UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

SCHERING –PLOUGH CORPORATION,

UPSHER-SMITH LABORATORIES,

and

AMERICAN HOME PRODUCTS CORPORATION.

Docket No. 9297

NON-PARTY ANDRX CORPORATION'S MEMORANDUM IN OPPOSITION OF RESPONDENT UPSHER-SMITH'S MOTION TO COMPEL COMPLAINT COUNSEL TO PRODUCE PRIOR TESTIMONY OF LAWRENCE ROSENTHAL

Respondent Upsher-Smith Laboratories ("Upsher") seeks to compel Complaint Counsel to produce the highly confidential transcript of Lawrence Rosenthal's deposition in an unrelated action. While Upsher seeks to eviscerate the legitimate confidentiality safeguards protecting that transcript from disclosure (particularly to potential competitors), Upsher wholly fails to meet its burden of demonstrating a basis for doing so. Indeed, Upsher already deposed Mr. Rosenthal in this very action, and Mr. Rosenthal indisputably answered every question put to him that he was able to answer. For the reasons explained below, Respondent's motion should be denied.

ARGUMENT

I. Upsher Already Has Obtained All Relevant Information From Mr. Rosenthal

On November 1, 2001, Upsher, along with respondent Schering Plough Corporation ("Schering") and Complaint Counsel, deposed Lawrence Rosenthal, a sales/marketing executive of non-party Andrx Corporation ("Andrx"). At that deposition, Upsher had a full

and fair opportunity to examine Mr. Rosenthal. Indeed, the transcript of that deposition shows that Mr. Curran, counsel for Upsher, examined Mr. Rosenthal for approximately three and one half hours (nearly three-quarters of the deposition). The transcript also shows that Mr. Rosenthal answered every question he was able to. Neither respondent has made any claims that Mr. Rosenthal failed to provide full and accurate testimony, nor has any motion been made to compel further answers from Mr. Rosenthal. During his examination of Mr. Rosenthal, Mr. Curran did not even ask about Mr. Rosenthal's testimony in any other matter – including the unrelated matter at issue here.

II. Valid Confidentiality Safeguards Protect Mr. Rosenthal's Transcript In The Unrelated Action From Disclosure

Despite having availed itself of an uninhibited opportunity to depose Mr. Rosenthal in this matter, Upsher now asks this Court to compel production of the transcript of Mr. Rosenthal's deposition testimony in *In re Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corp.*, Dkt. No. 9293 ("*Hoechst/Andrx*"), an unrelated proceeding. The deposition transcript Upsher seeks is highly confidential and governed by a strict confidentiality order. *See* Second Amended Protective Order Governing Discovery Material in *Hoechst/Andrx*, dated August 7, 2000, annexed hereto as Appendix A. The protective order issued by this Court in *Hoechst/Andrx*, which covers deposition testimony taken in that action, clearly states that covered material "shall be used solely by the Parties for the purposes of this Matter, and shall not be used for any other purpose." *Hoechst/Andrx* Protective Order at 5.

Like other witnesses in confidential FTC matters, Mr. Rosenthal and Andrx provided testimony in *Hoechst/Andrx* in reliance on express assurances of confidentiality – including those embodied in this Court's confidentiality order. The integrity of the FTC process will

be frustrated and undermined unless its confidentiality protections are enforced. If this Court's protective order is to be given effect, then third parties must not be allowed to compel protected testimony without, at the very least, a credible demonstration that a substantial competing interest exists. Upsher has not made -- and cannot make -- any such showing.

Upsher cannot now claim that it will be prejudiced if it cannot review Mr. Rosenthal's testimony in that unrelated action. However, Andrx -- and the other parties to *Hoechst/Andrx* -- will be substantially prejudiced if the protective order in *Hoechst/Andrx* is weakened. As Complaint Counsel recognize on this motion, the confidentiality protection afforded to the *Hoechst/Andrx* matter

> is intended to protect the interests of a third party by providing it with the opportunity to object to the production of its confidential information. This safeguard may be particularly important here. Mr. Rosenthal is a senior executive at Andrx. Andrx and Upsher are competitors in the generic drug business and soon might compete directly in the generic potassium chloride 20 mEq market.

Complaint Counsel's Response at 2-3.

III. There Is Absolutely No Basis For Production Of Unrelated Testimony In This Action

Upsher predicates its request for Mr. Rosenthal's *Hoechst/Andrx* deposition testimony on the clearly erroneous argument that the testimony is covered by the Jencks Act, 18 U.S.C. § 3500. However, this is not a situation in which the Jencks Act applies. In any event, the situation here is readily distinguishable from circumstances where a respondent or defendant does not have an opportunity to examine or interview a government witness before the witness testifies at trial. To the contrary, Upsher both had a full opportunity to do so and availed itself of that opportunity. Upsher now seeks a "fishing expedition" into unrelated

areas, which is particularly problematic given its commercial posture vis-à-vis non-party Andrx.[1]

Upsher contends that, since "Mr. Rosenthal testified that he had not spoken with anyone at the FTC since his *Hoechst/Andrx* deposition," it somehow follows that "Complaint Counsel's expectations as to Mr. Rosenthal's testimony are based entirely on his *Hoechst/Andrx* deposition." Respondent's Motion at 2. There is absolutely no evidence to support this wild speculation. To the contrary, Complaint Counsel have informed Andrx that they have neither reviewed nor relied upon Mr. Rosenthal's *Hoechst/Andrx* deposition in this action. *See* Complaint Counsel's Response at 2 ("complaint counsel did not and have not reviewed or relied upon the deposition in prosecuting this case.")

Upsher has not made even the most minimal showing that the prior testimony it seeks is relevant to the instant proceeding. Indeed, at the November 1 deposition, Schering's counsel specifically asked Mr. Rosenthal about his prior testimony in the *Hoechst/Andrx* proceeding, and Mr. Rosenthal's answers clearly indicated that it did not touch upon matters relevant to this proceeding:

> Q. Did you give any testimony – were you asked any questions concerning the generic for K-Dur that Andrx is working on?
>
> A. I don't believe so.
>
> Q. Were you asked any questions concerning Upsher Smith during that deposition?
>
> A. I don't believe so.

[1] Contrary to Upsher's assertion, the Jencks Act does not compel the production of Mr. Rosenthal's *Hoechst/Andrx* deposition. As the Commission has put it, "our reliance on the Jencks Act 'principle' rather than the Act itself . . . is not an invitation to ignore the other salutary limitations incorporated in the Act to protect the principle's integrity." *In re General Motors Corp.*, 99 F.T.C. 464, 1982 F.T.C. Lexis 39, 319 (1982). The Jencks Act specifically limits disclosure under its aegis to those statements "which relate[] to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Rosenthal Depo. at 146. Upsher has not suggested any valid reason to believe that Mr. Rosenthal's testimony in *Hoechst/Andrx* is at all relevant here.

Because there is nothing before this Court to suggest that Mr. Rosenthal's *Hoechst/Andrx* deposition contains any testimony related to the subject matter as to which Mr. Rosenthal is expected to testify – much less what he actually does testify to – and particularly because both Andrx and the FTC have a strong interest in maintaining the integrity of the Protective Order in *Hoechst/Andrx*, Upsher's motion to compel Mr. Rosenthal's *Hoechst/Andrx* deposition testimony should be denied in its entirety. At the very least, this Court should follow the procedure set forth in 18 U.S.C. § 3500(c), and order that the *Hoechst/Andrx* transcript be delivered for *in camera* inspection. "Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness." *Id.; see In re L.G. Balfour Co.*, 69 F.T.C. 1118 (1966). Thus, Upsher at most is entitled only to select portions of Mr. Rosenthal's transcript pertinent to this case (and we believe there are none). Should the Court ultimately order the production of any portion of Mr. Rosenthal's *Hoechst/Andrx* transcript, all such material should be treated as highly confidential and therefore subject to *in camera* protection under the protective order governing disclosure in this action.

CONCLUSION

For the foregoing reasons, Andrx respectfully requests that this Court deny Upsher-Smith's motion to compel Complaint Counsel to produce prior testimony of Lawrence Rosenthal. However, in the event the Court does grant Upsher-Smith's motion, Andrx respectfully requests that any portion of Mr. Rosenthal's prior testimony that is disclosed be treated as highly confidential and granted *in camera* protection.

Dated: New York, New York
January 14, 2002

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By: Colin A Underwood /Bmd

Colin A. Underwood
Michael B. Smith
45 Rockefeller Plaza
New York, New York 10111
(212) 956-3700

Counsel for Non-Party Andrx Corporation

CERTIFICATE OF SERVICE

I, Peter M. Todaro, hereby certify that on January 14, 2002 I caused a true and correct copy of the foregoing Non-Party Andrx Corporation's Memorandum In Opposition Of Respondent Upsher-Smith's Motion To Compel Complaint Counsel To Produce Prior Testimony Of Lawrence Rosenthal (including accompanying Appendix) to be served by hand delivery upon the following:

Secretary
Federal Trade Commission
Room 172
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(One with original signature and two copies)

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W
Washington, D.C. 20580
(Two copies)

David Pender, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., N.W
Washington, D.C. 20580

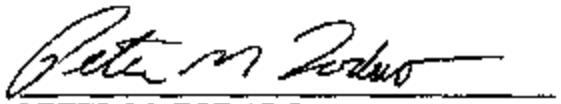
Karen Bokat, Esq.
Federal Trade Commission
600 Pennsylvania Ave., N.W
Washington, D.C. 20580
Complaint Counsel

Paul F. Stone, Esq.
White & Case
601 Thirteenth St., N.W.
Suite 600 South
Washington, DC 20005
Counsel for Upsher-Smith Laboratories, Inc.

Diane E. Bieri, Esq.
Howrey & Simon
1299 Pennsylvania Ave., N.W.
Washington, DC 20004-2402
Counsel for Schering-Plough Corp.

I further certify that on January 14, 2002, I sent a true and correct electronic copy (in Microsoft Word 97 format) of the paper original of the foregoing Non-Party Andrx Corporation's Memorandum In Opposition Of Respondent Upsher-Smith's Motion To Compel Complaint Counsel To Produce Prior Testimony Of Lawrence Rosenthal (including accompanying Appendix in Portable Document Format) by e-mail to secretary@ftc.gov. A paper copy of the foregoing with an original signature has been filed by hand delivery on the same day with the Secretary of the Federal Trade Commission.

Dated: January 14, 2002



PETER M. TODARO

Appendix A

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

SECOND AMENDED PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter (the "Matter") against improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation,* Docket Number 9293, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting or purporting to act on its behalf,

excluding persons retained as consultants or experts for purposes of this Matter.

3. "HMR" means Aventis Pharmaceuticals Inc., formerly known as Hoechst Marion Roussel, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Parsippany, New Jersey.

4. "Carderm" means Carderm Capital L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of the Delaware, with its office and principal place of business located at Hamilton, Bermuda.

5. "Andrx" means Andrx Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at Fort Lauderdale, Florida.

6. "Party" means either the FTC, HMR, Carderm or Andrx.

7. "Respondents" means HMR, Carderm and Andrx.

8. "Outside Counsel" means the law firm(s) that is/are counsel of record for Respondents in this Matter and its/their associated attorneys; persons regularly employed by such law firm(s) (including legal assistants, clerical staff, and information management personnel) and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondents. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

9. "Producing Party" means a Party or Third Party that produced or intends to

produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

10. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter -- including without limitation Biovail Corporation ("Biovail") and Faulding Inc. ("Faulding") -- and their employees, directors, officers, attorneys and agents.

11. "Expert/Consultant" means experts or other persons who are retained to assist complaint counsel or Respondents' counsel in preparation for trial or to give testimony at trial.

12. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, envelope, telegraph meeting minute, memorandum statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation, including all drafts of all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono

record, tape and other data compilations from which information can be obtained, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

13. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

14. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); submitted to the FTC pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, or formal interpretations or rules promulgated thereunder, 16 C.F.R. Part 800; or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondent or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to

confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. This paragraph concerns the designation of material as "Confidential" and "Restricted Confidential, Attorney Eyes Only."

(a) Designation of Documents as CONFIDENTIAL - FTC Docket No. 9293.

Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "CONFIDENTIAL - FTC Docket No. 9293" (or other similar notation containing a reference to this Matter) to the first page of a document containing such Confidential Discovery Material, or, by Parties by instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as "Confidential." Such designations shall be made within fourteen (14) days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the

designations that the document constitutes or contains "Confidential Discovery Material."

(b) Designation of Documents as "RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY"

In order to permit Producing Parties to provide additional protection for a limited number of documents which contain highly sensitive commercial information, Producing Parties may designate documents as "Restricted Confidential, Attorney Eyes Only" by placing on or affixing such legend on each page of the document. It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, business plans, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and personnel information, and that this particularly restrictive designation is to be utilized for a limited number of documents. Documents designated Restricted Confidential, Attorney Eyes Only shall not be disclosed to the individuals designated under paragraph 5, hereof, and shall not be disclosed to Experts/Consultants (paragraph 4(c), hereof) and to witnesses or deponents at trial or deposition (paragraph 4(d) hereof), in each instance who are officers, directors, or employees of pharmaceutical companies except in accordance with subsection (c) of this paragraph 2. In all other respects, Restricted Confidential, Attorney Eyes Only material shall be treated as Confidential Discovery Material and all references in this Protective Order and in the exhibit hereto to Confidential Discovery Material shall include documents designated Restricted Confidential, Attorney Eyes Only.

(c) Disclosure to Experts/Consultants, Deponents or Witnesses in Each Instance Who Are Officers, Directors, or Employees of Pharmaceutical Companies

If any Party desires to disclose Restricted Confidential, Attorney Eyes Only material to any Expert/Consultant, deponent or witness in each instance who is an officer, director, or employee of a pharmaceutical company ("the individual"), the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific individual to whom the Restricted Confidential, Attorney Eyes Only material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the proposed individual. The Producing Party may object to the disclosure of the Restricted Confidential, Attorney Eyes Only material within five (5) business days of receiving notice of an intent to disclose the Restricted Confidential, Attorney Eyes Only material to an individual by providing the disclosing Party with a written statement of the reasons for the objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five (5) business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the Expert/Consultant within five (5) business days,

the disclosing Party may disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual.

(d) Disputes Concerning Designation or Disclosure of Restricted Confidential, Attorney Eyes Only Material

Disputes concerning the designation or disclosure of Restricted Confidential, Attorney Eyes Only material shall be resolved in accordance with the provisions of paragraph 7.

(e) No Presumption or Inference

No presumption or other inference shall be drawn that material designated Restricted Confidential, Attorney Eyes Only is entitled to the protections of this paragraph.

(f) Due Process Savings Clause

Nothing herein shall be used to argue that a Party's right to attend the trial of, or other proceedings in, this matter is affected in any way by the designation of material as Restricted Confidential, Attorney Eyes Only.

3. To the extent any such material is made part of this proceeding, all documents heretofore obtained by compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, which were obtained during the pre-complaint stage of this Matter shall be treated as Confidential Discovery Material. Material previously produced by Respondents or a Third Party, and designated as "Confidential," regardless of whether such materials have been marked in accordance with paragraph 2 above, shall be treated as Confidential Discovery Material as provided herein. The material referred to in this paragraph shall only be available for use in this proceeding once an independent basis has

been demonstrated for such use.

4. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except, in accordance with paragraphs 5 and 6, to:

(a) complaint counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel;

(c) Experts/Consultants;

(d) witnesses or deponents at trial or deposition;

(e) the Administrative Law Judge and personnel assisting him;

(f) court reporters and deposition transcript reporters;

(g) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter; and

(h) any author or recipient of Confidential Discovery Material (as indicated on the face of the document, record or material), and any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received.

5. In addition to the above-designated persons, certain named designated individuals and in-house counsel not to exceed two attorneys per corporate party who do not have day to day business responsibilities shall be provided with access on the condition that each such in-house counsel or designated executive signs a declaration in the form attached hereto as Exhibit "A," which is incorporated herein by reference. For Respondent Carderm, the designated individual is Stephan Petri. For Respondent HMR, the designated individual is Edward Stratemeier, Vice President and General Counsel. For Respondent Andrx, the designated

individual is Scott Lodin, Vice President and General Counsel.

6. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to complaint counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) to not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

7. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Disclosure to Experts

If any Party desires to disclose Confidential Discovery Material to any expert who may testify, who is not an FTC employee, and who may have interests in the pharmaceutical industry beyond their employment as an expert in this Matter, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific expert who may testify to whom the Confidential Discovery Material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional

address and/or affiliation of the proposed expert who may testify, and a current curriculum vitae of such expert identifying all other present and prior employers and/or firms in the pharmaceutical industry for which or on behalf of which the identified expert has been employed or done consulting work in the preceding four (4) years. The Producing Party may object to the disclosure of the Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose the Confidential Discovery Material to the identified expert by providing the disclosing Party with a written statement of the reasons for the objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Confidential Discovery Material to the identified expert, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified expert. If at the end of five (5) business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not object to the disclosure of Confidential Discovery Material to the identified expert within five (5) business days, the disclosing Party may disclose the Confidential Discovery Material to the identified expert.

(b) Challenges to Confidentiality Designations

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers,

deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation within five (5) business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party preserving its rights and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five (5) business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not preserve its rights within five (5) business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Party of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, and excerpts from published books and public documents filed with the Securities and Exchange Commission may be used by any Party without reference to the procedures of this subparagraph.

(c) Resolution of Disclosure or Confidentiality Disputes

If negotiations under subparagraphs 7(a)-(b) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Party, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have failed to resolve outstanding issues. The Producing Party and any other Party shall have five (5) business days to respond to the application, which time may be extended by the Administrative Law Judge. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the propriety of a requested disclosure or change in designation.

8. Confidential Discovery Material shall not be disclosed to any person described in subparagraphs 4(b), 4(c) and 4(d) and paragraph 5 of this Protective Order until such person has executed and transmitted to Respondent's counsel or complaint counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondents' counsel and complaint counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process

by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL - FTC Docket No. 9293."

9. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraphs 4 and 5 above. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as Confidential from the time the Producing Party advises complaint counsel and Respondents' counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

10. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five (5) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

11. If anyone receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena

recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Producing Party at least five (5) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission.

12. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice ("Rule"), 16 C.F.R. § 3.45.

13. *In camera* provisions

(a) The Commission's Rules of Practice require that material may not be withheld from the public record unless it falls within the scope of an order by the Administrative Law Judge that such material, or portions thereof, be placed *in camera*. 16 C.F.R. § 3.45(b) and (d). To comply with this rule, the Party seeking to introduce into evidence by filing a pleading, an exhibit thereto, or otherwise placing on the record Confidential Discovery Material ("filing Party") must first obtain an order by the Administrative Law Judge that such information has been granted *in camera* status.

An application for *in camera* treatment must: (1) specifically identify or describe the materials for which *in camera* treatment is sought; (2) provide reasons for granting such

materials *in camera* status; (3) specify the time period for which *in camera* treatment is sought for each document; and (4) attach as exhibits to the application the documents containing the specific information for which *in camera* treatment is sought.

A blanket *in camera* order for an entire pleading is contrary to public policy and will not be granted. The parties must specifically identify the portions of a pleading, document, deposition transcript, or exhibit for which *in camera* treatment is sought. Entire documents or exhibits will rarely, if ever, be eligible for *in camera* treatment. The parties are reminded that Rule 3.45 places the burden of showing that public disclosure will likely result in a clearly defined, serious injury upon the person requesting *in camera* treatment. In addition, to sustain the burden of proof, an application must be supported by proper evidence, such as affidavits, to support all factual issues. See 16 C.F.R. § 3.43.

(b) The Scheduling Order requires the parties to file motions to request *in camera* treatment of materials marked confidential pursuant to a protective order no later than September 1, 2000.

A Party that has produced materials or information that it reasonably expects to include in a pleading, motion, exhibit or other paper to be filed with the Secretary ("pleading") and that it believes meets the standards for *in camera* treatment must file a motion with the Administrative Law Judge to request *in camera* treatment of such materials no later than September 1, 2000.

A Party that has received materials or information from another Party or a Third Party that it reasonably expects to include in a pleading must provide the opposing Party or Third Party with a list of such materials no later than August 18, 2000. A Third Party shall be provided

with a copy of this Order along with such list. This list will not be filed with the Secretary's Office, but must be served on the Administrative Law Judge.

(c) If any Party seeks to file a pleading or attachment thereto which includes its own Confidential Discovery Material which has not previously been granted *in camera* status, and the Party seeks to prevent its own materials or information from being placed on the public record, at least 10 days prior to filing such pleading, -- unless it is impracticable (e.g., when filing a response or reply brief) in which case at least 5 days prior to filing such pleading -- the Party shall make an application to the Administrative Law Judge to request that such materials or information be treated as *in camera* information.

If any Party seeks to file a pleading or attachment thereto which includes another Party's or Third Party's Confidential Discovery Material which has not previously been granted *in camera* status, the filing Party must notify the Producing Party at least 14 days prior to such proposed filing -- unless it is impracticable (e.g., when filing a response or reply brief). If 14 days advance notice cannot be provided, the Producing Party must be notified as soon as possible and prior to the time of introduction of such documents or information. The Producing Party shall have 7 days from the date of notice to make an application to the Administrative Law Judge to request that such materials be treated as *in camera* information. The parties shall not file pleadings or attachments thereto that contain another Party's or Third Party's Confidential Discovery Material unless the Party seeking to introduce such material has first obtained an *in camera* order or certifies that the Producing Party has been given notice prior to the introduction of such material, and, in the case of Third Parties, has also been given a copy of this Order.

(d) The parties are cautioned that compliance with this Order will require them

to submit applications for *in camera* treatment in advance of filing motions which include confidential materials and that deadlines for filing motions attaching confidential materials will not be extended for failure to file applications for *in camera* treatment in a timely manner. The parties are further cautioned that it is rarely necessary to attach confidential information in support of pleadings. Absent strict adherence to these procedures, pleadings should be composed in a manner which sufficiently apprises the Court of the matter at issue and which does not identify or disclose any confidential information. Failure to comply with these procedures may result in pleadings or portions thereof being stricken from the record.

(e) Should any party seek to introduce into evidence at the trial of this case or any pretrial hearing Confidential Discovery Material which has not previously been granted *in camera* status, the evidence will not be disclosed or admitted into evidence until the Producing Party has had the opportunity to seek *in camera* treatment. The party seeking to introduce such evidence must demonstrate good cause for not previously obtaining an *in camera* order. If the Producing Party is a Third Party, the Party seeking to introduce or disclose such evidence must provide notice to the Third Party within 3 days of the date on which the evidence was sought to be introduced or disclosed. The Producing Third Party shall have 7 days from the date of notice to make an application to the Administrative Law Judge to request that such materials be treated as *in camera* information.

14. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50,

57b-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)-(e).[1] Any Party or Producing Party may move at any time for, treatment *in camera* of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter.

15. At the conclusion of this Matter, Respondent's counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material which have not been made part of the public record in this Matter. Complaint counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

16. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

17. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

18. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not automatically be deemed to be a waiver of

---

[1] The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery Material within twenty (20) days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control – including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided – unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the Discovery Material, or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking return of the Discovery Material may thereafter move for an order compelling the return of the Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

19. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: August 7, 2000

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

EXHIBIT A

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

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by Administrative Law Judge D. Michael Chappell on April 28, 2000, in connection with the above captioned matter. I understand the restrictions on my use of any Confidential Discovery Material (as this term is used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidential Discovery Material include:

   a. that I will use such Confidential Discovery Material only for the purposes of preparing for this proceedings, and hearing(s) and any appeal of this proceeding and for no other purpose;

   b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

c. that upon the termination of my participation in this proceeding I will promptly return all Confidential Discovery Material, and all notes, memoranda, or other papers containing Confidential Discovery Material, to complaint counsel or respondent's counsel, as appropriate.

[4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation:

a. to maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

b. to return such Confidential Discovery Material to complaint counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention; and

c. to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.]

5. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature