

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



In the Matter of)
)
)

Impax Laboratories, Inc.,)
a corporation,)

Respondent.)
_____)

DOCKET NO. 9373

**ORDER ON NON-PARTIES' MOTIONS
FOR *IN CAMERA* TREATMENT**

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, three non-parties filed motions for *in camera* treatment for materials that Federal Trade Commission ("FTC") Complaint Counsel and/or Respondent Impax Laboratories, Inc. ("Respondent" or "Impax") have listed on their exhibit lists as materials that might be introduced into evidence at the trial in this matter. Neither Complaint Counsel nor Respondent has filed an opposition to any of these motions.

II.

The legal standards governing the non-parties' motion for *in camera* treatment are stated in the Order on Respondent's Motion for *In Camera* Treatment, issued on October 16, 2017. Included in that Order was an explanation of the circumstances where indefinite *in camera* treatment is appropriate, summarized here.

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time. . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration."

In re E. I. DuPont de Nemours & Co., 1990 FTC LEXIS 134, at *2-3 (April 25, 1990). In *DuPont*, the Commission rejected the respondent's request for indefinite *in camera* treatment, but noting "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry," the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1189 (Mar. 14, 1961). Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980); *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991). In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996).

III.

The non-parties listed below filed separate motions for *in camera* treatment. Each motion included the documents for which *in camera* treatment is sought and was properly supported by a declaration of an individual within the company who had reviewed the documents at issue. These declarations supported the applicants' claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. The specific motions of each of the non-parties are analyzed using the standards set forth above.

Actavis South Atlantic LLC ("Actavis"):

Non-party Actavis seeks indefinite *in camera* treatment for eleven documents that Complaint Counsel and Respondent intend to introduce into evidence. Actavis supports its motion with a declaration from the Senior Director, Executive Counsel at Teva Pharmaceuticals USA, Inc., a wholly owned subsidiary of Teva Pharmaceuticals Limited. The declaration describes in detail the confidential nature of the documents and the competitive harm that Actavis would suffer if these documents were made publicly available and the measures that Actavis takes to ensure that they remain confidential. The declaration explains that the documents fall into three categories.

First, RX002 and CX3191 contain actual net sales and pricing information for Actavis' generic oxymorphone product. Actavis states that it closely guards this information because it directly speaks to Actavis's negotiations and decision making with respect to specific customers. Actavis further asserts that, as competitive decisions in the generic drug industry are driven by price, disclosing this information would irreparably harm Actavis' ability to compete.

Second, CX2971, CX2972, and CX2975 contain proprietary and competitively sensitive models used to forecast generic drug incursion and price effects, and the models' results. Actavis states that these forecasting models are highly valuable because they are the methodology Actavis uses to make strategic decisions and determine product pricing and that, if disclosed, competitors could take advantage and use Actavis' forecasting and pricing strategies to harm Actavis.

Third, RX003, RX004, CX1203, CX2969, CX3192, and CX3383 contain confidential draft and final settlement agreements between Actavis and certain third parties. Actavis states that these settlement agreements and their drafts are non-public settlement agreements subject to confidentiality clauses and that, while Actavis was required to disclose the agreements to the FTC, the FTC is not permitted to disclose them, citing 21 U.S.C. § 355 note.

With respect to the documents in the first category, Actavis has met its burden of demonstrating that these documents are entitled to *in camera* treatment, but has not met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. *In camera* treatment for a period of ten years, to expire on November 1, 2027, is GRANTED for: RX002 and CX3191.

With respect to documents in the second and third categories, Actavis has met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. Indefinite *in camera* treatment is GRANTED for: RX003, RX004, CX1203, CX2969, CX2971, CX2972, CX2975, CX3192, and CX3383.

Purdue Pharma L.P. ("Purdue"):

Non-party Purdue seeks indefinite *in camera* treatment for six documents that Respondent intends to introduce into evidence. Purdue supports its motion with a declaration from its Executive Vice President. The declaration describes in detail the confidential nature of the documents and the competitive harm that Purdue would suffer if these documents were made publicly available and the measures that Purdue takes to ensure that they remain confidential.

The declaration explains that the documents contain highly confidential, competitively sensitive proprietary information, including sales and marketing initiatives, discounting tactics, training plans for providing prescribers and patients appropriate information, goals for negotiations with third party payors, and internal training and

compliance information. Purdue states that this information could readily be used by competitors to undermine Purdue's competitiveness in the market.

With respect to these six documents, Purdue has met its burden of demonstrating that these documents are entitled to *in camera* treatment, but has not met its burden of demonstrating that these documents are entitled to indefinite *in camera* treatment. *In camera* treatment for a period of ten years, to expire on November 1, 2027, is GRANTED for: RX444, RX445, RX446, RX447, RX448 and RX449.¹

Endo Pharmaceuticals, Inc. ("Endo"):

Non-party Endo seeks *in camera* treatment for 47 documents that Complaint Counsel and Respondent intend to introduce into evidence. Endo supports its motion with a declaration from its Senior Counsel, Litigation and Risk. The declaration describes in detail the confidential nature of the documents, the competitive harm that Endo would suffer if these documents were made publicly available, and the measures that Endo takes to ensure that they remain confidential. The declaration explains that the documents fall into three categories.

The first category consists of documents Endo describes as containing confidential information regarding Endo's business strategies and evaluation of potential opportunities. Endo states that these documents contain internal analyses of particular markets, development and commercial strategies, and the financial terms that Endo might find acceptable.

With respect to documents in this first category, Endo seeks *in camera* treatment for a period of five years for the following documents: CX2745, CX2746, CX3181, and seeks *in camera treatment* until the date on which confidentiality expires pursuant to a non-disclosure agreement for: CX3171. In order to make the expiration date of *in camera* treatment consistent across exhibits provided by non-parties, which establishes consistency and furthers administrative efficiency,² *in camera* treatment for a period of ten years, to expire on November 1, 2027, is GRANTED for the documents identified as CX2745, CX2746, CX3171, and CX3181.

The second category consists of documents Endo describes as information concerning Endo's confidential pricing strategy. With respect to documents in the second category, Endo seeks indefinite *in camera* treatment. Endo states that some of the

¹ In addition, Purdue states that the FTC's subpoena *duces tecum* requested that Purdue provide certain documents related to OxyContin, but instructed that no documents could be redacted prior to submission. As a result, the documents include some pages devoted entirely to another Purdue product, Butrans. Purdue states that this information was not responsive to the subpoena and presumably is not relevant to the litigation and thus requests that its confidential documents be redacted to remove the information related to plans for other Purdue products. Because Purdue's motion for *in camera* treatment has been granted, Purdue's need for this relief has been obviated.

² See *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101, at *20 n.1 (May 25, 2011).

documents in this category reveal information on complicated rebate, discount, and allowance agreements Endo has with third party payors, group purchasing organizations, and pharmacy benefit managers. Endo states that the other documents in this category reveal transactional data at very detailed levels, including gross-to-net and chargeback data, contribution margins reports, customer-level information on rebates, discounts, and allowances, net profits, and manufacturing costs. For all of the documents in this category, Endo states that it has non-disclosure agreements with third parties that do not release Endo from its obligation to maintain this information as confidential.

Endo's non-disclosure agreements with third parties provide a reason for granting *in camera* treatment to the documents covered thereby. The non-disclosure agreements, by themselves, do not provide support for indefinite *in camera* treatment. By the terms of those agreements, Endo is required to maintain the information it receives as confidential, but may disclose confidential information as mandated by law or legal process provided that, in connection with such disclosure, it exercises reasonable efforts to preserve the confidentiality of the confidential information. (Exhibits 5, 6, and 7 to Endo's Declaration).

Upon review of the documents in this second category for which Endo seeks *in camera* treatment, it is clear that the documents are entitled to *in camera* treatment, but are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of ten years, to expire on November 1, 2027, is GRANTED for: CX2681, RX021, RX022, CX3292, CX3327, CX3289, CX3290, CX3318, CX3319, CX3320, CX3321, CX3322, CX3323, CX3325 (same as RX561) and CX3326.

The third category consists of documents Endo describes as competitively sensitive information purchased or obtained from third parties and subject to non-disclosure agreements. With respect to documents in the third category, Endo seeks indefinite *in camera* treatment. Endo states that it subscribes to a number of data services that collect proprietary data about sales of pharmaceutical products, including total market share by product, total prescriptions, source of business, and channel of distribution. Endo states that it pays a substantial sum for these services and that this data is of significant strategic and competitive importance to Endo. Lastly, Endo states that these documents are protected by confidentiality agreements with Endo's providers.

Endo seeks *in camera* treatment for an indefinite duration on ground that its non-disclosure agreements with third parties do not release Endo from its obligation to maintain the information as confidential. Two of the nondisclosure agreements are silent as to the duration of the agreements. (Exhibits 8 and 10 to Endo's Declaration). The other nondisclosure agreement explicitly states that all non-public information shall be held in confidence during the term of the agreement and for four years after termination or expiration of the agreement. (Exhibit 9 to Endo's Declaration).

Upon review of the documents in this third category for which Endo seeks *in camera* treatment, it is clear that the documents are entitled to *in camera* treatment, but are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of ten

years, to expire on November 1, 2027, is GRANTED for: CX1107, CX1110, CX2528, CX2551, CX2553, CX2572, CX2577, CX2607, CX2609, CX2732, CX3199, CX3206, CX3291, RX013, RX020, RX026, RX028, RX040, RX048, RX067, RX082, RX084, RX085, RX104, RX111, RX112, RX114, and RX558.

IV.

Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence, or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session. Any testimony regarding documents that have been granted *in camera* treatment may be provided in an *in camera* session.

ORDERED:

Dm Chappell

D. Michael Chappell

Chief Administrative Law Judge

Date: October 20, 2017

Notice of Electronic Service

I hereby certify that on October 20, 2017, I filed an electronic copy of the foregoing Order on Non-Parties Motions for In Camera Treatment, with:

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I hereby certify that on October 20, 2017, I served via E-Service an electronic copy of the foregoing Order on Non-Parties Motions for In Camera Treatment, upon:

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