UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
CSL Limited,	)	
a corporation	)	
	)	**Docket No. 9337**
and	)	
	)	**PUBLIC**
Cerberus-Plasma Holdings, LLC,	)	
a limited liability company.	)	

COMPLAINT COUNSEL'S MOTION TO PLACE COMPLAINT ON THE PUBLIC RECORD

Complaint Counsel respectfully moves for an order placing the Complaint, in unredacted form, on the public record. In this matter, Complaint Counsel seeks permanent relief to enjoin CSL's proposed $3.1 billion acquisition of its competitor, Talecris Biotherapeutics Holdings Corporation ("Talecris"), from Cerberus-Plasma Holdings, LLC ("Cerberus"). If consummated, the acquisition threatens substantial competitive harm in four separate markets for critical plasma-derivative protein therapies.

The Complaint was issued as nonpublic because it contains quotes from the Respondents' documents produced pursuant to the Hart Scott Rodino Act ("HSR Act").[1] Although material submitted pursuant to the HSR Act is routinely utilized in public proceedings involving merger challenges, out of an abundance of caution, Complaint Counsel sought agreement from the

[1] Paragraph 9 of the Standard Protective Order, Appendix A to 16 C.F.R. § 3.31, provides that such materials "shall continue to have *in camera* treatment until further order of the Administrative Law Judge[.]"

Respondents before placing the Complaint on the public record. Respondents refused, claiming that every quote in the Complaint derived from the Respondents' documents constitutes confidential business information and must be redacted.

In accordance with Respondents' position, and to preserve this Court's ability to rule on whether the quoted material shall be made public, Complaint Counsel has placed only a highly redacted version of the Complaint on the public record. The redacted version obscures all of the information Respondents have claimed is confidential and, as a result, makes it nearly impossible for interested third parties to fully understand the nature of the allegations in this case. As outlined below, Respondents' proposed redactions attempt to conceal this litigation from the public eye, contrary to Commission Rules of Practice, applicable law, and public policy – all of which clearly favor the transparency of these proceedings.

ALLEGATIONS OF THE COMPLAINT

The Commission alleges in its Complaint that CSL's proposed $3.1 billion acquisition of Talecris threatens to substantially lessen competition in the markets for several life-sustaining plasma-derivative protein therapies. (Compl. ¶ 1). These therapies are essential for treating many serious illnesses, and their cost may exceed $90,000 per patient annually in some cases. (Compl. ¶ 20). Significant industry consolidation in recent years has emboldened a tight oligopoly of sellers to seek to avoid competition, restrict supply, and raise prices. (Compl. ¶ 28). Firms closely monitor each other, collecting and cataloging an extraordinary wealth of timely competitive information, and overtly signal to one another, seeking to ensure that all are restraining output and curbing growth. (Compl. ¶¶ 36-37, 39). CSL has even explored means of punishing firms – for example, Talecris – that have increased capacity and output in contravention of the prevailing restrained approach. (Compl. ¶ 40).

The proposed acquisition would decrease the number of firms with control over U.S. Ig and albumin sales from five to four (Compl. ¶ 65), while reducing the number of sellers of alpha-1 and Rho-D from three to two (Compl. ¶¶ 67, 71). Post-merger concentration levels in each of the relevant markets would far exceed the thresholds provided in the Government's Horizontal Merger Guidelines, giving rise to a strong presumption that the transaction would harm competition. (Compl. ¶ 60). Indeed, with the elimination of Talecris – the one firm that has consistently and significantly expanded output in the United States – CSL and Baxter International, Inc. ("Baxter") would face no remaining significant obstacle in their efforts to coordinate and tighten supply conditions for the relevant products, to the great detriment of consumers. (Compl. ¶¶ 66, 70, 73). The acquisition also would eliminate beneficial head-to-head competition between CSL and Talecris in the alpha-1 and Rho-D markets. (Compl. ¶¶ 68, 72).

Significantly, the Complaint does *not* include any discussion of competitively sensitive topics such as pricing plans, marketing plans, research and development plans, corporate alliances or mergers and acquisitions; trade secrets; customer-specific evaluations or data; sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; or proprietary consumer, customer or market research or analyses. Simply stated, the material that the Commission seeks to place on the public record does not qualify as confidential business records, and there is no credible basis for shielding it from public view.

ARGUMENT

FTC adjudicative proceedings should be open and on the public record.[2] Detroit Auto Dealers Ass'n, Inc., D-9189, 1985 FTC LEXIS 90, at *2 (June 7, 1985) ("The principle of open proceedings and public records in Federal Trade Commission administrative adjudication is beyond dispute."); *accord* Intel, 1999 FTC LEXIS 227, at *1. *See also* H.P. Hood, 58 F.T.C. at 1186 ("There is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons."). To ensure such transparency, there is a strong presumption that the public should have access to the record of the Commission's adjudicative proceedings. Detroit Auto Dealers Ass'n, 1985 FTC LEXIS 90, at *3 (there is a "presumption of public access to any document filed in the record of an adjudicative proceeding").

In short, the quoted language that Respondents seek to keep secret may be embarrassing for them. But embarrassment is not a basis for obscuring such material from the public. *See* H.P. Hood, 58 F.T.C. LEXIS at 1184 ("Quite clearly the mere embarrassment of the movant should not foreclose public disclosure. Nor should documents be sealed simply on the ground that they contain information which competitors for business reasons are extremely desirous to possess.").

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[2] Open and public proceedings permit the public to evaluate the "fairness of the Commission's work," and they "provide[] guidance to persons affected by [the Commission's] actions." Intel Corp., D-9288, 1999 FTC LEXIS 227, at *1 (Feb. 23, 1999) (citing The Crown Cork & Seal Co., 71 F.T.C. 1714, 1714-15 (1967); H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1186 (1961)); accord Volkswagen of Am., Inc., 103 F.T.C. 536, 538 (1984); *see also* RSR Corp., 88 F.T.C. 734, 734-35 (1976) ("One reason for the requirement that proceedings of this sort be decided 'on the record' is to permit the public to evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct.").

A. Disclosure of the Relevant Material Would Not Result in a "Clearly Defined, Serious Injury" to the Respondents

The Commission's Rules of Practice provide that *in camera* treatment may be afforded to evidentiary material "only after a finding that its public disclosure will likely result in a clearly defined, serious injury to the person . . . requesting" such treatment, "or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45 (b). For material other than sensitive personal information – which is not at issue here – a finding that public disclosure will likely result in a clearly defined, serious injury is based on the standard articulated in *H.P. Hood.*

H.P. Hood provides that there are essentially two kinds of information for which parties may seek *in camera* treatment. First, there are trade secrets, such as "secret formulas, research or processes" for which *in camera* treatment is clearly appropriate. Second, there are "confidential business records," for which "requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure." H.P. Hood, 58 F.T.C. at 1188.

In this case, the quotations that Respondents seek to keep nonpublic clearly are not trade secrets akin to those types of information recognized as such in *H.P. Hood.* The quotations also are not considered "business confidential" merely by virtue of the fact that Respondents would prefer to keep them confidential. *See id.* More importantly, many of the quotations in the Complaint here are not even confidential in the first place, because they appear in the files of *both* Respondents, who presumably would not confess to possessing the confidential, secret documents of their competitors. For example, a quote in paragraph 36 of the Complaint appears verbatim in both CSL and Talecris documents. Appendix A at 0013-046; Appendix B at PX

0012-024.[3] Similarly, many of the terms Respondent seeks to keep nonpublic have been used in public presentations by Baxter, the only other significant participant in the market. *Compare* Compl. ¶ 36 *with* ¶ 41.

In short, in light of the substantial public interest in open adjudicative proceedings, the quoted material should not remain nonpublic. Instead, the material clearly falls into the third and final category of information identified in *H.P. Hood* – that is, information that "should not foreclose public disclosure" because it would result in "the mere embarrassment" of Respondents or could "expose respondent to possible treble damages actions." H.P. Hood, 58 F.T.C. at 1188.

B. The Relevant Material is Important to Explain the Rationale of the Commission's Ultimate Decision in This Matter

The quotations at issue go to the very core of Complaint Counsel's allegations. Such allegations, and the Commission's ultimate decision in this matter, cannot be understood meaningfully without access to such information. Specifically, the relevant quoted language suggests a strong possibility of ongoing coordinated interaction between firms in the plasma industry. Evidence of transparency, interdependence, and signaling among firms is particularly relevant to the allegations in this matter. The language at issue bears on these very important points, and demonstrates how firms used specific key words to:

- suggest to each other that increasing the production of lifesaving drugs could hurt the firms' ability to reap the significant profits they all achieved during an extended period where demand exceeded supply for the key products;

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[3] Appendix A is a presentation authored by Dr. Alberto Martinez, at the time the CEO of Talecris. Appendix B is a presentation prepared by Sam Lovick, CSL's Chief Economist. Of the 59 slides in Martinez's presentation, over half, or 32, of the slides are essentially identical to slides that can be found in Lovick's files. Appendix C is a chart listing corresponding pages between the two presentations.

- remind each other of how, during a period when supply increased, prices and profitability for the firms in the market dropped significantly; and

- encourage each other to only increase supply incrementally to keep pace with demand, not increase supply to the extent the firms actually compete with each other for market share.

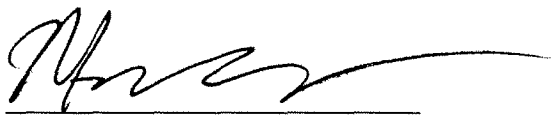
The quoted language is particularly relevant here. In fact, it is similar to language that in other instances has been found to be evidence supporting an illegal price fixing conspiracy.[4] For this reason, the public has a right to see the exact wording used in Respondents' documents.

[4] *See, e.g., In Re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 662 (7th Cir. 2002) (Posner, J.) (referring to competitor as a "friendly competitor," mentioning an "understanding between the companies that . . . causes [them] not to . . . make irrational decisions," and querying whether competitors will "play by the rules (discipline)" can all be evidence of an explicit agreement to fix prices).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully request that the Court authorize placement of the original, unredacted Complaint on the public record.

Respectfully submitted,



Dated: May 29, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2009, I filed *via* hand a paper original and electronic copy of the foregoing COMPLAINT COUNSEL'S MOTION TO PLACE COMPLAINT ON THE PUBLIC RECORD, PUBLIC VERSION with:

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The Honorable D. Michael Chappell
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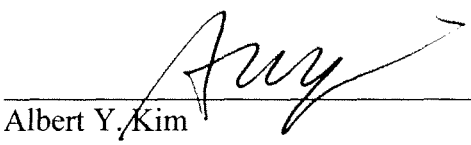

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APPENDIX A, B, C (REDACTED)