



The issue of whether such confidential information can be disclosed to the public is currently pending before the U.S. District Court for the District of Columbia (“District Court”). Respondents respectfully request that this tribunal abstain from deciding this motion and defer to the District Court’s ruling.

Should this tribunal choose to rule on the issue, Respondents request that the Complaint not be made public. The release of the confidential information has the potential to severely prejudice the Respondents. First, the information reveals confidential strategic analysis and other business secrets, including analysis of competitors, market conditions and capacity utilization. Second, the information has been selectively and misleadingly included in the Complaint in a manner calculated to cause readers to make unfair inferences about the implications of these documents. The misuse of these confidential documents threatens to harm Respondents’ substantial business reputations and good will.

There is absolutely no reason to publicly disclose this confidential information, the release of which would cause Respondents serious injury. The redacted version of the Complaint provides clear notice to the public of the FTC’s concerns and reasons for seeking to block the transaction at issue. It would be inappropriate to disclose the confidential information in the Complaint even if the parties were proceeding with the transaction. That prejudice is only heightened by the fact that Respondents have abandoned the transaction at issue here.

#### **THE RESPONDENTS AND THE PROPOSED TRANSACTION**

CSL is the progeny of a healthcare agency of the Australian government tracing its core plasma therapeutics business to the early 1950s when fractionated plasma on behalf of the Australian government.

The Company has an impeccable reputation as the provider of life-saving therapies, vaccines, and anti-venoms. In the past four and a half years, CSL has increased its production of the life-saving plasma products and the collection of the raw material, plasma, more than any other competitor. In addition to the plasma products at issue here, CSL is (a) the leading manufacturer of the flu vaccine, (b) the developer of Gardasil, the cancer-preventive treatment for millions of young women in the U.S., (c) the manufacturer of Cytogam, an important medicine critical to transplants, and (d) the first company to be awarded a contract with the U.S. Department of Health and Human Services to produce the H1N1 (“swine flu”) vaccine. At the core of CSL’s business is a commitment to patients, as evidenced by the many programs it offers to help patients maintain access to life-saving drugs even when their insurance lapses. Reputation among patients, patient groups, hospitals and health care providers is critical to CSL’s business.

Talecris Biotherapeutics Holdings Corp. was established as an independent entity in 2005 from the assets of the Bayer Plasma Products Business Group and Precision Plasma Services, Inc. Talecris is committed to providing high quality and innovative plasma-derived therapies that extend and enhance the lives of people suffering from chronic and acute, sometimes life-threatening, conditions. Talecris’s history of innovation includes developing the first ready-to-use 10% liquid IVIG product in North America and the first alpha-1 product globally. Talecris’s reputation for excellence that it has established with patients, patient groups, and health care providers is critical to its business success.

In August 2008, CSL agreed to purchase Talecris for \$3.1 billion (the “Transaction”) with the intent of integrating the assets of the two companies into a more efficient manufacturing spine. Prior to the abandonment of the Transaction, every plan CSL had for the

combined company contemplated that, as a result of the integration, CSL would relieve manufacturing bottlenecks at both companies, and substantially increase the supply of the products at issue here. Based upon CSL's reputation for commitment, dedication and responsibility to patients, doctors, group purchasing organizations, distributors, analysts, and patient groups praised the Transaction. Almost nine months after CSL filed the Transaction with the FTC, the FTC filed the Complaint seeking to prevent the merger and its efficiencies. On June 8, approximately two weeks after the FTC filed the Complaint, the parties abandoned the Transaction by mutual agreement.

## ARGUMENT

Public disclosure of the unredacted Complaint threatens irreparable harm to the businesses and reputations of CSL and Talecris. Complaint Counsel should not be allowed to reveal highly confidential and competitively sensitive information to the public and other competitors, particularly when the information is misleading and the underlying transaction at issue has been terminated.

### **I. The Same Issue Is Currently Pending Before The District Court, And This Tribunal Should Stay Any Decision On The Issue**

The Commission has frequently recognized that a stay of administrative proceedings is appropriate pending the decision of collateral issues in the district court in order to avoid duplicative and potentially inconsistent rulings. *See, e.g., In re Dynamic Health of Florida, LLC*, 2005 FTC LEXIS 6, \*4-\*6 (Jan. 12, 2005) (issuing a stay in the proceeding pending decision of federal criminal court proceeding because the same issues were being addressed, the stay was limited, and sentencing was imminent); *In re California Dental Ass'n*, 1996 FTC LEXIS 277, \*8-\*12 (accord).

On the day after it filed its Complaint before this tribunal, the FTC filed a nearly identical complaint in the District Court, seeking a temporary restraining order and preliminary injunction to prevent Respondents from consummating the proposed merger. The parties have already fully briefed before the District Court the issue of whether the confidential information cited in the Complaint can be made public. A decision on the protection of the very same confidential information at issue here is imminent. To avoid the potential for disparate rulings, this tribunal should exercise its discretion to abstain from ruling on Complaint Counsel's motion to make the Complaint here public and defer to the District Court's ruling.

**II. The Complaint Contains Sensitive, Confidential Business Secrets, The Release Of Which Will Cause A Clearly Defined, Serious Injury To Respondents**

**A. The Complaint Contains Confidential Business Secrets**

In the event that this tribunal refuses to stay a decision on the motion, Complaint Counsel's motion should be denied. Complaint Counsel seeks to publicly disclose several paragraphs in the Complaint containing confidential business strategies and proprietary information. Such information should be protected from public disclosure and indeed is considered "nonpublic material" under section 4.10 of the FTC's own Rules. *See* 16 C.F.R. § 4.10(a)(2). This Rule notes that "competitively sensitive information"—such as the information at issue here—is not within the scope of the FTC policies encouraging wide public access to information.

The material for which the parties seek to avoid public disclosure — "pricing and marketing information," "perspectives of the players in [the] market, assessment of potential and existing competitors, evaluations of competitive conditions, discussions of the risks of entering into the market, and analyses of the barriers to entering that market"—is confidential business information. *See, e.g., Vesta Corset Co. v. Carmen Founds., Inc.*, No. 97 CIV. 5139 (WHP),

1999 WL 13257 at \*2 (S.D.N.Y. Jan. 13, 1999); *ACT, Inc. v. Sylvan Learning Sys.*, No. CIV. A. 99-63, 1999 WL 305300 at \*2 (E.D. Pa. May 14, 1999).

Complaint Counsel seeks disclosure of CSL's impressions of barriers to entry, Talecris's expansion plans, the price CSL previously offered to acquire Talecris, Talecris's internal impressions of CSL, CSL's impressions of marketplace dynamics and pricing trends, Talecris's impressions of marketplace dynamics and pricing trends, CSL's views of what it takes to succeed in the marketplace, and Talecris's responses to competition. *See* Compl. ¶¶ 5, 6, 8, 16-17, 30, 40-42, 63, 66, 69, 72, 74. This is exactly the type of information that should never be disseminated to competitors, who are sure to read any public version of the Complaint. *See F.T.C. v. Exxon Corporation*, 636 F.2d 1336, 1350 (D.C. Cir. 1980); *Bradburn Parent/Teacher Store, Inc. v. 3M*, No. Civ. A. 02-7676, 2004 WL 1146665 at \*1-3 (E.D. Pa. May 19, 2004) (accord).

None of the confidential statements and information at issue is public today. Complaint Counsel should not be allowed to make it public at the expense of CSL and Talecris.

**B. Disclosure Would Cause Serious, Irreparable Injury**

Complaint Counsel wrongly points to *H.P. Hood & Sons, Inc.* as supporting its motion. *See* Pl. Mem. at 4-6. Unlike *H.P. Hood*, the disclosure of ordinary business documents that contain non-confidential information such as customer lists is not at issue here. Rather, Respondents seek to keep confidential their business plans and strategies as well as their impressions of the competitive dynamics of the marketplace. Indeed, in *H.P. Hood*, the Commission explicitly noted that in certain cases it would be appropriate to protect such information from public disclosure because disclosure would result in "irreparable injury." *See H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, \*14 (1961). The FTC's motion presents precisely the

type of circumstance where disclosure of business confidential information is unnecessary, unfair, and would extensively and irreparably injure the parties.

The injury here would be particularly acute because the information could not only be used by competitors in the market, it could also irreparably harm Respondents' reputations, causing "serious competitive injury." See *In the Matter of Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298 at \*2 (June 26, 1996). The selectively quoted materials would lead readers to unfair inferences regarding the parties' conduct.<sup>1</sup> This would be particularly unfair both because there will be no opportunity for the parties to present evidence in this proceeding to rebut such inferences and because the release of the confidential material in question would add little to the public's insight into the FTC's process in this matter.

### **III. The Public Interest Does Not Favor Disclosure**

The Commission recognizes that, once the risk of competitive injury is established as it has been here, the "principal countervailing consideration weighing in favor of disclosure should be the importance of the information in explaining the rationale of [the FTC's] decisions." See *In the Matter of General Foods Corporation*, 95 F.T.C. 352 at \*10 (1980). Confidential business records, including those contained in a complaint, should not be made public where the "prospective injury from disclosure outweighs the public interest in full knowledge" *In the Matter of RSP Corp.*, 88 F.T.C. 734 at \*2-3 (1976); see also *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).

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<sup>1</sup> Press reports concerning the FTC's complaint have already included unfounded inferences of misconduct unrelated to the transaction. The release of the unredacted Complaint, with its unfair and misleading excerpts from confidential documents would likely encourage similar reports, rather than providing any unbiased clarity as to the actual facts.

Public access to documents related to FTC proceedings allows the public to “evaluate the fairness and wisdom with which the decisions of public agencies have been made, and to permit affected parties to draw guidance from those decisions in determining their future conduct.” *In the Matter of RSP Corp.*, 88 F.T.C. 734 at \*2. For this reason, the FTC is only required to make public its final opinions and orders, *not* information gathered pursuant to an investigation. *In the Matter of Schering Plough Corporation*, 2001 FTC LEXIS 180 at \*6 (Sept. 17, 2001) (“the only materials that this Court must make available for public inspection and copying pursuant to the Administrative Procedure Act are “final opinions and orders.”); *see also* 5 U.S.C. § 552(a)(2); 16 C.F.R. 4.10(a)(8).

Given that Respondents abandoned the Transaction and, as a result, no decision on the Transaction will be forthcoming from this tribunal, Respondents’ interests in maintaining the confidentiality of their business records far outweighs any interest the public may have in accessing the information in question. There is no longer an action pending before this tribunal. The case will not be litigated to a final decision or order, and, therefore, the public has no need to evaluate the fairness of the proceeding.

Moreover, the public version of the Complaint and the FTC’s own press releases (*see* Exhibit A) abundantly explain the reasons why the FTC challenged the proposed, but now abandoned, transaction. The release of snippets of confidential documents and other confidential information in the complaint would add little insight into the FTC’s theories beyond what is already disclosed.

On the other hand, the potential harm to Respondents is heightened by the abandonment of the Transaction. Respondents no longer have the opportunity at trial to refute the FTC’s misleading allegations, characterizations of statements taken out-of-context, and

inferences of wrongful conduct. The FTC's attempts to make these portions of the complaint public serve no purpose other than to punish parties no longer under review by this Agency.

#### **IV. CSL And Talecris Have Safeguarded Their Confidential Documents**

Complaint Counsel's quotations derive from materials submitted confidentially by the parties as part of the Hart-Scott-Rodino ("HSR") antitrust review process. Such material is protected from public disclosure during pre-complaint discovery. *See* 15 U.S.C. § 18a(h); *Lieberman v. Federal Trade Commission*, 771 F.2d 32 (2nd Cir. 1985). At every step of the way, CSL and Talecris sought confidential protection for the documents and information it disclosed. *See* Exs. B and C (letters accompanying CSL and Talecris productions to the FTC). As the Commission has noted, "the extent of measures taken by the party to guard the secrecy of the information" is germane to a consideration of the protection which should be afforded to the information. *See Bristol-Myers Co.*, 90 F.T.C. 455, \*5 (1977).

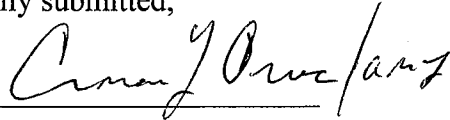
Complaint Counsel alleges that CSL and Talecris have not kept their information confidential because the same slides appear in both a Talecris and CSL document. *See* Pl. Mem. at 5-6, n.3, App. A-C. The reason for this is obvious. In May 2004, while Alberto Martinez was a CSL employee, Sam Lovick, also a CSL employee, authored Appendix B to Complaint Counsel's memorandum. On or about September 1, 2005, Mr. Martinez left CSL, became employed by Talecris, and thereafter authored Appendix A to Complaint Counsel's memorandum, which contains much of the same material as Complaint Counsel's Appendix B. That hardly amounts to CSL failing to protect its confidential information.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the tribunal abstain from deciding the issue or, alternatively, order that the Complaint remain nonpublic.

Dated: June 10, 2009

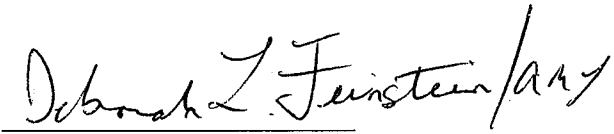
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

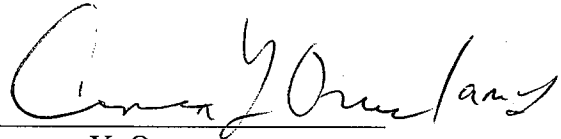
I hereby certify that on June 11, 2009, I caused to have both a paper original and electronic copy of the foregoing *Memorandum of Points and Authorities in Opposition* filed on behalf of Respondents, via hand-delivery, with:

Donald S. Clark  
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600 Pennsylvania Avenue, N.W., H-135  
Washington, D.C. 20580

I further certify that on June 10, 2009, I caused to have a true and complete paper copy served via hand-delivery upon the following:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
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