UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
PIEDMONT HEALTH ALLIANCE, INC., a corporation,	)	**Docket No. 9314**
and	)	
PETER H. BRADSHAW, M.D., S. ANDREWS DEEKENS, M.D., DANIEL C. DILLON, M.D., SANFORD D. GUTTLER, M.D., DAVID L. HARVEY, M.D., JOHN W. KESSEL, M.D., A. GREGORY ROSENFELD, M.D., JAMES R. THOMPSON, M.D., ROBERT A. YAPUNDICH, M.D., and WILLIAM LEE YOUNG III, M.D., individually.	)	**PUBLIC**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT PIEDMONT HEALTH ALLIANCE'S MOTION TO LIMIT OR QUASH SUBPOENA DUCES TECUM TO ORLIKOFF & ASSOCIATES

It is well established that voluntary disclosures to third parties waive attorney-client privilege. In March 2001, PHA's CEO sent a letter to Mr. James E. Orlikoff ("Orlikoff letter"),[1] a consultant for PHA for two days in 2000 and 2001, in which she voluntarily and intentionally disclosed a legal opinion from PHA's counsel. Notwithstanding that disclosure, PHA now erroneously claims that no privilege was waived.

Only in limited circumstances will consultants avoid being considered third parties. Principles of waiver employed by courts, including the *Glaxo*[2] case upon which PHA relies,

---

1 Orlikoff letter (Tab 1) (redacted version).

2 *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).

make it clear that Mr. Orlikoff is a third party. Most importantly, there is no evidence that the requisite understanding of confidentiality existed between PHA and Mr. Orlikoff.

Even if the Orlikoff letter had retained confidential status when sent to Mr. Orlikoff, PHA waived its privilege when it disclosed an unredacted version of the document to complaint counsel during the pre-complaint investigation. Applying the balancing test Your Honor applied in *In re Schering*, Dkt. 9297, demonstrates waiver.

Complaint counsel therefore ask that PHA be found to have waived privilege and that the request to limit or quash the subpoena duces tecum sent to Orlikoff & Associates be denied.[3]

I. PHA Waived Privilege by Disclosing Legal Advice to a Third Party

A. PHA's Relationship With Mr. Orlikoff

Mr. Orlikoff is a health care consultant[4] and President of Orlikoff & Associates, Inc., a consulting firm specializing in health care governance, leadership quality, and organizational development, among other issues.[5] One of his roles as a consultant is to conduct retreats for corporations, at which he makes presentations and facilitates discussions.[6]

As detailed in his attached declaration, Mr. Orlikoff's involvement with PHA has been extremely limited. The entire extent of his work for PHA, totaling no more than eighteen hours,[7] was to prepare for and lead sessions at retreats held for PHA Board members in April 2000 and

---

[3] Putting aside PHA's motion, the real issue is whether the document retains privilege and, consequently, whether complaint counsel can use and rely upon the legal opinion referenced therein.

[4] Orlikoff Decl. ¶ 2 (Tab 2).

[5] *Id.* ¶ 1.

[6] *Id.* ¶ 2.

[7] *Id.* ¶¶ 3, 5-6, 8, 10-11, 13.

March 2001.[8] His involvement consisted of speaking about PHA Board governance issues and health care trends.[9] There is no evidence any of his work related to legal issues regarding PHA.[10]

The document that is the subject of this motion is a March 12, 2001 cover letter for materials sent to Mr. Orlikoff by PHA's CEO, Ms. Sharon Alvis.[11] The letter included background information on PHA and the issues it faced, including reference to the legal opinion of its counsel.[12] The letter was not marked confidential, and there was no request in the letter that any information therein be kept confidential.[13]

B. Mr. Orlikoff is a Third Party for Purposes of Attorney-Client Privilege

The attorney-client privilege requires "confidentiality both at the time of the communication and maintain[ing] [it] since."[14] PHA, the party asserting the privilege, has the burden[15] of establishing that the purportedly privileged communication has been kept as "confidential between attorney and client."[16] Disclosure to a third party waives the privilege,[17]

---

8 *Id.* ¶ 13.

9 *Id.* ¶¶ 3, 6, 8, 11.

10 *Id.* ¶ 15.

11 *Id.* ¶ 9; Orlikoff letter.

12 Orlikoff Decl. ¶9; Orlikoff letter.

13 Orlikoff Decl. ¶¶ 16; Orlikoff letter.

14 *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 863 (D.C. Cir. 1980).

15 *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("[t]he burden falls on the party seeking to invoke the privilege to establish all the essential elements").

16 *McErlean v. United States Dept. of Justice*, 1999 WL 791680 at *7 (S.D.N.Y. 1999), *quoting Brinton v. United States Dept. of State*, 636 F.2d 600, 603 (D.C. Cir. 1980).

17 *In re Grand Jury Subpoena*, 341 F.3d 331, 337 (4th Cir. 2003).

and PHA must show that no such waiver has occurred.[18]

PHA "must offer more than just conclusory statements" to meet its burden.[19] It must provide specific facts sufficient to allow the court to make an independent judgment as to whether the document in question retains any privileged status.[20] The burden on PHA to establish privilege is high here because the attorney-client privilege, like all privileges, should be "narrowly construed."[21] Narrow construction is required because the privilege withholds relevant information from the fact finder[22] and is in derogation of the search for truth.

In keeping with this narrow construction, as applied to a corporation like PHA, only a limited set of persons constitute "the client" for a given issue.[23] Courts look to the following factors: (1) Was the consultant the "functional equivalent"[24] of a company employee? (2) Did the consultant's work have to do with the communication at issue? (3) Did both the company and the consultant act in a manner consistent with keeping the communication confidential?[25]

---

18 *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996); *United States v. Zolin*, 809 F.2d 1411, 1415 (9th Cir. 1987).

19 *Alexander v. FBI,* 192 F.R.D. 42, 45 (D.D.C. 2000).

20 *Conagra, Inc. v. Arkwright Mut. Ins. Co.*, 32 F. Supp. 2d 1015, 1017 (N.D. Ill. 2000); *Copalcor Mfg. v. Meteor Indus., Inc.*, 1988 WL 52194, at *2 (E.D.N.Y. 1988).

21 *Hawkins v. Stables*, 148 F.3d 379, 383 (4th Cir. 1998); *Coastal States*, 617 F.2d 854; *In re Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).

22 *United States v. Zolin*, 491 U.S. 554, 562 (1989).

23 *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981).

24 *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 220 (S.D.N.Y. 2001), case *cited by Glaxo*, 294 F.3d at 148; Paul R. Rice, *Attorney-Client Privilege in the United States* §4.19 at 91 (2d ed. 1999).

25 *Glaxo*, 294 F.3d at 147-148; *see In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994); *Copper Market*, 200 F.R.D. 213; Rice, supra note 24, §4.19 at 91-92 (asking essentially same

Companies must prove affirmative answers to all of these questions to assert privilege for information disclosed to a consultant. Here, the only evidence provided shows the answer to all of these questions is **no**.

PHA's failure to prove any understanding of confidentiality existed with Mr. Orlikoff is stark. In *Glaxo*, the D.C. Circuit explained that the company asserting the privilege has to show "it limited dissemination of the document[] in keeping with [its] asserted confidentiality."[26] In upholding privilege claims, the court found that GlaxoSmithKline's consultants were "bound. . . by a separate understanding[] to keep confidential the contents of the documents."[27]

By contrast, PHA has made no showing that Mr. Orlikoff was similarly bound. The document itself contains nothing to indicate that PHA expected Mr. Orlikoff to maintain confidentiality.[28] PHA has produced no evidence that it requested Mr. Orlikoff to keep any PHA documents or information confidential: PHA has produced no written confidentiality agreement with Mr. Orlikoff nor any consulting contract containing a confidentiality provision.

Furthermore, Mr. Orlikoff's declaration attests that he can recall no PHA request to treat its communications as confidential, he had no understanding any PHA information was to be kept confidential, and he does not believe he ever agreed to keep that information confidential.[29] The absence of evidence that PHA had any reasonable expectation that its information would be kept confidential compels a conclusion that the Orlikoff letter is entitled to no privilege.

---

questions in analyzing privileged nature of consultant's communications with client's attorney).

26 *Id.* at 147.

27 *Id.*

28 Orlikoff letter.

29 Orlikoff Decl. ¶ 16.

Moreover, PHA has made no showing that Mr. Orlikoff was the functional equivalent of a PHA employee. The court in *Glaxo* found that communications to consultants who were "integral members of the team" were protected.[30] The *Bieter* court considered the consultant basically an employee of the company because he had worked with it on a "daily basis" and was "intimately involved" with its business.[31]

Here, Mr. Orlikoff spent a total of about eighteen hours over a two year period working as a consultant to PHA.[32] In contrast to someone "intimately involved" with PHA, he has no knowledge of what, if anything, PHA did with the information it obtained from him.[33] These sworn facts stand in contrast to the unsupported conclusory statements by PHA that Mr. Orlikoff "worked closely with PHA" and "played a pivotal role" helping it to revise its strategic plan.[34]

Finally, the legal subject matter of the communication at issue has nothing to do with Mr. Orlikoff's limited work for PHA. His assistance on health care governance and trends was not "completely intertwined with litigation and legal strategies," unlike in *Glaxo*.[35] Indeed, he does not recall requesting the legal opinion PHA transmitted to him[36] or there being legal issues or strategies discussed during his participation in the two retreats.[37] Ms. Alvis even admitted in the

---

30 *Glaxo*, 294 F.3d at 148.

31 *Bieter*, 16 F.3d 929 at 939; *see, e.g.*, *Copper Market,* 200 F.R.D. at 220.

32 Orlikoff Decl. ¶¶ 3, 5-6, 8, 10-11, 13.

33 *Id.* ¶¶ 7, 12-13.

34 Resp. Mot. at 6-7.

35 *Glaxo*, 294 F.3d at 148.

36 Orlikoff Decl. ¶ 9.

37 *Id.* ¶ 15.

Orlikoff letter the information included therein was "[redacted]"[38]

II. PHA Waived Privilege by Disclosing the Orlikoff Letter to the FTC

A. Factual Background

As part of the Commission's investigation, PHA submitted documents on about sixteen separate occasions over twelve months, totaling thirty-eight boxes.[39] Despite this unhurried production, complaint counsel have found, and returned to PHA when requested, numerous documents that appeared to be privileged.[40]

In addition, as a courtesy and in an abundance of caution, on December 31, 2003, Mr. Narrow of complaint counsel wrote to Mr. Koberstein, PHA's counsel, informing him that we had a document, PHA 40526-40528 (Orlikoff letter), that referred to a legal opinion provided by PHA's counsel. Mr. Narrow stated that any attorney-client privilege protecting that information appeared to have been waived because it had been sent to a third party, but that we were open to facts to the contrary.[41] Mr. Koberstein responded on February 10, 2004, stating that PHA believed there had been no waiver and that the document and all copies should be returned.[42] Mr. Narrow replied on February 13 that, based on our analysis and conversation with Mr. Orlikoff, we believed there had been a waiver. We thus declined to return the document.[43]

---

38 Orlikoff letter at PHA 40528.

39 Braun Decl. ¶¶ 5-7 (Tab 3).

40 Narrow Decl. ¶¶ 4-12 (Tab 4).

41 Letter from Mr. Narrow to Mr. Kobertsien (Dec. 31, 2003) (Tab 5).

42 Letter from Mr. Kobertsien to Mr. Narrow (Feb. 10, 2004) (Tab 6).

43 Letter from Mr. Narrow to Mr. Kobertsien (Feb. 13, 2004) (Tab 7).

B. PHA's Production of the Orlikoff Letter to the FTC Evidences Waiver

Any privilege that the Orlikoff letter may have retained was waived when PHA disclosed it to complaint counsel. "[I]nadvertent disclosure in a document production can be deemed to evidence abandonment of the requisite intent to maintain confidentiality, and thereby waive the attorney-client privilege under certain circumstances."[44] Under the five-factor balancing test Your Honor employed in the *Schering* Order to analyze whether an inadvertent disclosure waived privilege,[45] PHA cannot meet its burden to show there has been no waiver.

First, PHA has made no effort to offer evidence showing it took reasonable precautions to protect the confidentiality of privileged communications in document submissions to the Commission.[46] Indeed, the available evidence shows the opposite, since PHA failed to mark the Orlikoff letter as privileged when it was created. Such a failure shows inadequate precautions.[47]

Second, PHA's assertion of privilege was not timely. PHA never discovered its error on its own, and then it waited six weeks after being notified to assert privilege.[48] By contrast, courts

---

[44] Order Denying American Home Products Corporation's Motion for Protective Order and to Compel Return of Materials, *In re Schering*, Dkt. 9297 at 4 (Jan. 15, 2002) ("*Schering* Order") (Tab 8), *citing F.C. Cycles Int'l Inc. v. Fila Sport*, 184 F.R.D. 64, 76 (D. Md. 1998).

[45] The five factors are: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overarching issue of fairness and the protection of an appropriate privilege." *Schering* Order at 4.

[46] *Cf. IBM v. United States*, 37 Fed. Cl. 599, 602 (1997).

[47] *Schering* Order at 4; *Local 851 of the Int'l Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127, 132 (E.D.N.Y. 1998) (considering failure to label document as confidential among reasons party's precautions were not reasonable).

[48] The relevant time period begins whenever the party either knew or reasonably should have known about its error. *See Zapata v. IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997).

have considered it timely when parties act to recover privileged documents "immediately"[49] after discovering the disclosure. Six weeks, particularly in a case under time constraints, is too long.[50]

Third, neither the volume of documents produced, nor any time pressures in production, were great or unusual here.[51] The volume of documents involved in a production process can be important, but "only if it can be shown to have influenced the mistaken disclosures that were made."[52] PHA has made no such showing. It produced thirty-eight boxes and did so on a rolling basis for a one year period. Your Honor found a similar schedule in the *Schering* Order to suggest that the producing party was not under burdensome time pressure.[53]

Fourth, because it had no facial privilege designation and had been sent to what appears to be a third party, members of complaint counsel have read the document and relied on it in preparing for trial. Courts distinguish this "complete" disclosure from instances when the disclosure has been partial, such as where documents have merely been designated for copying.[54] This complete disclosure mitigates in favor of finding a waiver.

---

[49] *In re Southeast Banking Corp. Sec. and Loan Loss Reserves Litig.*, 212 B.R. 386 (S.D. Fla. 1997); *accord Bank Brussels Lambert v. Credit Lyonnais (Suisse) (S.A.)*, 160 F.R.D. 437 (S.D.N.Y. 1995).

[50] *Harmon Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996) (considering as "lax" a delay of two weeks after learning of disclosure to assert privilege and two additional weeks to file motion).

[51] Other courts have found that a lack of time pressure, even in a massive document production, weighs in favor of finding a waiver. *Parkway Gallery Furn., Inc. v. Kittinger/Penn. House Group, Inc.*, 116 F.R.D. 46, 51 (M.D.N.C. 1987).

[52] Rice, *supra note* 24, § 9:72 at 331.

[53] *Schering* Order at 5. Also, PHA's requests for additional time were always granted. Braun Decl. ¶ 9.

[54] *See, e.g., Parkway Gallery*, 116 F.R.D. at 51-52.

Finally, fairness issues dictate that waiver be found. Given the circumstances outlined above (i.e., no facial designation of privilege and dissemination to third party), complaint counsel's review of the document and reliance thereon was reasonable. Furthermore, PHA's disclosure cannot be cured. Redacting the reference to legal advice in the document will not redact the information from the minds of complaint counsel.[55]

IV. Conclusion

Complaint counsel request that this Court find that no part of the Orlikoff letter is entitled to be withheld or otherwise protected from disclosure or use based on the attorney-client privilege and thus deny PHA's motion.

Respectfully submitted,

David M. Narrow
Christi Braun
Andrew S. Ginsburg
Complaint Counsel

Date: February 25, 2004

---

[55] *Schering* Order at 6.

CERTIFICATE OF SERVICE

I, Andrew S. Ginsburg, hereby certify that on February 25, 2004:

I caused copies of the public version of Complaint Counsel's Opposition to Respondent Piedmont Health Alliance's Motion to Limit or Quash Subpoena Duces Tecum to Orlikoff & Associates be served by hand delivery upon the following person:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

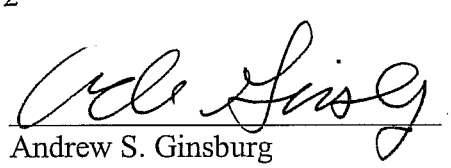
I caused one original and one copy of the public version of Complaint Counsel's Opposition to Respondent Piedmont Health Alliance's Motion to Limit or Quash Subpoena Duces Tecum to Orlikoff & Associates be served by hand delivery and one copy be served by electronic-mail upon the following person:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused copies of the public version of Complaint Counsel's Opposition to Respondent Piedmont Health Alliance's Motion to Limit or Quash Subpoena Duces Tecum to Orlikoff & Associates be served by electronic mail and Federal Express upon the following persons:

Nicholas R. Koberstein, Esq.
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005

Paul L. Yde
Senior Counsel
Freshfields Bruckhaus Deringer LLP
701 Pennsylvania Avenue, N.W., Suite 600
Washington, D.C. 20004-2692



Andrew S. Ginsburg

Tab 1

[REDACTED]

Tab 2

Declaration of James E. Orlikoff

I, James E. Orlikoff, hereby declare the following:

1. I am the President of Orlikoff & Associates, Inc., a consulting firm specializing in health care governance, leadership, quality, organizational development, strategy, and risk management. I have been involved in health care leadership, governance, and quality issues for over twenty years. I received my BA from Pitzer College in 1976 and my MA in Social and Organizational Psychology from the University of Chicago in 1978.

2. As a consultant for health care companies, one of the things I do is conduct retreats. At these retreats I make a presentation and/or facilitate discussions about strategy, trends, and governance issues. I conduct between 50 and 100 retreats per year, and travel extensively in connection with my work.

3. I was first contacted by Piedmont Health Alliance, Inc. ("PHA") in early 2000. PHA asked me to conduct a retreat for its Board of Directors. I spoke to Ms. Sharon Alvis, CEO of PHA, on March 27, 2000 for no more than one hour about the purpose of the retreat. She told me it was to teach its Board members, many of whom were doctors, how to function well as a Board. I was to go over the role, duties, and responsibilities of a Board of Directors, and address governance issues. As this conversation occurred nearly four years ago, other than the notes that I made of this call, I do not recall all of the details of my discussion with Ms. Alvis.

4. I do not know how Ms. Alvis learned of me or my firm, and I do not recall if she provided me this information when we first spoke. Since I have a large number of clients in the health care industry, it is possible that members of PHA are or have been clients of my firm. I do not recall in detail all my prior communications with other health care providers in North Carolina that may be members of PHA.

5. In advance of this first retreat, Ms. Alvis sent me some materials. These included, for example, a strategic plan, PHA financial statements, an agenda for the retreat, and an eleven page memorandum titled "Antitrust Guidelines for Managed Care Contracting by Provider Controlled Networks." I spent about one to two hours reviewing these materials and preparing for the retreat.

6. The first retreat took place near Greensboro, North Carolina, on April 1, 2000. At the retreat I made two presentations and then I facilitated discussions. I do not recall all the details of my two presentations nor all the discussions I facilitated or participated in during the retreat. I do not recall all of the people who participated in this retreat nor the details of the casual conversations I may have had with the retreat participants while I was there. My work at this retreat lasted approximately six hours.

7. I did no work to follow-up, continue, or advance what had occurred at this first retreat after it concluded. I have no knowledge of the specific manner in which PHA used what occurred at this retreat in its business.

8. To the best of my recollection I next heard from PHA in February 2001, when Ms. Alvis sent me a letter asking me to conduct another retreat. When I spoke to Ms. Alvis after receiving PHA's letter, she informed me that she wanted me to do a presentation to the PHA Board on current health care trends and then to break them up into small groups and facilitate their discussion and identification of three critical issues facing PHA, as well as two or three possible strategies to deal with those issues. I had several communications with Ms. Alvis following the 2001 retreat, but I do not recall when all of these communications occurred nor the details of all these communications. For example, I believe that I have spoken with Ms. Alvis at educational programs sponsored by other organizations. In addition, I also recall asking Ms. Alvis via e-mail to vote in support of my candidacy as one of the most influential people in healthcare.

9. In advance of this second retreat, Ms. Alvis sent me additional materials relating to PHA, under cover of a letter dated March 12, 2001. In this letter, Ms. Alvis provided background information on PHA and issues it was facing, including a brief reference to an opinion on the antitrust legality of its risk contracting and clinical integration. I do not recall requesting this information. However, my clients often provide me with background information regarding their organizations and the issues they face because they believe this information will assist me in preparation for their retreats.

10. I spent about one to two hours reviewing the materials that PHA sent me in March 2001 and preparing for the second retreat.

11. The second retreat took place in Greesnboro, North Carolina, on March 31, 2001. At the retreat I made a presentation and then I facilitated a discussion among small groups. I have no recollection of the issues raised by the small groups at the retreat. My work at this retreat lasted approximately six hours.

12. I did no work to follow-up, continue, or advance what had occurred at this second retreat after it concluded, outside of possibly providing to PHA at the end of the retreat any notes I may have taken. I have no knowledge of the specific manner in which PHA used what occurred at this retreat in its business.

13. Other than the work I did in preparing for, and at, the retreats in April 2000, and March 2001, I have done no work for PHA.

14. Other than the brief e-mail exchange referred to above, I have had no contact with PHA in any professional business or consulting capacity between March 31, 2001 and February 2004. In February 2004, after receiving a subpoena from the Federal Trade Commission, I telephoned Ms. Alvis at PHA to inform her of that event. The next day, PHA's counsel and Ms. Alvis contacted me with respect to the subpoena and requested that I keep confidential the letter of March 12, 2001, from Ms. Alvis to me.

15. Outside of the reference to antitrust legal issues in Ms. Alvis's March 12, 2001, letter to me, I do not recall that any antitrust issues regarding PHA ever arose during my period of participation in either of the two retreats. I do not recall that Ms. Alvis ever raised or discussed antitrust issues with me before either retreat. Antitrust issues relating to PHA, or legal strategies or other responses by PHA to those issues, were not part of my presentation at either retreat. I do not recall any member of the small groups at the second retreat raising antitrust issues regarding PHA as one of the critical issues discussed by the groups. Because raising such issues would have been unusual, it is highly likely that I would remember if those issues, in fact, had been raised. To the best of my knowledge, no antitrust or other legal counsel were present or participated at either retreat during the periods when I was working there.

16. I do not recall discussing confidentiality with Ms. Alvis. I have no recollection that any other person at PHA ever informed me in any way that the documents sent to me, or the communications I had with anyone at PHA regarding my work at either retreat, were confidential, or requested that I keep confidential any documents or information that I had received. I had no understanding that any part of these documents or communications were to be kept confidential, and I do not believe that I ever told anyone that I would keep the materials and information confidential. My practice, however, is not to release information provided to me by my clients without first speaking with and receiving guidance from the client. Although I took no extraordinary measures to keep the materials and information I received from PHA as confidential, I have not disseminated the March 12, 2001 letter, or the information it contained, except in response to the subpoena served upon me by the Federal Trade Commission.

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

Executed: February 23, 2004

James E. Orlikoff
President
Orlikoff & Associates, Inc.

Tab 3

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
PIEDMONT HEALTH ALLIANCE, INC., a corporation,	)	**Docket No. 9314**
and	)	
PETER H. BRADSHAW, M.D., S. ANDREWS DEEKENS, M.D., DANIEL C. DILLON, M.D., SANFORD D. GUTTLER, M.D., DAVID L. HARVEY, M.D., JOHN W. KESSEL, M.D., A. GREGORY ROSENFELD, M.D., JAMES R. THOMPSON, M.D., ROBERT A. YAPUNDICH, M.D., and WILLIAM LEE YOUNG III, M.D., individually.	)	

DECLARATION OF CHRISTI BRAUN

I, Christi J. Braun, declare as follows:

1. I am an attorney employed by the Federal Trade Commission ("FTC") in Washington, DC. I am a member of complaint counsel in *In re Piedmont Health Alliance, Inc.*, FTC Docket No. 9314.

2. I have personal knowledge of the facts stated in this declaration.

3. I was assigned to the investigation of Piedmont Health Alliance, Inc. ("PHA") in early 2002. It was this investigation which led to the complaint being issued in *In re PHA*.

4. One of my assignments for the PHA investigation has been to request and receive documents from PHA and the ten physician respondents.

5. I sent a letter to PHA, voluntarily requesting documents, on March 28, 2002. According to FTC records and correspondence with PHA, PHA submitted documents three times in response to our voluntary request for documents between April 19, 2002 and May 24, 2002. Its submissions filled one box.

6. The FTC issued a subpoena to PHA on September 12, 2002. Between September 30, 2002 and March 6, 2003, PHA made twelve separate document submissions, producing thirty-six boxes of documents. A number of these boxes were only partially filled.

7. The FTC issued a second subpoena to PHA on February 28, 2003. In response to protests from PHA regarding the burden of producing additional documents, the FTC's Bureau of Competition Assistant Director Jeffrey W. Brennan agreed to limit the scope of documents requested under the FTC's second subpoena. PHA produced one box of documents in response to the second subpoena on April 11, 2003.

8. According to FTC records and correspondence with PHA, we received a March 12, 2001 letter from Ms. Sharon Alvis, CEO of PHA, to Mr. Jamie Orlikoff, identified with the Bates stamp PHA 40526-40528 ("Orlikoff letter"), on February 14, 2003. This was in response to our first subpoena.

9. In verbal communications I had with counsel for PHA at McDermott, Will & Emery, counsel often requested additional time to complete the document productions described in Paragraphs 5 through 7 above. Those requests were always granted.

I declare, under penalty of perjury, that the forgoing is true and correct to the best of my knowledge of the information.

Christi J. Braun
Complaint Counsel

Executed: February 23, 2004

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
PIEDMONT HEALTH ALLIANCE, INC., a corporation,	)	**Docket No. 9314**
and	)	
PETER H. BRADSHAW, M.D., S. ANDREWS DEEKENS, M.D., DANIEL C. DILLON, M.D., SANFORD D. GUTTLER, M.D., DAVID L. HARVEY, M.D., JOHN W. KESSEL, M.D., A. GREGORY ROSENFELD, M.D., JAMES R. THOMPSON, M.D., ROBERT A. YAPUNDICH, M.D., and WILLIAM LEE YOUNG III, M.D., individually.	)	

DECLARATION OF DAVID M. NARROW

I, David M. Narrow, declare as follows:

1. I am an attorney employed by the Federal Trade Commission ("FTC") in Washington, D.C. I am serving as complaint counsel in *In re Piedmont Health Alliance, Inc.*, FTC Docket No. 9314.

2. I have personal knowledge of the facts stated in this declaration.

3. I was assigned to the investigation of Piedmont Health Alliance, Inc. ("PHA") in 2002. It was this investigation that led to the complaint being issued in *In re PHA*.

4. I have contacted PHA four times since December 2003, in each instance identifying documents that had been submitted to the FTC by PHA that appeared to raise issues regarding attorney-client privilege, possible inadvertent disclosure of privileged materials, or possible waiver of any such privilege. Paragraphs 5-12 below explain the sequence of events with respect to each identified document.

5. PHA 85197-85198

   a. December 30, 2003: I wrote to Mr. Nicholas R. Koberstein, PHA's counsel, informing him that complaint counsel had found a document, PHA 85197-85198, that we thought might contain privileged information. I informed him that I had set the document aside in a sealed envelope, pending his response as to whether or not the document, in fact, contained privileged information.
   b. January 7, 2004: Mr. Koberstein wrote to me, following up on an earlier telephone conversation, that PHA believed this document to be protected under the attorney-client privilege, and he requested its return.
   c. In response to Mr. Koberstein's January 7 letter, I sent back the original of PHA 85197-85198 to him, and destroyed all copies in complaint counsel's possession.

6. PHA 40526-40528 ("Orlikoff letter")

   a. December 31, 2003: I wrote to Mr. Koberstein informing him that complaint counsel had found a document, PHA 40526-40528, that we thought might contain privileged information. I informed him that we believed the document's having been sent to a third party waived any privilege, but that we would entertain information to the contrary.
   b. February 10, 2004: Mr. Koberstein wrote to me that PHA believed this document to be protected under the attorney-client privilege, and he requested its return.
   c. February 13, 2004: In response to Mr. Koberstein's letter, I informed him that after careful analysis we still believed privilege had been waived. I wrote that we would quarantine the document, pending the outcome of our dispute.

7. PHA 65634-65638

   a. January 6, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, PHA 65634-65638, that we thought might contain privileged information. I informed him that I had segregated the document in a sealed envelope, pending his response as to whether or not the document, in fact, contained privileged information, and that there had been no waiver of the privilege.
   b. January 9, 2004: Mr. Koberstein wrote to me that PHA believed this document to be protected under the attorney-client privilege, and he requested the return of all copies of the document.
   c. January 12, 2004: In response to Mr. Koberstein's letter of January 9, I sent back to him the original of PHA 65634-65638, and destroyed all copies in complaint counsel's possession.

8. PHA 33931-33935

a. January 6, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, PHA 33931-33935, that we thought might contain privileged information. I informed him that I had segregated the document in a sealed envelope, pending his response as to whether or not the document, in fact, contained privileged information, and that there had been no waiver of the privilege.

b. February 10, 2004: Mr. Koberstein wrote to me that PHA believed this document to be protected under the attorney-client privilege, and he requested return of the original and all copies and provided a redacted copy of the document to complaint counsel.

c. In response, complaint counsel returned our only copy of PHA 33931-33935 (the original) to Mr. Koberstein.

9. PHA 70544

a. January 6, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, PHA 70544, that referenced legal opinions and an antitrust audit. I told him that, while we did not believe that the document was privileged, we would entertain information to the contrary.

b. February 10, 2004: Mr. Koberstein wrote me that PHA would not seek the return of this document, but that it was not waiving attorney-client or any other applicable privilege with respect to the information referenced therein.

10. DEEK 1166

a. January 12, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, DEEK 1166, that appeared to raise a possible privilege issue. I informed Mr. Koberstein that I would be segregating this document, pending further communication from him regarding the document's status.

b. February 10, 2004: Mr. Koberstein wrote me that PHA would not seek the return of this document, but that it was not waiving attorney-client or any other applicable privilege with respect to the information referenced therein.

11. DEEK 1879

a. January 12, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, DEEK 1879, that appeared to raise a possible privilege issue. I informed Mr. Koberstein that I would be segregating this document, pending communication from him regarding the document's status.

b. February 10, 2004: Mr. Koberstein wrote me that PHA would not seek the return of this document, but that it was not waiving attorney-client or any other applicable privilege with respect to the information referenced therein.

12. DIL 0004

a. January 12, 2004: I wrote to Mr. Koberstein, informing him that complaint counsel had found a document, DIL 0004, that appeared to raise a possible privilege issue. I informed Mr. Koberstein that I would be segregating this document, pending communication from him regarding the document's status.

b. February 10, 2004: Mr. Koberstein wrote me that PHA would not seek the return of this document, but that it was not waiving attorney-client or any other applicable privilege with respect to the information referenced therein.

I declare, under penalty of perjury, that the forgoing is true and correct, to the best of my information, knowledge, and belief.

Executed: February 23, 2004

David M. Narrow
Complaint Counsel

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580
~
David M. Narrow
Attorney
~
Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

December 31, 2003

Nicholas R. Koberstein, Esquire
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096

Re: Piedmont Health Alliance, Inc., et al.
FTC Docket No. 9314

Dear Nick Mr. Koberstein:

It has just been brought to my attention that document PHA 40526-40528, a letter dated March 12, 2001, from Sharon Alvis to Mr. Jamie Orlikoff of Orlikoff & Associates, Inc., contains a restatement by Ms Alvis of the substance of a legal opinion provided by PHA's legal counsel. While this letter contains information that apparently was provided as part of a privileged communication, the letter itself is not part of a chain of such communication between PHA and its counsel, and therefore does not appear to be privileged. Moreover, by including the information in a letter to an outside party, any privilege that might exist regarding that information appears to have been waived by PHA. However, if you have information that clearly demonstrates that the document is entitled to be given privileged status, we would be willing to reconsider our position regarding the document.

Please call me at (202) 326-2744 if you have any questions.

Very truly,

David M. Narrow
Counsel Supporting the Complaint

Tab 6

A Partnership Including Professional Corporations
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

Nicholas R. Koberstein
Attorney at Law
nkoberstein@mwe.com
202-756-8288

Boston
Chicago
Düsseldorf
London
Los Angeles
Miami
Munich
New York
Orange County
Silicon Valley
Washington, D.C.

McDERMOTT, WILL & EMERY

February 10, 2004

VIA U.S. MAIL

David M. Narrow, Esq.
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: In the Matter of Piedmont Health Alliance, et al., Docket 9314; Privileged Documents

Dear David:

In your letters of December 31, January 6, and January 12, you identified a number of potentially inadvertently produced privileged documents. In this letter, we address the claims of privilege for the documents mentioned in your letters. As a preliminary matter, however, we do not believe that the inadvertent disclosure of these documents in any way constitutes a waiver of the attorney-client privilege, or any other applicable privilege.

Documents DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544

In your letters dated January 6, 2004 and January 12, 2004 you stated that documents numbered DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544 may be privileged. We do not seek the return of these documents. However, we are not waiving the attorney-client privilege, or any other applicable privilege, with respect to the information referenced in these documents.

Document PHA 40526-40528

In your letter of December 31, 2003, you identified the document numbered PHA 40526-28 as a document potentially subject to the attorney-client privilege. This document is a letter from Sharon Alvis to James Orlikoff of Orlikoff & Associates dated March 12, 2001 ("March 12, 2001 letter"). Although you acknowledge that this document appears to reflect a privileged communication, you assert that that the document is not privileged because (1) the letter itself is

not part of a chain of such communication between PHA and its counsel, and (2) PHA waived any privilege by including this information in a letter to an outside party.

We believe that the document is protected from disclosure by the attorney-client privilege because it contains the substance of communications between PHA and its attorneys, made for the purpose of obtaining legal advice. Under certain circumstances, privileged information may be disclosed to third parties without waiving the privilege. *See, e.g., Fed. Trade Comm'n v. GlaxoSmithKline,* 294 F.3d 141, 146 (D.C. Cir. 2002). To preserve the attorney-client privilege in such situations, courts generally require that parties asserting the privilege establish the following prerequisites: first, the document must contain confidential information; second, the document must have been kept confidential. *Id.*.

The March 12, 2001 letter contains confidential information, satisfying the first prerequisite for the attorney-client privilege to attach. As you know, the attorney-client privilege applies to communications that would reveal a client's confidential information given to its attorney. *See, e.g., Tax Analysts v. Internal Rev. Serv.*, 117 F.3d 607, 617 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). As you acknowledge in your December 31 letter, the document describes substantive legal advice. The disclosure of that advice would reveal information provided by PHA to its counsel in confidence, and thus constitutes the type of communication protected from disclosure by the attorney-client privilege.

The March 12, 2001 letter also meets the second prerequisite of the attorney-client privilege because PHA intended for the communication to be kept confidential, and in fact kept it confidential. To maintain the confidentiality of a communication, the communication can be disclosed only to those who need to know the information, or are authorized to speak or act for the company on such matters. *GlaxoSmithKline,*294 F.3d at 147 (quoting *Coastal States Gas Corp.,* 617 F.2d at 862). In addition, courts have held that, in certain cases, confidential communications can be disclosed to consultants without waiving the attorney-client privilege. *See GlaxoSmithKline,* 294 F.3d at 147-48. In *GlaxoSmithKline,* the D.C. Circuit found that GlaxoSmithKline's disclosure of confidential information contained in 91 documents to public relations and government relations consultants, among others, was protected by the attorney-client privilege because (1) the documents at issue were disclosed only to the individuals whose duties related generally to the contents of the documents; (2) the consultants acted as part of a team, working with full-time employees on issues that were "completely intertwined" with GlaxoSmithKline's legal strategies, and (3) the consultants understood that the information was confidential. *Id.* at 147-49 (citing *In re Copper Market Antitrust Litig.,* 200 F.R.D. 213, 219 (S.D.N.Y. 2001)).

PHA's disclosure of confidential information in its letter to Mr. Orlikoff likewise demonstrates PHA's efforts to maintain the confidentiality of the information. First, PHA disclosed the document only to Mr. Orlikoff, whose duties unquestionably related to the contents of the document, and implementing the legal advice it contained. Mr. Orlikoff specializes in supporting the organization and governance of boards, as well as the development of strategies in

risk management by boards. His relationship with PHA began more than one year before the March 2001 board meeting, during which time Mr. Orlikoff worked closely with PHA to improve its Board's governance and structure. While Mr. Orlikoff continued to work on these issues in 2001, he also played a pivotal role working with PHA staff and Board members in developing and revising PHA's strategic plan. In order to facilitate the development of a strategic plan, Mr. Orlikoff needed to understand the current issues facing PHA, including legal issues that would play a significant role in any strategic plan PHA adopted. PHA provided Mr. Orlikoff with the March 12, 2001 letter with the understanding that it would remain confidential.

The March 12, 2001 letter is therefore entitled to protection under the attorney-client privilege for the following reasons: First, it contains the type of confidential information that is protected by the attorney-client privilege. Second, PHA maintained the confidentiality of the information by limiting its disclosure to Mr. Orlikoff, a consultant who (a) was provided the confidential information contained in the letter to fulfill his duties within PHA; (b) worked closely with PHA staff and Board members to formulate a framework for a new strategic plan; and (c) understood that the information contained in the letter was confidential and could not be distributed further.

In accordance with Paragraph 17 of the Protective Order, we request that you return your original and all copies of the March 12, 2001 letter. Since only a portion of the March 12, 2001 letter is privileged, we have attached (1) a redacted copy of this document, and (2) the necessary supplement to our Privilege Log.

Document PHA 33931-33935

In your letter of January 6, 2004, you identified document PHA 33931-33935 as a potentially privileged document. This document is an outline of PHA's goals approved by PHA's Board of Directors, which includes substantive legal advice conveyed to PHA based on the confidential information it expressed to its attorney. We believe that this document is protected from disclosure by the attorney-client privilege, and that the attorney-client privilege has not been waived with respect to this document.

It is well-settled that the intra-corporate distribution of legal advice based on confidential client information does not necessarily waive the attorney-client privilege, provided the disclosure is made only to those employees who (1) are directly concerned with the subject matter of the confidential information and therefore have a "need to know" or (2) are authorized to speak or act for the corporation regarding such matters. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980). *See also Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Members of PHA's Board of Directors satisfy these requirements. First, PHA's Board members were closely involved with the matters described in these documents, and therefore had a need to know. Second, the Board members understood the confidential nature of this information. Taken together, these factors place PHA's disclosure of this document squarely within the bounds of the attorney-client privilege.

In accordance with Paragraph 17 of the Protective Order, we request that you return your original and all copies of the document numbered PHA 33931-35. Since only a portion of the document is privileged, we have attached (1) a redacted copy of this document, and (2) the necessary supplement to our Privilege Log.

* * *

Please call me if you wish to discuss any of this further.

Sincerely,

Nicholas R. Koberstein

Tab 7

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580
~
David M. Narrow
Attorney
~
Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

February 13, 2004

VIA FACSIMILE AND U.S. MAIL

Nicholas R. Koberstein, Esq.
McDermott, Will & Emery
600 13th Street, NW
Washington, DC 20005

Re: *In re Piedmont Health Alliance, Inc., FTC Dkt. No. 9314*

Dear Nick:

Thank you for your letter of February 10, 2004 to me. This letter confirms the phone conversation we had the same day about that letter.

In your letter, you state that you are not asking us to return DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544. You explained to us that while you have not asked for those documents back, you are not waiving privilege beyond that which is on the face of the documents.

In response to your claim of privilege with respect to PHA 33931-33935, we told you that we will collect all copies of that documents and segregate them. Once all copies of PHA 33931-33935 have been collected, we will return them to you. We hope to have that done shortly.

With regard to PHA 40526-40528 ("Orlikoff letter"), we told you we will collect and segregate all copies of that document. We are working on having all copies of that document quarantined.

We also discussed that Mr. Orlikoff has the Orlikoff letter in his custody and presumably will be sending it to us in response to the subpoena we sent him on February 2, 2004. You communicated to us that if PHA and complaint counsel disagreed about the letter's privileged status, you would be filing a motion shortly to limit or quash our subpoena to Mr. Orlikoff.

We informed you that we would review your claim of privilege concerning the Orlikoff letter and would get back to you as soon as possible with a response regarding your assertion that the document is covered by attorney-client privilege. After careful analysis, including considering the points raised in your letter and speaking at length with Mr. Orlikoff, it is our current view that any privilege that the Orlikoff letter may have had has been waived as to all portions, including the sentence referencing the legal opinions of PHA counsel. We also believe that such a waiver would waive privilege as to the underlying substance of the communication referenced in the letter. We may pursue subject matter waiver, given your statement to me today that PHA is unwilling to stipulate that it will not raise a legal defense based on clinical integration – clinical integration is the very subject of the potion of the Orlikoff letter for which you are asserting privilege.

Because we believe the Orlikoff letter does not retain any privilege, we do not believe we have an obligation to return it to you or to limit the subpoena to Mr. Orlikoff with respect to the letter at this time. We also would expect PHA to comply with any requests for information concerning the underlying substance of the communication referenced in the letter.

As we discussed, we think it would be best to have all privilege questions with respect to the Orlikoff letter resolved at one time, and to not burden ALJ Chappell with having to make more than one decision on what are a related set of issues. Please keep this in mind when filing any motions regarding the Orlikoff letter.

If you have any questions or concerns, please contact me at 202-326-2744.

Sincerely,

David M. Narrow
Counsel Supporting the Complaint

Tab 8

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
Schering-Plough Corporation, a corporation,	)	
Upsher-Smith Laboratories, a corporation,	)	Docket No. 9297
and	)	
American Home Products Corporation, a corporation.	)	

ORDER DENYING AMERICAN HOME PRODUCTS CORPORATION'S MOTION FOR PROTECTIVE ORDER AND TO COMPEL RETURN OF MATERIALS

I.

On September 27, 2001, American Home Products Corporation ("AHP"), which was then a respondent in this proceeding, filed a motion for a protective order and to compel the return of privileged and work product materials ("AHP's Motion"). On October 12, 2001, the Secretary of the Commission issued an Order Withdrawing Matter from Adjudication as to Respondent American Home Products Corporation. By stipulation, Complaint Counsel's time for filing a response brief was extended and AHP's request to file a reply brief was granted. On October 19, 2001, Complaint Counsel filed an opposition to AHP's motion ("Opposition"). AHP filed a reply to Complaint Counsel's opposition on November 13, 2001. On November 27, 2001, Complaint Counsel filed a motion for leave to file a response to AHP's reply and its response. By stipulation, the parties asked the Court to defer ruling until after November 28, 2001.

Complaint Counsel's motion for leave to file a response to AHP's reply is GRANTED. For the reasons set forth below, AHP's motion for a protective order is DENIED.

II.

AHP moves for a protective order (i) compelling Complaint Counsel to return to AHP or destroy all copies of nine documents it claims are privileged and work product and were inadvertently produced during the pre-complaint investigation; (ii) compelling Complaint Counsel to return all copies of the October 5, 2000 deposition of Dr. Michael Dey so that testimony about these documents given during that deposition may be redacted; (iii) prohibiting Complaint Counsel from using these documents and testimony; and (iv) barring Complaint Counsel from asking questions at depositions or at trial concerning these documents. AHP asserts, first, that the attorney-client privilege and work product doctrine apply to and protect the documents at issue. AHP asserts, second, that the disclosure of these documents was inadvertent and did not waive the privileges.

Complaint Counsel responds, arguing, first, that the documents are not protected by attorney-client or work product privileges. Complaint Counsel argues, second, that AHP's disclosure was not accidental, but instead was the result of an erroneous judgment about whether the documents were privileged. Complaint Counsel argues, third, that even if AHP's disclosure is deemed inadvertent, AHP has waived any privileges.

III.

The circumstances surrounding the creation of the documents subject to this motion, according to AHP are as follows. Schering-Plough Corporation (Schering) brought a patent infringement suit against AHP on February 16, 1996. AHP's Motion, p. 3. AHP was represented in the patent litigation by outside counsel other than Arnold & Porter, AHP's current outside counsel for this proceeding. *Id.* During the course of the patent infringement litigation, AHP's outside counsel and AHP representatives communicated with each other to assist AHP's counsel in providing legal services and advice to AHP; those communications were reflected in written documents. *Id.* AHP's motion relates to nine such documents and to testimony thereof.

AHP asserts that each of the nine documents reflects communications to the client from counsel and from the client to counsel for the purpose of giving and receiving legal advice and services in connection with the patent infringement litigation. *Id.* at p. 4. Six of the documents are tables or spreadsheets; two of the documents are handwritten notes or memoranda; one is handwritten notes and a market forecast. *Id.* at pp. 4-8. AHP does not assert that any of the documents were created by counsel; rather AHP states that officers or personnel of ESI-Lederle ("ESI") created the documents at the request of counsel and in order to assist counsel in the patent litigation. *Id.* Many, though not all, of the documents are described by AHP as incorporating assumptions that resulted from discussions with counsel. *Id.*

The circumstances surrounding the disclosure of AHP's documents, according to AHP and not contradicted by Complaint Counsel, are as follows. In response to a subpoena *duces tecum* that the Federal Trade Commission ("FTC") issued to AHP on November 5, 1999, AHP's

current outside counsel, Arnold & Porter, produced more than 27,000 pages to the FTC during the pre-complaint investigation. *Id.* at p. 8. According to the declaration of the attorney who oversaw the production process, market forecasting documents bearing "Confidential" and "Attorney-Client Privileged" designations were reviewed and withheld from production on privilege grounds. *Id.* Other documents that did not contain on their faces any designation of privilege but were determined by the supervising attorney to be privileged, including some market forecasting documents, were also withheld from production. *Id.* When documents were produced to the FTC in February and March 2000, counsel for AHP in charge of production had not segregated out as privileged and thus did not withhold from production the nine documents subject to this motion. *Id.*

On October 5, 2000, seven months after the documents had been produced, during the investigative phase of this proceeding, the FTC took the testimony of Dr. Michael Dey, who was then President of ESI, the AHP unit that manufactured and sold generic drugs. *Id.* at pp. 3, 9. Prior to the deposition, Arnold & Porter lawyers met with Dey regarding his upcoming investigational hearing. *Id.* at p. 9. During the investigational hearing of Dey, counsel for the FTC inquired into the origins of five of the nine documents at issue in this motion. *Id.* During his testimony, Dey was unable to recall why these documents had been created, who at the company had prepared them, or to whom they had been distributed. *Id.* Because Dey was unable to remember the origins of these documents, counsel for AHP did not object to questioning about the documents and Dey testified about them. *Id.* at pp. 9-10.

On February 9, 2001, FTC staff sent documents to Complaint Counsel's economic expert, Timothy Bresnahan, including the transcript of the Dey investigational hearing and five of the documents at issue here. Declaration of Yaa Apori, ¶ 5. ("Apori Decl.") One of the other documents at issue in this motion was also sent to Bresnahan in August 2001. *Id.* at ¶ 6.

On June 25, 2001, Complaint Counsel served on counsel for AHP a Notice of Deposition which required AHP to produce a witness to testify about the five of the nine documents marked as exhibits in Dey's deposition. *Id.* at p. 10. During its efforts to locate a witness to testify about these documents, Arnold & Porter determined that the nine documents at issue were privileged and notified Complaint Counsel that these documents had been inadvertently produced. *Id.* By letters dated July 20, 2001, and July 25, 2001, Arnold & Porter requested the return of the documents and Dey's deposition transcript and provided Complaint Counsel its basis for asserting privileges. *Id.*

IV.

In this case, whether or not the documents and Dey's testimony about the documents are privileged is not dispositive because, as discussed below, waiver is found. "'When the producing party claims inadvertent disclosure it has the burden of proving that the disclosure was truly inadvertent, and that the privilege has not been waived.'" *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, *6 (Oct. 17, 2000) (quoting *Golden Valley Microwave Foods, Inc. v.*

Weaver Popcorn Co., Inc., 132 F.R.D. 204, 207 (N.D. Ind. 1990)). Whether or not a privilege has been waived can be determined by assessing the circumstances under which the documents were produced. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155 at *5-6 (*citing United States v. De Lajara*, 973 F.2d 746, 749 (9th Cir. 1992)). In *Hoechst Marion Roussel*, a balancing test, which permits consideration of the totality of the circumstances surrounding disclosure, was adopted for determining whether disclosure waives any privileges. 2000 FTC LEXIS 155 at *7. Under the balancing approach, "inadvertent disclosure in a document production can be deemed to evidence abandonment of the requisite intent to maintain confidentiality, and thereby waive the attorney-client privilege under certain circumstances." *F.C. Cycles Int'l Inc. v. Fila Sport*, 184 F.R.D. 64, 76 (D. Md. 1998). To determine if waiver has occurred through inadvertent production, five factors are considered: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege. *Hoechst Marion Roussel*, 2000 FTC LEXIS 155 at * 6 (*citing Gray v. Gene Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996); *Alldread v. Grenada*, 988 F.2d 1425, 1434-35 (5th Cir. 1993)).

Applying the balancing test and the above stated five factors to the disclosure made in the instant case, AHP waived any privileges it may have had with respect to the documents and testimony subject to this motion.

First, the precautions taken to prevent disclosure of privileged materials were inadequate in three respects. One, privileged documents were created without a label of privilege. *See* Declaration of Randal Shaheen, ("Shaheen Decl.") at ¶ 6. Two, the procedures for reviewing and pulling from production privileged materials were not adequate. Responsive documents were reviewed by trained and experienced attorneys who segregated out potentially privileged materials. Shaheen Decl. at ¶ 4. Those first line reviewers applied inconsistent standards, as some market forecasting and related documents were withheld from production, but others were not. *See* Shaheen Decl. at ¶¶ 4-5. The supervising attorney did not review documents that had not been segregated out as potentially privileged. Shaheen Decl. at ¶ 4. Thus there appears not to have been a second attorney review of the documents selected for production. Three, AHP did not investigate the origins of the documents following the deposition of Dey to determine if they were privileged. *See* Shaheen Decl. at ¶ 8.

The procedures in place for reviewing documents for production are similar to those found to be inadequate in other cases. In *F.C. Cycles Int'l Inc.*, 184 F.R.D. at 76-78, documents were reviewed first for responsiveness by an attorney or senior paralegal. Documents originally reviewed by a paralegal were then subjected to a privilege review by an attorney. If the initial review was conducted by an attorney, the same attorney simultaneously conducted a privilege review. Sixty-four thousand pages were produced under no particular time constraints. The court held that the party did not have adequate procedures in place because it failed to provide for a post designation review or an additional safeguard of reviewing the documents after copying. *Id.* at 78. *See also In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 U.S. Dist. LEXIS

17110, *7-8 (N.D. Ill. 1995) (finding waiver where reviewing attorneys applied inconsistent standards for determining privilege).

There are cases where the procedures in place at the time of production were less rigorous than those employed by counsel for AHP and the court found the procedures to be reasonable. E.g., *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985). However, in the instant case, counsel for AHP failed to take reasonable precautions to preserve any privileges after it was reasonably on notice that privileged documents may have been produced. When Dey was asked about the origins of five of the nine documents, counsel for AHP was on notice that market forecasts and related marketing documents had been produced and should have made inquiries at that time into whether these documents and other related documents - like the other market forecasting documents that had been withheld as privileged - were also privileged. Accordingly, the reasonableness of the precautions factor weighs in favor of waiver.

Second, AHP did not take steps to rectify the production error in a reasonable time. "Delay in asserting the privilege can result in waiver." *Graco Children's Products, Inc. v. Dressler*, 1995 U.S. Dist. LEXIS 8157, *19 (June 14, 1995); *Transonic Systems, Inc. v. Non-Invasivemedical Tech.*, 192 F.R.D. 710, 715 (D. Ut. 2000) ("In the context of inadvertent disclosures, courts have required parties seeking the return of a document to act timely."). The documents were produced in February or March 2000. Shaheen Decl. at ¶ 7. Dr. Dey was asked to testify about the origins of five of the nine disputed documents in October 2000. Shaheen Decl. at ¶ 7. Counsel for AHP did not assert privilege when Dey was asked about the documents in his deposition. Shaheen Decl. at ¶ 8. After Dey was questioned about five of these documents, AHP was clearly on notice that there may have been a problem with the documents produced. Counsel for AHP did not inquire into the origins of the documents immediately following the deposition of Dey, but instead waited eight months, until July 2001, and then, only in response to Complaint Counsel's deposition notice seeking testimony about five of the nine documents. See Declaration of Cathy Hoffman, ("Hoffman Decl.") at ¶ 2. By this time, Complaint Counsel had already provided five of the documents to its economic expert. Apori Decl. at ¶ 5. This delay of asserting privilege nearly a year and a half after production and eight months after notice of Complaint Counsel's use of the documents weighs heavily in favor of waiver.

Third, the scope of the production weighs slightly in favor of AHP, but does not require a finding of non-waiver. Counsel for AHP reviewed more than 100,000 pages of documents looking for responsive material and produced more than 27,000 pages of documents to the FTC during the pre-complaint investigation. Shaheen Decl. at ¶ 3. The size of production alone does not dictate a finding in AHP's favor. "As the number of documents grows, so too must the level of effort increase to avoid an inadvertent disclosure. Failure to meet this level of effort invites the inference of waiver." *New Bank of New England v. Marine Midland Realty Co.*, 138 F.R.D. 479, 483 (E.D. Va. 1991). Furthermore, counsel was not under unduly burdensome time constraints, as it produced documents on a rolling basis three to four months after it was served

with the FTC's subpoena *duces tecum*. Shaheen Decl. at ¶¶ 2,7. See *F.C. Cycles*, 184 F.R.D. at 78 ("considering the lack of time constraints" and finding waiver).

Fourth, the extent of disclosure is complete. *In re Grand Jury Investigation*, 142 F.R.D. 276 (M.D.N.C. 1992) (disclosure complete where company turned documents over to an investigator for the government). "A limited disclosure resulting from glancing at an open file drawer or designating documents for copying may not justify a finding of waiver when the party does not know the essence of the document's contents. However, when disclosure is complete, a court order cannot restore confidentiality and, at best, can only attempt to restrain further erosion." *Parkway Gallery Furniture, Inc. v. Kettinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 51-52 (M.D.N.C. 1987). Complaint Counsel has read, analyzed, and used the documents. Moreover, Complaint Counsel provided five of the nine the documents and the transcript of Dey's testimony to Professor Bresnahan, Complaint Counsel's economic expert, in February 2001, long before AHP claimed privilege for the documents in June 2001. Apori Decl. ¶ 5. Bresnahan cites to several of the documents in his report. Expert Report of Professor Timothy Bresnahan at A11-A14. Thus the extent of disclosure is complete and this factor weighs in favor of finding waiver. See *Marine Midland*, 138 F.R.D. at 480 (inadvertently disclosed document marked as an exhibit at a deposition); *Golden Valley Microwave Foods*, 132 F.R.D. at 209 (document already used in other discovery including depositions of a party's employees).

Fifth, considerations of fairness and the policy behind the privilege weigh in favor of finding that the privilege was waived. "Whether fundamental fairness weighs for or against waiver largely depends on the extent of reliance the party has made on the document in the case." *F.C. Cycles*, 184 F.R.D. at 78-79 (citing *Golden Valley Microwave Foods, Inc.*, 132 F.R.D. at 209 (fairness required use of an inadvertently produced letter since it had already been used in depositions of opposing side's employees); *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (N.D. Cal. 1990) (fairness required a finding of waiver because defendants had analyzed document and had possibly disclosed it to experts, and had shown strong reliance on it for their defense). Complaint Counsel asserts that it has relied on the documents in the pre-complaint investigation and in trial preparation prior to AHP's assertion of privilege. Opposition at p. 36. This reliance was justifiable as nothing on the face of the documents suggests that the documents might be privileged. Complaint Counsel further asserts that Bresnahan based his expert opinion in part on several of the disputed documents. *Id.* at p. 38. Complaint Counsel asserts that if Bresnahan is barred from discussing the documents and at trial is asked about the bases of his opinions, he may not be able to answer fully. Because Complaint Counsel would be prejudiced if not allowed to use these documents on which it has reasonably relied and because AHP did not act reasonably in maintaining and asserting any privileges, considerations of fairness and the policy behind the privilege weigh in favor of finding that any privileges were waived.

AHP has not met its burden of showing that, under the totality of these circumstances, AHP did not waive any privileges. Accordingly, AHP has waived its right to assert the work product or attorney-client privileges as to these nine documents and to Dey's testimony regarding five of the documents. For the above stated reasons, AHP's motion is DENIED. Although AHP is found to have waived any privileges, this order does not constitute a ruling on whether the documents will be afforded *in camera* treatment.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: January 15, 2002