

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

SCHERING-PLOUGH CORPORATION,
UPSHER-SMITH LABORATORIES,

and

AMERICAN HOME PRODUCTS CORPORATION.

Docket No. 9297

**NON-PARTY ANDRX CORPORATION'S
APPLICATION FOR *IN CAMERA* PROTECTION OF
CERTAIN OF ITS CONFIDENTIAL MATERIALS**

Non-Party Andrx Corporation (Andrx) submits this memorandum, pursuant to Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45, in support of its application for *in camera* treatment of certain of its confidential materials.

ARGUMENT

On December 17, 2001, Complaint Counsel identified two Andrx documents that it has "placed on its exhibit list and intends to offer in evidence". Complaint Counsel also informed Andrx that any application for *in camera* treatment for these documents would need to be filed by December 27, 2001. After reviewing the two documents, Andrx believes that one of them contains information properly designated as nonpublic information under Section 4.10(a)(2) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(a)(2), and deserves *in camera* protection.

After business hours on Friday, December 21, 2001, respondent Schering sent a facsimile to Andrx counsel identifying nineteen Andrx documents that "Schering may offer as exhibits at the hearing". By letter dated December 21, 2001, which was

delivered to Andrx counsel by mail on the afternoon of December 26, respondent Upsher-Smith identified twenty-one Andrx documents (many of which were duplicated on Schering's list) that Upsher-Smith had included on its exhibit list. Neither Schering's nor Upsher-Smith's letters indicated a deadline for Andrx to seek *in camera* treatment of the Andrx materials identified therein. Andrx has endeavored to review the documents identified by respondents but due to the limited time afforded by respondents' notices has not been able to determine whether or not to request *in camera* treatment for those documents. Andrx accordingly requests permission to supplement this application on or before January 3, 2002 to address the Andrx documents identified to Andrx by respondents.

Andrx requests that the Court grant *in camera* status to the document designated by Complaint Counsel as "CX 54" — also identified by Schering (with no exhibit number) — which bears the designation "ANDX-SP 001158". That document contains information that would reveal Andrx's sales forecasts, assumptions and projected requirements for Andrx's generic potassium chloride product, a product that has not yet even been approved by FDA or brought to market. If this information were to become public, it would cause significant competitive injury to Andrx.

"There is no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). In order to qualify for such protection, an applicant must "show that the information in the documents is 'sufficiently secret' and 'sufficiently material' to its business that disclosure would result in serious competitive injury". *In re E.I. DuPont de Nemours & Company*, 103 F.T.C. 533, 534 (1984) (quoting *Hood*, 58

F.T.C. at 1188). Within the context of this legal backdrop, "the courts have generally attempted to protect confidential business information from unnecessary airing." *Hood*, 58 F.T.C. at 1188.

The document in question contains details concerning Andrx's financial projections and product strategies for a product still in development, a product that is specifically intended to compete directly against products marketed by others, including respondents. In the ordinary course of its business, Andrx carefully guards the confidentiality of such information, even within Andrx. This information is not already a matter of public record. In this proceeding, Andrx has taken every possible legal measure to keep the information confidential, and has never publicly disclosed it in any other context.

Because the document at issue relates to a product Andrx is currently developing, the information it contains is certainly sensitive and worthy of the utmost protection. That information is based entirely on Andrx's human and financial resources. Competitors, including respondents themselves, could not come by this information — Andrx's expectations concerning its sales and its strategies — on their own. The information could be invaluable to competitors and would give them an unfair advantage against Andrx. For example, the public disclosure of this information could reveal to competitors Andrx's expected prices and pricing strategy before Andrx is in a position to market its product, affording those competitors ample time to pre-empt Andrx's marketing efforts.

The public interest would not be served by making these confidential documents a matter of public record. The confidential information of Andrx, a non-party to this

proceeding, bears no direct relationship to consumers or other members of the public at large. The information, however, would be highly valuable to Andrx' competitors in the marketplace and would, as a business matter, significantly prejudice Andrx' legitimate commercial interests. *See In re Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500 (1984) (holding that certain documents warranted *in camera* treatment; "public understanding of this proceeding does not depend on access to these data submitted").

The confidential nature of this information will not decrease over the foreseeable future. For at least as long as Andrx is delayed in introducing its generic potassium chloride product, its plans and projections for that product will continue to be commercially sensitive and confidential. The information contained in these documents would continue to provide competitors with an unfair business advantage. Because Andrx cannot now predict when it will be permitted to market its product, it respectfully requests that indefinite *in camera* protection be granted to this document.

CONCLUSION

For the foregoing reasons, Andrx respectfully requests that this Court determine that the document designated as "ANDRX-SP 1158" properly contains nonpublic information under 16 C.F.R. § 4.10(a)(2) and is entitled to *in camera* protection pursuant to 16 C.F.R. § 3.45. In addition, in the event that the Commission intends to disclose *in camera* Andrx information in a final decision, Andrx respectfully requests that the Commission notify both Andrx counsel, Colin A. Underwood of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 45 Rockefeller Plaze, New York, New York, 10111, telephone: 212-956-3700, facsimile 212-956-4068, and Andrx in-house counsel Herschel

E. Sparks, Jr., 4955 Orange Drive, Davie, Florida 33314, telephone 954-585-1709,
facsimile 954-581-8750.

Dated: New York, New York
December 27, 2001

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: Colin A. Underwood
Colin A. Underwood
Michael B. Smith

45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

Counsel for Non-Party Andrx Corporation

CERTIFICATE OF SERVICE

I, Peter M. Todaro, hereby certify that on December 27, 2001 I caused the foregoing Non-Party Andrx Corporation's Application For *In Camera* Protection Of Certain Of Its Confidential Materials to be served by hand delivery upon the following:

Karen Bokar, Esq.
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Complaint Counsel

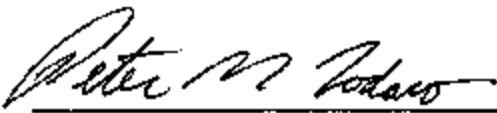
Diane E. Bieri, Esq.
Howrey & Simon
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2402

Counsel for Schering-Plough Corp.

Paul F. Stone, Esq.
White & Case
601 Thirteenth St., N.W.
Suite 600 South
Washington, DC 20005

*Counsel for Upsher-Smith Laboratories,
Inc.*

Dated: December 27, 2001



PETER M. TODARO