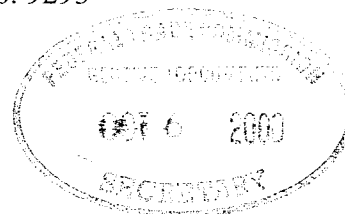


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the matter of )  
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 )  
HOECHST MARION ROUSSEL, INC., )  
a corporation )  
 )  
CARDERM CAPITAL L.P., )  
a limited partnership, )  
 )  
and )  
 )  
ANDRX CORPORATION, )  
a corporation, )  
\_\_\_\_\_ )

Docket No. 9293



MERCK & CO., INC.'S MOTION FOR IN CAMERA TREATMENT

Merck & Co., Inc. ("Merck"), 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 a document produced in this proceeding by Merck in response to subpoenas issued by the Federal Trade Commission at the request of Respondents Hoechst Marion Russell, Inc. ("Hoechst").

On September 27, 2000, Merck received notification from counsel for Aventis of its intention to use four specifically identified confidential documents produced by Merck. As discussed below, *in camera* treatment is warranted here for one of the documents because of the competitive injury that Merck, as a third party, would suffer from its disclosure, particularly given the questionable relevance of the document to this proceeding. This motion is supported by the declaration of Bruce Dore, Executive

developed at Merck, is the culmination of an intensive collective effort by employees in marketing, corporate manufacturing, finance and research and represents Merck's detailed plans for marketing its products for a five-year period. Senior marketing and sales management rely on this business plan to ensure that the programs they implement are consistent with the company's overall strategy for its hypertension and heart failure products. (Dore Decl. ¶¶ 5-6.)

If Merck's competitors had access to the business plan at issue, they would be able to learn about the company's market forecasts, budget projections, actual and anticipated production costs, rebate programs, customer relationships and its overall strategic plan as it relates to hypertension and heart failure medications. In addition, competitors would also have access to the strategic decision-making process inside Merck. They would learn, for example, what external data sources Merck relies upon, how Merck analyzes that data, and what role the analysis plays in Merck's strategic decision-making.

Access to this highly secret and sensitive information would unfairly afford competitors the opportunity to create strategies to counter the effectiveness of Merck's marketing programs, and to bolster the marketing of their own products. Accordingly, disclosure of this document at any time covered by the business plan -- that is, any time prior to December 31, 2003 -- would subject Merck to the risk of substantial competitive harm. (Id. ¶ 7.)

B. The Document At Issue Is Secret

The information in the business plan document at issue is highly sensitive and is kept strictly confidential within Merck. To ensure the confidentiality of this document,

Merck prohibits its disclosure by employees to any unauthorized persons outside the Company. Even within Merck, precautions are taken to ensure that the document remains confidential. Accordingly, the business plan is kept in a central file with restricted access. It is distributed only to a group of executives with marketing responsibility, and is otherwise made available only on a strict need-to-know basis. (Id. ¶ 10.)

C. The Risk Of Harm To 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 is a third party to this proceeding and has fully cooperated with Hoechst’s 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).

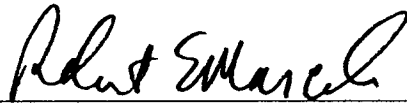
*In camera* treatment is particularly appropriate where – as here – the designated documents are of only marginal relevance to the issues in this proceeding. General Foods, 95 F.T.C. 352 (1980); see also Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984) (threat of competitive injury to be balanced against the “importance of the information in explaining the rationale of [the Commission’s] decisions.”). The strategic plan of a non-party, particular one covering a time period 1999-2003, bears little

relevance to the central issue in this proceeding – whether respondents unlawfully agreed in 1997 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.

CONCLUSION

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

Respectfully submitted,



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Deborah L. Feinstein  
Robert E. Mascola  
ARNOLD & PORTER  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
(202) 942-5000

Dated: October 6, 2000

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF BRUCE DORE

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

1. I am an Executive Director of the Hypertension and Heart Failure Business Group at Merck & Co., Inc. ("Merck").
2. Merck is not a party to the captioned matter.
3. I have reviewed the documents designated in Aventis' Pharmaceuticals, Inc.'s Notification of Use of Confidential Materials, each of which was designated by Merck as Restricted Confidential under the terms of the protective order entered in the captioned matter.
4. One of the documents designated for use by Aventis, as explained further below, contains secret, proprietary information, the disclosure of which would cause Merck serious competitive injury.

A. Merck 001061-1114

5. This 53 page document contains the 1999-2003 Business Plan for Merck's Hypertension and Heart Failure business group. It details the business strategy for six products Merck developed and currently markets: Vasotec, Vaseretic, Prinivil, Prinzide, Cozaar and Hyzaar.

6. Merck marketing executives employ a continuous business planning process that is organized around the specific therapeutic business group and the products within it. The process is highly intensive, time consuming and rigorous. It involves substantive input, analysis and strategic planning not only from marketing staff but also from the corporate manufacturing, finance, sales, and research groups. Once completed, it generates a detailed strategy for guiding the marketing of Merck products for a five-year period, and it is the regular reference for senior marketing and sales management in ensuring that tactical implementation decisions are consistent with the overall market vision. The finalized Plan details the strategic choices recommended for optimizing Merck's opportunities in the marketplace, and it reflects Merck's view of the competitive environment and our strategy for success within it. I have been closely involved in this process as it applies to the Hypertension /Heart Failure group at Merck's US Human Health division throughout the period 1996 to the present.

7. Disclosure of this Business Plan prior to December 31, 2003 would cause serious competitive harm to Merck because it would reveal secret strategic information regarding Merck's internal analysis of the market for prescription drugs used in the treatment of hypertension and heart failure. The Plan contains extensive internally generated market data showing Merck's actual and projected sales and marketing costs

for each of the six products in the group. In addition, it reflects current strategic analysis and tactical plans for implementation in every area of sales and marketing for these products. For example, the Plan outlines Merck's contracting and discounting strategy for implementation in negotiating with managed care organizations. It analyzes the competing products in the market, projects the sales and promotional effort required to effectively compete against them and provides recommended counter measures for dealing with anticipated competitive actions and other changes in the market. It describes the promotional strategy and key product messages to be communicated within the prescribing community. The Plan also includes highly confidential information concerning ongoing clinical development studies.

8. Disclosure of this Hypertension / Heartfailure Business Plan would injure Merck unfairly because it would give competitors concrete information and strategic insight enabling the competitor to make decisions and create strategies on the basis of information that is otherwise not available. Competitors would learn about Merck's strategy for discounting in managed care, giving them the ability to design new pricing and discounting strategies. They would be able to anticipate and counter Merck's marketing of these products possibly before Merck even implements it. Competitors would also learn what external data sources Merck relies upon, how Merck analyzes that data, and what role the analysis plays in our strategic decision-making.

9. The Business Plan also includes 31 pages of detailed financial data not available outside of Merck from any source. (Merck 001083 – 001114). These data show actual and projected sales and expense figures associated with the products in the Hypertension Heart Failure group. The data also includes actual and projected figures

relating to product costs, expenses in clinical development expenses, consumer marketing expenses, promotion costs, expected discounts and customer rebates. All of this data is highly sensitive and is kept strictly confidential within Merck. Its disclosure would provide a competitor with the ability to understand Merck's vision of the future of the market. This would not only provide information to a competitor that reflects an enormous investment by Merck in time and effort and would confer an unfair competitive advantage.




10. Because of the sensitivity of the information contained in this document, Company's employees are absolutely not permitted to share these documents, or the information contained therein, to unauthorized third parties. Even within Merck the information is shared on a strict need-to-know basis. In an effort to ensure that the information in this document is not improperly revealed to any unauthorized person, distribution of all business plans is limited within Merck to a group of senior executives. The documents are maintained in secure files. Accordingly, it is my belief that this document has not been disclosed to any unauthorized person outside of Merck.

11. To my knowledge, there are no non-confidential sources from which the information contained in this document could be properly acquired or duplicated by others.

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

October ~~23~~<sup>6</sup>, 2000

  
\_\_\_\_\_  
Bruce A. Dore  
Executive Director  
Hypertension / Heart Failure  
Merck & Co., Inc.  
West Point PA 19002

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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a corporation, )  
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ORDER

Upon review of the Merck & Co., Inc.'s Motion for In Camera Treatment, the document for which in camera treatment is sought, and the supporting declaration of Bruce Dore dated October 5, 2000 ("Dore Decl."),

IT IS ORDERED THAT:

1. Merck & Co.'s Motion for In Camera Treatment is granted.
2. The document identified as Merck Restrict Confidential 001061-1114 shall be afforded in camera treatment until December 31, 2003.

\_\_\_\_\_  
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 & Co., Inc.'s Motion For In Camera Treatment to be served upon the following persons by U.S. Mail on this 6<sup>th</sup> day of October, 2000.

Daniel Kotchen  
Federal Trade Commission  
Room 3017  
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Washington, DC 20580

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Shook Hardy & Bacon, LLP  
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Louis M. Solomon  
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Kleinfeld, Kaplan and Becker  
1140 18th St., N.W.  
Washington, DC 20036



Robert E. Mascola