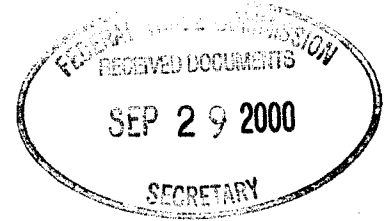


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

**RESPONDENT CARDERM CAPITAL L.P.'S
APPLICATION FOR *IN CAMERA* TREATMENT
OF CERTAIN CONFIDENTIAL DOCUMENTS**

Respondent Carderm Capital L.P. ("Carderm") hereby applies for *in camera* treatment of certain documents previously marked as "Confidential" or "Attorney Eyes Only" pursuant to Second Amended Protective Order Governing Discovery Material in this case. Peter Bernstein, counsel for Aventis Pharmaceuticals, Inc., and Carolyn Dizon, counsel for Andrx Corporation, have consented to the application. A message was left for Bradley Albert, a Commission attorney serving as Complaint Counsel.

In support of this application, respondent respectfully refers the Court to the accompanying Memorandum and Declaration of Stacy L. Ehrlich, Esq.

WHEREFORE, Respondent Carderm Capital L.P. respectfully prays that this tribunal enter an Order granting *In Camera* treatment to the documents designated in the attached memorandum.

Dated: September 29, 2000

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Stacy L. Ehrlich", is written over a horizontal line.

Peter O. Safir
Stacy L. Ehrlich
KLEINFELD, KAPLAN & BECKER
1140 19th St. NW, Suite 900
Washington, D.C. 20036
(202) 223-5120

Attorneys for Respondent
Carderm Capital L.P.

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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**RESPONDENT CARDERM CAPITAL L.P.'S
MEMORANDUM IN SUPPORT OF APPLICATION FOR
IN CAMERA TREATMENT OF CERTAIN CONFIDENTIAL DOCUMENTS**

Pursuant to Rule 3.45 of the Federal Trade Commission's ("FTC") Rules of Practice, Respondent Carderm Capital L.P. ("Carderm") submits this Memorandum in Support of Application for *In Camera* Treatment of Certain Confidential Documents.

I. INTRODUCTION

On September 8, 2000, Complaint Counsel advised Carderm that it intended to include 11 documents which Carderm designated "Confidential" pursuant to the Second Amended Protective Order Governing Discovery Materials "in a pleading, motion, exhibit, or other paper to be filed in this proceeding."¹ Carderm reviewed these documents and believes that many of these

1. See Complaint Counsel's List of Documents attached to the Declaration of Stacy L. Ehrlich in Support of Application for *In Camera* Treatment of Materials Marked Confidential Pursuant to Protective Order (the "Ehrlich Declaration") as Exhibit A.

documents meet the requirements for *in camera* treatment.² Accordingly, pursuant to the September 19, 2000 Order on Applications for *In Camera* Treatment and Modifying the Scheduling Order, the Protective Order³ and the FTC Rules of Practice,⁴ Carderm makes this application for *in camera* treatment of certain of the documents identified by Complaint Counsel.

II. LEGAL STANDARD GOVERNING *IN CAMERA* TREATMENT

The FTC's Rules of Practice provide for *in camera* treatment of confidential documents when "public disclosure will likely result in a clearly defined, serious injury to the . . . corporation requesting their *in camera* treatment."⁵ Proof of "serious injury" requires that "the information in question is secret and material to the applicant's business."⁶ In considering whether documents are entitled to *in camera* treatment, the Commission has identified the following factors:

- (1) the extent to which the information is known outside of [the applicant's] business;
- (2) the extent to which it is known by employees and others involved in [the applicant's] business;
- (3) the extent of measures taken by [the applicant] to guard the secrecy of the information;
- (4) the value of the information to [the applicant and its competitors];
- (5) the amount of effort or money expended by [the applicant] in developing the information;

2. The remaining documents consist of confidential documents which do not meet this Tribunal's stringent requirements for *in camera* treatment.

3. Protective Order, ¶13.

4. 16 C.F.R. § 3.45(b) (providing for *in camera* treatment of confidential documents).

5. 16 C.F.R. § 3.45(b).

6. *Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25 at 4 (1977); *General Foods Corp.*, 95 F.T.C. 352, 255 (1980).

- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁷

Carderm respectfully requests that should the harmful nature of the release not be clear from the existing record, the Court err on the side of designating the requested materials as *in camera*, with the understanding that this designation will be subject to further review as the case progresses. As the Commission stated in *Bristol-Myers*,

it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that the public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.⁸

III. CONFIDENTIAL DOCUMENTS FOR WHICH *IN CAMERA* TREATMENT IS SOUGHT

Carderm respectfully advises the Court that in determining which documents should be afforded *in camera* treatment, Aventis has only designated those documents containing information the release of which would be harmful on a prospective as opposed to a retrospective basis. Carderm was also mindful not to request *in camera* treatment for dated materials the release of which would not cause serious injury. Moreover, all documents for which *in camera* treatment has been requested have continuously been treated as confidential by Carderm and have only been produced under protective orders in other related litigations marked “Confidential” or “Attorney Eyes Only.”⁹

7. *Bristol-Myers Co.*, 90 F.T.C. 455,1977 FTC LEXIS 25 at 5.

8. *Id.* at 6.

9. *See Ehrlich Declaration*, ¶ 9.

A. Business Plans and Forecasts

Complaint Counsel has identified a number of Carderm's business plans and forecasts that contain information on Cardizem® CD, which is an active, existing product line.¹⁰ While some of these plans are not for the current year, they contain strategic forecasting determinations made based upon internal analysis of market conditions. Included in the documents identified by Complaint Counsel are internal business plans, quarterly forecasts, generic entry analyses, risk analyses, 5-Year forecasts, product lifecycle strategies, and strategic planning documents (collectively "Plans").

The Plans contain information on cost of sales, cost of goods, third party royalties, operating expenses, inter-company margins, cash discounts, revenues and rebates. While minor aspects of this information may later be used and aggregated to develop public financial statements, the Plans contain a plethora of information not publicly available.¹¹ Certain of the forecasting documents reflect proprietary modeling used to determine generic introduction and erosions scenarios¹² and contain studies conducted by outside vendors at significant cost to Carderm.¹³ In addition, some of the Plans contain information for products other than Cardizem® CD.¹⁴ These documents reflect the thought processes and business judgement of Carderm representatives.

10. See Ehrlich Declaration, ¶ 8.

11. Should Complaint Counsel wish to identify particular aspects of the Plans for use, Carderm remains willing to work with them to provide information that may be made available to the public. Absent such an identification, Carderm is forced to request *in camera* treatment for these Plans and the information contained in them in their totality.

12. 0000066-0000077.

13. 0000001-0000028; 0000124-0000133.

14. 0000065-0000077.

Granting competitors access to such confidential material would cause serious injury to Carderm and its partners.

None of the Plans are widely circulated within the Carderm partnership or elsewhere and none have been shared with outside analysts or competitors. The Plans remain particularly sensitive given the current competition within the hypertension market. The effect of public disclosure could upset the competitive balance in the market and cause Carderm and its partners financial harm.

B. Partnership Meeting Minutes

Complaint Counsel also proposes to include minutes of Carderm partnership meetings in its public filings. These minutes reflect the internal discussions of limited partners and representatives of Carderm and are generally the most tightly held and controlled documents within the Carderm partnership.¹⁵ The minutes also contain the identities of each of the limited partners of Carderm, information which has never been made public and which is protected from disclosure under the terms of the Carderm Partnership Agreement.

Further, the minutes identified by Complaint Counsel contain information regarding tax and other internal financial issues that is closely protected by the partnership. In addition, one set of the minutes identified by Complaint Counsel contains information regarding a product other than Cardizem® CD.¹⁶ This information would enable competitors to anticipate sales promotions, strategies and product launches, causing serious injury to Carderm and its partners. Providing

15. See Ehrlich Declaration, ¶ 10.

16. 0000323-0000327.

public access to such secretive internal thinking would chill the necessary and proper exercise of managerial governance and discretion.

C. Andrx Patent Litigation

Complaint Counsel has identified the Stipulation and Agreement¹⁷ which Carderm produced from the patent infringement litigation filed by Hoechst Marion Roussel, Inc. (“HMRI”) and Carderm against Andrx in the U.S. District Court for the Southern District of Florida.¹⁸ The Stipulation and Agreement contains very specific licensing and royalty provisions, the release of which would cause serious harm to Carderm and Aventis (formerly HMRI) in negotiations with other pharmaceutical manufacturers. In order to address these concerns, Aventis has provided a redacted version of this document in *In Re Cardizem CD Antitrust Litigation*, MDL Docket No. 1278 (E.D. Mich.). Carderm and Aventis propose the use of the redacted version of the Stipulation and Agreement in this action for all public filings, with the unredacted portions receiving *in camera* treatment.¹⁹

D. Miscellaneous Documents

The following documents listed by Complaint Counsel do not fit neatly into any one category and are addressed below.

1. Complaint Counsel advised that it may use in its public filings a current royalty agreement Carderm entered with an unrelated third-party concerning a product other than

17. 0000218-0000231.

18. *Hoechst Marion Roussel, Inc. et al. v. Andrx Corporation*, 96-CV-06121 (S.D. Fla.).

19. A copy of the redacted Stipulation and Agreement is attached as Exhibit B to the Bernstein Declaration filed with Respondent Aventis Pharmaceuticals, Inc.’s Application for *In Camera* Treatment of Certain Confidential Documents.

Cardizem® CD.²⁰ The agreement was in settlement of an unrelated patent infringement action. As this document contains third-party information and involves a product other than Cardizem® CD, the release of this information could cause injury to Carderm. In particular, release of this document could harm Carderm in future negotiations with third parties.

2. Complaint Counsel advised that it may use in its public filings memoranda describing the financing and internal structure of Carderm.²¹ This is extremely sensitive and closely-held information the release of which would cause injury to Carderm and its partners.

IV. EXPIRATION DATE

Due to the peculiar regulatory and intellectual property aspects of the pharmaceutical industry, Carderm believes that the documents for which it seeks *in camera* treatment will retain their sensitive nature for some time. The majority of the products in the hypertension market with which Cardizem® CD competes retain patent exclusivity for the next 10 years, for example Procardia XL is protected until 2010 and Tiazac is protected until 2013.²² Thus, unless otherwise specified,²³ Carderm requests that the Court permit *in camera* treatment of certain of the identified documents until August 8, 2012, the date on which the last patent for Cardizem® CD expires.²⁴

20. 0000732-0000764.

21. 0000124-0000133; 0000298-0000299.

22. See Ehrlich Declaration, ¶ 3.

23. With regard to the document identified by Bates Nos. 0000298-0000299, however, Carderm requests *in camera* treatment only until October 6, 2002.

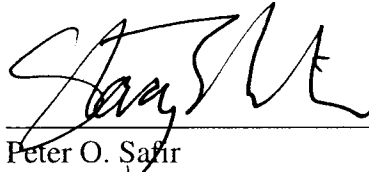
24. See *id.*

V. CONCLUSION

For the above reasons, Carderm respectfully requests that this tribunal issue an *in camera* order for the documents attached as Exhibit B of the Ehrlich Declaration.

Dated: September 29, 2000

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Peter O. Safir", written over a horizontal line.

Peter O. Safir
Stacy L. Ehrlich
KLEINFELD, KAPLAN AND BECKER
1120 19th St., N.W., Suite 900
Washington, D.C. 20036
(202) 223-5120

Attorneys for Respondent
Carderm Capital L.P.

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Docket No. 9293

**ORDER GRANTING RESPONDENT CARDERM CAPITAL L.P.'S APPLICATION
FOR *IN CAMERA* TREATMENT OF CERTAIN CONFIDENTIAL DOCUMENTS**

On September 29, 2000, Respondent Carderm Capital L.P. filed an application for *in camera* treatment of certain confidential documents. Respondent's motion is GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October __, 2000

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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HOECHST MARION ROUSSEL, INC.,
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Docket No. 9293

**DECLARATION OF STACY L. EHRLICH IN SUPPORT OF
RESPONDENT CARDERM CAPITAL L.P.'S
APPLICATION FOR *IN CAMERA* TREATMENT OF
CERTAIN CONFIDENTIAL DOCUMENTS**

I, Stacy L. Ehrlich, pursuant to 28 U.S.C. § 1746, declare as follows,:

1. I am associated with the firm of Kleinfeld, Kaplan and Becker, Washington, DC, and serve as outside counsel for respondent Carderm Capital L.P. ("Carderm").

2. Peter Bernstein, counsel for Aventis Pharmaceuticals, Inc., and Carolyn Dizon, counsel for Andrx Corporation, have consented to this application. A message was left for Bradley Albert, a Commission attorney serving as Complaint Counsel.

3. According to the U.S. Food and Drug Administration Center for Drug Evaluation and Research Approved Drug Products with Therapeutic Equivalence Evaluations, Patent and Exclusivity Information Addendum B (commonly known as the "Orange Book") (June 8, 2000) <<http://www.fda.gov/cder/orange/adp.htm>>, the last patent for Cardizem® CD expires on August

8, 2012, the last patent for Procardia XL expires on November 23, 2010, and the last patent for Tiazac expires on June 25, 2013. Carderm holds the patents and new drug application for Cardizem® CD. Cardizem® CD is indicated for the treatment of hypertension and angina and competes with numerous other pharmaceutical products. Aventis, and its predecessors, have sold Cardizem® CD since 1993 and continue to do so in 2000.

4. The documents for which *in camera* treatment is requested have been reviewed by Carderm corporate counsel, Stephan Petri, and I have consulted with Dr. Petri concerning the content of these documents.

5. Annexed hereto as Exhibit A is a copy of Complaint Counsel's List of Documents, dated September 8, 2000.

6. A copy of the HMRI/Andrx Stipulation and Agreement as redacted in *In Re Cardizem CD Antitrust Litigation*, MDL Docket No. 1278 (E.D. Mich.) is attached to the Declaration of Peter D. Bernstein in Support Of Respondent Aventis Pharmaceuticals, Inc.'s Application for *in Camera* Treatment of Certain Confidential Documents.

7. Annexed hereto as Exhibit B are the documents for which *in camera* treatment has been requested.

8. As the Court knows, there are numerous private actions around the country that are factually related. A large number of these documents have been produced under the protective orders governing discovery in two of those actions, *Biovail Corporation v. Hoechst AG, et al.*, Civil Action No. 98-1434(D.N.J.) and *In Re Cardizem CD Antitrust Litigation*, MDL Docket No. 1278 (E.D. Mich.). All of documents produced in these litigations that are identified by this application

for *in camera* treatment have been produced either as “Confidential” or “Attorney Eyes Only” in the other litigations.

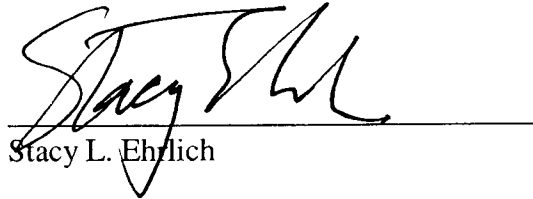
9. Our review of these documents revealed that the identified information is closely held and is not widely circulated within the partnership. Typically, information is only disseminated within the partnership to those with a necessary interest. A good example of this is partnership meeting minutes, that are typically only distributed to limited partners and anyone with specific reasons for possessing such information. Information such as minutes and marketing studies are valuable to the partnership as it provides the necessary facts with which prudent business decisions are made. This sort of information would be valuable in the hands of any competitor. Due to the proprietary nature of the identified information, it would not be available to a competitor and it would be difficult, if not impossible, for a competitor to acquire or duplicate this information. The business forecasts, valuations, documents concerning partnership structure and partnership minutes reflect the thought processes and business judgement of Carderm representatives and partners. Granting competitors access to such confidential materials would cause serious injury to Carderm.

10. Release of this information contained in this application would cause serious injury in that the information for which *in camera* treatment has been requested would provide competitors with access to proprietary information including cost of sales, cost of goods, third party royalties, operating expenses, inter-company margins, revenues and partnership distributions. Such access would undermine Carderm’s and Aventis’ competitive position in the hypertension market.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, DC, on September 29, 2000.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Stacy L. Ehrlich", is written over a solid horizontal line. The signature is fluid and cursive, with the first name "Stacy" being the most prominent part.

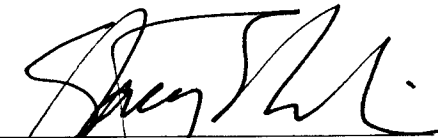
CERTIFICATE OF SERVICE

I, Stacy L. Ehrlich, hereby certify that on September 29, 2000, I caused a copy of Carderm Capital L.P.'s Application for *In Camera* Treatment of Certain Confidential Documents; Memorandum in Support of Application for *In Camera* Treatment of Certain Confidential Documents; Proposed Order Granting Application for *In Camera* Treatment of Certain Confidential Documents; and Declaration of Stacy L. Ehrlich in Support of Application for *In Camera* Treatment of Certain Confidential Documents by hand or Federal Express:

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W.
Suite 800
Washington, D.C. 20004

Colin A. Underwood, Esq.
Solomon, Zauderer, Ellenham,
Frischer & Sharpp
45 Rockefeller Plaza
New York, NY 10111

Markus H. Meier, Esq.
Federal Trade Commission
Room 3620
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580



Stacy L. Ehrlich