UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
HOECHST MARION ROUSSEL, INC., a corporation,	)	
CARDERM CAPITAL L.P., a limited partnership,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation.	)	

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' APPLICATIONS FOR *IN CAMERA* TREATMENT OF CERTAIN CONFIDENTIAL MATERIALS

Respondents do not even approach satisfying their burden of showing that disclosure of the material for which they seek *in camera* treatment will result in a clearly defined and serious injury. Indeed, respondents explicitly acknowledge their failure to meet the standards established by the Commission and in orders entered in this very proceeding. Respondents fail to justify their broad request for what should be a narrow application of *in camera* treatment, and even a cursory review of the materials for which respondents seek *in camera* treatment reveals documents that should be put on the public record. Respondents' applications should therefore be denied.

The Commission has always operated under the presumption that its proceedings –

including the evidence presented in those proceedings – should be open to the public. *See Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); ***H.P. Hood & Sons, Inc.***, 58 F.T.C. 1184, 1186 (1961). "The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings." Order on Applications for *In Camera* Treatment and Modifying the Scheduling Order, at 3 (Sept. 19, 2000) [hereafter, *In Camera* Order]. It is respondents' burden to overcome the presumption of public disclosure, "using the most specific information available," *Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977). To carry its burden, respondents must show "that the public disclosure . . . will result in a clearly defined, serious injury," *Hood*, 58 F.T.C. at 1188. *See also In Camera* Order, at 2.

Instead of satisfying their burden, respondents paint with the broadest brush possible. First, respondents seek *in camera* treatment for entire documents even though their own analysis shows, at best, that only parts of the documents contain purportedly *in camera* material.[1] However, the Court has ordered that parties seeking *in camera* treatment "must specifically identify the portions of a . . . document . . . for which *in camera* treatment is sought. Entire documents or exhibits will rarely, if ever, be eligible for *in camera* treatment." Second Amended Protective Order Governing Discovery Material, at 16 (Aug. 7, 2000). Respondents Aventis and Carderm seem to acknowledge their obligation and ability to analyze whether portions of documents should be granted *in camera* treatment by providing redacted copies of the September 1997 Stipulation and Agreement,[2] but then improperly try to place the burden on complaint

---

[1] *See, e.g.*, Respondent Aventis Pharmaceuticals, Inc.'s Memorandum in Support of Application for *In Camera* Treatment of Certain Confidential Documents [hereafter "Aventis Memorandum"], at 5-6.

[2] *See* Aventis Memorandum, at 11.

counsel for the remainder of the documents,[3] in violation of the Second Amended Protective Order. Respondent Andrx merely ignores its obligations under the Order.

Second, respondents fail to analyze the particular documents themselves, preferring to discuss only broad categories, thereby failing to justify *in camera* protection for any of the documents respondents propose. For example, Andrx fully admits that it did not seek to justify *in camera* treatment for each document listed in its application.[4] And Aventis does not even always try to show clearly defined serious injury resulting from disclosure of its categories, instead broadly asserting that "public disclosure could upset the competitive balance in the market and cause Aventis financial harm." Aventis Memorandum, at 6 (emphasis added); *see also id.* at 12, 13. Respondents' approach not only fails to meet their burden of justifying the unusual step of keeping material from the public eye, but it also prohibits complaint counsel from effectively countering respondents' applications. Respondents' applications should therefore be rejected on these grounds alone.

To the extent complaint counsel can glean any relevant information from respondents' applications, even a cursory examination of the documents for which respondents seek *in camera* treatment reveals the flaws in their approach. For example, respondents seek to seal the following documents:

- Business plans containing the very type of information considered by the Commission in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961). *See* Aventis Memorandum, at 5-6;

---

[3] *See* Aventis Memorandum, at 5 n.11; Respondent Carderm Capital L.P.'s Memorandum in Support of Application for *In Camera* Treatment of Certain Confidential Documents [hereafter "Carderm Memorandum"], at 4 n.11.

[4] *See* Respondent Andrx Corporation's Application for *In Camera* Protection of Certain of Its Confidential Materials [hereafter "Andrx Application"], at 2.

Carderm Memorandum, at 4-5; Andrx Application 5. Noting that the information on pricing, the costs of doing business, and profits is "of a type which most businesses would prefer to keep confidential," the Commission nonetheless held that "requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances." *Id.* at 1189 (emphasis added). Respondents' applications show no "exceptional circumstances" that place all of their information above that at issue in *H.P. Hood*, and thus they have failed to satisfy their burden.

- Drafts of the contract that terminated the Stipulation and Agreement at issue in this case. *See* Aventis Memorandum, App. C (listing HMRI 1-117 under "Andrx Patent Litigation" heading). This contract was entered over 16 months ago. Aventis fails to show – using any information, not to mention the most specific information available – why allowing such documents to appear on the public record would cause it clearly defined serious injury; nor can complaint counsel discern the justification.

- Correspondence with Commission staff (FTC 4861-65), including letters written by Commission staff (FTC 4884-86), *see* Aventis Memorandum, at 12 and n.43; hardly "top secret" documents.

- Drafts of the September 1997 Stipulation and Agreement and correspondence related thereto. *See* Andrx Application, at 5 and Corrected Exhibit A, Category 3. The Stipulation and Agreement was signed over three years ago and is no longer in existence. Despite Andrx's conclusory assertions to the contrary, there is no evidence as to why disclosure of particular information in particular drafts of the Stipulation and Agreement would cause serious injury.

- Documents that are three or more years old. *See* Aventis Memorandum at 7 and Exh. C (Business Plans/Forecasting, listing, *e.g.*, HMRI 3063); Andrx Application, at 5 and Corrected Exhibit A, Category 3. Such documents are presumed to belong on the public record. *See In Camera* Order, at 4; *General Foods Corp.*, 95 F.T.C. 352, 353 (1980); *Crown Cork & Seal*, 71 F.T.C. at 1715.[5] Andrx tries to overcome this presumption by asserting that still-sensitive information exists, "to the extent some documents relate to products Andrx was developing or considering developing." Declaration of Herschel E. Sparks, Jr. ¶ 13 (emphasis added). However, it is Andrx's burden to show, using the most specific information available, the extent to which disclosure will cause a clearly defined serious injury. Andrx's submission fails this burden. Aventis, for its part, provides no evidentiary basis to overcome the presumption as to its stale documents. In any event, given that none of the respondents identified which particular documents are three or more years old, none can meet the heightened showing that must be made to

---

[5] Andrx's citation to *Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984), is not to the contrary, as the request in that case by third parties – who deserve special protection in any event, *id.* at 500 – for *in camera* treatment was unopposed.

justify *in camera* treatment for each such document.

These examples are merely illustrative of the many problems caused by respondents' broad approach.

For the reasons discussed above, respondents' applications for *in camera* treatment of certain confidential materials should be denied in their entirety.

Respectfully Submitted,

Markus H. Meier
Bradley S. Albert
Jon M. Steiger
Daniel Kotchen
Robin Moore

Counsel Supporting the Complaint

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

Dated: October 10, 2000

CERTIFICATE OF SERVICE

I, Jon Miller Steiger, hereby certify that on October 10, 2000, I caused a copy of the Complaint Counsel's Opposition to Respondents' Applications for *In Camera* Treatment of Certain Confidential Materials to be served upon the following persons via hand delivery or facsimile and overnight delivery.

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

Peter O. Safir, Esq.
Kleinfeld, Kaplan, and Becker
1140 19th Street, N.W.
9th Floor
Washington, DC 20036

Louis M. Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111

Jon Miller Steiger