

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

ORDER ON KOS PHARMACEUTICALS, INC.'S
MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Commission Rule 3.45(b), on February 5, 2002, non-party Kos Pharmaceuticals, Inc. ("Kos") filed a renewed motion to obtain *in camera* treatment of certain highly confidential information. By order dated January 24, 2002, Kos was ordered to provide a declaration or affidavit from a person within the company in a position to provide evidence that public disclosure of the documents would result in a clearly defined, serious injury to Kos.

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).

The renewed motion of Kos seeks *in camera* treatment for a period of five years for confidential documents that contain information regarding co-promotion, collaboration, and

partnership agreements between Kos and unrelated third parties, licensing and pricing terms, internal sales data, and confidential marketing and promotional strategies for Kos's products. The declaration of Kos's Chairman demonstrates that the confidential information for which Kos seeks *in camera* treatment is competitively sensitive information that Kos guards and maintains as confidential. Kos also seeks *in camera* treatment for testimony evidence from either Mr. Dan M. Bell and/or Mr. Mukash Patel on the grounds that their testimony would reveal confidential and proprietary information belonging to Kos.

Kos has adequately demonstrated that public disclosure of these documents would result in injury to Kos without serving any countervailing public purpose. Kos's motion is GRANTED IN PART and DENIED IN PART.

In camera treatment, for a period of five years, to expire January 1, 2007, is hereby GRANTED to the material set forth below:

AAA0000001
AAA0000003
AAA0000005-06
AAA0000010
AAA0000011-15
AAA0000016-20
AAA0000021-22
AAA0000023
AAA0000024-26
AAA0000027-28
AAA0000029
AAA0000030-32
AAA0000033
AAA0000034-36
AAA0000039-41
AAA0000042-44
AAA0000151-52
AAA0000158
AAA0000159
AAA0000160
AAA0000161-62
AAA0000163
AAA0000164
AAA0000165
AAA0000166-67
AAA0000168-70
AAA0000171
AAA0000172-74

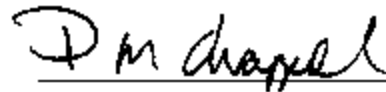
AAA0000217-59
AAA0000346-47
USX 22

The parties are ORDERED to inform the Court of the exhibit numbers of the Kos documents which have been granted provisional *in camera* treatment by this order.

Kos' motion is DENIED to the extent it seeks *in camera* treatment for the testimony of Bell or Patel. However, to the extent that either of these individuals discusses documents that have been granted *in camera* status by this order, such testimony will be held during an *in camera* session.

ORDERED:

Date: February 12, 2002



D. Michael Chappell
Administrative Law Judge