

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

Docket No. 9373

_____)
In the matter of)
)
Impax Laboratories, Inc.)
)
_____)

NON-PARTY ACTAVIS SOUTH ATLANTIC LLC'S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R § 3.45(b), non-party Actavis South Atlantic LLC ("Actavis") respectfully moves this Court for *in camera* treatment of competitively-sensitive, confidential business documents (the "Confidential Documents"). Actavis produced the Confidential Documents and other documents in response to a third-party subpoena and civil investigative demand in this matter on March 3, 2017. Actavis also produced related documents pursuant to a civil investigative demand issued on February 20, 2014. The Federal Trade Commission ("FTC") and Impax Laboratories, Inc. ("Impax") have now notified Actavis that each intends to introduce Actavis's documents, including the Confidential Documents, into evidence at the administrative trial in this matter. See Letter from the Federal Trade Commission dated September 18, 2017 (attached as Exhibit A); See Email from Counsel to Impax Laboratories, Inc. dated October 5, 2017 (attached as Exhibit B).

All of the materials for which Actavis is seeking *in camera* treatment, the Confidential Documents, contain competitively sensitive information not known outside of Actavis that, if disclosed publicly, would significantly harm Actavis's ability to compete in the generic

pharmaceuticals industry. For the reasons herein, Actavis requests that this Court grant the Confidential Documents *in camera* treatment indefinitely. In support of this motion, Actavis relies on the Declaration of Brian Savage, Esq., attached as Exhibit C, which provides additional details about Confidential Documents.

I. The Confidential Documents

Actavis seeks *in camera* treatment for the following Confidential Documents, copies of which are attached as Exhibit D:

<u>Exhibit No.</u>	<u>Document Name</u>	<u>Date</u>	<u>Beginning Bates</u>	<u>Ending Bates</u>
RX-002	Pricing and Sales Spreadsheet	August 2013	RX-002.0001	RX-002.0001
RX-003	Settlement and License Agreement	2/20/2009	RX-003.0001	RX-003.0022
RX-004	Settlement and License Agreement	Undated	RX-004.0001	RX-004.0019
CX2971	FM8-1-Oxymorphone ER V2	2/13/2008	CX2971-001	CX2971-065
CX2972	FM-Oxymorphone ER #2.xlsx	8/27/2010	CX2972-001	CX2972-065
CX2975	nASP Oxymorphone ER August 2013.xlsx	12/17/2013	CX2975-001	CX2975-007
CX3191	Oxymorphone Sales Accruals	3/29/2017	CX3191-001	CX3191-017
CX1203	Settlement and License Agreement	2/20/2009	CX1203-001	CX1203-022
CX2969	Settlement and License Agreement	2/20/2009	CX2969-001	CX2969-022
CX3192	Settlement and License Agreement	2/20/2009	CX3192-001	CX3192-022
CX3383	Settlement and License Agreement	2/20/2009	CX3383-001	CX3383-023

II. The Confidential Documents are Secret and Material such that Disclosure Would Result In Serious Injury to Actavis

In camera treatment of materials is appropriate when its “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting” such treatment. 16 C.F.R. § 3.45(b); *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500,

500 (1984). A clear showing of serious competitive injury is established when “the information concerned is sufficiently secret and sufficiently material to [the movant’s] business.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980).

In considering secrecy and materiality, the Court may consider the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others within the business; (3) the extent of measures taken to protect the information’s secrecy; (4) the value of the information to the business and its competitors; (5) the effort or investment made in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. *In re BristolMyers Co.*, 90 F.T.C. 455, 456-457 (1977). Each of these factors weighs in favor of granting the Confidential Documents *in camera* treatment

The Confidential Documents are both secret and material, and their disclosure would cause serious competitive harm to Actavis as detailed in Mr. Savage’s declaration. Exhibit Nos. RX-002 and CX3191 contain actual net sales and pricing information for Actavis’s generic oxymorphone product. Actavis closely guards this information because it directly speaks to Actavis’s negotiation and decision-making with respect to specific customers. Brian Savage Declaration at ¶ 6. Actavis does not share this information with potential customers and current customers are contractually obligated to keep pricing strictly confidential. *Id.* As competitive decisions in the generic drug industry are driven by price, disclosing this information would irreparably harm Actavis’s ability compete. *Id.* at ¶ 7.

Exhibit Nos. CX2971, CX2972, and CX2975 contain proprietary and competitively sensitive models (and the models’ results) used to forecast generic-drug incursion and price effects. While these specific models apply to the product at issue in this case, Actavis employs

the same general model for forecasting across multiple products within Actavis's business. These models are proprietary to Actavis and are not known outside of the company. *Id.* at 9. The forecasting models and their results are highly valuable to Actavis because they are the methodology Actavis uses to make strategic decisions and determine product pricing. *Id.* As a result, they proprietary to Actavis and not replicated other participants in the generic pharmaceutical industry if improperly disclosed, competitors could take advantage and use Actavis's forecasting and pricing strategies to harm Actavis. *Id.* at 9. Moreover, if Actavis were to share this information with a competitor voluntarily (i.e. outside of the context of this litigation), it would likely face allegations of price fixing and other antitrust claims.

Exhibits Nos. RX-003, RX-004, CX1203, CX2969, CX3192, and CX3383 of Confidential Documents contain confidential draft and final settlement agreements between Actavis and third parties. These settlement agreements and their drafts are non-public confidential settlement agreements subject to confidentiality clauses within each. While Actavis was required to disclose these agreements with the FTC, the FTC is not permitted to disclose them. 21 U.S.C. § 355 note. The terms of the draft and final settlement agreements contain competitively sensitive information such that if it were disclosed to third parties, it could be used against Actavis (and the other party to the settlement) in future settlement negotiations.

For these reasons, the Confidential Documents merit *in camera* treatment because they are secret and material such that their disclosure would cause serious competitive harm to Actavis.

III. The Confidential Documents Contain Trade Secrets, which will Remain Sensitive Over Time and Thus, Permanent In Camera Treatment is Justified

Actavis requests that the Confidential Documents be granted indefinite *in camera* treatment because they contain Actavis's methodology and models used to forecast generic-drug

incursion and price effects across multiple products. The trade secret information contained in the Confidential Documents “is likely to remain sensitive or become more sensitive with the passage of time,” thus the need for confidentiality is not likely to decrease over time. *In re Dura Lube Corp.*, 1999 FTC LEXIS at *7-8. As indicated in *In re Dura Lube Corp.*, trade secrets such as secret formulas and secret technical information are granted more protection than ordinary business documents. Actavis’s forecasting methodology and models do not become stale or diminish over time. While the results of the forecasting models may no longer be applicable in the future, *how* Actavis arrived at those results will continue to be secret and material.

Similarly, the non-public confidential draft and final settlement agreements contain information that could be used against Actavis and the other party to the settlement agreement by their respective competitors or counterparts to future settlement negotiations. This confidential information does not become stale over time.

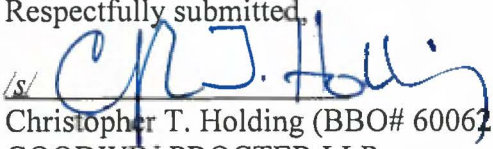
Thus, the Confidential Documents merit indefinite *in camera* treatment.

IV. Conclusion

For the reasons set forth herein and in the accompanying declaration, Actavis requests the Court grant the Confidential Documents indefinite *in camera* treatment.

Dated: October 10, 2017

Respectfully submitted,


/s/ Christopher T. Holding (BBO# 600627)

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CHolding@goodwinlaw.com

Counsel for non-party Actavis South Atlantic
LLC

STATEMENT REGARDING MEET AND CONFER

The undersigned certifies that counsel for Actavis South Atlantic LLC (“Actavis”) notified counsel for the parties via email on October 6, 2017 that it would be seeking in camera treatment of the Confidential Documents. Counsel to Impax Laboratories, Inc. indicated that they would not object to Actavis’s motion and Actavis is awaiting the response from counsel for the Federal Trade Commission.

Dated: October 10, 2017

Respectfully submitted,


/s/ Christopher T. Holding (BBO# 600627)

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Counsel for non-party Actavis South Atlantic
LLC

CERTIFICATE OF SERVICE

I, Christopher Holding, declare under penalty of perjury under the laws of the State of Massachusetts that the following is true and correct. On October 10, 2017, I caused to be served the following documents on the parties listed below by the manner indicated:

- NON-PARTY ACTAVIS SOUTH ATLANTIC LLC'S MOTION FOR IN CAMERA TREATMENT
- NOTICE OF APPEARANCE
- [PROPOSED] ORDER

The Office of the Secretary: (via hand delivery and FTC E-Filing system)

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-172
Washington, D.C. 20580

The Office of the Administrative Law Judge (via hand delivery and FTC E-Filing system)

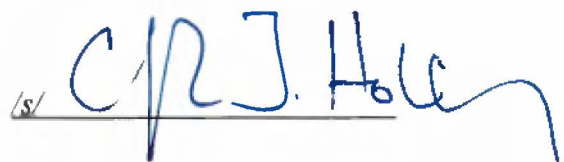
D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-106
Washington, D.C. 20580

Federal Trade Commission (via FedEx overnight delivery and FTC E-Filing system)

Charles A. Loughlin
Synda Mark
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580

Counsel to Impax Laboratories, Inc. (via FedEx overnight and FTC E-Filing system)


Edward D. Hassi
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006

A handwritten signature in blue ink that reads "C/R J. Holding". The signature is written over a horizontal line.

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that the original signature page of the document will be delivered via FedEx overnight mail.

October 10, 2017

A handwritten signature in blue ink, appearing to read "C. J. Holte", written over a horizontal line. The signature is stylized and cursive.

Notice of Electronic Service

I hereby certify that on October 10, 2017, I filed an electronic copy of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on October 10, 2017, I served via E-Service an electronic copy of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, upon:

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Garth Huston
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Complaint

I hereby certify that on October 10, 2017, I served via other means, as provided in 4.4(b) of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, upon:

Markus Meier
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Federal Trade Commission
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Complaint

Christopher Holding
Attorney

EXHIBIT A



SYNDA MARK
(202) 326-2353
SMARK@FTC.GOV

September 18, 2017

VIA ELECTRONIC MAIL

Actavis South Atlantic LLC
c/o Christopher T. Holding
Goodwin Procter LLP
100 Northern Ave
Boston, MA 02210
cholding@goodwinlaw.com

RE: *In the Matter of Impax Laboratories, Inc.*, Docket
No. 9353

Dear Chris:

By this letter we are providing formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Complaint Counsel intends to offer the documents and testimony referenced in the enclosed Attachment A into evidence in the administrative trial in the above-captioned matter. For your convenience, a copy of the documents and testimony will be sent to you in a separate email with an FTP link.

The administrative trial is scheduled to begin on October 24, 2017. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential).

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R §§ 3.45 and 4.10(g). Judge Chappell may order that materials, whether admitted or rejected as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.

Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Jerk*, 2015 FTC LEXIS 39 (Feb. 23,

Christopher T. Holding
September 18, 2017
Page 2 of 2

2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (Apr. 23, 2004). For your convenience, we have collected examples of third-party motions (and the accompanying declaration or affidavit) for *in camera* treatment that were filed and granted in an FTC administrative proceeding; these are included as email links in the cover email. If you choose to move for *in camera* treatment, you must provide a copy of the document(s) for which you seek such treatment to the Administrative Law Judge. Also, you or your representative will need to file a Notice of Appearance in the administrative proceeding. For more information regarding filing documents in adjudicative proceedings, please see <https://www.ftc.gov/faq/ftc-info/file-documents-adjudicative-proceedings>.

Please be aware that under the current Scheduling Order, **the deadline for filing motions seeking *in camera* status is October 10, 2017**. A copy of the current Scheduling Order can be found at <https://www.ftc.gov/system/files/documents/cases/d09373secondschedulingorder.pdf>.

If you have any questions, please feel free to contact me at (202) 326-2353.

Sincerely,

s/ Synda Mark
Synda Mark
Counsel Supporting the Complaint

Attachments

Notice of Electronic Service

I hereby certify that on October 10, 2017, I filed an electronic copy of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on October 10, 2017, I served via E-Service an electronic copy of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, upon:

Bradley Albert
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Complaint

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Rebecca Weinstein

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Complaint

Garth Huston
Attorney
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Complaint

I hereby certify that on October 10, 2017, I served via other means, as provided in 4.4(b) of the foregoing Non-Party Actavis South Atlantic LLC's Motion for In Camera Treatment, Exhibit A, Exhibit B, Exhibit C, Exhibit D, Proposed Order, upon:

Markus Meier
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Federal Trade Commission
mmeier@ftc.gov
Complaint

Christopher Holding
Attorney

EXHIBIT B

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September 27, 2017

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VIA ELECTRONIC MAIL

Actavis Pharma, Inc.
c/o Christopher T. Holding
Goodwin Procter LLP
100 Northern Avenue
Boston, MA 02210

Re: Notice of Disclosure: *In the Matter of Impax Laboratories, Inc.*, Docket No. 9353

Dear Sir or Madam:

I write on behalf of Impax Laboratories, Inc. ("Impax"). Pursuant to the Second Revised Scheduling Order in the in the above-captioned matter and Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), Impax hereby provides notice that it intends to offer the documents and testimony referenced in Exhibit A, which may contain confidential or sensitive Actavis information, into evidence in the above-captioned matter, which is currently pending in the Federal Trade Commission's Part III Administrative Court.

The administrative trial is scheduled to begin on October 24, 2017. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status (i.e., non-public/confidential) to a movant. Please be advised there are strict standards for *in camera* treatment of evidence to be introduced at trial under Rule § 3.45, explained in *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); and *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). Motions by any party or non-party seeking *in camera* status must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment must also provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

Sincerely,

/s/ Eileen M. Brogan

Eileen M. Brogan
Associate
for O'MELVENY & MYERS LLP

EMB

Enclosure

EXHIBIT C

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)	
In the matter of)	
)	Docket No. 9353
Impax Laboratories, Inc.)	
)	
_____)	

DECLARATION OF BRIAN SAVAGE IN SUPPORT OF NON-PARTY ACTAVIS SOUTH ATLANTIC LLC’S MOTION FOR IN CAMERA TREATMENT

I, Brian Savage, Esq., hereby depose and state as follows:

1. I am currently employed as Senior Director, Executive Counsel at Teva Pharmaceuticals USA, Inc., a wholly-owned subsidiary of Teva Pharmaceutical Industries Limited (“Teva”). I submit this declaration in support of Non-Party Actavis South Atlantic LLC’s (“Actavis”) Motion for *In Camera* Treatment. Through my work at Teva, I am familiar with the documents and information discussed in this declaration.

2. Generic oxymorphone extended release products are generic equivalents of Opana ER, marketed by Endo. Actavis is a company that develops, manufactures, and sells generic drugs. Actavis sold generic oxymorphone extended release products in the United States from approximately 2011 through 2015. Teva acquired the Actavis generics business in 2016.

3. In 2007, Actavis filed an ANDA for generic oxymorphone extended release products, with certain amendments filed thereafter. Endo subsequently sued Actavis for patent infringement, and the parties reached a settlement in 2009. In 2011, after receiving FDA approval for two strengths of its generic oxymorphone product, Actavis launched those two strengths pursuant to a license from Endo granted in connection with the 2009 settlement

agreement. In 2013, Actavis received FDA approval for the remaining strengths of its generic oxymorphone product, and Actavis launched those strengths of its product, also pursuant to a license from Endo. The license from the 2009 agreement did not, however, apply to certain additional patents. In 2012, Endo filed an additional patent lawsuit against Actavis, C.A. No. 12-cv-8985 (S.D.N.Y.). In 2015, the Court in the second patent litigation held that Actavis infringed certain Endo patents and ordered Actavis to discontinue sales of its generic oxymorphone products. Actavis complied with that order.

4. On March 3, 2017, the FTC served a third-party subpoena duces tecum on Actavis in this matter, and Actavis subsequently produced documents to the FTC, on a rolling basis, in response to the subpoena. Actavis also produced Opana-related documents to the FTC pursuant to a Civil Investigative Demand issued by the agency in early 2014.

5. The parties to this matter seek to introduce at trial three categories of Actavis documents that contain confidential, proprietary, commercially sensitive information that is not known outside of Actavis and should not be made public. Those categories are:

- a. Information about the actual sales prices that Actavis charged its customers for generic oxymorphone, as reflected in an internal Actavis spreadsheet, including non-public information relating to rebates and other price concessions that Actavis extended to those customers, who are identified by name [Impax Ex. RX-002; CX3191];
- b. Actavis's internal proprietary forecasts relating to its sale of generic oxymorphone. These forecasts include confidential, non-public, and competitively sensitive information relating to, among other things, the prices that Actavis was considering charging for generic oxymorphone and the erosion rate

at which Actavis expected generic oxymorphone to capture market share. Actavis uses similar pricing assumptions and erosion rates in forecasting hundreds of other generic products [CX2971, CX2972, and CX2975]; and

- c. The confidential patent settlement agreement between Actavis and Endo concerning Actavis's generic oxymorphone product, as well as drafts thereof, all of which (i) include competitively sensitive information and (ii) contain a confidentiality provision barring disclosure of any term other than the licensed entry date [RX-003, RX-004; CX1203, CX2969, CX3192, and CX3383].

I address each of these categories of information, and the associated documents, below.

6. The first category – actual sales and pricing information for Actavis's generic oxymorphone product – is contained in Impax proposed trial exhibit RX-002 and FTC proposed trial exhibit CX3191. This is quintessentially non-public information. While Actavis publishes the Suggested Wholesale Price (SWP) and the Wholesale Acquisition Cost (WAC) for its generic products, RX-002/CX3191 contains additional pricing information that Actavis carefully protected from public disclosure, including net prices to specific customers (*i.e.*, the prices actually and ultimately charged to specific customers, accounting for negotiated discounts, rebates, chargebacks, etc.). Actavis does not make this net price information available publicly – to the contrary, Actavis specifically maintains this information as confidential – and for good reason: it speaks directly to Actavis's negotiating and decision-making with respect to specific customers, and its public disclosure would put Actavis at a significant competitive disadvantage. Thus, to the extent Actavis is required to produce such information in private litigation, it routinely designates such information as being subject to the highest level of confidentiality that the applicable protective order permits. Actavis does not share one customer's net price for a

product with any other actual or potential customer. Actavis's customers are normally contractually obligated to keep their own net pricing information confidential and contractually prohibited from sharing this information with other Actavis customers. Moreover, other documents on the parties' exhibit lists contain information about the public, published prices for Actavis's generic oxymorphone product, and Actavis is not seeking in camera treatment for those documents. [E.g., CX3317]

7. The specific prices and/or price levels that Actavis – or any generic drug company – offers to specific customers or categories of trade are among the most important competitive factors in the generic drug industry. Competition amongst different drug companies for the same product is driven largely by price. Actavis's ability to compete successfully would be irreparably harmed if the prices and/or price levels that it charged specific customers or categories of trade were to become public.

8. The prices that Actavis charged to specific customers for generic oxymorphone products are not otherwise available and could not be readily determined by others in the marketplace. Customers (such as retail pharmacies) set their own prices when reselling a product (for cash customers) or charge patients a set copay when filling a prescription (for customers with insurance). Public services such as IMS, which report certain pricing information, do not have access to confidential information concerning rebates or other price concessions, so the data they publish likewise does not reflect confidential net prices. Moreover, because different customers or categories of customers may pay different net prices, it is not possible for someone to reverse engineer Actavis's prices to particular customers from Actavis's publicly available SWP or WAC prices.

9. The second category of documents involves Actavis's forecasts. These documents also contain confidential, non-public information relating to Actavis's pricing that is not available to people outside Actavis. Although the forecasts do not contain customer-specific pricing, they do forecast and project what Actavis's average net price would be based on the number of generic competitors in the market. This non-public information is again competitively sensitive, as it reflects how Actavis is considering pricing its products in response to competitive developments in the marketplace. Actavis does not make these forecasts available publicly, and when Actavis is required to produce such documents in private litigation, it routinely designates such information as being subject to the highest level of confidentiality that the applicable protective order permits. For the same reasons discussed above, public disclosure of this information would harm Actavis's ability to compete.

10. The third category comprises the Actavis/Endo 2009 settlement agreement and drafts. These documents also are non-public, proprietary, and confidential, they are not available to people outside the company (with the exception that they are submitted to the government subject to confidentiality protections) and they reflect, among other things, Actavis's strategic decision-making in deciding whether (and under what terms) to settle its patent litigation with Endo. The agreement also contains a confidentiality provision, as is typical with Actavis's patent settlements, which allows disclosure of the fact of settlement and the effective date of the license and covenant not to sue from Endo to Actavis but no other details. [Agreement § 5.1, Appendix B] Actavis maintains the confidentiality of this and all of its patent settlements. When Actavis is required to produce patent settlement agreements in private litigation, it routinely designates the documents as being subject to the highest level of confidentiality that the applicable protective order permits.

11. Even though it is now public that the agreement gave Actavis certain license entry dates, the agreement contains many other terms that are confidential and competitively sensitive. Patent settlements are an important part of the generic drug business, and the agreements are complex agreements extensively negotiated by both sides. Actavis seeks to negotiate terms that will provide it the best commercial position possible consistent with the law, vis-à-vis both the brand company and other generic competitors. Actavis would suffer significant competitive harm if this agreement were publicly disclosed, because competitors would be able to learn otherwise confidential information concerning the types of terms Actavis seeks to include in patent settlement agreements, and its decision-making with respect to settling patent cases more generally.

I declare under penalty of perjury that the foregoing is true and correct. Executed October 10, 2017 in Horsham, Pennsylvania.


Brian Savage

EXHIBIT D
PRODUCED AND MARKED FOR IN
CAMERA REVIEW

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

_____)
In the matter of)

Impax Laboratories, Inc.)
_____)

) Docket No. 9373
)
)
)
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)

Upon consideration of Non-Party Actavis South Atlantic LLC's ("Actavis's") Motion for In Camera Treatment, it is HEREBY ORDERED that the following documents are to be provided permanent in camera treatment from the date of this Order in their entirety.

<u>Exhibit No.</u>	<u>Document Name</u>	<u>Date</u>	<u>Beginning Bates</u>	<u>Ending Bates</u>
RX-002	Pricing and Sales Spreadsheet	August 2013	RX-002.0001	RX-002.0001
RX-003	Settlement and License Agreement	2/20/2009	RX-003.0001	RX-003.0022
RX-004	Settlement and License Agreement	Undated	RX-004.0001	RX-004.0019
CX2971	FM8-1-Oxymorphone ER V2	2/13/2008	CX2971-001	CX2971-065
CX2972	FM-Oxymorphone ER #2.xlsx	8/27/2010	CX2972-001	CX2972-065
CX2975	nASP Oxymorphone ER August 2013.xlsx	12/17/2013	CX2975-001	CX2975-007
CX3191	Oxymorphone Sales Accruals	3/29/2017	CX3191-001	CX3191-017
CX1203	Settlement and License Agreement	2/20/2009	CX1203-001	CX1203-022
CX2969	Settlement and License Agreement	2/20/2009	CX2969-001	CX2969-022
CX3192	Settlement and License Agreement	2/20/2009	CX3192-001	CX3192-022
CX3383	Settlement and License Agreement	2/20/2009	CX3383-001	CX3383-023

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____