

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

Dkt. No. 9293

**HOECHST MARION ROUSSEL, INC.,
a corporation,**

**CARDERM CAPITAL L.P.,
a limited partnership,**

and

**ANDRX CORPORATION,
a corporation**

**TO: The Honorable D. Michael Chappell
Administrative Law Judge**

**MOTION OF BAYER CORPORATION FOR TREATMENT OF
CERTAIN NON-PUBLIC COMMERCIAL INFORMATION
AS CONFIDENTIAL DISCOVERY MATERIAL UNDER
THE PROTECTIVE ORDER OF APRIL 28, 2000**

Counsel to Bayer Corporation:
Jones, Day, Reavis & Pogue
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113
Phillip A. Proger (D.C. Bar No. 929596)
Brian K. Grube (D.C. Bar No. 464452)

To: The Honorable D. Michael Chappell, Administrative Law Judge

Bayer Corporation (“Bayer”) respectfully moves, under Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46, and Rule 4.10(g) of the Commission Rules of Practice, 16 C.F.R. § 4.10(g), for the treatment of certain non-public, commercial information, provided in response to a Civil Investigative Demand and Subpoena Duces Tecum issued by the Federal Trade Commission (“Commission” or “FTC”) to Bayer on December 14, 1998 (File No. 981-3608), as Confidential Discovery Material, as defined in Definition 14 of the Protective Order Governing Discovery Material of April 28, 2000 (“Protective Order”).

I. Factual Background

On December 14, 1998, the Commission issued to Bayer a Civil Investigative Demand and Subpoena Duces Tecum (“CID”) in connection with its pre-complaint investigation of Respondents for alleged violations of Section 5 of the FTC Act. 15 U.S.C. § 45. On January 29, 1999, Bayer timely responded to the CID and produced numerous pages of documentary materials (the “Bayer Discovery Material”), which included, *inter alia*, confidential, proprietary commercial information. Upon production Bayer requested confidential treatment of the Bayer Discovery Material under 16 C.F.R. § 4.10(a)(2), and clearly marked as confidential every page of each document.

Pursuant to Paragraph 10 of the Terms and Conditions of the Protective Order, the Commission notified counsel for Bayer by facsimile on May 1, 2000 of its intention to produce the Bayer Discovery Material to Respondents in the above-referenced Matter. (*See* Ltr. from Robin L. Moore to Phillip A. Proger of 5/1/00 (attached as Exhibit 1).) On May 3, 2000, the Commission filed a motion in this Court

seeking to amend Paragraph 3 of the Terms and Conditions of the Protective Order, so as to include all documents obtained during the pre-complaint stage of this Matter by compulsory process or voluntarily from any Third Party, as defined in Definition 10 of the Protective Order, regardless of whether designated confidential by the Third-Party. (*See* Complaint Counsel’s Motion to Amend Protective Order Governing Discovery of Material (filed May 3, 2000) (“Complaint Counsel’s Motion”).) On information and belief Respondent Andrx Corporation filed an opposition motion on May 4, 2000. (*See* Respondent Andrx Corporation’s Opposition to Complaint Counsel’s Motion to Amend Protective Order (dated May 4, 2000) (“Andrx Motion”).)

Because of questions surrounding the applicability of the Protective Order to Third-Party Discovery Material, Bayer now moves that this Court treat certain documents included in the Bayer Discovery Material as Confidential Discovery Material under the terms of Paragraph 3 of the Terms and Conditions of the Protective Order, thereby safeguarding highly-sensitive Bayer competitive information and preventing the substantial commercial injury that Bayer could suffer in the event the relevant material was disclosed.

II. The Bayer Discovery Material Warrants Treatment As Confidential Discovery Material Under The Protective Order.

The Bayer Discovery Material meets the definition of Confidential Discovery Material provided in Definition 14 of the Protective Order. Definition 14, in effect, correctly limits discovery only for those documents that satisfy the standard under Section 6(f) and Rule 4.10(a)(2).¹ The Bayer Discovery Material contains non-public

¹ Definition 14 also incorporates the standard provided in Federal Rule of Civil Procedure 26(c)(7) and the precedents thereunder. Protective Order ¶ 14. Federal Rule of Civil Procedure 26(c)(7) similarly provides as a basis for a protective order “a trade secret or other confidential research, development, or

materials under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and Rule 4.10(a)(2) of the Commission Rules of Practice, 16 C.F.R. § 4.10(a)(2). In response to the CID, Bayer produced, *inter alia*, confidential business plans and strategies, marketing plans, pricing data, and other financial data, all of which manifest a “proprietary or highly competitive interest.” 16 C.F.R. § 4.10(a)(2). The Bayer Discovery Material thus meets those standards. That the Bayer Discovery Material warrants protection is further demonstrated by the identity between the Bayer Discovery Material and the examples of “non-public commercial information” subject to the Protective Order that Definition 14 provides.

Moreover, Bayer seeks protection from discovery under the terms of the Protective Order only for those documents that meet the standard. Bayer has not sought “blanket” or “umbrella” protection for all of the materials produced in response to the CID. Rather, Bayer limited its request for protection to those documents, the disclosure of which could inflict on Bayer substantial competitive injury.

The inclusion of Third-Parties under the Protective Order preserves reasonable expectations and does not in any way impede the timely progress of this litigation. The Bayer Discovery Material, for which Bayer is seeking protection, is indistinguishable from the Parties’ Discovery Material now subject to Paragraph 3 of the Terms and Conditions of the Protective Order. Much to their credit, Complaint Counsel has candidly admitted in their motion on this issue that the omission of Third-Party documents from Paragraph 3 resulted from sheer inadvertence. (Complaint Counsel’s Motion at 2.) There is otherwise no reasonable explanation why confidential materials obtained from Respondents through compulsory process in the pre-complaint stage are

commercial information.” Fed. R. Civ. P. 26(c)(7). The Bayer Discovery Material, of course, may be characterized as including confidential commercial information.

any more (or less) competitively sensitive or deserving of protection from unnecessary disclosure than those of Third Parties. Likewise it is impossible to reconcile Paragraph 3 of the Protective Order, as it now stands, with the expectation of confidentiality arising under the Commission Rules of Practice. *See, e.g.*, 16 C.F.R. §§ 4.10(d) and (g). Accordingly, the protection of Third-Party documents provided pursuant to compulsory process does little to upset any reasonable expectations of Respondents.

Respondent Andrx Corporation's arguments that the inclusion of Third-Party documents would needlessly delay this litigation are not only beside the point, but also simply untrue. However long it has taken Complaint Counsel and Respondents to negotiate the terms of the Protective Order is immaterial to the protection due Third-Parties' confidential commercial information under Section 6(f) and Rule 4.10(a)(2). Rather than trying to have it both ways, (*see* Andrx Motion at 2), Complaint Counsel seeks only to preserve the reasonable safeguards against unnecessary and unjustified disclosure of confidential materials contemplated under the law. For the same reason, the inclusion of Third-Parties under Paragraph 3 of the Protective Order does not prejudice Respondents; indeed, such protection prevents Respondents from receiving an unjustified windfall at Bayer's expense.²

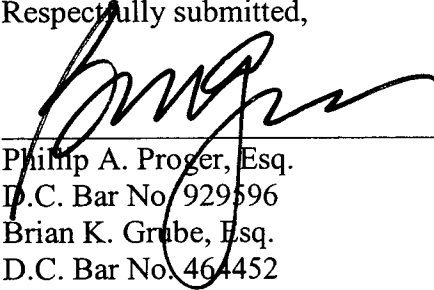
Finally, as suggested above, Bayer has timely provided the Commission with instruction as to which documents included in the Bayer Discovery Material warrant protection under the Protective Order. (*See* Ltr. from Brian K. Grube to Markus Meier of 5/8/00 (attached as Exhibit 2). As far as Bayer is concerned, the selected documents should be prepared for distribution by this afternoon, subject to their being marked

confidential. Thus, there is no basis for Andrx's arguments that the application to Third-Parties of the very same protections for which Andrx bargained for itself will impede timely disclosure of relevant discovery material either in this instance or in the future.

III. Conclusion

The Bayer Discovery Material clearly meets the standards for protection in the Commission Rules of Practice and under the FTC Act. Bayer has not sought unduly broad protection for non-sensitive documents, but has limited its request to those documents, the disclosure of which could substantially injure Bayer. Accordingly, this Court should grant the designated Bayer Discovery Material protection under the Protective Order.

Respectfully submitted,



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ATTORNEYS FOR
BAYER CORPORATION

² This is further demonstrated by the failure of Respondents Hoechst Marion Roussel and Cardem to join in Andrx's opposition to this common-sense amendment to the terms of Paragraph 3 of the Terms and Conditions of the Protective Order.

CERTIFICATE OF SERVICE

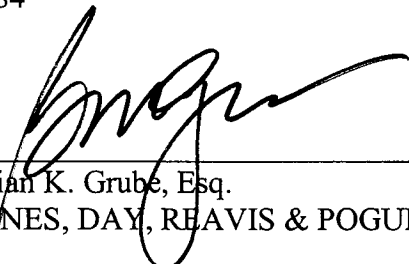
I hereby certify that today I caused a copy of the attached document, entitled MOTION OF BAYER CORPORATION FOR TREATMENT OF CERTAIN NON-PUBLIC COMMERCIAL INFORMATION AS CONFIDENTIAL DISCOVERY MATERIAL UNDER THE PROTECTIVE ORDER OF APRIL 28, 2000 to be delivered by Federal Express and facsimile to:

James M. Spears, Esq.
Shook, Hardy & Bacon L.L.P.
600 Fourteenth Street, N.W.
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Facsimile: (202) 783-4211

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601 Pennsylvania Ave., N.W.
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Brian K. Grube, Esq.
JONES, DAY, REAVIS & POGUE

DATE: May 8, 2000





UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

May 1, 2000

VIA FACSIMILE ((202) 626-1700)

Phillip A. Proger, Esq.
Jones, Day, Reavis, & Pogue
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm
Capital L.P., and Andrx Corporation. FTC Docket No. 9392

Dear Mr. Proger:

As you know, on March 16, 2000, the Federal Trade Commission issued an administrative complaint against Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation. We are contacting you now, because the respondents in this matter have served document requests to us, and we intend to produce the documents you provided on behalf of Bayer Corporation in our pre-complaint investigation. Of course, these documents will be governed by the protective order entered by Administrative Law Judge Chappell on April 28, 2000, which I have attached.

We believe this protective order provides adequate protection for the confidential documents that Bayer provided. It not only limits the scope of those individuals within the respondents' companies who have access to the documents but also provides a procedure in Paragraph 13 for Bayer to seek *in camera* treatment of documents. However, should you have concerns about the protection provided by the Order, you may petition Judge Chappell and address your concerns. Under §4.10(g) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(g), Bayer has "an opportunity to seek an appropriate protective or *in camera* order." Pursuant to Paragraph 10 of the Order, we intend to produce documents to the respondents 5 days from the date you receive this notice.

Should you have any questions about this, please do not hesitate to contact me at (202) 326-3133. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Robin L. Moore".

Robin L. Moore
Attorney

Enclosure



JONES, DAY, REAVIS & POGUE

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May 8, 2000

Confidential Treatment Requested

Markus Meier, Esq.
Health Care Services & Products
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Suite 3017
Washington, D.C. 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation (FTC Dkt. No. 9293)

Dear Markus:

This letter responds to the notification of May 1, 2000 provided to Bayer Corporation ("Bayer") pursuant to Definition 10 of the Protective Order Governing Discovery Material ("Protective Order") issued April 28, 2000 in the above-referenced matter. Based on the notice, it is our understanding that the Federal Trade Commission ("Commission") intends to produce to Respondents the confidential material ("Bayer Discovery Material") that Bayer provided the Commission in response to a Civil Investigative Demand and Subpoena Duces Tecum (File No. 981-0368) issued on December 14, 1998 to Bayer in connection with the Commission's pre-complaint investigation of this matter.

Certain documents in the Bayer Discovery Material contain highly-sensitive, non-public commercial information, including, *inter alia*, business plans and strategies, pricing data, and other financial information, the disclosure of which could substantially impair Bayer's ability to compete. As such, those documents plainly fall within the definition of Confidential Discovery Material in Definition 14 of the Protective Order, and under the terms of Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Rule 4.10(a)(2) of the Commission Rules of Practice, 16 C.F.R. § 4.10(a)(2).

Bayer hereby instructs you to designate certain documents in the Bayer Discovery Material as Confidential Discovery Material in accordance with Paragraph 2 of the Terms and Conditions of the Protective Order before producing such material to Respondents. Please find

Markus Meier, Esq.
May 8, 2000
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JONES, DAY, REAVIS & POGUE

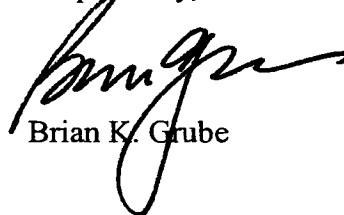
below a list of the documents, indicated by their respective Bates ranges, which are to be designated as Confidential Discovery Material:

Bayer 00019-00049
Bayer 00050-00081
Bayer 00082-00151
Bayer 00152-00187
Bayer 00188-00209
Bayer 00210-00242
Bayer 00268-00271
Bayer 00380-00403

Enclosed are labels indicating "CONFIDENTIAL – FTC DOCKET NO. 9293" for attachment to the first page of each of the above-listed documents.

If you have any questions, please feel free to contact me at the above-listed number.

Respectfully,



Brian K. Grube

Enclosure

cc: Phillip A. Proger, Esq.
George J. Lykos, Esq.
Keith Abrams, Esq.