UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
HOECHST MARION ROUSSEL, INC., a corporation	)	
CARDERM CAPITAL L.P., a limited partnership,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation,	)	

MERCK-MEDCO MANAGED CARE L.L.C.'S
MOTION FOR IN CAMERA TREATMENT

Merck-Medco Managed Care, L.L.C. ("Merck-Medco"), which is not a party to the above-captioned action, respectfully request that this Court grant *in camera* treatment pursuant to 16 C.F.R. § 3.45(b) to certain documents, attached hereto as Exhibits A and B, produced in this proceeding by Merck-Medco in response to subpoenas issued by the Federal Trade Commission at the request of Respondents Hoechst Marion Russell, Inc. ("Hoechst") and Andrx Corporation ("Andrx").[1]

On September 27, 2000, Merck-Medco received notification from counsel for Aventis of its intention to use two specifically identified confidential documents produced by Merck-Medco. *In camera* treatment is warranted here for each of these

[1] In accordance with this court's September 19, 2000 Order, the document for which *in camera* treatment is requested is attached as Exhibits A and B only in the copy of the motion served on the Office of Administrative Law Judges.

documents. Their disclosure would subject Merck-Medco to a substantial risk of competitive injury that is unwarranted here given that Merck-Medco is a third party and the documents at issue are of questionable relevance to any resolution of the matters in these proceedings. This motion is supported by the declaration of Isaac Shulman, Executive Vice President of Merck-Medco, attached as Exhibit C ("Shulman Decl.").[2]

ARGUMENT

The rules of this court allow it to place material *in camera*, and thus shield it from the public's access, if disclosure of the material would "likely result in a clearly defined, serious injury" to the person requesting in camera treatment. 16 C.F.R. § 3.45(b). The requirements of the rule, as well as the standards for application of the rule – as set forth in the September 19, 2000 Order of the Administrative Law Judge – are met here because: (i) Merck-Medco will suffer serious competitive harm if the designated documents are disclosed to the public; (ii) the information contained in the designated documents is secret and material, and (iii) the risk of harm to Merck-Medco, as a third party, is not outweighed by the importance of the information to the matter to be decided by the Commission. In addition, because the harm that disclosure could cause to Merck-Medco is not likely to diminish after any fixed period of time, *in camera* treatment of the designated documents in perpetuity is warranted.

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[2] Complaint counsel and counsel for Aventis and Andrx have indicated that they do not plan to oppose this motion.

A. Disclosure of the Designated Documents Will Harm Merck-Medco's Business.

The documents to be disclosed constitute an agreement between Merck-Medco, a prescription drug benefit management company (PBM), and a pharmaceutical company supplier ("Supplier"), as well as amendments thereto. The contract, which is scheduled to remain in effect through the end of 2001 and may be extended thereafter, covers the terms and conditions under which Merck-Medco makes certain of the Supplier's prescription drugs available to its plan sponsor customers.

The terms of the contract with the Supplier is the product of confidential, strategic negotiations. Disclosure of the documents designated for use by Aventis could cause serious competitive harm to Merck-Medco. If made available to other pharmaceutical companies, they could use it to their advantage to extract more favorable rebates and other terms in their negotiations with Merck-Medco. (Shulman Decl. ¶ 7.) In addition, competing PBMs could use this knowledge to negotiate more favorable rebates and other terms with the Supplier and other pharmaceutical companies, affording them an unfair advantage in the competition for plan sponsor customers. In addition, disclosure of the designated contract could harm Merck-Medco's commercial relationship with the Supplier, which may insist on reducing its rebates to Merck-Medco to the level the Supplier is prepared to make available generally. Alternatively, the Supplier may be less will to renew its contract with Merck-Medco. (Id. ¶ 7)

B. The Designated Documents Are Secret.

In recognition of the fact that the contract in question contains commercially sensitive information, the parties included in the contract a provision (¶ 8) that prohibited them from disclosing its terms and conditions to third parties without prior written

consent. The parties have adhered to that provision, and the documents have remained secret. See Shulman Decl. ¶ 5.

C. The Risk Of Harm To Merck-Medco, As A Third Party, Is Not Outweighed By The Importance Of The Information To The Matter To Be Decided By The Commission.

As this court wrote in Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984), *in camera* requests by third parties "deserve special solicitude. As a policy matter, extensions of confidential or in camera treatment in appropriate cases involving third-party bystanders encourages cooperation with future adjudicative discovery requests." Because Merck-Medco is a third party to this proceeding and has fully cooperated with Hoechst's and Andrx' discovery requests, its request for *in camera* treatment should be treated more favorably than the request of a party, which may unfairly seek to shield its own competitive information while receiving the information of the other parties. See H.P. Hood & Sons, Inc., 58 F.T.C. 1184 (1961).

In camera treatment is particularly appropriate where – as here – the designated documents are of only marginal relevance to the issues in this proceeding. General Foods, 95 F.T.C. 352 (1980); see also Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984) (threat of competitive injury to be balanced against the "importance of the information in explaining the rationale of [the Commission's] decisions."). The terms on which non-party Merck-Medco agreed to make available the products of a non-party pharmaceutical company bear little relevance to the central issue in this proceeding – whether respondents unlawfully agreed to delay the introduction by Andrx of a generic version of Hoechst's branded prescription drug, Cardizem. Thus, the public policy that favors "government decisions based on publicly available facts," Bristol-Myers,

90 F.T.C. 455, 457 (1977), is not contradicted by *in camera* treatment of the designated contract here, because it is not likely to be necessary to an understanding of the Commission's decision-making process.

D. Because the Potential Harm From Disclosure Does Not Diminish After Any Ascertainable Period, Perpetual In Camera Treat is Appropriate

The potential harm that disclosure of the designated contract could cause to Merck-Medco will not diminish after any fixed period of time. Although the terms of the designated contract expire on December 31, 2001, the contract may well be extended for several years without substantial modification, as it has in the past. More importantly, even after the contract expires, it would continue to be commercially sensitive because other pharmaceutical companies could continue to use any knowledge of its terms and conditions in their favor when negotiating similar contracts with Merck-Medco. Also, other competing PBMs could make use of the terms and conditions in the designated contract when negotiating with the Supplier (and other pharmaceutical companies) regarding rebates awarded on the Supplier's (and others') products. By doing so, the competing PBM would have an unfair advantage in designing its prescription drug benefits that it offers to plan sponsors. As a result, Merck-Medco could lose plan sponsor customers. In addition, the Supplier may become unwilling to renew its contract with Merck-Medco or may, at very least, reduce the rebates made available to Merck-Medco to the level the Supplier is prepared to make available generally. For these reasons, Merck-Medco requests that the documents designated for use by Aventis be granted *in camera* in perpetuity. (Id. ¶ 8.) In the alternative, Merck-Medco requests that *in camera* treatment be granted for a period of 10 years, ending December 31, 2010.

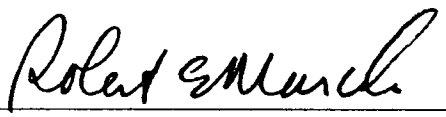
* * * * *

Because the harm that disclosure of the designated documents could cause Merck-Medco, as a third party, outweighs the benefit of making them public, considering their limited relevance to the issues in this case, the designated documents merit *in camera* treatment. Furthermore, the *in camera* status should remain in force in perpetuity because there is no ascertainable time after which disclosure would cause no competitive harm to Merck-Medco.

CONCLUSION

For the foregoing reasons, Merck-Medco's Motion for In Camera Treatment should be granted.

Respectfully submitted,



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-- and --

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Dated: October 6, 2000

Exhibit C

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
HOECHST MARION ROUSSEL, INC., a corporation	)	
CARDERM CAPITAL L.P., a limited partnership,	)	Docket No. 9293
and	)	
ANDRX CORPORATION, a corporation,	)	

DECLARATION OF ISAAC SHULMAN

I, Isaac Shulman, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am an Executive Vice President of Merck-Medco Managed Care, Inc. ("Merck-Medco").

2. Merck-Medco is not a party to the captioned matter.

3. I have reviewed the Merck-Medco documents designated in Aventis' Pharmaceuticals, Inc.'s Notification of Use of Confidential Materials (Merck-Medco 001000-1, 001008-23), each of which was designated by Merck-Medco as Restricted Confidential under the terms of the protective order entered in the captioned matter.

4. The designated documents comprise a contract between Merck-Medco and a major pharmaceutical company (the "Supplier"), as well as amendments thereto. The agreement, which is scheduled to remain in effect through the end of 2001 and may be

extended thereafter, is the product of confidential, strategic negotiations between Merck-Medco and the Supplier.

5. Because of the commercial sensitivity of the terms contained in this contract, it contains a provision prohibiting Merck-Medco and the Supplier from disclosing the terms and conditions of the contract to third parties without prior written consent. I am not aware of any violations of this provision by either Merck-Medco or the Supplier. Accordingly, it is my belief that the documents designated for use by Aventis, as well as the information contained therein, have not been disclosed to any unauthorized person outside of Merck-Medco or the Supplier.

6. I am not aware of any sources outside of Merck-Medco or the Supplier from which the provisions contained in this agreement could be properly learned or obtained by others.

7. Disclosure of the designated documents could cause serious competitive harm to Merck-Medco. If made available to Merck-Medco's other pharmaceutical company suppliers, they could use it to their advantage in negotiating the terms of the arrangements with Merck-Medco, resulting in a decline in Merck-Medco's revenues. In addition, competing PBMs (including new internet-based competitors) could use the terms and conditions in the contract with Supplier as a benchmark or guideline in their own negotiations with Supplier's products. By doing so, competing PBMs could exert significant pressure on the Supplier (and other pharmaceutical companies) to provide rebates similar to those received by Merck-Medco. Not only could this confer on competing PBMs an unfair advantage to attract plan sponsors away from Merck-Medco, but it could also increase the likelihood of the Supplier being unwilling to renew the contract with Merck-Medco upon its expiration, or at very least reducing the rebates

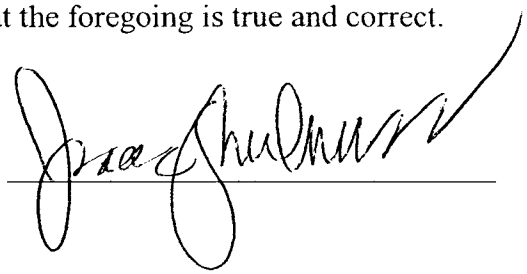
made available to Merck-Medco to the level the Supplier is prepared to make available generally. In addition, disclosure of the designated documents would provide new competitors a "roadmap" of the strategies and approaches utilized by Merck-Medco to negotiate competitive rebates from pharmaceutical companies.

8. To protect against competitive injury, the designated documents should be kept confidential in perpetuity. Although the designated contract is set to expire on December 31, 2001, it may be extended for a period of time thereafter. It has already been extended once without substantial modification. Furthermore, the commercial sensitivity of the designated contract will continue even after the contract expires. In addition to setting forth the types of rebates and other terms and conditions negotiated between Merck-Medco and the Supplier, the designated contract reflects Merck-Medco's strategic approach in negotiating rebate arrangements with pharmaceutical companies generally. Other pharmaceutical companies and competing PBMs (including start up competitors) could, as described above, continue to use any knowledge of its terms and conditions in their favor when negotiating similar contracts with Merck-Medco, or with the Supplier and other pharmaceutical manufacturers. As a result, Merck-Medco could experience a significant erosion of the competitive advantage it maintains in negotiating these types of arrangements, with a resulting decline in rebates from the Supplier and

other pharmaceutical companies. In addition, Merck-Medco may lose the business of particular customers altogether.

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

October 5, 2000



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ORDER

Upon review of the Merck-Medco Managed Care L.L.C.'s Motion for In Camera Treatment, the documents for which in camera treatment is sought ("Confidential Documents"), and the supporting affidavit of Isaac Shulman dated October 5, 2000 ("Shulman Affidavit"),

IT IS ORDERED THAT:

1. Merck-Medco Managed Care L.L.C.'s Motion for In Camera Treatment is granted.

2. The Confidential Documents shall be afforded *in camera* treatment in perpetuity.

D. Michael Chappell
Administrative Law Judge

Date: October __, 2000

CERTIFICATE OF SERVICE

I, Robert E. Mascola, hereby certify that I have caused a copy of Merck-Medco Managed Care L.L.C.'s Motion For In Camera Treatment to be served upon the following persons by U.S. Mail on this 6th day of October, 2000.

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Robert E. Mascola