered by the

acquiring party to the disclosing party upon the termination of this Agreement or upon prior written request by the disclosing party."

7. Merck-Medco does not deviate from and strictly enforces the confidentiality provisions in both the Prescription Drug Program Proposal and in its client contracts. For example, if a client or potential client requests consent to provide a Merck-Medco proposal to a consultant or other third party, Merck-Medco routinely requires that consultant or other third party to execute a confidentiality agreement.

8. The pharmacy benefits management industry is highly competitive. Each competitor strives to distinguish itself by, among other things, developing and implementing unique and innovative programs and services to meet client needs. Some of Merck-Medco's programs are described in the Proposed Trial Exhibit. The document is sufficiently detailed that it could be used by a competitor as a blueprint to adopt and use Merck-Medco's innovations and, thereby, deprive Merck-Medco of valuable competitive assets it independently developed. Conversely, Merck-Medco's competitors would be able to adopt and use these innovations without having had to incur any of the cost or effort in developing them, placing Merck-Medco at a competitive disadvantage because it will have incurred substantially greater product development costs than its competitors. For these reasons, public disclosure of this type of document would discourage PBM competitors from independently developing and marketing innovative health care solutions and programs.

9. Every section of the Proposed Trial Exhibit contains detailed descriptions of client services and programs that are unique to Merck-Medco. I do not believe that any Merck-Medco competitor would, absent public disclosure of this document, be aware of all of these intricate details that distinguish Merck-Medco and provide it with a competitive edge in this market. (See, e.g., the section starting at Merck-Medco 000138).

10. The Proposed Trial Exhibit, for example, describes proprietary programs and services Merck-Medco has developed in the coverage management context. Similarly, the Proposed Trial Exhibit describes proprietary patient and provider education programs developed by Merck-Medco as well as Merck-Medco's comprehensive and systematic approach to coordinating pharmaceutical care for the elderly. We believe that many aspects of these programs, which are described in fair detail, are unique, provide substantial benefits and value for our clients, and are not replicated in our competitors' programs and services.

11. Additionally, the Proposed Trial Exhibit contains competitively sensitive financial and contracting information. (See, e.g., Merck-Medco 00129-00131). Specifically, we describe the nature of the contractual savings guarantee we will provide and a description of the kinds of detailed reports we provide to clients to assist them in monitoring and controlling the costs of their prescription benefit plans. If this information became available to Merck-Medco competitors, such competitors would be able to undercut Merck-Medco's efforts to effectively compete thereby resulting in potentially substantial loss of business to Merck-Medco.

12. In addition to the inherently confidential nature of the substantive material reflected in the Proposed Trial Exhibit, Merck-Medco has invested a great amount of time and effort in marketing research to ensure the effectiveness of the business strategy reflected therein.

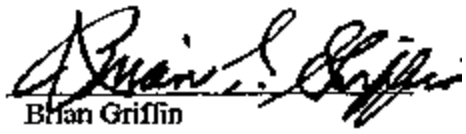
13. I am unaware of any competitor document that is in any way similar to the Proposed Trial Exhibit. It is not an industry standard document; rather, it is an integral part of what distinguishes Merck-Medco from its competition. To my knowledge, none of Merck-Medco's PBM competitors make this type of detailed information concerning their programs and services publicly available.

14. In sum, the information conveyed in the Proposed Trial Exhibit is highly valuable from a competitive perspective as it would aid competitors in structuring and positioning their own business proposals and sales presentations in a way that either incorporates or reacts to the proprietary strategies

and customized services outlined therein. It is my belief that public disclosure of this document will result in clearly defined, serious injury to Merck-Medco in the form of substantial loss of business and loss of proprietary information to competitors. Release of the confidential portions of this document to competitors would seriously compromise Merck-Medco's position and ability to compete in this market.

15. Further, I believe that the risk of substantial competitive harm to Merck-Medco that could be caused by public disclosure of the Proposed Trial Exhibit potentially could persist for an indeterminate period of time. This is because the information contained in the document reveals Merck-Medco's business strategies and approaches to pharmacy benefits programs and services that potentially will be used, adopted, or incorporated into future Merck-Medco innovations. Accordingly, although certain operational aspects of the specific programs and services described in the Proposed Trial Exhibit may eventually become known in the industry as some of these programs and services mature in the marketplace, the underlying business strategies and approaches reflected in these materials will, in my view, continue to be competitively-sensitive.

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



Brian Griffin

January 10, 2002

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY MERCK-MEDCO MANAGED CARE, L.L.C.'S MOTION FOR *IN CAMERA* TREATMENT OF DOCUMENT DESIGNATED AS A TRIAL EXHIBIT

Non-party Merck-Medco Managed Care, L.L.C. ("Merck-Medco") respectfully submits this memorandum in support of its motion for an order directing in camera treatment of a highly confidential Merck-Medco document that counsel for Respondent Upsher-Smith Laboratories has designated as Trial Exhibit USX 121. This document is a client proposal template used by Merck-Medco's sales force in developing proposals and presentations for current and prospective clients. It reflects the details of unique and innovative programs and services developed by Merck-Medco and the business strategies and marketing approaches Merck-Medco uses in competing against other pharmacy benefit management ("PBM") companies. This information would be extremely valuable to Merck-Medco's competitors and, absent public disclosure through this proceeding, Merck-Medco's competitors would not have access to this document. As set forth more fully below and in the accompanying Declaration of Brian Griffin

(attached as Exhibit 2 to Merck-Medco's motion), public disclosure of this information would result in serious and irreparable competitive injury to Merck-Medco.[1]

1. Description of the Document.

Trial Exhibit USX 121 is a portion of a Prescription Drug Program Proposal developed and used by Merck-Medco as a template for preparing actual proposals sent to current and prospective clients considering new or additional PBM programs and services. The portions of this template contained in USX 121 include various and detailed descriptions of Merck-Medco's policies, practices, and programs pertaining to competitively sensitive areas such as formulary management, eligibility determinations, drug utilization review, disease management and education, customer-specific services and benefits, and pricing practices. (*See* Declaration of Brian Griffin at ¶ 4, dated January 10, 2002 ("Griffin Decl.")) The document reflects Merck-Medco's sales and marketing strategies with respect to these programs and services. In addition, the document contains competitively sensitive financial and contracting information.

The information contained in USX 121 is highly sensitive. It is included in Merck-Medco's sales proposals to clients and potential clients, but only on the express understanding that such information is Merck-Medco's sole and exclusive property and is not to be further disseminated. If a client or potential client wishes to disseminate the information to another person, Merck-Medco requires that such person agree in writing to preserve its confidentiality.

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[1] Merck-Medco submitted numerous documents in response to subpoenas served by Upsher-Smith and Schering-Plough in this proceeding. Although Upsher-Smith has proposed to use several of these documents as trial exhibits in this proceeding, Merck-Medco is only seeking *in camera* treatment for USX 121 because of the significant amount of competitively sensitive information that it contains.

(Griffin Decl. ¶¶ 5, 7.) This information is not distributed to any other persons outside the company and it is not accessible to any Merck-Medco competitors. (*Id.*)

Merck-Medco provided a copy of USX 121 in response to subpoenas served by Upsher-Smith and Schering-Plough in this proceeding. Due to the sensitive nature of the information contained in USX 121, Merck-Medco designated it as "Restricted Confidential, Attorney Eyes Only" pursuant to the May 10, 2001 Protective Order. The premise of confidentiality upon which Merck-Medco provided USX 121 should be preserved. Indeed, no party has objected to Merck-Medco's designation of this document as "Restricted Confidential," nor does any party oppose its request for *in camera* treatment.[2]

2. Reasons for Granting In Camera Treatment.

The Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252 (May 28, 1980), as amended, provides that confidential business information obtained by the Commission "shall be considered confidential when so marked by the person supplying the information and shall not be disclosed," unless certain notice requirements are met. 15 U.S.C. § 57b-2(c)(1998). Although the Act on its face allows the Commission's normal rules for adjudicative proceedings

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[2] The May 10, 2001 Protective Order recognizes that information of the type set forth in USX 121 is competitively sensitive and should be protected against unnecessary disclosure. Specifically, that Order extends confidential treatment to "non-public commercial information, the disclosure of which . . . would causes substantial commercial harm, [such as] strategic plans (involving pricing, marketing, research and development, product roadmaps . . . [and] information subject to confidentiality or non-disclosure agreements." The Protective Order also recognizes that the type of information contained in USX 121 could properly be designated for the heightened level of protection afforded to "Restricted Confidential" material, describing such material as including "marketing plans, . . . operating plans, [and] pricing and costing data." USX 121 contains precisely this type of commercially sensitive material.

to apply with respect to disclosure of this type of information, *id* § 57b-2(d)(2), the clear intent of the Act is to provide as much protection as possible for confidential business information without interfering unduly with the adjudicative process of the Commission. In this case, an order for *in camera* treatment of the document in question is necessary to carry out the intent of this legislation.

First, public disclosure of USX 121 would result in serious business injury to Merck-Medco. Merck-Medco relies on the unique programs and services (and the business strategies and methodologies through which Merck-Medco developed those innovations) detailed in USX 121 to distinguish itself from its competitors. (Griffin Decl. ¶ 3.) If the detailed descriptions of these programs and services contained in USX 121 were publicly disclosed, then a Merck-Medco competitor could attempt to replicate or incorporate all or some of the features of these programs into its own offerings. (Griffin Decl. ¶ 8.) In addition, a competitor could glean from the document the sales and marketing strategies and methodologies used by Merck-Medco in developing prospective client proposals and, thereby, obtain an unfair advantage in its efforts to position itself in the PBM market. *Id.*

Information of the type set forth in USX 121 generally is not available to competitors. (Griffin Decl. ¶ 9.) Thus, public disclosure of the document would be enormously useful to Merck-Medco competitors, place Merck-Medco at a competitive disadvantage, and deprive Merck-Medco of the strategic and other competitive benefits that otherwise would accrue to it by reason of the PBM program and service innovations that are detailed in USX 121. (Griffin Decl. ¶ 3.) Moreover, public disclosure of USX 121 would discourage companies like Merck-Medco

from developing or providing such detailed and informative marketing materials for fear that the materials could be obtained by a competitor. (Griffin Decl. ¶ 8.) Thus, public disclosure would effectively deprive PBM consumers of an important resource in making their pharmacy benefits decisions. *See, e.g., Orion Research Inc. v. Envtl. Prot. Agency*, 615 F.2d 551, 554 (1st Cir. 1980)(upholding lower court decision exempting customer proposal materials from disclosure under FOIA Exemption 4 because "competing firms would be less likely to include novel ideas in their responses to solicitation for fear that their confidentiality requests would not be honored and competitors would get the benefit of their innovative theories.")[3]

Second, there is a long line of Commission and federal court decisions to support protection of documents such as the one at issue here. In *Bristol Myers*, 90 F.T.C. 455 (1977), for example, the Commission held that *in camera* treatment is warranted where confidential business information is secret, material to the business, and where disclosure would discourage the future production of such information.[4] Moreover, "[t]he likely loss of business advantages is a good example of a 'clearly defined, serious injury'" that mandates in camera treatment under

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[3] The Commission has noted that ALJs should refer to "court decisions dealing with the scope and subject matter of Exemption 4 of the Freedom of Information Act [("FOIA")] ... Categories of business records that courts have judged to be exempt from mandatory disclosure under the FOIA may be suited to *in camera* treatment." *General Foods Corp.*, 95 F.T.C. 352 (1980).

[4] In *In the Matter of General Foods Corp.*, 1980 FTC LEXIS 99 (1980), the Commission modified this three-pronged test by eliminating the third prong, namely, that disclosure would discourage the future production of such information. The Commission noted that "it is unnecessary and not particularly helpful to require as an *additional* consideration an assessment of the likelihood that businesses will continue to produce that type of information even if disclosed." *General Foods Corp.*, at 10 (italics added). Thus, our arguments focus primarily on the fact that the exhibit at issue here meets the secrecy and materiality requirements as set forth in *Bristol Myers*. We note, however, that even if the previously more restrictive standard were still in place, this exhibit would still qualify for *in camera* protection since public disclosure of this document will, in fact, discourage Merck-Medco from producing such a document in the future.

Rule 3.45. *Hoecsht Marion Russel, Inc.*, 2000 F.T.C. LEXIS 138 (2000). These factors plainly are present here (*see, e.g.*, Griffin Decl. 14) and have been found in other cases to warrant in camera protection for material similar to that at issue here. *See, e.g., Audio Technical Serv. v. Dep't of the Army*, 487 F.Supp. 779 (D.D.C. 1979), appeal dismissed (D.C. Cir. 1980) (FOIA Exemption 4 protects from disclosure customer proposal materials reflecting prospective areas of customer concern and program design concepts, methods and procedures); *Fidell v. U.S. Coast Guard*, 1981 U.S. Dist. LEXIS 18429 (D.D.C. 1981)(FOIA Exemption 4 protects customer proposal materials because "a company's individual approach to [soliciting business] is a major selling point in obtaining the bid and shapes the quality of the final product.").

Third, consistent with the FTC Rules of Practice, placing these materials *in camera* will not deprive the public of information which is needed to analyze decisions which will be made, for the Commission retains the right to reveal *in camera* information "to the extent necessary for proper disposition of the proceeding." Rule 3.45(a) of FTC Rules of Practice, 16 C.F.R. §3.45(a). Moreover, with respect to USX 121, it is highly unlikely that any public or other disclosure of the document would be necessary for the proper disposition of this proceeding because the document is largely, if not entirely, immaterial to the central matters at issue.

3. Duration and Scope of Requested In Camera Treatment.

Given the extent of the confidential information contained in this document, it is not possible for Merck-Medco to designate specific page or paragraph numbers for *in camera* treatment. Merck-Medco, therefore, requests that USX 121 be provided *in camera* treatment in its entirety.

Further, the risk of substantial competitive harm to Merck-Medco that could be caused by public disclosure of this Exhibit potentially could persist for years to come. Griffin Decl. at ¶15. For this reason, Merck-Medco requests that this document be held *in camera* for a period of not less than ten years. The information contained in the document reveals Merck-Medco's business and sales and marketing strategies with respect to PBM programs and services that could be used, adopted, or incorporated into future Merck-Medco innovations and marketing plans. Accordingly, although certain operational aspects of the specific programs and services described in the document may eventually become known in the industry as some of these programs and services mature in the marketplace, the underlying business strategies and approaches reflected in USX 121 will continue to be competitively-sensitive.

CONCLUSION

For the reasons stated above, Merck-Medco respectfully requests that the Administrative Law Judge issue an order placing *in camera* the proposed trial exhibit labeled Upsher-Smith Laboratories USX 121; and that this document be held *in camera* for a period of ten years.

Respectfully submitted,

Jon R. Roellke
Erin M. Brown
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Washington, D.C. 20006
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Fax: (202) 912-6000

Counsel for Non-party
Merck-Medco Managed Care, L.L.C.

Dated: January 11, 2002