

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

JUN 12 1998

MICHAEL N. MITCHELL, CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**THE PROCTOR & GAMBLE COMPANY, §
ET AL. §**

versus §

AMWAY CORPORATION, ET AL. §

CIVIL ACTION NO. H-97-2384

ORDER

Pending before the Court is Plaintiff's Motion for Entry of Protective Order (Instrument No. 83) and Defendants' Combined Opposition to P&G's Motion for Entry of Protective Order and Memorandum in Support of Defendants' Cross Motion for Entry of a Protective Order (Instrument No. 87).

WHEREAS, discovery in the above-entitled action involves the disclosure of certain documents, things and information that constitute or contain trade secrets or other confidential commercial information within the meaning of Rule 26(c)(7) of the Federal Rules of Civil Procedure ("Fed.R. Civ. P."); and enters the following Protective Order to prevent unnecessary dissemination or disclosure of such confidential information;

IT IS HEREBY ORDERED as follows:

1. This Protective Order shall apply to all information, documents and things within the scope of discovery of this action that are in the custody or possession of the Parties and/or which were received by a Party from a third party under an obligation of confidentiality, which constitute or contain confidential financial, commercial, marketing or business information, trade secrets, know-how or proprietary data relating to financial, commercial, marketing, business and

other subject matter within the meaning of Rule 26(c)(7), and which is properly designated as **CONFIDENTIAL INFORMATION** pursuant to the following provisions by the Party producing the information including, but not limited to, documents and things responsive to requests for production of documents, responses to written interrogatories, responses to requests for admission, testimony adduced at depositions, and hearing or trial transcripts.

2. The Parties shall label or mark documents and things that constitute or contain **CONFIDENTIAL INFORMATION** with the legend "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL.**" Documents and things that constitute or contain **CONFIDENTIAL INFORMATION** shall be labeled or marked with the appropriate legend when the document or thing is produced to the party or parties seeking discovery. The designations of "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" by a Party constitutes the representation of the Party that it reasonably and in good faith believes that the designated material constitutes or discloses trade secrets, know-how, proprietary data or commercial information within the meaning of Rule 26(c)(7) that has previously been maintained in confidence, or, if newly created, will be maintained in confidence.

Documents and things produced without a legend designating the material confidential shall not be **CONFIDENTIAL INFORMATION** subject to this Protective Order unless agreed by all Parties or ordered by this Court, or otherwise designated confidential in accordance with the provisions of Paragraph 4 of this Protective Order.

3. Testimony adduced at depositions upon oral examination of current or former directors, officers, employees or agents of a Party, or any witness pursuant to paragraph 8(e) below, that constitutes or contains **CONFIDENTIAL INFORMATION** may be so designated

when such testimony is provided or within ten (10) days after a deposition transcript is provided. The Parties agree to mark all copies of such deposition transcripts with the legend "CONFIDENTIAL MATERIAL." The Parties agree to treat all testimony adduced at each deposition as being confidential at least ten (10) days after the deposition transcript is provided. If notice is timely received prior to the expiration of such ten days that a Party has designated transcript pages or testimony as "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL," such testimony and/or pages shall be deemed CONFIDENTIAL INFORMATION under this Order. All other testimony shall not be subject to this Order.

4. If a Party or Third Party, through inadvertence, produces or provides discovery of any CONFIDENTIAL INFORMATION without labeling or marking it with the legend "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" as provided in Paragraphs 2-3 of this Protective Order, the Party may, within 10 days of learning of the inadvertence, give written notice to the receiving Party that the document, thing or other discovery information, response or testimony is CONFIDENTIAL INFORMATION and should be treated as such in accordance with the provisions of this Protective Order. Upon receipt of such notice, and unless such designation is challenged pursuant to paragraph 14 of this Protective Order, the receiving Party shall treat such documents, things, information, responses and testimony as CONFIDENTIAL INFORMATION and shall mark the documents or things "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" and so notify the objecting party. Prior to receipt of such notice, disclosure of such documents, things, information, responses and testimony to a person not authorized to receive CONFIDENTIAL INFORMATION shall not be deemed a violation of this Protective Order.

5. Nothing contained in this Protective Order shall be construed to affect or govern the scope of discovery in this action, or to preclude any Party from moving this Court for a further order pursuant to Rule 26(c), Fed. R. Civ. P., or any other provision of the Federal Rules of Civil Procedure. Nothing contained in this Protective Order shall be construed to require production or disclosure of any CONFIDENTIAL INFORMATION deemed by counsel for the party possessing such material to be protected from disclosure by the attorney-client privilege or the attorney work-product immunity, so long as the withheld materials are properly identified in separate privileged and withheld document indices. For material the disclosure of which might constitute a breach of an agreement with a third party, the Party may notify the third party of the request for such material ten days prior to its disclosure, and if said third party files a motion to preclude disclosure within said ten-day period, the Party shall not disclose such material until the Court rules on the motion.

6. There is no waiver of the attorney-client privilege or the attorney work-product immunity should document(s) and thing(s) be produced which the producing Party can demonstrate are protected from disclosure by the attorney-client privilege or the attorney work-product immunity and which were inadvertently produced. Upon prompt notice by a producing Party and upon a showing of privilege or immunity together with a showing of inadvertent production, the receiving Party shall immediately return the originals and all copies of the privileged or immune document(s) or thing(s), unless the receiving Party disputes the showing of privilege, immunity or inadvertent production. If the receiving Party disputes the showing, the receiving Party may retain one copy of the document(s) or thing(s) with its outside trial counsel. Within ten (10) days thereafter, the receiving Party must file a motion with the Court

to compel production of the document(s) or thing(s). The producing Party shall have the burden of showing privilege or immunity, together with a showing of inadvertent production. From receipt of notice and until this Court resolves any such motion, the receiving Party shall maintain the document(s) or thing(s) at issue on an outside counsel's eyes only basis.

7. Material marked, labeled or otherwise designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" as described in Paragraphs 2 through 4 of this Protective Order may be offered into evidence at hearings on motions and may be used to prepare for and conduct discovery, to prepare for trial and to support or oppose any motion in this action, but shall be subject to Paragraphs 8 through 14 below and to any further order regarding confidentiality that this Court may enter.

8. Material marked, labeled or otherwise designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" as described in Paragraphs 2 through 4 of this Protective Order shall be deemed and treated as CONFIDENTIAL INFORMATION, unless and until this Court rules to the contrary, and access thereto or disclosure thereof shall be limited, unless and until this Court rules that there may be further disclosure, to:

(a) The following in-house attorneys for the parties, and their stenographic, clerical and paralegal employees and agents whose duties and responsibilities require access to material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL":

For Procter & Gamble:

Any in-house counsel to the extent necessary in the conduct of this litigation or in rendering legal advice in connection with this litigation. P&G must provide an identification of all counsel to whom disclosure is made to the other parties.

For Amway:

Any in-house counsel to the extent necessary in the conduct of this litigation or in rendering legal advice in connection with this litigation. Amway must provide an identification of all counsel to whom disclosure is made to the other parties.

(b) Outside counsel of record for the parties, and outside counsels' stenographic, paralegal and clerical employees or agents whose duties and responsibilities require access to material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL";

(c) Other outside counsel that are retained or engaged by a party for purposes of this litigation, excluding any counsel that are currently counsel of record in other litigation where Amway is a party;

(d) Outside consultants for each party, a consultant is someone who is not intended to be used as a fact witness but is a person with specialized knowledge or technical information about matters within the parameters of this litigation;

(e) Notwithstanding the foregoing, it is presumed that a witness may, in preparation for a deposition, see any CONFIDENTIAL INFORMATION of any party, which is reasonably calculated to lead to the discovery of relevant evidence, and is necessary in the conduct of the deposition. There is no need for a party to seek a pre-deposition approval to use such CONFIDENTIAL INFORMATION. At the deposition before such CONFIDENTIAL INFORMATION is placed before the witness, a copy shall be provided to counsel for the party whose CONFIDENTIAL INFORMATION is to be disclosed.

(f) Current officers or employees only to the extent necessary to provide advice in the conduct of this litigation.

If a Party's counsel wishes to disclose material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" to additional counsel pursuant to subpart (c) above, outside consultants pursuant to subpart (d) above, witnesses pursuant to subpart (e) above, or employees pursuant to the subpart (f) above, Party's counsel shall first obtain a signed Undertaking in the form of the annexed Exhibit A from each such counsel, consultant or witness who would require access to material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL". Counsel shall retain the original of each such signed Undertaking through the conclusion of this action, including any appeals and shall make a copy of each such undertaking available at the deposition of any witness.

9. Any corporation or entity which is affiliated with any of the Parties and which produces documents or information responsive to another of the Parties' discovery requests is a third-party beneficiary of this Protective Order and Nondisclosure Agreement and may pursue all civil remedies available to it for breach thereof.

10. In the event that the Parties desire to provide access to or disseminate CONFIDENTIAL INFORMATION to any person not otherwise entitled to access under this Protective Order, the Parties may agree to allow such access or any Party may move the Court for an Order that such person be given access thereto. In the event that the motion is granted, such person may have access to CONFIDENTIAL INFORMATION after first signing an Undertaking in the form of Exhibit A attached hereto. Counsel shall retain the original of each such signed Undertaking through the conclusion of this action, including any appeals.

11. Material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL," including all information derived therefrom, and all copies, summaries, abstracts, excerpts,

indices and descriptions of such material shall be held in confidence, shall not be made public by any Party or person entitled under the terms of this Protective Order to access such material, and shall not be used for any financial, commercial, marketing, business or other competitive purpose.

12. If **CONFIDENTIAL INFORMATION** is disclosed to or comes into the possession of any person other than in the manner authorized by this Protective Order, any Party becoming aware of such disclosure shall immediately inform the producing Party of all pertinent facts relating to such disclosure and shall instruct each unauthorized person to treat such information as confidential and demand that it be returned.

13. If any material designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" is to be filed with the court in connection with any proceedings in this action, such material shall be filed with the Clerk of the Court in sealed envelopes or containers prominently marked with the caption of the case, a general description of the contents of the envelope or container and the notation:

**CONTAINS CONFIDENTIAL INFORMATION COVERED BY
PROTECTIVE ORDER TO BE OPENED ONLY (1) BY OR AS
DIRECTED BY THE COURT OR (2) BY WRITTEN AGREEMENT
OF THE PARTIES.**

14. The acceptance of material designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" shall not constitute an admission or concession, or permit an inference that such material is, in fact, confidential. Any Party may challenge that material designated confidential is not confidential. Such challenge must be in writing. If the status of any material or information that has been designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" is challenged, the producing Party shall have ten (10) days after receipt

of the written challenge to object in writing to the challenge. In the case that a timely written objection to the challenge is made, the party requesting declassification shall have the burden of filing with the Court a motion to declassify, and this Court will resolve the issue. The producing party shall have the burden of establishing that the CONFIDENTIAL INFORMATION should not be declassified. If there is no written objection to the challenge within ten (10) days thereof, the challenged material shall become non-confidential.

15. This Protective Order shall not be construed to prevent any of the Parties from applying to this Court for relief therefrom, or from applying to this Court for further or additional protective orders, or from agreeing between themselves to modifications of this Protective Order, subject to the approval of this Court. The Protective Order shall not preclude the Parties from enforcing their rights against any other Party or any non-Party believed to be violating their rights. It is expressly understood between counsel for the parties that the number of personnel set forth in Paragraph 8 *supra* may be increased by agreement or upon a showing, subject to the approval of this Court, by any Party that such modification is necessary.

16. Upon final termination of this action, including all appeals, the receiving Party may retain at its outside counsel of record in this case documents, things, copies and samples to the extent they include or reflect the receiving attorney's work product. Such outside counsel may also retain a complete set of all documents filed with the Court in this action. With respect to any such retained material, this Protective Order shall survive the final termination of this action to the extent the information in such material is not or does not become known to the public and continue to be binding upon all persons to whom


CONFIDENTIAL INFORMATION is disclosed hereunder. Within thirty (30) days of final termination of this action, including all appeals, all other copies and samples of material designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" and any other summaries, abstracts, excerpts, indices and descriptions of such material and information derived from such material that are recorded in any tangible form, shall be assembled and returned (except for any that may be retained by the Court) to the producing Party's counsel or the receiving Party may alternatively certify in writing destruction thereof. Accordingly, upon final termination of this action, no one other than outside counsel of record in this case shall retain any copies or samples of any material designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**".

17. The restrictions and obligations set forth herein relating to material designated "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**" shall not apply to any information which: (a) the Parties agree should not be designated as "**CONFIDENTIAL MATERIAL**" or "**CONFIDENTIAL**"; (b) the Parties agree, or this Court rules, is already public knowledge; (c) the Parties agree, or this Court rules, has become public knowledge other than as a result of disclosure by the receiving Party, its employees or agents in violation of this Protective Order; or (d) has come or shall come into the receiving Party's legitimate knowledge or possession independently of the production by a Party under conditions such that its use and/or public disclosure by the receiving Party would not violate some obligation to another. The burden of proving prior knowledge is upon the Party asserting such prior knowledge. Such restrictions and obligations shall not be deemed to prohibit

discussions with any person of any material designated "CONFIDENTIAL MATERIAL" or "CONFIDENTIAL" if that person already has or obtains legitimate possession thereof.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 12th day of June, 1998, at Houston, Texas.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

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