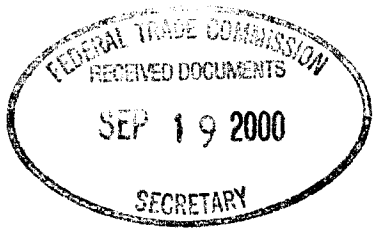

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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.	)	

ORDER ON APPLICATIONS FOR *IN CAMERA* TREATMENT AND MODIFYING THE SCHEDULING ORDER

I.

The Amended Scheduling Order, issued August 17, 2000, required parties and third parties to file, by September 22, 2000, motions for *in camera* treatment of materials marked confidential pursuant to the Protective Order issued in this case. For the reasons set forth below, the September 22, 2000 deadline no longer applies to third parties and is extended to September 29, 2000 for the parties.

On September 8, 2000, the parties provided to opposing parties and third parties their lists of materials, information, or documents that have been designated as confidential which the listing party expected to include in a pleading, motion, exhibit or other paper to be filed with the Secretary of the Commission. These lists are extensive. Given the overbroad nature of these designations, it would serve no useful purpose at this time to require third parties to file applications for *in camera* treatment for all documents that a party has indicated it might utilize in this litigation. Therefore, the Scheduling Order is modified to relieve third parties of this obligation at this time. However, as described below, third parties are still required to file applications for *in camera* treatment after they receive notice from a party that the party actually intends to use a third party's Confidential Discovery Material in a pleading or exhibit thereto.

The parties to this litigation are still required to file applications for *in camera* treatment for their own information that they expect to be included in a pleading or an attachment thereto to

be filed with the Secretary of the Commission. However, the request for an extension of time made by Respondents on September 19, 2000, will be granted. All parties have until September 29, 2000 to file their applications for *in camera* treatment of their own Confidential Discovery Material. Any oppositions to motions for *in camera* treatment shall be filed by October 9, 2000.

II.

Parties are forewarned that they must comply with the Commission's Rules of Practice regarding *in camera* treatment of materials and with the Second Amended Protective Order entered in this case on August 7, 2000. Under the Commission's Rules of Practice, material that has been designated as "confidential" does not become "*in camera*" material until the Administrative Law Judge has granted the material *in camera* status. 16 C.F.R. § 3.45. Paragraph 13 of the Second Amended Protective Order requires that if a party expects it is necessary for the disposition of an issue to attach or include information of an opposing party or a third party that has been designated as Confidential Discovery Material, the party seeking to include such information must contact the Producing Party no later than 14 days in advance of filing such pleading, unless it is impracticable. The Producing Party shall have seven days from the date of notice to make an application for *in camera* treatment.

When the parties to this litigation decide to utilize documents produced by third parties, those third parties have no choice but to apply for *in camera* treatment to protect their own confidential information. Accordingly, parties shall not attach to, nor reveal in, their pleadings, information designated by a third party as Confidential Discovery Material unless it is necessary for the disposition of a material issue before the Court. Abuse of the *in camera* process will not be tolerated. Absent strict adherence to the *in camera* procedures, pleadings should be composed in a manner which sufficiently apprises the Court of the matter at issue and which does not identify any confidential information. Pleadings not in compliance with the procedures set forth in the Protective Order will be denied without prejudice unless the party seeking to introduce Confidential Discovery Material can show that it provided notice to the Producing Party and that the Producing Party failed to file an application for *in camera* treatment.

A blanket *in camera* order for an entire pleading will not be granted. An application for *in camera* treatment shall describe the materials for which *in camera* treatment is sought, provide reasons for granting such materials *in camera* status, specify the time period for which *in camera* treatment is sought for each document, and attach as exhibits to the application the specific documents for which *in camera* treatment is sought. In addition, to sustain the burden of proof, an application must be supported by proper evidence, such as affidavits, to support all factual issues or assertions.

III.

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission's work and to provide guidance to persons affected by its actions. *Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961) ("[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.").

To clarify, all applications for *in camera* treatment will be evaluated by the standards set forth in Rule 3.45(b) and described in this Order. "The party seeking *in camera* treatment must make a clear showing that 'the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.'" *Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984) (*quoting General Foods Corp.*, 95 F.T.C. 352, 355 (1980)); *Hood*, 58 F.T.C. at 1188 (applicant has burden of showing "that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved"). Whenever an applicant seeks *in camera* treatment, it should demonstrate the necessity thereof by "using the most specific information available." *Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977).

In *Bristol-Myers*, the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information 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; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Bristol-Myers*, 90 F.T.C. at 456-57. The likely loss of business advantages is a good example of a "clearly defined, serious injury." *General Foods*, 95 F.T.C. at 355. To warrant *in camera* treatment, an application must include a complete analysis and evidence in support of these factors.

A determination that information should be accorded *in camera* treatment does not end the inquiry. The next step is to determine the duration for which material will be held *in camera*. Again, the applicant has the burden of proof on this issue. In making this determination, the distinction between trade secrets and ordinary business records is important since ordinary business records are granted less protection than trade secrets. *See Hood,* 58 F.T.C. at 1189. "Trade secrets" are primarily limited to secret formulas, processes, and other secret technical information. *Id.*; *General Foods,* 95 F.T.C. at 352. "Ordinary business records" includes names of customers, prices to certain customers, and costs of doing business and profits. *Hood,* 58 F.T.C. at 1189. (Although Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), prohibits the Commission from publishing "trade secrets and names of customers," this provision does not apply to adjudicative proceedings. *Id.* at 1185, 1186 n.1.)

Applicants seeking indefinite *in camera* treatment must demonstrate "'at the outset that the need for confidentiality of the material is not likely to decrease over time.'" *E.I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, *2 (April 25, 1990) (*quoting* 54 Fed. Reg. 49,279 (1989)). Commission Rule 3.45(b)(3) requires:

> [An] expiration date [for an *in camera* order] may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period.

16 C.F.R. § 3.45(b)(3). The applicant has the burden of proof to demonstrate these "unusual circumstances." Accordingly, requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *See DuPont,* 1990 FTC LEXIS 134 at *2. In addition, there is a presumption that *in camera* treatment will not be provided to information that is three or more years old. *See, e.g., General Foods*, 95 F.T.C. at 353; *Crown Cork & Seal*, 71 F.T.C. at 1715.

IV.

Because the Commission's rules do not contemplate the filing of an *in camera* version of a pleading until the Administrative Law Judge has granted *in camera* treatment to confidential materials, when filing applications for *in camera* treatment or responses thereto, the parties and third parties are instructed to compose their pleadings in a manner which does not reveal Confidential Discovery Material. Documents for which *in camera* treatment is sought shall be attached as exhibits. The parties or third parties shall file with the Office of the Secretary and serve on each other only the pleadings, but not the exhibits thereto. The parties or third parties shall serve the Office of Administrative Law Judges the pleadings and the exhibits thereto which the Administrative Law Judge will maintain under seal while making a determination on the *in camera* status of such documents.

V.

It is hereby ORDERED that the Scheduling Order be modified to relieve third parties of their obligation of filing motions for *in camera* treatment by September 22, 2000, until seven days after the dates on which third parties receive notice from a party that the party actually intends to introduce that third party's Confidential Discovery Material in a pleading or attachment thereto to be filed with the Office of the Secretary.

It is further ORDERED that the Scheduling Order be modified to allow parties to file their motions for *in camera* treatment by September 29, 2000 and any oppositions to motions for *in camera* treatment by October 9, 2000.

It is further ORDERED that the parties deliver a copy of this Order immediately to third parties who have produced or will produce documents in this proceeding.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: September 19, 2000