

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)

Schering-Plough Corporation,
a corporation,)
)

Upsher-Smith Laboratories, Inc.,
a corporation,)
)

and)
)

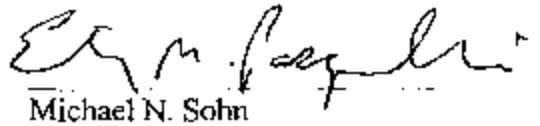
American Home Products Corporation,
a corporation)
_____)

Docket No. 9297

**MOTION FOR LEAVE TO FILE A REPLY TO COMPLAINT COUNSELS'
OPPOSITION TO AHP'S EMERGENCY MOTION TO STAY ORDER, FOR
CERTIFICATION FOR INTERLOCUTORY APPEAL AND APPLICATION
FOR FULL COMMISSION REVIEW**

American Home Products Corporation ("AHP") respectfully requests leave to file
the attached Reply to complaint counsels' January 23, 2002 Opposition to AHP's Motion

Respectfully submitted,



Michael N. Sohn

Elliot Feinberg

CORPORATION
Five Giralda Farms

David M. Orta
Emily M. Pasquinelli

UNITED STATES OF AMERICA
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_____)
In the Matter of _____)

Schering-Plough Corporation, _____)
a corporation, _____)

) Docket No. 9297
)

_____ and _____

Complaint counsel also agree that this Court should enter an order granting *in camera* treatment at trial to the nine privileged documents AHP inadvertently disclosed. See

Ord. at 5 p. 21. Complaint counsel however, oppose AHP's request for an amendment

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

necessary to respond to certain assailable arguments made by complaint counsel in their Opposition.

Complaint Counsel assert that a stay is inappropriate because the stay requested by AHP would “alter the status quo.” Opp. at 5. In arguing that a stay would alter the status quo, complaint counsel assert that “maintenance of the status quo requires that all parties be able to continue using” the privileged documents. *Id.* The faulty logic in this argument is easily exposed. Continued use of the privileged documents – which is precisely what is happening and what will continue to happen in the absence of a stay –

produced documents were privileged, there would be no waiver because Versace "never intended to turn over privileged communications." Gianni Versace, 1999 WL 608711 at

25. In other words, because Versace's counsel did not believe that the documents

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

following additional points in support of its position that this Court erred in finding waiver.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7201

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

voluntarily produced the privileged documents or the court found that the party's disclosure was not inadvertent. See Order at 5.⁴

Third, this Court erred in finding that disclosure was "complete." See Order at 6.

~~A UP has also determined that this Court failed to distinguish between the documents~~

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

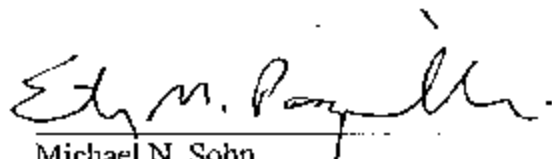
[REDACTED]

First, disclosure is not "complete," as pointed out above. To date, the documents

[REDACTED]

will file an answer explaining why the Administrative Law Judge's Order at issue should

Respectfully submitted,



Michael N. Sohn
Cathy A. Hoffman
David M. Orta
Emily M. Pasquinelli

Elliot Feinberg
AMERICAN HOME PRODUCTS
CORPORATION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

.....

.....

.....

FN3. There is uncontroverted testimony that [redacted] intended to turn over privileged communications.

[The remainder of the page is redacted with multiple thick black horizontal bars.]

solely as a result of the assertion of a laches defense.
[REDACTED]

They knew that Versace asserted privilege at least as of
February 1999 in the documents containing [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

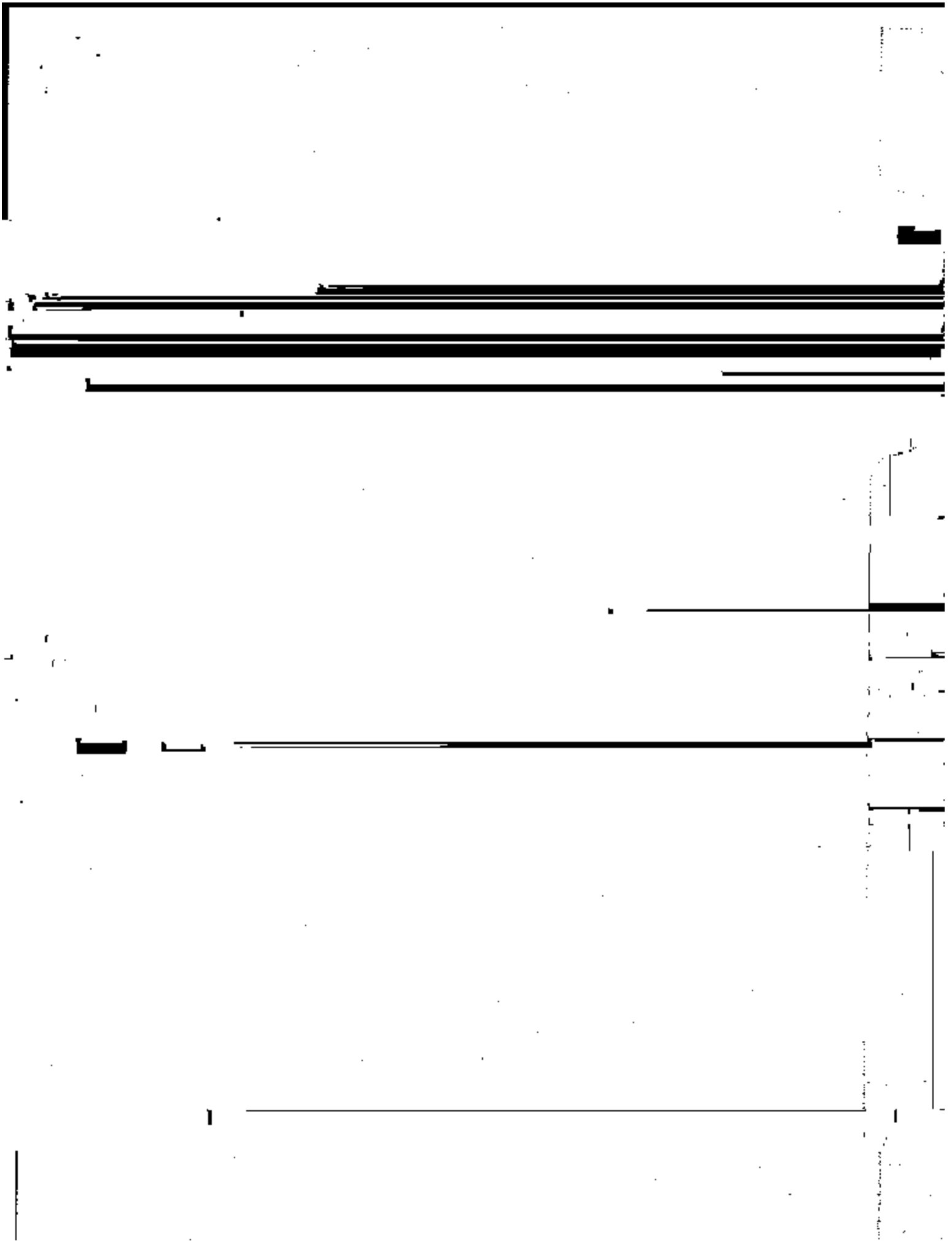
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



United States District Court,
D. Kansas.

Saul ZAPATA, et al., Plaintiffs,
v.
IBP, INC., Defendant.

Civil Action Nos. 93-2366-EEO, 96-2242-EEO.

July 15, 1997.

Corporate defendant moved for protective order concerning expert witness report of plaintiffs' expert, which contained handwritten notes of defendant's attorneys. The District Court, Earl E. O'Connor, J., held that inadvertent disclosure of witness report did not amount to waiver of work product protection.

Motion granted

[4] Witnesses \Leftrightarrow 219(3)
410k219(3)

To determine if inadvertent disclosure of documents effects waiver of attorney-client privilege, court considers reasonableness of precautions taken to prevent inadvertent disclosure, time taken to rectify error, scope of discovery, extent of disclosure, and overriding issues of fairness.

[5] Federal Civil Procedure \Leftrightarrow 1600(5)
170Ak1600(5)

To determine if inadvertent disclosure of documents results in waiver of work product protection, court considers reasonableness of precautions taken to prevent inadvertent disclosure, time taken to rectify error, scope of discovery, extent of disclosure and

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Where document production is extensive ... a
finding that an inadvertent disclosure of privileged

93812 (D.Kan.1987):

[1]he court finds no compelling reason to rigidly