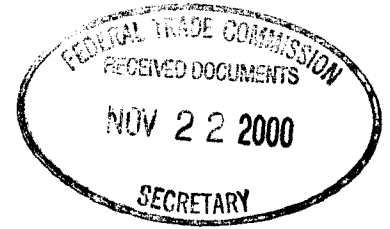


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
 )  
 )  
HOECHST MARION ROUSSEL, INC., )  
 a corporation, )  
 )  
CARDERM CAPITAL L.P., )  
 a limited partnership, )  
 )  
and )  
 )  
ANDRX CORPORATION, )  
 a corporation. )  
\_\_\_\_\_

Docket No. 9293

**ORDER ON RESPONDENTS' APPLICATIONS FOR  
IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**

**I.**

On September 29, 2000, Respondents Aventis Pharmaceuticals, Inc., ("Aventis") formerly known as Hoechst Marion Roussel, Inc. and Carderm Capital L.P. ("Carderm"), and on October 2, 2000, Andrx Corporation ("Andrx"), each filed applications for *in camera* treatment of certain documents which Respondents had designated as Confidential pursuant to the Second Amended Protective Order Governing Discovery Materials. Aventis, Carderm, and Andrx assert respectively that 215, 11, and 268 of their documents meet the criteria for *in camera* treatment.

Complaint Counsel filed an opposition to all Respondents' applications for *in camera* treatment on October 10, 2000. Complaint Counsel asserts that Respondents have failed to demonstrate with sufficient specificity that the documents for which *in camera* treatment is sought meet the Commission's stringent criteria.

For the reasons set forth below, Respondents' motions are DENIED WITHOUT PREJUDICE.

## II.

The Commission Rule sets forth that the Administrative Law Judge may order material to be placed *in camera* “on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their *in camera* treatment.” 16 C.F.R. § 3.45(b). Respondents bear the burden of demonstrating that public disclosure will result in a clearly defined, serious injury. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

The parties have previously been instructed on the strict standards governing applications for *in camera* treatment. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000). The parties have also been instructed that to sustain their burden of proof, an application must be supported by proper evidence, such as affidavits, to support all factual issues or assertions. *Id.* The parties’ failure to meet these standards will result in documents being included in the public record.

## III.

Respondents have each failed to meet their heavy burden. Carderm’s and Aventis’ pleadings group their documents into categories and explain, generally, why these types of documents qualify for *in camera* treatment. Carderm and Aventis have failed to provide an affidavit or declaration from an employee of Carderm or Aventis with personal knowledge to support their claim that the documents for which *in camera* treatment is sought meet the Commission’s standards. Carderm has submitted a declaration of its outside counsel and Aventis has submitted a declaration of its in-house counsel which aver generally that:

the identified information is closely held and is not widely circulated within the [partnership/ company]. Typically, information is only disseminated within the [partnership/ company] to those with a necessary interest. A good example of this is [partnership meeting minutes/internal company minutes], that are typically only distributed to [limited partners/attendees] and anyone with specific reasons for possessing such information.

This general averment - intended to cover all of the documents for which *in camera* treatment is sought - is not sufficient for Carderm and Aventis to meet their burden of demonstrating, with “the most specific information available,” that the information concerned is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977); *In re Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984).

The declaration submitted by Andrx’s litigation counsel is more specific and is closer to meeting the Commission’s requirements. Andrx’s declaration provides arguments for granting *in*

*camera* treatment to certain types of documents. Andrx then lists which documents fall into each category. However, the declaration is couched in general terms and it is doubtful whether every single one of the documents actually consists of the information described in the declaration or is actually treated in the manner that Andrx has described in its declaration.

The overwhelming defect with Respondents' requests for *in camera* treatment is that they seek *in camera* treatment for enormous numbers of documents. It is not necessary, nor is it feasible, to review each of these documents to make a determination that the exceptional circumstances under which *in camera* treatment may be granted are not present for all of these documents. Aventis seeks *in camera* treatment for 215 documents and Andrx for 268. Respondents must not simply renew their applications with more specific information. Rather, Respondents must narrow the documents to a significantly more limited field of documents that meet the Commission's strict standards.

It is apparent from a cursory review of the documents that several of the documents do not meet the standards for *in camera* treatment. Using Carderm's application for *in camera* treatment as an example, only because the number of documents for which Carderm sought *in camera* treatment is manageable, many of Carderm's documents do not meet the standards. For example, Carderm 0000001-28 appears to be a sales forecast that is over 7 years old; Carderm 0000065-77 is described as a "forecasting document" that appears to have been distributed to investors and is over 4 years old; Carderm 0000316 appears to be a press release. There is a presumption that *in camera* treatment will not be provided to information that is three or more years old. *See, e.g., In re General Foods Corp.*, 95 F.T.C. 352, 353 (1980); *Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1715 (1967). In addition, Carderm is cautioned that while 0000732-764, a settlement agreement of an unrelated patent infringement action, contains some information that may be granted *in camera* status, it is doubtful that the entire document qualifies for such treatment.

Furthermore, none of the respondents have justified the length of time for which they seek *in camera* treatment. Aventis and Carderm have sought *in camera* treatment for most documents for a period of nearly twelve years. Their reasoning is that *in camera* treatment ought to be extended through the date on which the last patent for Cardizem CD expires. However, Aventis and Carderm have failed to demonstrate that the documents for which *in camera* treatment is sought will retain their commercial sensitivity through the life of the patent. Andrx has sought *in camera* treatment for an indefinite period, claiming that Andrx's analyses will continue to be confidential indefinitely because there is no known date when products that are or may be in development will no longer be relevant.

Indefinite *in camera* treatment is granted only in those "unusual" cases where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1990 FTC LEXIS 364 (Oct. 17, 1990). Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged. *See Hood*,

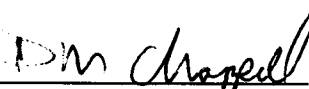
58 F.T.C. at 1189; *In re R.R. Donnelley & Sons Co.*, 1993 FTC LEXIS 32 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 FTC LEXIS 135 (April 26, 1991). Where *in camera* treatment is granted for ordinary business records, such as business plans, marketing plans, or sales documents, it is typically extended for two to five years. *E.g.*, *In re E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (Jan. 21, 1981); *In re International Ass. of Conf. Interpreters*, 1996 FTC LEXIS 298 (June 26, 1996).

#### IV.

Respondents have failed to present specific justifications for their requests for *in camera* treatment and overreached in seeking *in camera* treatment for an enormous number of documents. However, in order to prevent public disclosure of documents that may legitimately qualify for *in camera* status, the motions for *in camera* treatment are DENIED WITHOUT PREJUDICE.

The deadline for filing motions for *in camera* treatment of proposed trial exhibits is currently November 28, 2000. This deadline is hereby extended until November 30, 2000. The deadline for filing any oppositions is extended until December 5, 2000. The parties are cautioned that *in camera* treatment will not be granted if the parties fail to meet their burden of demonstrating that the documents for which *in camera* treatment is sought meet the Commission's requirements.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: November 22, 2000