

**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

**OMNIBUS MOTION OF NON-PARTY NOVARTIS CORPORATION
FOR IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**

Non-Party Novartis Pharmaceutical Corporation (“Novartis”), by its attorneys, Dewey Ballantine LLP, respectfully requests that the Commission enter a protective order, pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), directing in camera treatment for four documents produced by Novartis in this adjudicatory proceeding. The documents are secret marketing contracts, material to Novartis’s pharmaceutical products business, which contain Novartis’s confidential commercial and trade secret information. The terms of the contracts reveal prices and competitive tactics, and their disclosure would permit Novartis’s competitors to (i) understand Novartis’s strategies and (ii) match or undercut Novartis’s prices and terms. Their public revelation would thus result in serious

competitive injury to Novartis. The grounds for this motion are set forth in full in the accompanying memorandum of law.

Dated: Washington, D.C.
October 25, 2000

Respectfully submitted,

DEWEY BALLANTINE LLP

By: 
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In the Matter of

HOECHST MARION ROUSSEL, INC.,
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CARDERM CAPITAL L.P.,
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Docket No. 9293

**MEMORANDUM OF LAW IN SUPPORT OF OMNIBUS
MOTION OF NON-PARTY NOVARTIS CORPORATION
FOR IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**

Non-Party Novartis Pharmaceutical Corporation (“Novartis”), by its attorneys, Dewey Ballantine LLP, respectfully submits this memorandum of law in support of its omnibus motion for a protective order directing in camera treatment, pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), for four documents that contain Novartis’s confidential commercial and trade secret information which were produced during the discovery process in this adjudicatory proceeding.

Novartis is not a party to this action. In response to a Subpoena *Duces Tecum*, dated May 17, 2000, Novartis produced 524 pages of documents to respondent, Hoechst Marion Roussel, Inc. (“Hoechst”). All of these materials were stamped “Restricted, Confidential - Attorney’s Eyes Only” according to the provisions of the protective order in this proceeding. Thus, they were to be provided to outside counsel

and certain designated in-house counsel only. No objection was made by any party to Novartis's designation of these documents as Confidential pursuant to paragraph 7(b) of the protective order.

Counsel for Novartis was recently served with Aventis Pharmaceuticals, Inc.'s Notification of Use of Confidential Discovery Material, informing them that two confidential Novartis documents are referenced in and attached to their expert reports. Affidavit of Wayne A. Cross, ¶ 2. Novartis has been recently informed by the parties to this action that depositions are about to take place, and that other Novartis documents may be used in the cross-examination of the parties' experts. *Id.* ¶ 3. Moreover, counsel for Aventis has informed Novartis that the parties have been reluctant to designate, in advance, documents they intend to utilize on cross examination -- for obvious tactical reasons. *Id.* Although the two documents specifically identified by Aventis do not concern Novartis as a confidentiality risk, the possibility of other parties using certain documents in Novartis's production for cross examination purposes without prior notification would create a serious problem. As set forth in more detail below, these materials contain non-party Novartis's confidential, commercially sensitive formulary, pricing and rebate agreements. Use of such documents in any proceeding that may be deemed public under the F.T.C.'s Rules of Practice would disclose Novartis's most sensitive and confidential business information to its competitors and result in irreparable harm to Novartis. Accordingly, since it does not appear that Novartis will be notified in advance of such use, Novartis respectfully requests that the Commission preemptively rule that these materials be used only in camera and maintain them under seal.

THE DOCUMENTS

There are only four documents for which Novartis requests in camera treatment. Each of these documents is a marketing contract that reveals the most sensitive negotiations dealing with pricing and rebate structures. Affidavit of Jeffrey Thomas ¶ 4 (“Thomas Aff.”). Public revelation of this information would allow Novartis’s direct competitors to freely analyze how Novartis defines its incentive programs and prices its products, thereby placing Novartis at a distinct disadvantage in the market. *Id.*

The first document (NOV000098-000114) is a 17 page Amendment to the Health Maintenance Organization Reimbursement Agreement between Novartis and Aetna Health Management, Inc.. *Id.* ¶ 5. Attached to the Amendment are numerous schedules which list in detail the specific drugs covered by the reimbursement agreement, the rates of reimbursement, and the entire mathematical structure of each discount and condition pertinent to the contract. *Id.* The Amendment expired just nine months ago in December of 1999, and the information it reveals is therefore still very current and would reveal the bases and formulations for many of Novartis’s current HMO rebate contracts. *Id.*

The second document (NOV000115-000121) is a seven page Performance Benefit Amendment between Novartis and Merck-Medco Managed Care, LLC (“Merck-Medco”) which alters the parties’ then-existing formulary contract. *Id.* ¶ 6. This document records the result of secret negotiations between the parties regarding a rebate system for purchase of certain pharmaceutical products. *Id.* It is designed to facilitate a

competitive edge in the market for these drugs. *Id.* The document was executed at the end of 1998 and was effective through the end of June, 1999. *Id.*

The third document (NOV000122-000143) is a 22 page marketing contract between Sandoz Pharmaceuticals Corp. (“Sandoz”) and Humana, Inc.. *Id.* ¶ 7. Sandoz was one of the precursors to Novartis, which was formed as a merger of Sandoz Ltd. and Ciba-Geigy Ltd. on December 20, 1996. *Id.* This document reveals the specific pricing terms of DynaCirc® and Lescol®, and lists a number of other drug products as part of the formulary between the two companies. *Id.* The terms and conditions of formulary rebates are also discussed in detail. *Id.* Exhibits to the contract reveal the pricing of many of Sandoz’s pharmaceuticals. *Id.* Exhibits also include Sandoz’s return goods policy, product liability protection, and quality assurance and compliance program terms. *Id.* Again, the sensitive pricing and formulary rebate information in this contract is just the sort of information that Novartis’s competitors could use to gain an unfair edge in the pharmaceuticals market. *Id.* Although the rebate periods covered by the contract expired in September of 1998, this type of information is still pertinent just two years later, and revealing it would reveal Novartis’s current marketing strategies. *Id.*

The fourth document (NOV000144-000183) is the Pharmaceutical Rebate Agreement between Novartis and Express Scripts, Inc. (“ESI”), dated September 30, 1999 and currently in effect. *Id.* ¶ 8. This 40 page contract recites in painstaking detail the full arrangement between ESI and Novartis regarding numerous pharmaceutical products and the terms governing formulary rebates, including percentages and pricing figures. *Id.* Again, these numbers and covenants are extremely confidential and reveal

information that competitors could use to their advantage to seriously harm Novartis's market position. *Id.*

ARGUMENT

Materials offered into evidence may 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). Demonstrating serious injury requires a showing that (1) the documents are secret, and (2) the documents are sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *Bristol-Myers Co.*, 90 F.T.C. 455 (1977), *as modified by General Foods Corp.*, 95 F.T.C. 352 (1980). In considering these criteria, the Commission has identified six factors which should be weighed: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors, including the age of the information; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bristol-Meyers*, 90 F.T.C. at 456.

The contracts at issue here are not ordinary business records, but rather extremely sensitive rebate contracts which reveal competitive strategy. Their purpose is to induce the health care entities at issue to prefer Novartis products over those of its competitors. Revealing the prices and terms of such contracts would permit Novartis's

competitors to (i) understand Novartis's strategies and (ii) match or undercut Novartis's prices and terms. Thus, it is clear on the face of the documents that the nature of the negotiations revealed therein is inappropriate for public disclosure.

The pharmaceutical industry is highly competitive, and the demand for brand-name prescription drugs relatively stable. Thomas Aff. ¶ 9. Accordingly, Novartis's formulary rebate agreements, which form the backbone of their competitive strategy with respect to certain managed care entities, are material elements of the company's success in the marketplace, and are among the most sensitive and confidential business information Novartis maintains. *Id.* Certainly the documents qualify as "secret" according to the *Bristol-Meyers* criteria, and their disclosure would result in "serious competitive injury" as required therein.

I. THE DOCUMENTS ARE SECRET

All four marketing contracts contain current, competitively sensitive formulary pricing and rebate information which is known only to the contracting parties. This information has not been revealed to any third party, nor is it available to the public. Thomas Aff. ¶ 10. All parties involved have taken extensive measures to protect the information contained in these documents and have maintained them in their most confidential business records. *Id.* Since the contracts are the result of extended private negotiations between the participants, the information memorialized in the finished products could never be duplicated by competitors. *Id.* Finally, the terms would be of the utmost value to Novartis's competitors should they gain access to the documents, as the identities of drugs on the formulary, the percentage rebate and the pricing of the drugs are the bases for a competitive strategy in the brand-name pharmaceutical market. *Id.*

II. DISCLOSURE OF THE DOCUMENTS WOULD CAUSE NOVARTIS SERIOUS COMPETITIVE INJURY

Pricing and cost terms such as those contained in the documents at issue are routinely found to be deserving of in camera treatment in an F.T.C. adjudicatory proceeding because of the threat of competitive injury that would result from their disclosure to competitors. *See, e.g., International Telephone & Telegraph Corp., et al.*, 104 F.T.C. 280 (1984) (“ITT”) (formulas for wholesale pricing of products deemed highly sensitive and afforded in camera treatment); *E.I. DuPont de Nemours & Co.*, 103 F.T.C. 533 (1984) (in camera protection awarded to data that was over three years old where current cost information could be extracted therefrom); *Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984) (sales data for certain lines of products afforded in camera protection despite being over five years old); *E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116 (1981) (earnings, profit, operative return and cost information afforded extension of in camera treatment); *General Foods Corp.*, 96 F.T.C. 168 (1980) (profit figures deemed worthy of in camera treatment for certain markets due to potential for competitive harm).

Formularies are a primary method used by pharmaceutical companies to increase their shares of the marketplace for certain drugs with certain managed care entities and improve sales performance on others. Thomas Aff. ¶ 9. The data contained in the four marketing contracts are thus material to Novartis’s success in the same way that ITT’s pricing formulas were, for example. *Id.* ¶ 10. *See ITT*, 104 F.T.C. at 280. The secrecy of this information allows Novartis to remain competitive by linking certain highly successful drugs with others that may need a market boost. Moreover, the rebate percentages revealed in the contracts are akin to pricing and profit information like that

protected in *ITT*, *DuPont* and *Kaiser Aluminum*. In each of those cases, the figures were deemed highly sensitive because their release could allow competitors to reconstruct the competitive strategy and financial approach of the company. *See DuPont*, 97 F.T.C. at 117. Novartis's figures would have a similar detrimental effect in the hands of its competitors.

A showing of serious injury does not require a specific demonstration of the way in which other firms would use material to Novartis's disadvantage. *DuPont*, 97 F.T.C. at 116. It is proper to infer that disclosure of sensitive information would seriously affect Novartis's commercial position. *Id.* As suggested by *H.P. Hood & Sons*, injury in this case can be inferred from the documents themselves. Moreover, as a third party, Novartis's request deserves "special solicitude." *Kaiser Aluminum*, 103 F.T.C. at 500. As a policy matter, extensions of in camera treatment to third parties encourages future cooperation with adjudicative discovery requests. *Id.* The contracts clearly constitute sensitive competitive data and should therefore be granted in camera treatment.

III. THE DATA IN THE DOCUMENTS IS NOT STALE

Competitively sensitive information is commonly granted in camera treatment for a period of three years. *DuPont*, 103 F.T.C. at 533. However, although the burden on the applicant increases after this period, it does not necessarily require a finding of staleness. *Id.* In fact, in camera protection is often increased when the information in question remains competitively sensitive. *See, e.g., Kaiser Aluminum*, 103 F.T.C. at 500; *DuPont*, 103 F.T.C. at 533; *DuPont*, 97 F.T.C. at 116.

The Aetna and Merck-Medco contracts expired within a year ago and the information contained therein is still very much current, and falls well within the three-

year guideline. The contract terms are still competitively relevant, as competitors would be able to extrapolate the terms of similar current contracts as well as gain insight into Novartis's negotiating strategies with respect to formularies. The Humana contract expired just two years ago, again indicating that the terms are still sensitive as recognized by the courts in imposing the general three-year principle. The ESI contract is ongoing, and thus is particularly sensitive and worthy of protection. None of the information contained in these documents approaches staleness, and the data will need protection until at least 2003.

CONCLUSION

For the reasons set forth above, non-party Novartis's application for in camera treatment of NOV000098-000114, NOV000115-000121, NOV000122-000143 and NOV000144-000183 should be granted, together with such other and further relief as the Commission deems just and proper.

Dated: Washington, D.C.
October 25, 2000

Respectfully submitted,

DEWEY BALLANTINE LLP

By: 
David A. Bentley (DC 460351)

1775 Pennsylvania Avenue
Washington, D.C. 20006-4605
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Attorneys for Non-Party
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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CARDERM CAPITAL L.P.,
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ANDRX CORPORATION,
a corporation.

Docket No. 9293

**AFFIDAVIT OF WAYNE A. CROSS IN SUPPORT OF OMNIBUS MOTION
OF NON-PARTY NOVARTIS PHARMACEUTICALS CORPORATION
FOR IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**


STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Wayne A. Cross, being duly sworn, deposes and says:

1. I am a member of the firm of Dewey Ballantine LLP, attorneys for Non-Party Novartis Pharmaceuticals, Inc. ("Novartis").
2. On or about September 25, 2000, I was served with Aventis Pharmaceuticals, Inc.'s Notification of Use of Confidential Discovery Material, informing me that two confidential Novartis documents are referenced in and attached to their expert reports.

3. I have been informed by counsel to Aventis that depositions are about to take place, and that Novartis's documents may be used in the cross-examination of the deponent experts, and, further, that the parties have indicated an unwillingness -- for understandable tactical reasons -- to disclose in advance the materials they intend to use during cross examination. Thus, Novartis is confronted with the possible use of highly confidential information in what may be deemed a public proceeding without any prior notification and opportunity to seek in camera treatment.

4. Novartis is moving for in camera treatment for four documents: NOV000098-000114, NOV000115-000121, NOV000122-000143, and NOV000144-000183, which are attached hereto as Exhibits A, B, C, and D respectively. As described in the Affidavit of Jeffrey Thomas, submitted herewith, they are secret and their public disclosure would result in serious injury to Novartis.


Wayne A. Cross

Sworn to before me this
24th day of October, 2000


Notary Public

PATRICIA PHILLIPS
Notary Public, State of New York
No. 24-4652123
Qualified in Kings County
Commission Expires March 30, 2001

**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

**AFFIDAVIT OF JEFFREY THOMAS IN SUPPORT OF OMNIBUS MOTION
OF NON-PARTY NOVARTIS PHARMACEUTICALS CORPORATION
FOR IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MORRIS)

Jeffrey Thomas, being duly sworn, deposes and says:

1. I am the Vice President of Customer Marketing for Novartis Pharmaceuticals Corporation ("Novartis").
2. On or about May 17, 2000, in response to a Subpoena Duces Tecum, Novartis produced 524 pages of documents to respondent, Hoechst Marion Roussel, Inc. ("Hoechst"). All of these materials were stamped "Restricted, Confidential - Attorney's Eyes Only" according to the provisions of the protective order in this proceeding.
3. No objection was made by any party to Novartis's designation of these documents as Confidential pursuant to paragraph 7(b) of the protective order.

4. Of the documents Novartis provided to the FTC during the investigation, it is chiefly concerned about four marketing contracts, which reveal the most sensitive negotiations dealing with pricing and rebate structures. Public revelation of this information would allow Novartis's direct competitors to freely see how Novartis defines its incentive programs and prices its products, thereby placing Novartis at a distinct disadvantage in the market.

5. The first document (NOV000098-000114) is a 17 page Amendment to the Health Maintenance Organization Reimbursement Agreement between Novartis and Aetna Health Management, Inc.. Attached to the Amendment are numerous schedules which list in detail the specific drugs covered by the reimbursement agreement, the rates of reimbursement, and the entire mathematical structure of each discount and condition pertinent to the contract. The Amendment expired just nine months ago in December of 1999, and the information it reveals is therefore still very current and would reveal the bases and formulations for many of Novartis's current HMO rebate contracts.

6. The second document (NOV000115-000121) is a seven page Performance Benefit Amendment between Novartis and Merck-Medco Managed Care, LLC ("Merck-Medco") which alters the parties' then-existing formulary contract. This document records the result of secret negotiations between the parties regarding a rebate system for purchase of certain pharmaceutical products. It is designed to facilitate a competitive edge in the market for these drugs. The document was executed at the end of 1998 and was effective through the end of June, 1999.

7. The third document (NOV000122-143) is a 22 page marketing contract between Sandoz Pharmaceuticals Corp. ("Sandoz") and Humana, Inc.. Sandoz was the precursor to Novartis, which formed as a merger of Sandoz Ltd. and Ciba-Geigy Ltd. on December 20, 1996. This document reveals the specific pricing terms of DynaCirc® and Lescol®, and lists a number of other drug products as part of the formulary between the two companies. The terms and conditions of formulary rebates are also discussed in detail. Exhibits to the contract reveal the pricing of many of Sandoz's pharmaceuticals. Exhibits also include Sandoz's return goods policy, product liability protection, and quality assurance and compliance program terms. Again, the sensitive pricing and formulary rebate information in this contract is just the sort of information that Novartis's competitors could use to gain an inequitable edge in the pharmaceuticals market. Although the rebate periods covered by the contract expired in September of 1998, this type of information is still pertinent just two years later, and revealing it would reveal Novartis's current marketing strategies.

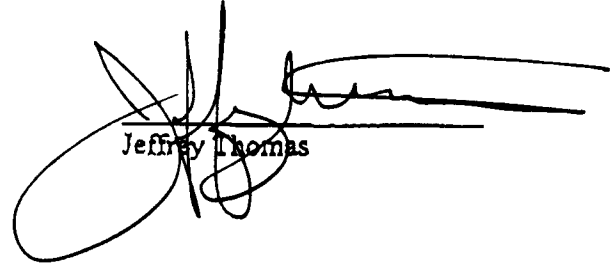
8. The fourth document (NOV000144-000183) is the Pharmaceutical Rebate Agreement between Novartis and Express Scripts, Inc. ("ESI"), dated September 30, 1999 and currently in effect. This 40 page contract recites in painstaking detail the full arrangement between ESI and Novartis regarding numerous pharmaceutical products and the terms governing formulary rebates, including percentages and pricing figures. Again, these numbers and covenants are extremely confidential and reveal information that competitors could use to their advantage to seriously harm Novartis's market position.

9. The pharmaceutical industry is highly competitive, and the demand for brand-name prescription drugs relatively stable. Formularies are a primary method used by pharmaceutical companies to increase their shares of the marketplace for certain drugs and improve sales performance on others. Accordingly, Novartis's formulary rebate agreements, which form the backbone of our competitive strategy with certain managed care entities, are material elements of the company's success in the marketplace, and are among the most sensitive and confidential business information Novartis maintains.

10. All four marketing contracts contain current, competitively sensitive formulary pricing and rebate information which is known only to the contracting parties. This information has not been revealed to any third party, nor is it available to the public. All parties involved have taken extensive measures to protect the information contained in these documents and have maintained them in their most confidential business records. Since the contracts are the result of extended private negotiations between the participants, the information memorialized in the finished products could never be duplicated by competitors. Finally, the terms would be of the utmost value to Novartis's competitors should they gain access to the documents, as the identities of drugs on the formulary, the percentage rebate and the pricing of the drugs are the bases for a competitive strategy in the brand-name pharmaceutical market. The data

contained in the four marketing contracts are thus material to Novartis's success and their disclosure would cause serious injury to its business.

Dated: East Hanover, New Jersey
October 20, 2000



Jeffrey Thomas

Sworn to before me this
20 day of October, 2000



Notary Public

CARMELA YAUCH
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Jan. 3, 2004

CERTIFICATE OF SERVICE

I, David A. Bentley, hereby certify that on October 25, 2000, a copy of the Omnibus Motion of Non-Party Novartis Pharmaceuticals Corporation for In Camera Treatment of Certain Documents, together with the supporting memorandum of law and affidavits (without the four documents for which in camera treatment is sought under this motion), was served upon the following persons by facsimile and Federal Express:

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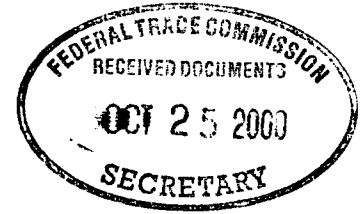
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Dated: Washington, D.C.
October 25, 2000



David A. Bentley

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FEDERAL TRADE COMMISSION



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Docket No. 9293

**ORDER GRANTING OMNIBUS MOTION
OF NON-PARTY NOVARTIS CORPORATION FOR
IN CAMERA TREATMENT OF CERTAIN DOCUMENTS**

The Commission having considered the Omnibus Motion of Non-Party
Novartis Corporation for In Camera Treatment of Certain Documents,

IT IS HEREBY ORDERED:

That the Omnibus Motion of Non-Party Novartis Corporation for In
Camera Treatment of Certain Documents is GRANTED.

IT IS FURTHER ORDERED:

That the documents NOV000098-000114, NOV000115-000121,
NOV000122-000143, and NOV000144-000183 are hereby granted in camera status and
shall be withheld from the public record.

IT IS SO ORDERED.

Entered _____.

D. Michael Chappell
Administrative Law Judge