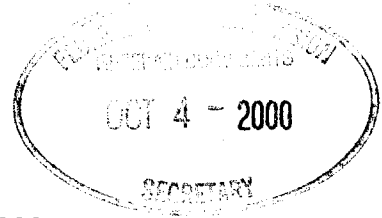


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of

Docket 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**

**BAYER CORPORATION'S MOTION
FOR *IN CAMERA* TREATMENT OF CERTAIN CONFIDENTIAL DOCUMENTS
PRODUCED TO RESPONDENT AVENTIS PHARMACEUTICALS INC.**

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

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 Rules 3.45(b) and 4.10(g) of the Commission Rules of Practice, 16 C.F.R. §§ 3.45(b), 4.10(g), for *in camera* treatment of certain non-public, commercial information provided in response to a Subpoena Duces Tecum issued in this proceeding by Respondent Aventis Pharmaceuticals Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc., to Bayer on May 17, 2000 ("Aventis Subpoena").

I. Factual Background

On August 7, 2000, this Court amended the Protective Order Governing Discovery Material issued on April 28, 2000 ("Second Amended Protective Order"). On August 16, 2000, pursuant to the Second Amended Protective Order, Bayer responded to the Aventis Subpoena and produced documents which included, among other things, confidential and proprietary commercial information. Upon production Bayer requested confidential treatment of the discovery material under the Second Amended Protective Order and clearly marked confidential documents as such.

On September 25, 2000, Aventis notified Bayer of its intention to attach the following Bayer documents to an expert witness report:¹

- (1) **BCD0030621-0030651**: Adalat CC Product Strategic Plan; and
- (2) **BCD0030652-0030685**: Adalat CC Product Strategic Plan (revised).

¹ See Aventis Pharmaceuticals Inc.'s Notification of Use of Confidential Discovery Material, attached to the Declaration of Brian K. Grube in Support of Bayer Corporation's Motion for *In Camera* Treatment of Certain Confidential Documents Produced to Respondent Aventis Pharmaceuticals Inc. (the "Grube Declaration") as Exhibit A.

Bayer produced these documents (the "Bayer Documents" or "Documents") under the protections provided in the Second Amended Protective Order with the "Restricted Confidential Attorney Eyes Only" designation.

Pursuant to Paragraph 13 of the Second Amended Protective Order² and Rule 4.3(a) of the Commission Rules of Practice, 16 C.F.R. § 4.3(a),³ Bayer now moves that this Court apply *in camera* treatment to these documents,⁴ thereby safeguarding Bayer's highly sensitive competitive information and preventing the substantial competitive injury that Bayer would suffer in the event the relevant material were publicly disclosed.

II. The Bayer Documents Warrant *In Camera* Treatment Under The Commission Rules of Practice.

Bayer is a third party in this proceeding and the information in the Bayer Documents is sufficiently material to Bayer's pharmaceutical business and sufficiently secret that disclosure would result in serious competitive injury to Bayer. Moreover, the countervailing interest in public disclosure of this information does not outweigh the likelihood of serious competitive injury to Bayer. Thus, the Bayer Documents warrant *in camera* treatment.

² Paragraph 13 of the Second Amended Protective Order requires a party that intends to attach to or include in a pleading information of an opposing or third party that has been designated as Confidential Discovery Material to notify such party no later than 14 days in advance of filing such pleading. The producing party then has seven days from the date of notice to make an application for *in camera* treatment. Second Amended Protective Order ¶ 13.

³ Commission Rule 4.3(a) addresses the computation of time regarding orders from the Commission or an Administrative Law Judge and provides that weekends and holidays are excluded from periods of time of seven days or less. 16 C.F.R. § 4.3(a).

⁴ Bayer reserves the right, pursuant to the Second Amended Protective Order, to seek *in camera* treatment of other confidential Bayer documents that parties may seek to use in a future pleading or other submission in this proceeding.

A. Disclosure of the Bayer Documents Would Result in Serious Competitive Injury to Bayer.

The two documents Aventis seeks to produce contain Bayer's strategic plans and include information that is the product of years of effort on the part of numerous Bayer personnel in developing Bayer's overall business strategy. Public disclosure of this information would result in serious competitive injury to Bayer. Bayer's competitors would gain valuable insight into Bayer's sales information, marketing methods, and business strategies -- all to Bayer's serious commercial detriment. This is especially true with regard to how Bayer manages the life cycle and the marketing of its products. Bayer is regarded as a leader in these practices because Bayer has demonstrated the ability to promote and sell pharmaceutical products effectively over the long term. In fact, Bayer's marketing of Adalat is often cited as a prime example of Bayer's excellence in life cycle management. While Bayer's competitors may have theories regarding Bayer's proprietary marketing strategies, the public disclosure of the specific steps Bayer takes in marketing Adalat would result in serious competitive injury to Bayer.

Moreover, Bayer has scrupulously maintained the confidentiality of the Documents precisely to avoid the serious competitive injury that would result upon their public disclosure. The Documents contain Bayer's recent business plans. These Documents were created at considerable time and expense to Bayer, and they have not been distributed outside of Bayer. It would be difficult, if not impossible, for Bayer's competitors to duplicate them. Bayer only produced these Documents because it was required to do so by this Court's order. Upon producing the Documents to Aventis, Bayer clearly marked them as "Restricted

Confidential Attorneys Eyes Only.” Thus, Bayer has uniformly treated this highly proprietary information as confidential.⁵

Bayer's competitors would find continuing predictive value in the Bayer Documents. While the Documents were created over three years ago, they discuss product positioning against several of Bayer's key competitors on a prospective basis. Public disclosure of these Documents would greatly help Bayer's competitors predict Bayer's current business strategies -- not only in the Adalat market, but in other pharmaceutical markets in which Bayer competes. See E.I. DuPont de Nemours & Co., 103 F.T.C. 533 (1984) (order extending *in camera* treatment of confidential financial data over three years old because of the ability of respondent's competitors to extrapolate an accurate model of its current business from the data, the limited number of documents at issue, and the finite period of continued protection requested). Therefore, the Bayer Documents warrant *in camera* treatment.

B. The Interest in Public Disclosure of the Bayer Documents is Outweighed by the Likelihood of Serious Competitive Injury to Bayer, a Third Party in this Proceeding.

A public understanding of this proceeding does not depend on access to the documents produced by Bayer, a mere third party in this proceeding. Public access to Bayer's strategic plans would not further the aims of the Commission's investigation in this matter. With this motion Bayer is seeking *in camera* treatment for only two documents. The public record of this proceeding will not suffer if these documents are granted *in camera* treatment. In contrast, Bayer would suffer serious competitive harm if the Bayer Documents were publicly disclosed. Thus, the interest in public disclosure of the Documents is outweighed by the likelihood of serious competitive injury to Bayer.

⁵ Throughout this proceeding, Bayer has taken steps to insure that its produced documents are designated Continued...

Moreover, as a third party, Bayer's request for *in camera* treatment of its documents deserves "special solicitude." See Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500 (1984) (order granting extension of *in camera* treatment to sales statistics over five years old). "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." Id. Bayer's status as a third party bystander presents this Court with an appropriate case in which to grant *in camera* treatment.

C. The Bayer Documents Warrant *In Camera* Treatment Until Expiration of the Adalat CC Patents.

Bayer submits that the documents for which it seeks *in camera* treatment will retain their sensitive nature for some time. These Documents relate to products patented by Bayer. In order to fully protect the intellectual property associated with these products, Bayer requests that the Court grant *in camera* treatment of the two Bayer Documents until November 23, 2010, the date on which Bayer's last patent for Adalat CC expires.⁶ Under this scenario, the Bayer Documents would receive *in camera* treatment as follows:

Document Number	Document Description	Ending Date of <i>In Camera</i> Treatment
BCD0030621-0030651	Adalat CC Strategic Plan	November 23, 2010
BCD0030652-0030685	Adalat CC Strategic Plan (revised version)	November 23, 2010

Finally, Bayer requests that, should the harmful effects of the public disclosure of the Bayer Documents not be clear from the existing record, the Court err on the side of granting the Documents *in camera* treatment, with the understanding that this

Confidential Discovery Material under the protective orders issued by this Court.

⁶ See Grube Declaration ¶ 2.

designation will be subject to further review as the case progresses. As the Commission stated in Bristol-Myers:

[I]t may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

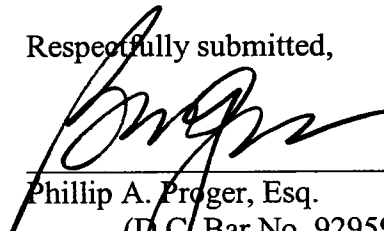
Bristol-Myers Co., 90 F.T.C. 455, 1977 FTC Lexis 25, at *6 (1977).

III. Conclusion

The Bayer Documents clearly meet the standard for *in camera* protection under the Commission Rules of Practice and relevant FTC rulings. The information in the Bayer Documents is sufficiently material to Bayer's pharmaceutical business and sufficiently secret that disclosure would result in serious competitive injury to Bayer. Moreover, the countervailing interest in public disclosure of this information does not outweigh the likelihood of serious competitive injury to Bayer, a mere third party in this proceeding. Accordingly, this Court should grant the designated Bayer Documents *in camera* protection.

DATED: October 4, 2000

Respectfully submitted,



Phillip A. Proger, Esq.
(D.C. Bar No. 929596)

Brian K. Grube, Esq.
(D.C. Bar No. 464452)

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ATTORNEYS FOR
BAYER CORPORATION

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

Docket No. 9293

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

**DECLARATION OF BRIAN K. GRUBE IN SUPPORT OF
BAYER CORPORATION'S MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN CONFIDENTIAL DOCUMENTS
PRODUCED TO RESPONDENT AVENTIS PHARMACEUTICALS INC.**

I, Brian K. Grube, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am associated with the firm of Jones, Day, Reavis & Pogue, counsel for third party Bayer Corporation ("Bayer").

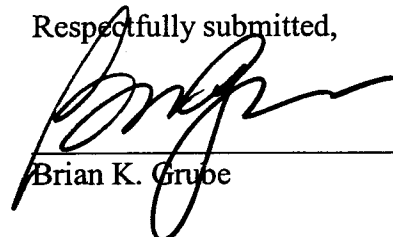
2. According to the U.S. Food and Drug Administration, Center for Drug Evaluation and Research, Approved Drug Products with Therapeutic Equivalence Evaluations, Patent and Exclusivity Information Addendum B (commonly known as the "Orange Book") (June 8, 2000) <<http://www.fda.gov/cder/orange/adp.htm>>, Bayer's last patent for Adalat CC expires on November 23, 2010.

3. Attached hereto as Exhibit A is a copy of Respondent Aventis Pharmaceuticals Inc.'s Notification of Use of Confidential Discovery Material, filed September 25, 2000.

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

Executed in Washington, D.C., on October 4, 2000.

Respectfully submitted,



Brian K. Grube

EXHIBIT 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

**AVENTIS PHARMACEUTICALS, INC.'S
NOTIFICATION OF USE OF CONFIDENTIAL DISCOVERY MATERIAL**

Pursuant to paragraph 13 of the Second Amended Protective Order Governing Discovery Materials entered by Administrative Law Judge D. Michael Chappell on August 7, 2000, a copy of which was provided by facsimile on August 7, 2000, Respondent Aventis Pharmaceuticals Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("HMR"), hereby identifies those documents or other materials that have been designated as confidential by Bayer Corporation that will be referenced in and attached to expert reports. These reports will be exchanged with Complaint Counsel and counsel for the other respondents on September 26, 2000.

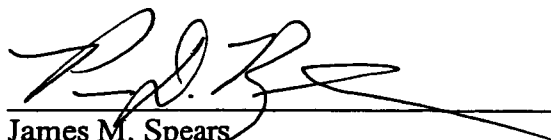
Since discovery in ongoing and we expect to review and receive additional documents, we reserve the right to supplement this list as circumstances warrant. We also reserve the right to use in a future submission or as an exhibit any document, information, or materials identified by Complaint Counsel or other respondents. Finally, we reserve the right not

to include any document, information, or materials identified on the attached lists in a future submission or as an exhibit.

Subject to these reservations of rights, the list of documents is attached hereto as Exhibit A.

Dated: September 25, 2000

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "P.D. Bernstein", written over a horizontal line.

James M. Spears
D. Edward Wilson, Jr.
Peter D. Bernstein
SHOOK HARDY & BACON, LLP
600 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2004
(202) 783-8400

Attorneys for Respondent
Aventis Pharmaceuticals, Inc.

EXHIBIT A

BAYER CORPORATION

BCD0010253-66

BCD0030621-51

BCD0030652-85

BCD0011875

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
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a corporation.

Docket No. 9293

**ORDER GRANTING BAYER CORPORATION'S
MOTION FOR *IN CAMERA* TREATMENT
OF CERTAIN CONFIDENTIAL DOCUMENTS
PRODUCED TO RESPONDENT AVENTIS PHARMACEUTICALS INC.**

IT IS HEREBY ORDERED that Bayer Corporation's Motion for *In Camera* Treatment of Certain Confidential Documents Produced to Respondent Aventis Pharmaceuticals Inc., filed October 4, 2000, is hereby GRANTED.

D. Michael Chappell
Administrative Law Judge

DATE: _____, 2000

CERTIFICATE OF SERVICE

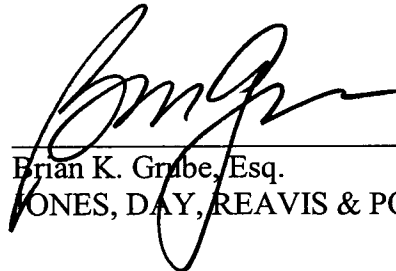
I hereby certify that today I caused a copy of the attached document, entitled
BAYER CORPORATION'S MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN
CONFIDENTIAL DOCUMENTS PRODUCED TO RESPONDENT AVENTIS
PHARMACEUTICALS INC. to be delivered by Federal Express and facsimile to:

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Brian K. Grube, Esq.
ONES, DAY, REAVIS & POGUE

DATED: October 4, 2000