

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

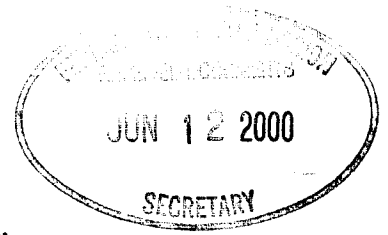
In the Matter of

**HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,**

and

ANDRX CORPORATION, a corporation.

DOCKET NO. 9293



**RESPONDENT ANDRX'S MOTION TO COMPEL
COMPLAINT COUNSEL TO PRODUCE DOCUMENTS**

Pursuant to § 3.38 of the Federal Trade Commission's Rules of Practice, Respondent Andrx Corporation hereby moves for an Order (1) overruling Complaint Counsel's objections and assertions of purported privileges to Andrx's First Request for Production of Documents and Things dated April 17, 2000; (2) requiring Complaint Counsel to produce all requested documents in the possession, custody, or control of the Federal Trade Commission; and (3) granting such other and further relief as the Court deems just and proper.


The bases of this motion are set forth in the accompanying Memorandum in Support of its Motion to Compel Complaint Counsel to Produce Documents (dated

June 1, 2000); and the accompanying Declaration of Hal S. Shaftel, executed on June 1, 2000.

Dated: June 1, 2000

Respectfully Submitted,

SOLOMON, ZAUDERER, ELLENHORN,
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By:  _____

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MEMORANDUM IN SUPPORT OF ITS MOTION TO
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**RESPONDENT ANDRX CORPORATION'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO
COMPEL COMPLAINT COUNSEL TO PRODUCE DOCUMENTS**

Pursuant to § 3.38 of the FTC's Procedures and Rules of Practice, respondent Andrx Corporation ("Andrx") submits this memorandum in support of its motion for an order compelling Complaint Counsel to produce certain categories of documents in the possession, custody or control of the FTC. Andrx served its First Request for Production of Documents and Things directed to Complaint Counsel on April 17, 2000. Complaint Counsel then served its responses on May 11, 2000. With respect to disputes over those responses, Andrx attempted to meet and confer in good faith as set forth in the accompanying Declaration of Hal S. Shaftel, executed June 1, 2000. Andrx brings this motion within 20 days after service of the responses as required by the Additional Provisions in this Court's Scheduling Order (dated April 26, 2000).¹

Preliminary Statement

Given that time is extremely limited for Andrx to conduct discovery and prepare for trial, Andrx served document requests focussed on information it genuinely requires. Andrx recognizes it does not have time to waste. Although Complaint Counsel produced a number of boxes of documents, the boxes largely consist of public filings, including filings from the very patent infringement action in which Andrx was a party, with few documents relating to the substance of what the FTC ascertained, through its multitude of sources, during its pre-complaint investigation.

¹ A copy of Andrx's First Request for Production of Documents and Things is annexed as Exhibit A to the accompanying Declaration of Hal S. Shaftel (the "Shaftel Declaration"); and Complaint Counsel's responses are annexed as Exhibit B thereto.

In response to Andrx's document requests, Complaint Counsel has given us no indication that it has fully complied with any single request. Nor has Complaint Counsel given any indication as to which of the boilerplate objections it has asserted apply to particular documents or categories of documents. Complaint Counsel also failed to comply with its obligations under the procedural rules to provide a log setting forth the grounds for each of its purported objections on a document-by-document basis. Accordingly, Andrx seeks an order overruling Complaint Counsel's purported objections to Andrx's document requests and directing Complaint Counsel to comply fully and promptly with Andrx's requests by producing the responsive documents in the FTC's possession, custody or control.

Prior to filing the Complaint, the FTC staff conducted a detailed investigation, during a period extending over two years, concerning respondents and the HMR/Andrx Stipulation that is the subject of these proceedings. As part of that process, Andrx made enormous efforts to provide the FTC staff with whatever information it requested. The universe of information compiled during the investigation, from an array of sources, is available to Complaint Counsel, giving it an enormous advantage as it already is essentially ready for trial.

Respondents have been allotted fewer than six months to conduct discovery and attempt to overcome the substantial information imbalance that Complaint Counsel enjoys. That schedule does not leave Andrx with an opportunity to redo the discovery the FTC obtained during its pre-complaint investigation. At every turn, Complaint Counsel has sought to maintain the disparity by frustrating Andrx's efforts to obtain relevant discovery -- and every day of delay benefits Complaint Counsel. For

example, Complaint Counsel ignored Andrx's request to include certain materials in its Initial Disclosures and forced respondents to serve formal document requests for that information. Waiting unnecessarily to provide formal responses, Complaint Counsel then raised a host of spurious, boilerplate objections, seeking to preclude Andrx's access to basic factual information. After Andrx pressed it, Complaint Counsel also admitted that it had failed to search known repositories of responsive documents. Even after doing so, it has delayed producing the documents it acknowledges now having located. In addition, Complaint Counsel inexcusably has failed to provide a detailed log setting forth its assertions of privileges -- which is long overdue.

By not producing a privilege log, Complaint Counsel has blocked Andrx from being able to identify what specific documents have been withheld and for what purported reasons. The failure to provide the log is particularly egregious because Complaint Counsel unilaterally decided it would not simultaneously do so with its responses. Even now, Complaint Counsel has not served the log by the deadline it arbitrarily selected for itself. On that basis alone, Complaint Counsel has waived its assertions of any privileges. Even, however, if the privileges and other objections asserted by Complaint Counsel are assessed on the merits, it is clear that Complaint Counsel is distorting the scope and application of its objections in an effort to obstruct appropriate discovery.

Complaint Counsel should not be allowed to escape the fundamental rule that "discovery must be a two-way street." Wardius v. Oregon, 412 U.S. 470, 475 (1973). However, that is precisely what it has sought to do. The hollowness of Complaint Counsel's objections to Andrx's document requests is highlighted by

Complaint Counsel's absolute refusal to produce documents concerning other transactions similar to the HMR/Andrx Stipulation, while relying, at the same time, on such other transactions as part of its own case. In fact, Andrx's request for information about other transactions or deals was a verbatim copy of a request the FTC served on Andrx in the pre-complaint investigation (and Andrx provided the requested information). Even beyond that, Complaint Counsel itself in these proceedings served document requests on Andrx calling for the same information. See First Request for Production of Documents and Things to Andrx Corporation (dated May 1, 2000), Specification Nos. 16, 17.

The resistance on Complaint Counsel's part to providing proper disclosures is more than just frustrating -- it is seriously prejudicial to Andrx. Given the extremely short time frame before the trial of this matter, delay in the discovery process benefits Complaint Counsel because it alone already has the information it intends to use and only respondents require discovery.

Overview of Discovery

Mindful of the one-year deadline for resolving proceedings, Andrx repeatedly has pressed Complaint Counsel to provide proper and meaningful disclosures. Shortly after the Complaint was filed on March 16, 2000, counsel for Andrx wrote to Complaint Counsel, by letter dated April 4, 2000, in an effort to have Complaint Counsel produce certain categories of documents as part of its Initial Disclosures. A copy of the April 4 letter is annexed as Exhibit C to the Shaftel Declaration. According to the letter:

If you [Complaint Counsel] will be asserting any purported objection to the production of these categories of documents, we ask that you let us know so that the matter can be raised with the Administrative Law Judge at our initial meeting.

In response, Complaint Counsel advised Andrx, by letter dated April 10, 2000, that it would do nothing to expedite the process -- it would only do what was minimally "required by § 3.31(b) of the FTC Rules of Practice". A copy of the April 10 letter is annexed as Exhibit D to the Shaftel Declaration.

Given the limited view Complaint Counsel took of the scope of its Initial Disclosures, Andrx promptly served Complaint Counsel with formal document requests on April 17, 2000. See Shaftel Decl., Exhibit A. Thereafter, the Court entered a Scheduling Order, dated April 26, 2000, providing that "[r]esponses or objections to document requests . . . shall be due within 20 days of service." Contrary to the Scheduling Order, Complaint Counsel took the position, over Andrx's objections, that the 20-day time limitation did not apply to requests served before it was adopted. Complaint Counsel unilaterally determined that for itself, without seeking an exemption from the Court.

During a telephone call on May 4, 2000, Andrx requested that Complaint Counsel produce responsive documents earlier than the rules require or, at the very least, serve any objections earlier so the meet and confer dialogue could begin. Complaint Counsel nonetheless rejected that suggestion, without ever explaining that it could not do so. By letter dated May 4, 2000, Andrx memorialized its proposal as follows:

There is no legitimate reason for Complaint Counsel to wait . . . to serve any objections it may have to Andrx's document requests. That schedule only wastes the valuable time before the parties can meet and confer on your objections and, if necessary, engage in motion practice.

A copy of this May 4 letter is annexed hereto as Exhibit E to the Shaftel Declaration.

Even after Complaint Counsel finally served its formal, basically boilerplate objections on May 11, 2000, it failed to provide, as required by the rules, a

log identifying the documents being withheld based on privileges and detailing the purported grounds for doing so. The absence of such a privilege log hinders Andrx's ability to understand what materials are being withheld. Pressing for the log, Andrx wrote Complaint Counsel, by letter dated May 12, 2000, as follows:

I reiterate that it is important for Complaint Counsel to provide its log promptly. On the phone, Brad [Albert] advised that Complaint Counsel would do so next week or, at the very least, promptly the following week.

A copy of the May 12 letter is annexed as Exhibit F to the Shaftel Declaration. In disregard of its commitment, Complaint Counsel still has not provided any privilege log.

In a series of telephone conversations after Complaint Counsel produced some documents, Andrx raised with Complaint Counsel that no production had been made of documents from the files of FTC staff members involved in the pre-complaint investigation, including, in particular, David Balto. Complaint Counsel conceded that it had not reviewed those files, which were obvious repositories of responsive documents. Complaint Counsel then undertook to review the files. Despite that commitment to do so, Andrx was required to write, both May 28 and again on May 31, 2000, again requesting production of materials from the files. Copies of these letters are annexed as Exhibits G and H to the Shaftel Declaration. Complaint Counsel now has advised Andrx it intends to produce these documents this week.

As further detailed in the accompanying Shaftel Declaration, Andrx has conferred in good faith with Complaint Counsel concerning the issues raised in this motion. During conversations in which the parties discussed their respective positions, Complaint Counsel did not agree to produce any additional documents whatsoever. Even after those discussions, Andrx does not know which documents are being withheld and

which purported privileges apply to which documents. Given the short discovery period and concomitant short time period to file a motion to compel, this motion was necessary.

ARGUMENT

The FTC's procedural rules provide that

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

See 16 C.F.R. § 3.41(c)(1). In turn, Complaint Counsel has available to it, for production to respondents, any information "in the possession, custody, or control of the Commission." 16 C.F.R. §3.31(b)(2). Neither the letter nor the spirit of the rules is consistent with Complaint Counsel's crabbed reading of its discovery objections.

Particularly since Complaint Counsel bears the burden to demonstrate the purported bases for its assertions of privileges, it is clear that the privileges and other objections raised by Complaint Counsel lack merit as applied to the particular requests at issue. See, e.g., Bartholdi Cable Co., Inc. v. FCC, 114 F.3d 274, 280 (D.C. Cir. 1997) (burden on party claiming privilege); Von Bulow by Aversprey v. Von Bulow, 811 F.2d 136, 144 (2d Cir.), cert. denied, 481 U.S. 1015 (1987) (same).

I.

COMPLAINT COUNSEL'S DELAY IN PROVIDING ITS PRIVILEGE LOG CONSTITUTES A WAIVER OF ANY PRIVILEGE OBJECTIONS

Not only did Complaint Counsel refuse Andrx's reasonable request to provide document responses (or at least objections) on an expedited basis, but Complaint Counsel has never produced a log describing the grounds for privileges as applied to specific documents. 16 C.F.R. 3.38(A)(a) calls for "a schedule of the items withheld which states individually as to each such item . . . the specific grounds for claiming that

the item is privileged." After Complaint Counsel finally served formal discovery responses (not responsive documents) on May 11, 2000, Andrx immediately pressed for a privilege log to enable it to identify what documents are being withheld and the purported objections. (Andrx already produced a privilege log as part of the pre-complaint investigative phase of these proceedings).

Complaint Counsel itself committed to providing a privilege log by May 19 (see Shaftel Decl., Ex. F) -- Andrx wanted it sooner. It is now almost two weeks after the date that Complaint Counsel itself arbitrarily selected and still no log has been provided. The rules contemplate essentially contemporaneous service of a privilege log with a party's responses, or at the very least promptly thereafter. This Court's Scheduling Order provides for a motion to compel within 20 days of responses, which also obviously contemplates a log well in advance of the expiration of the 20-day period.

The failure here to provide the privilege log is seriously prejudicial since Andrx cannot determine exactly what documents are being withheld. Nor does Complaint Counsel have a legitimate excuse for its failure. The FTC has been preparing this case for two-and-a-half years and Complaint Counsel has had ample opportunity to prepare a log. The failure to do so fits a broader pattern of conduct on the part of Complaint Counsel, which repeatedly has obstructed the discovery process given that it has the information it needs and only respondents require discovery.

Under these circumstances, Complaint Counsel's failure to produce a privilege log constitutes a waiver of its purported privileges. E.g., First American Corp. v. Al-Nahyan, 2 F.Supp.2d 58, 63 n.5 (D.D.C. 1998) (court can base determination that privilege had been waived on failure to submit privilege log); Bregman v. District of

Columbia, 182 F.R.D. 352, 363 (D.D.C. 1998) ("Plaintiff's failure to comply with Fed. R. Civ. P. 26(b)(5), requiring him to file a privilege log, bars in itself any claim of privilege, whatever its basis").²

II.

COMPLAINT COUNSEL'S PRODUCTION SHOULD NOT BE LIMITED TO THE FILE FOR THIS PARTICULAR INVESTIGATION

At page 4 of its Response, Complaint Counsel indicates that its search for responsive documents has been limited solely to those documents collected by the FTC in connection with investigation No. 981-0368 -- which is only one of at least two investigations preliminary to the filing of the complaint in these proceedings. For the reasons that follow, Complaint Counsel's unwarranted curtailment of its discovery obligations should be corrected, and Complaint Counsel should be directed to produce responsive documents, regardless of their location.

That there exist relevant documents collected in the context of other investigations cannot seriously be challenged. The FTC staff first investigated the HMR/Andrx Stipulation in 1997, in connection with its review of a planned acquisition by one of Andrx's shareholders, Watson Pharmaceuticals, Inc., of The Rugby Group, Inc., File No. 981-0006. The FTC resolution authorizing process specifically stated the investigation related to, among other things, "any stipulation or agreement between

² At the very least, the Court should conditionally strike Complaint Counsel's assertions of any privileges pending an immediate production of its privilege log. In the event the Court permits Complaint Counsel to provide a privilege log belatedly, Andrx respectfully reserves its right to bring a motion to compel directed to the categories of documents and/or specific documents identified on the log and the purported privileges applying to those documents.

[HMR] and Andrx.” In the course of that investigation, Andrx cooperated fully with the Bureau Staff and provided substantial volumes of material relating to the Patent Action and the Stipulation. Andrx fully explained the Stipulation, including voluntarily appearing for interviews. Andrx believes that the FTC collected documents from sources other than Andrx as part of the investigation.

Thereafter, in October 1998, the FTC recommenced an investigation under File No. 981-0368, which is the only file Complaint Counsel contends is relevant to these proceedings. However, both that file and the prior file focused on the dealings between HMR and Andrx, including, in particular, the HMR/Andrx Stipulation.

For its part, Complaint Counsel expressly claims the right to use documents it selected from other investigations. In particular, at page 4 of its purported reply memorandum in further support of its motion to strike, Complaint Counsel announced its intention to rely upon a document produced by HMR not in the context of Investigation no. 981-0368, but in the context of an investigation conducted by "one of the FTC's merger divisions." (Reply Memorandum at 4 n.4). The very fact that Complaint Counsel has had access to these other investigations and has made tactical decisions about what additional documents it intends to rely upon bespeaks the unfairness of Complaint Counsel's refusal to search these files as part of its basic discovery obligations. Fundamental due process requires that Andrx be given the same opportunity to survey the entire universe of responsive documents so that it too can make tactical assessments about those documents it intends to rely upon.

In addition to the two investigations specifically concerning the subject of these proceedings, the FTC has conducted other investigations relating to transactions similar to the HMR/Andrx Stipulation. For example, the FTC concluded an investigation concerning a deal with certain similar provisions between Abbott Laboratories and Geneva Pharmaceutical, Inc. See Matter of Geneva Pharmaceuticals, Inc., File No. 981-0395. Beyond that, there are numerous other deals, known to the FTC, as having similar provisions. As stated in Andrx's Answer, there is a March 31, 1998 agreement between Abbott Laboratories and Zenith Goldline Pharmaceuticals, with some of the very same provisions as Complaint Counsel challenges in the Andrx/HMR Stipulation. The Commission has publicly compared the Abbott/Geneva agreement with the HMR/Andrx Stipulation and has indicated that it will take no action against the Zenith Goldline agreement.

Moreover, Complaint Counsel itself has relied on the Abbott/Geneva investigation, as part of these proceedings, to argue before this Court that there is no basis for the defense that Complaint Counsel labels "selective enforcement (see Memorandum of Complaint Counsel (dated April 28, 2000) at 5 n.5)." As a matter of basic fairness, Complaint Counsel should not be allowed to "cherry pick" in that manner and select, for self-serving purposes, what information to use from other files concerning other deals.

The FTC's own discovery concedes the relevance of the information about similar transactions. During the pre-complaint investigation in these proceedings, the FTC sought information about Andrx's knowledge of other transactions -- and Andrx provided it. Indeed, Andrx's Request No. 47 directed to Complaint Counsel is verbatim

the same as a request by the FTC directed to Andrx during the pre-complaint investigation. Specifically, the request calls for:

All documents sufficient to identify each settlement or partial settlement of patent litigation, concerning which the FTC is aware, involving an innovative or brand name pharmaceutical company, and your generic company, that involved any form of:

- (a) Payment from the brand name company to the generic company; or
- (b) Licensing and/or royalty arrangement between the brand name company and the generic company.

Complaint Counsel also has served document responses, as part of these very proceedings, addressed to other deals (and Andrx intends to substantively respond to them). See e.g., First Request for Production of Documents and Things Issued to Andrx Corporation (dated May 1, 2000), No. 16 (calling for "each settlement of any patent infringement action to which Andrx is or was a party"); No. 17 (calling for "each Licensing Agreement and Joint Development Agreement to which Andrx is or was a party").

Nor does the law recognize any principled basis for Complaint Counsel to restrict its search for documents to the material in the file of a single investigation as it seeks to do. See Exxon Corporation, Docket No. 8934, 1980 FTC LEXIS 121 *3 (February 8, 1980) (court was "not persuaded by Complaint Counsel's argument that the subpoena should be limited to its files").

Additionally, the fact that Andrx seeks documents that do not involve the 1997 Stipulation or HMR's dealings with Andrx do not, ipso facto, render them irrelevant. The documents sought by this request are germane to various issues. For example, information concerning other transactions is relevant to Complaint Counsel's

case-in-chief insofar as general industry practices are relevant to a "Rule of Reason" analysis. The existence of agreements similar to the HMR/Andrx Stipulation in the brand name/generic context would tend to rebut Complaint Counsel's assertion that, under a Rule of Reason analysis, the agreement violates the antitrust laws. In addition, the information is also directly relevant to a number of Andrx's affirmative defenses, including, among others, selective prosecution.

Complaint Counsel may not unilaterally limit its discovery obligations by mere invocation of statutory and regulatory provisions that are inapplicable in the context of adjudicatory proceedings. Moreover, relevant and responsive documents do not become less so simply because they were produced in another FTC investigations. For these reasons, Complaint Counsel's blunderbuss objection should be denied, and Complaint Counsel should be directed to produce promptly documents collected as a result of its enlarged search.

III.

NO BASIS EXISTS FOR COMPLAINT COUNSEL TO CONCEAL BASIC FACTUAL INFORMATION FROM INVESTIGATORY FILES

In its Initial Disclosures, Complaint Counsel identified in excess of fifty parties with allegedly pertinent information. However, the mere identity of those parties is not enough -- particularly given that there is insufficient time before the close of discovery for respondents independently to redo the pre-complaint investigation. Accordingly, it is necessary, as a matter of basic fairness, for Complaint Counsel to provide the identity of all parties the FTC communicated with during its pre-complaint investigation (and not simply the ones on which Complaint Counsel intends to rely); all Civil Investigation Demands or other discovery requests (formal or informal) served on

each of the third parties (and not only the ones on which Complaint Counsel intends to rely); all FTC "Form 74's" or other documentation reflecting at least basic factual information ascertained from communications with all those parties; and all documents produced by those third parties or by the FTC staff based on the third party productions.

Complaint Counsel stated it has not provided all of this essential information. There is no legitimate bases for its failure to make these disclosures; accordingly, it should be ordered to do so.

IV.

COMPLAINT COUNSEL'S INVOCATIONS OF PRIVILEGES ARE OVERBROAD

Complaint Counsel also resists disclosure through broad and general claims of several evidentiary privileges. As noted above, given Complaint Counsel's failure to provide a privilege log, as required by 16 C.F.R. § 3.38A(a), it is virtually impossible for Andrx to address meaningfully Complaint Counsel's various claims of privilege. Suffice it to say, though, that none of the privileges invoked is absolute and without limitations. Because of Complaint Counsel's refusal to provide a privilege log, Andrx can only demonstrate, as it does below, that the general application of those privileges to the documents here is improper.

A. The Confidentiality Provisions Relied Upon By Complaint Counsel Do Not Apply In The Context Of An Adjudicatory Proceeding

Complaint Counsel references general statutory and regulatory provisions relating to the confidentiality accorded to materials provided to the FTC. See 15 U.S. C. § 46(f) (confidential treatment accorded to trade secrets); 15 U.S.C § 57b-2(b) (confidential treatment accorded to information acquired through compulsory process); 15 U.S.C. § 18a(h) (confidential treatment accorded to materials supplied to FTC in

context of a pre-merger investigation); 16 C.F.R. § 4.10(d) (confidential treatment accord material provided to FTC pursuant to compulsory process or voluntarily in lieu of compulsory process). However, these provisions are designed to protect against disclosure of sensitive information to the public-at-large -- not against disclosure to a litigant in the context of a carefully supervised administrative proceeding. Indeed, the Commission's own regulations make this abundantly clear:

Material obtained by the commission:

- (1) through compulsory process or voluntarily in lieu thereof, and protected by sections 21(b) and (f) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(b), (f), and 4.10(d) of this part; or . . .
- (2) that is confidential commercial or financial information protected by § 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), . . . may be disclosed in commission administrative or court proceedings subject to commission or court protective or *in camera* orders as appropriate.

16 C.F.R. § 4.10(g) (emphasis added); accord 15 U.S.C. § 18(a)(h) (permitting disclosure of documents to the extent "relevant to any administrative or judicial action or proceeding"); 15 U.S.C. § 15b-2(d)(2) ("any disclosure of relevant and material information in commission adjudicative proceedings . . . shall be governed by the rules of the Commission for adjudicative proceedings . . .").

As contemplated by Section 4.10(g), all documents produced in this proceeding are subject to appropriate confidentiality protection pursuant to the extensive, 20-page Confidentiality Order entered by the Court on May 8, 2000. Therefore, Complaint Counsel's confidentiality concerns are wholly without merit.

B. No Privileges Apply to Documents Received from the Pre-Complaint Investigatory Files

As the FTC's own rules recognize, the investigative and adjudicative phases of a proceeding are separate. See 16 C.F.R. § 2.1 *et seq.* (rules governing "investigations and inquiries") and §3.1 *et seq.* (separate "rules . . . govern procedure in adjudicative proceedings"); See also FTC v. Atlantic Richfield Co., 567 F.2d 96, an (D.C. Cir. 1977) ("The Commission has, in stating its rules of practice, clearly separated the rules relating to nonadjudicative procedures (such as investigations) from those dealing with adjudicative proceedings").

Given that dichotomy of functions, the FTC staff's making investigatory files available to Complaint Counsel -- acting in the separate prosecutorial role -- waives any potential privileges otherwise applicable to that information. The information obtained during the non-public investigation is not protected from disclosure to Andrx and the other respondents as parties to these proceedings. For example, in Champion Spark Plug Company, 1980 FTC LEXIS 200 at *8, the ALJ found

Once the complaint is issued the Commission becomes a third party to the adjudicative proceeding, with Complaint Counsel becoming a party . . . [and requests for] documents in files of officers of Federal Trade Commission other than those of counsel supporting the complaint is, in effect, a demand directed at a third party.

By treating Complaint Counsel as a party and other FTC staff members separately as a third party, there is no basis for attaching any privileges to information transmitted between them. Therefore, any release of information from the FTC Staff to Complaint Counsel eliminates the work product, deliberative process, and any other privileges covering the material since it involves information from a third party.

Indeed, any other result would be patently unfair because Complaint Counsel would have the advantage of a two plus year head-start in preparing its case, while Andrx would not have, given the short six-month period before trial, a fair opportunity ever to catch up.³

C. Complaint Counsel Seeks to Misapply the Deliberative Process Privilege

Complaint Counsel raises the so-called deliberative process privilege. However, Complaint Counsel fails to make any showing that the asserted privilege applies to any of the documents at issue here. The privilege generally does not apply in cases involving the government, but only where the dispute is between private litigants. See Champion Spark Plug Co., Docket No. 9141, 1980 FTC LEXIS 200 *7 (December 16, 1980) (citing to 8 Wright & Miller, Federal Practice & Procedure, § 2019, at 173 (1970), for the proposition that "courts have been more inclined to recognize executive privilege in litigation between private parties than in actions to which the government is a party").

To the extent the privilege is even applicable, it nonetheless may not be used to withhold factual information from disclosure. See Environmental Protection Agency v. Mink, 410 U.S. 73, 90-91 (1973) ("memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the government."); Playboy Enterprises, Inc. v. Department of Justice, 655

³ This argument is more fully set forth in Andrx's Memorandum in Support of its Motion for an Order Granting Respondents Access to Documents (dated May 30, 2000).

F.2d 931, 935 (D.C. Cir. 1982) (directing disclosure of factual portion of DOJ report, and noting that "anyone making a report must of necessity select the facts to be mentioned in it, but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report will be protected as part of the deliberative process.")

Principe v. Crossland Savings, FSB, 149 F.R.D. 444, (E.D.N.Y. 1993) (permitting discovery of factual portions of notes and memoranda created by FDIC); In Re Midlantic Corporation Shareholder Litigation, 1994 W.L. 750664, * 2 (D.D.C. 1994) (holding that holding that a privilege did not apply to factual materials in bank examination reports and directing the Office of the Comptroller of the Currency to redact non-factual portions of the document prior to production).

Thus, to the extent that Complaint Counsel seeks to withhold factual material (e.g., the factual portions of notes and interview memoranda prepared during the investigation), its claim of privilege is invalid.

Furthermore, the case law is clear that the deliberative process privilege does not apply in cases, such as here, involving allegations of governmental misconduct. See Texaco Puerto Rico v. Department of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (refusing to apply deliberative process privilege given allegations of government misconduct); In Re Sealed Case, 121 F.3d 729, 746 (D.C. Cir. 1997) ("[deliberative process] privilege disappears altogether when there is any reason to believe government misconduct occurred"); Alexander v. FBI, 186 F.R.D. 154, 164 (D.D.C. 1999) (same); Bank of Dearborn v. Saxon, 244 F. Sup. 394, 402 (E.D. Mich. 1965), *aff'd*, 377 F.2d 496

(insert) (rejecting claim of deliberative process privilege given prima facie showing of government misconduct).

In any event, the deliberative process privileged was waived in the circumstances here by reason of communications during the pre-complaint investigation between FTC staff members, including David Balto, and a purported business competitor of Andrx (Biovail) concerning the details of the FTC deliberations. Thus, the deliberative process privilege, even if otherwise applicable here (which it is not), has been waived. See Andrx's Memorandum in Opposition to Motion to Strike Certain Affirmative Defenses (dated May 19, 2000), pp. 16-18.

As set forth at length in both Andrx's Answer as well as its Memorandum in Opposition to Complaint Counsel's Motion to Strike Andrx's Affirmative Defenses, there is ample reason to believe that the Commission did not bring this action because it was "in the public interest," as required by statute, but instead commenced it at the behest of Andrx's alleged competitor, Biovail. See Answer, dated April 12, 2000; Andrx's Memorandum in Opposition to Motion to Strike, dated May 19, 2000. To the extent that Complaint Counsel seeks to withhold documents germane to its own misconduct on the basis of the deliberative process privilege, its invocation of the privilege is improper and should be rejected.

D. Complaint Counsel Seeks to Misapply the Government Informer Privilege

Complaint Counsel seeks to rely on a qualified privilege that protects against disclosure of the identity of confidential government informants. However, the privilege does not apply to protect the identity of a citizen reporting to the government on purely lawful activities. See Alliance v. Rochford, 75 F.R.D. 428 (N.D. Ill. 1977). Here,

Complaint Counsel has not demonstrated any facts or circumstances justifying the application of the privilege in these proceedings.

Even where applicable, the purported privilege is quite limited and does not cover factual information ascertained from the informer as distinct from the identity of the informer. See, e.g., *Champion Spark Plug Co.*, Docket No. 8141, 1980 FTC LEXIS 2000 *7 (December 16, 1980) ("To the extent, therefore, that the content of the requested documents can be segregated from the identity of the informant, fairness requires that they are subject to access by respondent").

Moreover, the D.C. Circuit has held that in assessing claims of the government informers privilege, the court must review each document for which the privilege is claimed in order to determine the applicability of the privilege. See *Westinghouse Electric Corporation v. City of Burlington*, 351 F.2d 762, 770 (D.C. Cir. 1965). By failing to produce a privilege log, Complaint Counsel has rendered it virtually impossible for the Court to assess the viability of the privilege. Consequently, Complaint Counsel should be deemed to have waived any claim of government informer's privilege it may have had.

E. Complaint Counsel Seeks to Misapply the Law Enforcement Investigatory Privilege

Complaint Counsel also claims that a purported law enforcement privilege should apply here; whatever the scope of such a privilege, no facts have been presented justifying its application. In order properly to invoke the so-called law enforcement investigatory privilege, the government must be specific about the documents for which it intends to invoke this privilege. Indeed, courts have held that "across-the-board claims of law enforcement privilege supported by only conclusory statements will not suffice."

Alexander v. FBI, 186 F.R.D. at 167; see also Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). In this case, given Complaint Counsel's failure to produce a privilege log or to otherwise identify, with specificity, those documents for which it intends to invoke the privilege, documents may not be withheld on that basis.

F. Complaint Counsel Seeks to Misapply Attorney Work-Product Doctrine

Complaint Counsel also has not demonstrated a basis for its invocation of the work-product privilege with respect to any specific documents. As a threshold matter, the protection accorded to work product is not absolute and may be overcome by a showing of substantial need. See 16 C.F.R. § 3.31(c)(3); Johnson v. Washington Metropolitan Area Transit Authority, 1990 WL 113, 877 (D.D.C. 1990). In this case, Andrx certainly has "substantial" need for factual work product such as attorney interview notes. Discovery in this proceeding is scheduled to close on October 20, 2000, and Complaint Counsel has had more than a two-year head start on Andrx in terms of preparing its case. Permitting Andrx access to witness interviews would go a long way towards leveling the playing field between Complaint Counsel, on the one hand, and Andrx on the other.

In any event, the production of interview notes and other statements made by those witnesses that Complaint Counsel intends to call at trial must be produced to Andrx pursuant to the Jenks Act. See, 18 U.S.C. § 3500; In Re Brunswick Corporation, 1976 FTC LEXIS 609 (1976). Given the complexity of this case and the short time-frame within which respondents have to complete their discovery, prudence (not to mention common sense) dictate that so-called "Jenks Act" material be provided well in

advance of the trial in this matter. See, Brunswick, 1976 FTC LEXIS 609 at * 4-5 ("where there was a large volume of material involved . . . it should be turned over in advance of the testimony to avoid delaying the trial while counsel peruse the material"); see also United States v. Poindexter, 727 F. Sup. 1470, 1484-85 (D.D.C. 1989) (same).

CONCLUSION

For the foregoing reasons, Andrx's motion to compel should be granted and Complaint Counsel should have its objections overruled and be directed to produce all documents in the Commission's possession, custody or control responsive to Andrx's requests.

SOLOMON, ZAUDERER, ELLENHORN,
FRISCHER & SHARP

By



Louis M. Solomon

Hal S. Shaftel

Colin A. Underwood

Jonathan D. Lupkin

45 Rockefeller Plaza

New York, New York 10111

(212) 956-3700

Attorneys for Respondent

Andrx Corporation

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

DOCKET NO. 9293

**[PROPOSED] ORDER GRANTING RESPONDENT ANDRX'S MOTION TO
COMPEL COMPLAINT COUNSEL TO PRODUCE DOCUMENTS**

IT IS HEREBY ORDERED that Respondent Andrx's motion for an Order (1) overruling Complaint Counsel's objections and assertions of purported privileges to Andrx's First Request for Production of Documents and Things, dated April 17, 2000; and (2) requiring Complaint Counsel to produce all requested documents in the possession, custody, or control of the Federal Trade Commission is GRANTED.

Dated: June _____, 2000

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Hal S. Shaftel, hereby certify that on June 1, 2000, I caused a copy of RESPONDENT ANDRX'S MOTION TO COMPEL COMPLAINT COUNSEL TO PRODUCE DOCUMENTS, PROPOSED ORDER, MEMORANDUM IN SUPPORT OF MOTION TO COMPEL COMPLAINT COUNSEL TO PRODUCE DOCUMENTS, AND DECLARATION OF HAL S. SHAFTEL (EXECUTED ON JUNE 1, 2000) to be served upon the following persons by hand:

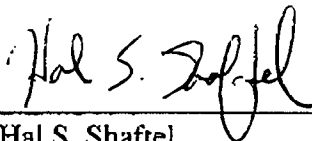
Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P.
801 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004

Donald S. Clark, Secretary
Federal Trade Commission
Room 172
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Peter O. Safir, Esq.
Kleinfeld, Kaplan and Becker
1140 19th St., N.W.
Washington, D.C. 20036

Richard Feinstein, Esq.
Markus H. Meier, Esq.
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580



Hal S. Shaftel

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

Docket No. 9293

DECLARATION OF HAL S. SHAFTEL

Hal S. Shaftel, pursuant to 28 U.S.C. § 1764, declares as follows:

1. I am a member of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, counsel for respondent Andrx Corporation ("Andrx"). I submit this declaration in order to place certain documents before the Court and pursuant to 16 C.F.R. 3.22(f).
2. Annexed hereto as Exhibit A is a copy of Andrx's First Request for Production of Documents and Things (served April 17, 2000) (the "Document Requests").
3. Annexed hereto as Exhibit B is a copy of Complaint Counsel's responses to the Document Requests.
4. Annexed hereto as Exhibit C is a copy of a letter, dated April 4, 2000, from Louis M. Solomon to Bradley S. Albert.

5. Annexed hereto as Exhibit D is a copy of a letter, dated April 10, 2000, from Bradley S. Albert from Louis M. Solomon.
6. Annexed hereto as Exhibit E is a copy of a letter, dated May 4, 2000, from Hal S. Shaftel to Bradley S. Albert.
7. Annexed hereto as Exhibit F is a copy of a letter, dated May 12, 2000, from Hal S. Shaftel to All Counsel.
8. Annexed hereto as Exhibit G is a copy of a letter, dated May 28, 2000, from Hal S. Shaftel to Bradley S. Albert.
9. Annexed hereto as Exhibit H is a copy of a letter, dated May 31, 2000, from Hal S. Shaftel to Marcus Meier and Bradley S. Albert.
10. As counsel for Andrx, I conferred with Complaint Counsel, pursuant to 16 C.F.R. § 3.22(f), in an effort in good faith to resolve by agreement the disputes concerning Complaint Counsel's responses to the Document Requests. During our conversations, the parties were unable to reach an agreement resolving any of the disputes.
11. In the morning on May 24, 2000, my colleague, Jonathan D. Lupkin, and I spoke with Bradley S. Albert of the FTC. At that time, Complaint Counsel stated it was withholding documents subject to privileges and other objections but could not connect specific objections to specific documents. I explained Andrx's position that the failure by Complaint Counsel to do so in a privilege log detailing, as required under the rules, the grounds for withholding documents based on purported privileges was prejudicial to Andrx. I further stated our position that the general objections asserted by Complaint Counsel do not cover the various categories of documents as to which

Complaint Counsel sought to apply them. Among other things, I raised issues pertaining to factual information derived from investigatory files. The parties did not reach any agreement to resolve these issues, but decided to confer further on May 26.

12. As scheduled, Mr. Lupkin and I spoke with Mr. Albert and his colleague, Marcus Meirer, on May 26, 2000, beginning at approximately 9:15 a.m. until approximately 10:00 a.m. In the discussion, Complaint Counsel stated it was not producing either FTC Form 74's (which Complaint Counsel stated it was unfamiliar with) or other such documentation reflecting factual information concerning, and/or ascertained from, sources with which the FTC communicated during the pre-complaint investigation. I again expressed our position that the various objections raised by Complaint Counsel in its document responses were not applicable to the categories of documents being sought. In addition, I disputed Complaint Counsel's position that it would not search any investigation files for responsive documents other than File No. 981-0368. The parties did not reach any agreement on any of the matters discussed.

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

Executed in New York, New York, on June 1, 2000


HAL S. SHAFTEL

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC., a corporation,
CARDERM CAPITAL L.P., a limited partnership,

and

ANDRX CORPORATION, a corporation.

Docket No. 9293

**RESPONDENT ANDRX CORPORATION'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to §3.37 of the Federal Trade Commission's Rules of Practice, respondent Andrx Corporation hereby requests that the Federal Trade Commission, through its Staff Counsel, produce all documents and other things responsive to the following requests, within its possession, custody or control, within thirty (30) days, at the offices of Solomon, Zauderer, Ellenhorn, Frischer & Sharp, 45 Rockefeller Plaza, New York, New York 10111, in accordance with the Definitions and Instructions set forth in the accompanying Appendix.

SPECIFIC REQUESTS

1. All documents concerning Andrx, Cartia XT, and/or the 1997 Stipulation.
2. All documents concerning HMR and/or Cardizem CD.
3. All documents concerning Biovail.
4. All documents concerning Faulding
5. All documents collected, generated, considered, reviewed and/or relied on by the FTC, including Staff Counsel and the staff involved in the Bureau of

Competition and Bureau of Economics, in connection with any investigation into or involving, in whole or in part, a) Andrx, b) HMR, c) the 1997 Stipulation, d) the Florida Patent Action, and/or e) Watson Pharmaceuticals, Inc., including, without limitation, documents concerning File No. 981-0006 and File No. 981-0368

6. All Civil Investigation Demands and subpoenas issued in connection with any of the investigations referenced above in Request No. 5.

7. All documents produced by any party in connection with any of the investigations referenced above in Request No. 5, or otherwise concerning Andrx or the 1997 Stipulation, including, without limitation, documents produced by HMR, Biovail, or Faulding.

8. All document collected, generated, considered, reviewed, and/or relied on by the Staff Counsel in connection with the Complaint and/or the Action.

9. All documents constituting or concerning any communications between the FTC and FDA concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

10. All documents constituting or concerning any communications between the FTC and the U.S. Patent and Trademark Office concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

11. All documents constituting or concerning any communications between the FTC and the U.S. Department of Justice, including the Antitrust Division, or any other department, agency or office of the executive branch, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

12. All documents constituting or concerning any communications between the FTC and any U.S. Senator, U.S. Congressman, congressional staff member

or employee, congressional committee or subcommittee, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

13. All documents constituting or concerning any communications between the FTC and any reporter or representative from the press or media concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

14. All documents constituting or concerning any communications between the FTC and any state Attorney General or any state Attorney General's office or staff member, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

15. All documents sufficient to identify each person with whom the FTC communicated in connection with any investigation concerning Andrx and/or the 1997 Stipulation, including, without, limitation, any FTC Form 74s, staff notes, or other documents reflecting each such person's name, address, and the substance of any information ascertained from the person.

16. All documents concerning each basis, if any, for the FTC to determine, as alleged in the Complaint, that there is reason to believe that Andrx has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, as such terms are used in Section 5 (b) of the FTC Act, 15 U.S.C. § 45.

17. All documents concerning each basis, if any, for the FTC to determine, as alleged in the Complaint, that it appears that the Action is in the interest of the public, as such terms are used in Section 5(b) of the FTC Act, 15 U.S.C. § 45.

18. All documents concerning each anticompetitive effect, if any, the FTC contends was the result of or caused, directly or indirectly, by the alleged

anticompetitive conduct, as set forth in the Complaint, including, without limitation, any actual increase in price, restriction in output, foreclosure of entry into the market, or any other consequence.

19. All documents concerning whether the alleged anticompetitive conduct, as set forth in the Complaint, constitutes, either in whole or in part, a "per se" violation of any laws.

20. All documents concerning whether the alleged anticompetitive conduct, as alleged in the Complaint, constitutes, either in whole or in part, a violation of any laws based on a "rule of reason" analysis.

21. All documents constituting or concerning any communications to any FTC Commissioner, the Commission, any employee, or any agent of the FTC concerning Andrx or the 1997 Stipulation.

22. All documents constituting or concerning any communications from or on behalf of any FTC Commissioner, the Commission, any employee, or any agent of the FTC, concerning Andrx or the 1997 Stipulation.

23. All documents concerning the definition of the market or markets for calcium channel blockers, beta blockers and/or ace inhibitors.

24. All documents concerning the definition or scope of the assertedly relevant market or any assertedly relevant submarket for Cardizem CD and/or Cartia XT, including, without limitation, documents concerning the number of wholesale purchasers, amount of annual sales by wholesale purchasers, the number of retail purchasers, and the amount of annual sales by retail purchasers to individual consumers.

25. All documents constituting or concerning any analyses, studies or reports, either proposed, commissioned, purchased, described or discussed, concerning the actual or potential market and/or any submarket relevant for Cardizem CD and/or Cartia XT, including, without limitation, any such documents concerning the market for calcium channel blockers, ace inhibitors and/or beta blockers.

26. All documents concerning the identity of any pharmaceutical products that allegedly or actually compete with, may be substituted for, or otherwise provide an alternative for Cardizem CD and/or Cartia XT.

27. All documents concerning the ability of either Biovail, Faulding, or any other party to market generic versions of Cardizem CD, including, without limitation, any documents concerning the timing or regulatory approval for Biovail or Faulding to market such products.

28. All documents concerning the extent, if any, that prices paid for any products were artificially inflated or otherwise exceeded what the prices otherwise would have been by reason of defendants' alleged anticompetitive conduct.

29. All documents concerning the relationship, if any, between (a) the degree to which, if any, the prices paid for Cardizem CD by wholesalers or retailers were higher than they would have been in the absence of defendants' alleged anticompetitive conduct, and (b) the degree to which, if any, the prices paid by individual consumers for Cardizem CD exceeded what they otherwise would have been.

30. All documents concerning the relationship, if any, between the retail and/or wholesale price of a brand name pharmaceutical product and the entry of one or more generic versions of such a product into the market.

31. All documents concerning whether HMR's patent(s) covering Cardizem CD were valid or invalid at any time prior to June 1999.

32. All documents concerning the allegation made in paragraph 38 of the Complaint that "Hoechst MRI, Cardizem and Andrx acted with the specific intent that Hoechst MRI monopolize the relevant market."

33. All documents concerning the allegation made in paragraph 9 of the Complaint that generic drugs "typically are sold at substantial discounts from the branded price."

34. All documents concerning the allegation made in paragraph 14 of the Complaint that "[a]t all relevant times herein, Hoechst MRI had monopoly power in the U.S. market for once-a-day diltiazem."

35. All documents concerning the allegation made in paragraph 29 of the Complaint that "[t]he acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and injure competition and consumers," including, without limitation, any documents concerning the meaning of "tendency or capacity" as used in the allegation.

36. All documents concerning the allegation in paragraph 30 of the Complaint that "[e]arlier entry of a generic version of Cardizem CD would have had a significant procompetitive impact on the relevant market."

37. All documents concerning the allegation in paragraph 31 of the Complaint that "[t]he purpose and intended effect of the \$10 million quarterly payments from Hoechst MRI to Andrx during the term of the Stipulation and Agreement was to provide an incentive for Andrx to refrain both from entering the relevant market, and

from taking any steps . . . to permit or facilitate the entry of any other generic manufacturer."

38. All documents concerning the allegations in paragraph 35 of the Complaint that "[a]lthough the Stipulation and Agreement provided Andrx with the option of selling a generic version of Cardizem CD pursuant to a license from Hoechst MRI at a future date, this did not offset the anticompetitive efforts."

39. All documents concerning the allegation in paragraph 35 of the Complaint that "[t]he requirement to pay substantial license fees may have reduced Andrx's incentive to exercise the licensing question."

40. All documents concerning the allegation in paragraph 35 of the Complaint that "[e]ntry by Andrx subject to the payment of substantial license fees, even if they may ultimately have been reimbursable, was likely to be competitively less significant than entry without the requirement of such fees."

41. All documents concerning or constituting any speech, statement, or article referring to any of the investigations referenced above in Request No. 5, Andrx, or the 1997 Stipulation.

42. The speech by David Balto referenced in the January 2000 FTC Watch article, and any other speech by Mr. Balto concerning, in whole or in part, generic drugs.

43. All documents concerning or constituting any communications between Mr. Balto and anyone else concerning Andrx or the 1997 Stipulation, including, without limitation, any communications that Mr. Balto had with anyone outside the FTC.

44. All communications concerning George Cary in connection with the allegations set forth in, or the subject matter of, the Action, Andrx, the 1997 Stipulation, Cardizem CD, or Cartia XT, including, without limitation, any responsive documents received by any FTC employee, staff member or agent, or sent to George Cary.

45. All regulations, rules, guidelines, procedures, or protocols of general applicability (in effect at any time from 1/1/97 to the present) concerning the manner in which FTC employees, staff members or agents collect, compile, maintain, organize or generate materials in connection with a non-public investigation, and the extent such materials are, should be, or may be treated in a confidential or non-public manner.

46. All documents concerning the actual or possible disclosure of any information concerning Andrx, the 1997 Stipulation, or any FTC investigation into the subject matter of the Action, in a manner inconsistent with any statute, regulation, rule, guideline, procedure or protocol, including, without limitation, any efforts made to review, investigate or protect against any such disclosure.

47. All documents sufficient to identify each settlement or partial settlement of patent litigation, concerning which the FTC is aware, involving an innovator or brand name pharmaceutical company, and a generic company, that involved any form of:

- (a) payment from the brand name company to the generic company; or
- (b) licensing and/or royalty arrangement between the brand name company and the generic company.

48. Each of the operative agreements involved in the settlements or partial settlements referenced in Request No. 47 above, together with any analyses of any such agreements.

49. All documents concerning industry customs and practices and/or commercially reasonable practices with respect to dealings between an innovator brand name pharmaceutical company and a generic company in connection with the development, licensing or marketing of a generic product.

50. All documents concerning the meaning and/or application of the Hatch-Waxman Act, also known as the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, codified at 21 U.S.C. § 355(j).

51. All documents exculpatory of any of the alleged anticompetitive conduct set forth in the Complaint.


52. All documents constituting or concerning any affidavits, declarations, testimony or sworn statements of some other kind, concerning the subject matters of the investigations referenced in Request No. 5 above.

53. All documents or other information produced or otherwise provided by Andrx to the FTC, including, without limitation, documents provided or

produced in connection with any of the investigations referenced above in Request No. 5.

Dated: April 17, 2000

SOLOMON, ZAUDERER, ELLENHORN
FRISCHER & SHARP

By:  _____

Louis M. Solomon

Hal S. Shafter

Colin A. Underwood

Michael S. Lazaroff

45 Rockefeller Plaza

New York, New York 10111

212-956-3700

212-956-4068 (Fax)

Attorneys for Respondent

Andrx Pharmaceuticals, Inc.

**APPENDIX OF DEFINITIONS AND INSTRUCTIONS
TO ANDRX'S FIRST REQUEST FOR PRODUCTION**

1. The term "FTC" shall mean, collectively or separately as the case may be to make the scope of the request as broad as permissible, the Federal Trade Commission, the Commissioners, employees, staff members or agents, including, without limitation, the staff involved in the Bureau of Competition or Bureau of Economics.

2. The term "Action" shall mean the Federal Trade Commission adjudicative proceeding, Docket No. 9293.

3. The term "Complaint" means the FTC Complaint dated March 16, 2000, issued in connection with this Action.

4. The term "Staff Counsel" shall mean any FTC attorney and other staff connected with this Action.

5. The term "Andrx" shall refer to respondent Andrx Corporation and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates and each of their present or former officers, directors, employees, agents, controlling shareholders (and any entity controlled by any such controlling shareholder) or other person acting for or on behalf of any of them.

6. The term "HMR" shall mean respondent Hoeschst Marion Roussel and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates and each of their present or former officers, directors, employees, agents, controlling shareholders (and any entity controlled by any such controlling shareholder) or other person acting for or on behalf of any of them.

7. The term "Biovail" shall refer to Biovail Corporation International, and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates and

each of their present or former officers, directors, employees, agents, consultants (including public relations consultants and Anne George, John Grimaldi, Michael Sitrick, Steven Seiler or Sitrick and Company), controlling shareholders (and any entity controlled by any such controlling shareholder) or other person acting for or on behalf of any of them.

8. The term "Faulding" shall refer to Faulding Inc., and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates and each of their present or former officers, directors, employees, agents, controlling shareholders (and any entity controlled by any such controlling shareholder) or other person acting for or on behalf of any of them.

9. The term "Florida Patent Action" should refer to the action captioned Hoechst Marion Roussel, Inc. v. Andrx Pharmaceuticals, Inc., No. 96-06121, which was commenced in the United States District Court for the Southern District of Florida.

10. The term "September 1997 Stipulation" shall refer to the Stipulation, dated September 24, 1997, between Andrx and HMR.

11. The term "Cardizem CD" means the diltiazem sold under that that name.

12. The term "person" shall mean any natural person, firm, partnership, corporation, incorporated association, organization, joint venture, cooperative, governmental body or other form of legal entity.

13. The term "document" or "documents" as used herein includes, without limitation, writings and printed matter of every kind and description, correspondence, memoranda, agreements, contracts, photographs, drawings, notes, records (tape, disc or

other), or any communication, statements, invoices, purchase orders, records of hearings, reports of decisions of state or federal governmental agencies, telegrams, summaries or records of telephone conversations, summaries of records of personal interviews, diaries, graphs, reports, notebooks, note charts, plans, sketches, maps, summaries or records of meetings or conferences, summaries or reports of investigations or negotiations opinions or reports of consultants, motion picture film, brochures, pamphlets, advertisements circulars, press releases, drafts marginal comments appearing on any document, microfilm, microfiche, computer printouts, programs, tapes, cassettes, disks, magnetic drums, and punch cards, all data stored in computer banks, all non-identical copies of any item listed above and all other writings of any kind.

14. The term "communication" or "communications" as used herein means any effort to convey information, whether written or oral, recorded or unrecorded, including, but not limited to: (a) speeches and lectures, (b) statements, (c) monologues, (d) dialogues, (e) telephone conversations and conferences, (f) discussions, (g) conferences, (h) debates, (i) arguments, (j) discourses, (k) interviews, (l) conversations, (m) consultations, and (n) information conveyed through documents.

15. The term "concerning" means related to, referring to, regarding, describing, evidencing or constituting.

16. Insofar as any of the requested documents disclose Andrx's confidential business information, the information should only be disclosed subject to an appropriate protective order covering confidentiality, which Andrx is prepared to have adopted in this proceeding.

17. Except for Request No. 53, the requests do not seek documents produced or provided by Andrx to the FTC. As for the documents sought in Request No. 40, Andrx will inspect those documents initially at a reasonable and appropriate location and time and, accordingly, the FTC does not need to copy them separately at this time.

18. Unless otherwise stated, each paragraph or subparagraph herein shall be construed independently and without reference to any other paragraph or subparagraph for purpose of limitation.

19. If it is claimed that any document responsive to any request is privileged, work product or otherwise protected from disclosure, identify such information by its subject matter and state the nature and basis for any such claim of privilege, work product or other ground for nondisclosure. As to any such document, state: (a) the reason for withholding it or other information relating to it; (b) the author of the documents; (c) each individual to whom the original or a copy of the document was sent; (d) the date of the documents or oral communication; (e) the general subject matter of the document; and (f) any additional information on which you base your claims of privilege. Any part of an answer to which you do not claim privilege or work product should be given in full.

20. Unless otherwise stated, the use of a verb in any tense shall be construed as the use of the verb in all other tenses as necessary to bring within the scope of the document requests that which might otherwise be construed outside its scope.

21. The singular includes the plural and vice versa; the words "and" and "or" shall be both conjunctive and disjunctive; the word "all" means "any and all"; the word "any" means "any and all"; the word "including" means "including without

limitation"; the word "he" or any other masculine pronoun includes any individual regardless of sex.

22. In the event that any document required to be identified or produced has been destroyed, lost, discarded or otherwise disposed of, any such document is to be identified as completely as possible, including, without limitation, the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

23. Whenever a document request, in whole or in part, calls for documents already supplied by plaintiff in answer to another one or more of these document requests, or in answer to prior documents requests served in one of these actions before consolidation, you need not repeat information already supplied, provided that you clearly indicate in your answer to the document request (a) the portion of the document request for which you have already supplied the information called for, and (b) the specific document request (or subpart thereof) in answer to which you have already supplied the requested documents.

24. The FTC should supplement, amend or correct the disclosures and responses to these requests, on a continuing basis, to the extent it ascertains any additional responsive information.

CERTIFICATE OF SERVICE

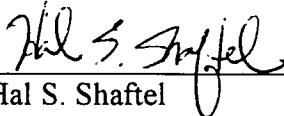
I, Hal S. Shaftel , hereby certify that on April 17, 2000, I caused a copy of Respondent Andrx Corporation's First Request for Production of Documents and Things to be served upon the following persons by Federal Express:

Bradley S. Albert, Esq.
Federal Trade Commission
Room 3116
601 Pennsylvania Ave, N.W.

James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P
801 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004

Markus H. Meier, Esq.
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Peter O. Safir, Esq.
Kleinfeld, Kaplan and Becker
1140 19th St., N.W.
Washington, D.C. 20036



Hal S. Shaftel

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

**COMPLAINT COUNSEL'S OBJECTIONS AND RESPONSES
TO RESPONDENT ANDRX'S FIRST REQUEST FOR
THE PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Federal Trade Commission ("FTC") Rules of Practice Section 3.37(b), Complaint counsel submit these Objections and Responses to Respondent Andrx's First Request for the Production of Documents and Things. The full text of each document request is set out below followed, by our respective objections and responses. Our provision of a response and production of any document shall not constitute a waiver of any applicable objection, privilege or other right.

GENERAL OBJECTIONS

The following general objections apply to each of Andrx's fifty-three (53) separately numbered document requests:

1. Complaint counsel object to each request to the extent it seeks information protected from disclosure by privilege, including, where applicable: (a) attorney-client privilege; (b) work-product privilege; (c) government deliberative-process privilege; (d) government-informant privilege; and (e) any other applicable privilege. These objections include, but are not limited to the following:

a. On the basis of both the work-product and attorney-client privileges, Complaint counsel object to each request which requires the production of: (a) notes, data compilations or summaries, internal communications, internal forms, or memoranda of FTC attorneys and staff; or (b) correspondence and documents exchanged between the FTC and its agents or non-testifying experts.

b. On the basis of the work-product, attorney-client, and government deliberative-process privileges, Complaint counsel object to each request which requires the production of any communications, memoranda, or documents: (a) between FTC attorneys or staff; or (b) between FTC attorneys or staff and FTC Commissioners or their staff.

c. On the basis of the work-product, attorney-client, and government-informant privileges, Complaint counsel object to each request which requires the production of unexecuted declarations of witnesses.

d. On the basis of the government-informant privilege, Complaint counsel object to each request which requires the production of: (a) complaints or documents received from confidential government informants without first redacting information that would identify these informants; or (b) documents received from confidential government informants which by their nature would identify these informants.

e. On the basis of the law enforcement investigatory-file privilege, Complaint counsel object to each request which requires the production of: (a) correspondence or documents exchanged between the FTC and other law enforcement agencies; or (b) confidential documents received from other government agencies.

2. Complaint counsel object to each request, instruction, or definition to the extent it seeks to impose obligations broader than those required or authorized by the Federal Trade Commission Rules of Practice for Adjudicatory Proceedings or any applicable order or rule of this Court.

3. Complaint counsel object to each request to the extent that it seeks information not reasonably calculated to lead to the discovery of admissible information.

4. Complaint counsel object to each request as unduly burdensome to the extent that it purports to have Complaint counsel conduct a search for responsive documents beyond those persons employed by the Commission that were assigned to, or actually worked on, the Hoechst Marion Roussel, Inc. and Andrx Corporation matter, FTC File No. 981-0368.

5. The failure of Complaint counsel to object to any specific request on a particular ground shall not be construed as a waiver of its rights to object on any additional ground(s). Complaint counsel reserves its rights to amend or supplement its objections and responses to these requests consistent with further investigation and discovery.

6. Complaint counsels' decision to produce documents in response to Andrx's First Request for the Production of Documents and Things, notwithstanding any objections to any of the definitions, requests, or instructions, should not be construed as: (a) an admission that the produced documents are relevant; (b) a waiver of the general or specific objections asserted

herein; or (c) an agreement that requests for similar information will be treated in a similar manner. Complaint counsel specifically reserve all objections as to the competency, relevancy, and admissibility of the information provided; all objections as to burden, vagueness, unintelligibility, over-breadth and ambiguity; and all rights to object to the use of any documents or information in any other proceeding.

GENERAL OBJECTIONS TO REQUESTS
1-7, 9, 11-15, 21-26, 30-31, 33-34, 41-43, 47-50, 53

7. Complaint counsel object to these requests to the extent they seek production of confidential information acquired through compulsory process, or produced voluntarily in lieu of compulsory process, in other closed or open investigations besides Hoechst Marion Roussel, Inc. and Andrx Corporation, FTC File Number 981-0368. Complaint counsel has no intention of relying on any documents produced in any investigation besides FTC File Number 981-0368. All documents produced in any investigation besides FTC File Number 981-0368 are privileged or confidential under 15 U.S.C. §§ 46(f), 57b-2(b), and 18a(h) as well as 16 C.F.R. § 4.10(d). Therefore, documents from other investigations may not be produced to respondents in this action. Complaint counsel further object to these requests because information obtained in other matters, not relied on by Complaint counsel, is not reasonably calculated to lead to the discovery of admissible evidence. Complaint counsel further object to these requests because searching other open or closed files would be unduly burdensome and would interfere with ongoing investigations.

OBJECTIONS TO INSTRUCTIONS

8. Complaint counsel object to Instruction 17 as unduly burdensome. Complaint counsel already has produced a copy of all documents produced by Andrx to Respondent Hoechst Marion Roussel, Inc. Andrx's inspection of those documents would be more convenient and less burdensome. Complaint counsel further object to this instruction on the grounds that inspection of complaint counsel's files for documents produced by Andrx would reveal attorney work-product.

9. Complaint counsel object to Instruction 19 to the extent that it purports to require Complaint counsel to identify, as to each document withheld based upon a claim of privilege, all of the information set forth in the instruction as to each and every individual document. Appropriate categories of documents may be submitted where, as here, a full and complete log as to each withheld document would be unduly burdensome. This approach is particularly appropriate where the privileged nature of the materials that are combined in general categories is facially apparent.

RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Document Request No. 1. All documents concerning Andrx, Cartia XT, and/or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 2. All documents concerning HMR and/or Cardizem CD.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 3. All documents concerning Biovail.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 4. All documents concerning Faulding

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly

broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 5. All documents collected, generated, considered, reviewed and/or relied on by the FTC, including Staff Counsel and the staff involved in the Bureau of Competition and Bureau of Economics, in connection with any investigation into or involving, in whole or in part, a) Andrx, b) HMR, c) the 1997 Stipulation, d) the Florida Patent Action, and/or e) Watson Pharmaceuticals, Inc., including, without limitation, documents concerning File No. 981-0006 and File No. 981-0368.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents from FTC File No. 981-0368 not previously produced, if any.

Document Request No. 6. All Civil Investigation Demands and subpoenas issued in connection with any of the investigations referenced above in Request No. 5.

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to this objection and the foregoing general

objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents from FTC File No. 981-0368, if any.

Document Request No. 7: All documents produced by any party in connection with any of the investigations referenced above in Request No. 5, or otherwise concerning Andrx or the 1997 Stipulation, including, without limitation, documents produced by HMR, Biovail, or Faulding.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, Complaint counsel responds that it will produce all responsive documents from FTC File No. 981-0368 not previously produced, if any.

Document Request No. 8: All documents collected, generated, considered, reviewed, and/or relied on by the Staff Counsel in connection with the Complaint and/or the Action.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 9: All documents constituting or concerning any communications between the FTC and FDA concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Complaint counsel object to this request in that it seeks information not reasonably calculated to lead to the discovery of admissible information. Complaint counsel further object to this request to the extent it seeks disclosure of commercially sensitive information from the U.S. Food and Drug Administration, which was shared with the Federal Trade Commission in its capacity as a law enforcement agency. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 10: All documents constituting or concerning any communications between the FTC and the U.S. Patent and Trademark Office concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Subject to the foregoing general objections, and without waiving any of them, complaint counsel respond that it possesses no documents responsive to this request.

Document Request No. 11: All documents constituting or concerning any communications between the FTC and the U.S. Department of Justice, including the Antitrust Division, or any other department, agency or office of the executive branch, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent it seeks the production of communications between the FTC and the U.S. Department of Justice or any other federal law enforcement agency on the ground that such communications are protected from disclosure under the law enforcement investigatory-file and work product privileges. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 12. All documents constituting or concerning any communications between the FTC and any U.S. Senator, U.S. Congressman, congressional staff member or employee, congressional committee or subcommittee, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it seeks information not reasonably calculated to lead to the discovery of admissible information. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 13. All documents constituting or concerning any communications between the FTC and any reporter or representative from the press or media concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it seeks information beyond the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible information. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 14. All documents constituting or concerning any communications between the FTC and any state Attorney General or any state Attorney General's office or staff member, concerning Cardizem CD, Cartia XT, or the 1997 Stipulation.

Response: Complaint counsel object to this request in that it seeks the production of communications between the FTC and state law enforcement agencies on the ground that such communications are protected from disclosure under the law enforcement investigatory-file and work-product privileges. Subject to this objection and the foregoing general objections, and

without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 15. All documents sufficient to identify each person with whom the FTC communicated in connection with any investigation concerning Andrx and/or the 1997 Stipulation, including, without, limitation, any FTC Form 74s, staff notes, or other documents reflecting each such person's name, address, and the substance of any information ascertained from the person.

Response: Complaint counsel object to this request to the extent that it seeks the production of information, such as "staff notes," that would identify confidential government informants on the ground that such information is protected from disclosure under the government-informant and work-product privileges. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks information already disclosed in Complaint counsel's Initial Disclosure. Subject to these objections and foregoing general objections, and without waiving any of them, complaint counsel respond that it already has produced all documents acquired from third parties through compulsory process, or produced voluntarily in lieu of compulsory process, during the course of FTC File No. 981-0368.

Document Request No. 16. All documents concerning each basis, if any, for the FTC to determine, as alleged in the Complaint, that there is reason to believe that Andrx has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, as such terms are used in Section 5 (b) of the FTC Act, 15 U.S.C. § 45.

Response: Complaint counsel object to this request on the ground that it seeks documents beyond the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible information. It has long been settled that the adequacy of the

Commission's "reason to believe" determination is a matter that goes to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved this question and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question, but whether the alleged violation has in fact occurred. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (Order Denying Reconsideration, June 4, 1974). Complaint counsel further object to this request in that it seeks information protected from disclosure by the government deliberative-process and work-product privileges.

Document Request No. 17. *All documents concerning each basis, if any, for the FTC to determine, as alleged in the Complaint, that it appears that the Action is in the interest of the public, as such terms are used in Section 5(b) of the FTC Act, 15 U.S.C. § 45.*

Response: Complaint counsel object to this request on the ground that it seeks documents beyond the scope of this proceeding and not reasonably calculated to lead to the discovery of admissible information. It has long been settled that the adequacy of the Commission's belief that a proceeding would be in the "public interest" is a matter that goes to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved this question and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question, but whether the alleged violation has in fact occurred. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (Order Denying Reconsideration, June 4, 1974). Complaint counsel further object to this request in that it seeks information protected from discovery by the government deliberative-process and work-product privileges.

Document Request No. 18. *All documents concerning each anticompetitive effect, if any, the FTC contends was the result of or caused, directly or indirectly, by the alleged anticompetitive conduct, as set forth in the Complaint, including, without limitation, any actual increase in price, restriction in output, foreclosure of entry into the market, or any other consequence.*

Response: Complaint counsel object to this request to the extent that it seeks, prior to the completion of discovery in this matter, information relating to “each” anticompetitive effect the FTC contends was the result of, or caused by, the alleged anticompetitive conduct.

Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 19. *All documents concerning whether the alleged anticompetitive conduct, as set forth in the Complaint, constitutes, either in whole or in part, a "per se" violation of any laws.*

Response: Complaint counsel object to this request to the extent that the request seeks identification of particular documents that support a “per se” violation. Such information calls for a legal conclusion and is protected from disclosure by attorney-client, work-product and government deliberative-process privileges. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel also object to this request as vague and unduly burdensome. Subject to these objections and the foregoing general objections, and

without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 20. All documents concerning whether the alleged anticompetitive conduct, as alleged in the Complaint, constitutes, either in whole or in part, a violation of any laws based on a "rule of reason" analysis.

Response: Complaint counsel object to this request to the extent that the request seeks identification of particular documents that support a "rule of reason" violation. Such information calls for a legal conclusion and is protected from disclosure by attorney-client, work-product and government deliberative-process privileges. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel also object to this request as vague and unduly burdensome. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 21. All documents constituting or concerning any communications to any FTC Commissioner, the Commission, any employee, or any agent of the FTC concerning Andrx or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it seeks information protected from disclosure by attorney-client, work-product and government deliberative-process privileges. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 22. All documents constituting or concerning any communications from or on behalf of any FTC Commissioner, the Commission, any employee, or any agent of the FTC, concerning Andrx or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it seeks information protected from disclosure by attorney-client, work-product and government deliberative-process privileges. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 23. All documents concerning the definition of the market or markets for calcium channel blockers, beta blockers and/or ace inhibitors.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to the discovery of admissible information. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 24. All documents concerning the definition or scope of the assertedly relevant market or any assertedly relevant submarket for Cardizem CD and/or Cartia XT,

including, without limitation, documents concerning the number of wholesale purchasers, amount of annual sales by wholesale purchasers, the number of retail purchasers, and the amount of annual sales by retail purchasers to individual consumers.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

***Document Request No. 25.** All documents constituting or concerning any analyses, studies or reports, either proposed, commissioned, purchased, described or discussed, concerning the actual or potential market and/or any submarket relevant for Cardizem CD and/or Cartia XT, including, without limitation, any such documents concerning the market for calcium channel blockers, ace inhibitors and/or beta blockers.*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 26. *All documents concerning the identity of any pharmaceutical products that allegedly or actually compete with, may be substituted for, or otherwise provide an alternative for Cardizem CD and/or Cartia XT.*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 27. *All documents concerning the ability of either Biovail, Faulding, or any other party to market generic versions of Cardizem CD, including, without limitation, any documents concerning the timing or regulatory approval for Biovail or Faulding to market such products.*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 28. *All documents concerning the extent, if any, that prices paid for any products were artificially inflated or otherwise exceeded what the prices otherwise would have been by reason of defendants' alleged anticompetitive conduct.*

Response: Complaint counsel object to this request to the extent that it seeks information not reasonably calculated to lead to the discovery of admissible information. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint

counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 29. All documents concerning the relationship, if any, between (a) the degree to which, if any, the prices paid for Cardizem CD by wholesalers or retailers were higher than they would have been in the absence of defendants' alleged anticompetitive conduct, and (b) the degree to which, if any, the prices paid by individual consumers for Cardizem CD exceeded what they otherwise would have been.

Response: Complaint counsel object to this request to the extent that it seeks information not reasonably calculated to lead to the discovery of admissible information. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 30. All documents concerning the relationship, if any, between the retail and/or wholesale price of a brand name pharmaceutical product and the entry of one or more generic versions of such a product into the market.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 31. All documents concerning whether HMR's patent(s) covering Cardizem CD were valid or invalid at any time prior to June 1999.

Response: Complaint counsel object to this request as unduly burdensome to the extent that it seeks materials known to be in the possession, custody, or control of respondents. Complaint counsel further object to this request to the extent that it seeks information not reasonably calculated to lead to the discovery of admissible information. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 32. *All documents concerning the allegation made in paragraph 38 of the Complaint that "Hoechst MRI, Cardizem and Andrx acted with the specific intent that Hoechst MRI monopolize the relevant market."*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 33. *All documents concerning the allegation made in paragraph 9 of the Complaint that generic drugs "typically are sold at substantial discounts from the branded price."*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 34. *All documents concerning the allegation made in paragraph 14 of the Complaint that "[a]t all relevant times herein, Hoechst MRI had monopoly power in the U.S. market for once-a-day diltiazem."*

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the

Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 35. All documents concerning the allegation made in paragraph 29 of the Complaint that "[t]he acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and injure competition and consumers," including, without limitation, any documents concerning the meaning of "tendency or capacity" as used in the allegation.

Response: Complaint counsel object to this request to the extent it seeks information protected from disclosure by the attorney-client, work-product and government deliberative-process privileges. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any testifying expert in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Complaint counsel further object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 36. All documents concerning the allegation in paragraph 30 of the Complaint that "[e]arlier entry of a generic version of Cardizem CD would have had a significant procompetitive impact on the relevant market."

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the

Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 37. All documents concerning the allegation in paragraph 31 of the Complaint that "[t]he purpose and intended effect of the \$10 million quarterly payments from Hoechst MRI to Andrx during the term of the Stipulation and Agreement was to provide an incentive for Andrx to refrain both from entering the relevant market, and from taking any steps . . . to permit or facilitate the entry of any other generic manufacturer."

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 38. All documents concerning the allegations in paragraph 35 of the Complaint that "[a]lthough the Stipulation and Agreement provided Andrx with the option of selling a generic version of Cardizem CD pursuant to a license from Hoechst MRI at a future date, this did not offset the anticompetitive efforts."

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it

seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 39. All documents concerning the allegation in paragraph 35 of the Complaint that "[t]he requirement to pay substantial license fees may have reduced Andrx's incentive to exercise the licensing question."

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 40. All documents concerning the allegation in paragraph 35 of the Complaint that "[e]ntry by Andrx subject to the payment of substantial license fees, even if they may ultimately have been reimbursable, was likely to be competitively less significant than entry without the requirement of such fees."

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request as premature to the extent it seeks information prepared by any expert who may testify in this matter. Such information shall be disclosed in accordance with this Court's Scheduling Order. Subject to these objections and

the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 41. All documents concerning or constituting any speech, statement, or article referring to any of the investigations referenced above in Request No. 5, Andrx, or the 1997 Stipulation.

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to discovery of admissible information. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 42. The speech by David Balto referenced in the January 2000 FTC Watch article, and any other speech by Mr. Balto concerning, in whole or in part, generic drugs.

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to discovery of admissible information. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents.

Document Request No. 43. All documents concerning or constituting any communications between Mr. Balto and anyone else concerning Andrx or the 1997 Stipulation, including, without limitation, any communications that Mr. Balto had with anyone outside the FTC.

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to

discovery of admissible information. Complaint counsel further object to this request to the extent it seeks information protected from disclosure by the attorney-client, work-product and government deliberative-process privileges. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 44. *All communications concerning George Cary in connection with the allegations set forth in, or the subject matter of, the Action, Andrx, the 1997 Stipulation, Cardizem CD, or Cartia XT, including, without limitation, any responsive documents received by any FTC employee, staff member or agent, or sent to George Cary.*

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to discovery of admissible information. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 45. *All regulations, rules, guidelines, procedures, or protocols of general applicability (in effect at any time from 1/1/97 to the present) concerning the manner in which FTC employees, staff members or agents collect, compile, maintain, organize or generate materials in connection with a non-public investigation, and the extent such materials are, should be, or may be treated in a confidential or non-public manner.*

Response: Complaint counsel object to this request on the ground that it seeks information beyond the scope of this proceeding and not reasonably calculated to lead to discovery of admissible information. Subject to this objection, and the foregoing general objections, and without waiving any of them, complaint counsel refers respondent to the FTC

Operating Manual which is available publically in the FTC's library at 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580.

Document Request No. 46. *All documents concerning the actual or possible disclosure of any information concerning Andrx, the 1997 Stipulation, or any FTC investigation into the subject matter of the Action, in a manner inconsistent with any statute, regulation, rule, guideline, procedure or protocol, including, without limitation, any efforts made to review, investigate or protect against any such disclosure.*

Response: Complaint counsel object to this request to the extent that it seeks information beyond the scope of this proceeding and not reasonably calculated to lead to discovery of admissible information. Subject to this objection and the foregoing general objections, complaint counsel respond that it possesses no documents responsive to this request.

Document Request No. 47. *All documents sufficient to identify each settlement or partial settlement of patent litigation, concerning which the FTC is aware, involving an innovator or brand name pharmaceutical company, and a generic company, that involved any form of:*

- (a) *payment from the brand name company to the generic company; or*
- (b) *licensing and/or royalty arrangement between the brand name company and the generic company.*

Response: Complaint counsel object to this request on the ground that it is overly broad and unduly burdensome, beyond the scope of this proceeding, and seeks information not reasonably calculated to lead to discovery of admissible information.

Document Request No. 48. *Each of the operative agreements involved in the settlements or partial settlements referenced in Request No. 47 above, together with any analyses of any such agreements.*

Response: Complaint counsel object to this request on the ground that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to discovery of admissible information. Complaint counsel further object to this request to the extent it seeks “analyses” of settlement or partial settlements on the ground that such “analyses” are protected from disclosure under the attorney-client, attorney work product and government deliberative-process privileges.

Document Request No. 49. All documents concerning industry customs and practices and/or commercially reasonable practices with respect to dealings between an innovator brand name pharmaceutical company and a generic company in connection with the development, licensing or marketing of a generic product.

Response: Complaint counsel object to this request to the extent that it is overly broad and unduly burdensome and seeks information not reasonably calculated to lead to discovery of admissible information. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents, if any.

Document Request No. 50. All documents concerning the meaning and/or application of the Hatch-Waxman Act, also known as the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585, codified at 21 U.S.C. § 355(j).

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Complaint counsel further object to this request to the extent it seeks information protected from disclosure under the attorney-client, attorney work product and government deliberative-process privileges. Subject to this objection and the foregoing general

objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 51. All documents exculpatory of any of the alleged anticompetitive conduct set forth in the Complaint.

Response: Complaint counsel object to this request to the extent that it is unreasonably cumulative and duplicative in that it seeks documents already disclosed in the Initial Disclosures. Subject to this objection and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

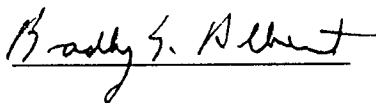
Document Request No. 52. All documents constituting or concerning any affidavits, declarations, testimony or sworn statements of some other kind, concerning the subject matters of the investigations referenced in Request No. 5 above.

Response: Complaint counsel object to this request as unduly burdensome on the ground that it seeks material known by Complaint counsel already to be in the possession, custody, or control of Andrx, or available to Andrx from another source that is more convenient and less burdensome. (See 10/5/99 letter from Bradley Albert to Louis Solomon authorizing Andrx to obtain investigational hearing transcripts from For The Record, Inc.). Complaint counsel further object to this request to the extent it seeks unexecuted declarations of witnesses on the ground that such information is protected from disclosure on the basis of work-product, attorney-client, and government-informant privileges. Subject to these objections and the foregoing general objections, and without waiving any of them, complaint counsel respond that it will produce all responsive documents not previously produced, if any.

Document Request No. 53. All documents or other information produced or otherwise provided by Andrx to the FTC, including, without limitation, documents provided or produced in connection with any of the investigations referenced above in Request No. 5.

Response: Complaint counsel object to this request as unduly burdensome to the extent that it seeks material known by complaint counsel already to be in the possession, custody, or control of Andrx, or available to Andrx from another source that is more convenient and less burdensome. Complaint counsel already has provided to Respondent Hoechst Marion Roussel, Inc. a copy of all documents produced by Andrx during the Commission's pre-complaint investigation of File No. 981-0368. Andrx's inspection of those documents would be more convenient and less burdensome. Complaint counsel further object to this request on the ground that inspection of complaint counsel's files for documents produced by Andrx would reveal attorney work-product.

Respectfully Submitted,



Markus H. Meier
Bradley S. Albert

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: May 11, 2000

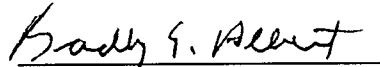
CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on May 11, 2000, I caused a copy of the Complaint Counsel's Objections and Responses to Respondent Andrx's First Request for the Production of Document and Things, to be served upon the following persons via hand delivery(*) or overnight delivery.

*James M. Spears, Esq.
Shook, Hardy & Bacon, L.L.P
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

Peter O. Safir, Esq.
Kleinfeld, Kaplan, and Becker
1140 19th Street, N.W.
9th Floor
Washington, DC 20036

Louis M. Solomon
Solomon, Zauderer, Ellenhorn,
Frischer, & Sharp
45 Rockefeller Plaza
New York, NY 10111



Bradley S. Albert

EXHIBIT C

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

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HARRY FRISCHER
DAVID N. ELLENHORN
MARK C. ZAUDERER
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JOHN J. O'CONNELL
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CAROLINE S. PRESS
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CHARLES D. STAR
EMILY STERN

April 4, 2000

VIA FACSIMILE

Bradley S. Albert, Esq.
Health Care Services and Products Division
Federal Trade Commission
601 Pennsylvania Avenue, Room 3116
Washington, DC 20580

Re: Andrx-Hoechst Generic Cardizem
Docket No. D-09293

Dear Brad:

I am writing to you as one of the FTC counsel listed as being involved in the above-captioned proceeding. If someone else is the appropriate person to respond to this letter, kindly forward this letter to them and let me know.

The FTC Rules require initial disclosure from the FTC. We assume that the FTC will promptly be producing all of the following. If I am incorrect, or if you will be asserting any purported objection to the production of these categories of documents, we ask that you let us know so that the matter can be raised with the Administrative Law Judge at our initial meeting.

We are expecting to receive from you all documents in the possession, custody, or control of the Commission (including of course any employee, agent, or representative) falling within any of the following categories, excepting only documents produced to you by Andrx:

1. All documents collected or generated during any of the investigations into or involving in whole or in part Andrx or the Andrx-Hoechst Stipulation (by which we mean throughout to include without limitation the underlying patent litigation, FDA-related issues and the class actions)

Bradley S. Albert, Esq.
April 4, 2000
Page 2

including the investigation of Watson (File No. 981-0006), the investigation of Andrx (File No. 981-0368), or any investigation concerning Hoechst.

2. All documents concerning or referring to Andrx or the Stipulation.
3. All documents produced by any party (other than Andrx) in any of the above investigations or otherwise relating to Andrx or the Stipulation, including documents produced by Hoechst, Biovail, and Faulding.
4. All documents constituting or reflecting any communication with any FTC Commissioner, the Commission, or any agent, staff member, or employee concerning Andrx or the Stipulation created or sent by or on behalf of any other FTC employee or anyone outside the Commission.
5. All documents concerning the definition or scope of the assertedly relevant market or any assertedly relevant submarket.
6. All documents concerning the ability of either Biovail or Faulding to market generic versions of Cardizem CD, including any documents concerning the timing or regulatory approval for Biovail or Faulding to market such products.
7. All documents constituting or concerning any speech, statement, or article referring to any of the above-mentioned Commission investigations, or to Andrx, or to the Stipulation, including specifically the speech by David Balto referenced in the January 2000 FTC Watch article, which I previously sent to you.
8. All communications between Mr. Balto and anyone else concerning Andrx or the Stipulation, including any communications that Mr. Balto had with anyone outside the FTC.
9. All communications concerning George Cary and any of the subject matters identified in item 5 above.
10. All documents reflecting any effort by anyone at the FTC to find out who was leaking information relating to Andrx or the Stipulation during the FTC's non-public investigation and any steps taken by anyone at the FTC in respect thereof.

Bradley S. Albert, Esq.
April 4, 2000
Page 3

11. All documents concerning the meaning and/or application of the Hatch-Waxman Act.

We are willing to discuss any legitimate need for confidentiality or a protective order.

This obviously is a non-exhaustive list. Please let us hear from you by April 11.

Sincerely,



Louis M. Solomon

LMS/bp

EXHIBIT D



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

Bureau of Competition
Health Care Division

April 10, 2000

VIA FACSIMILE

Louis Solomon, Esq.
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111

Re: **Andrx-Hoechst Generic Cardizem**
Docket No. D-09293

Dear Lou:

Thank you for your letter of April 4, 2000 regarding complaint counsel's initial disclosure requirements under the FTC Rules in the above referenced matter.

As required by §3.31(b) of the FTC Rules of Practice, we intend to make our initial disclosures within five days of receipt of Andrx's answer to the complaint. Pursuant to §3.31(b), our initial disclosures will identify the individuals likely to have relevant discoverable information and describe by category and location the relevant documents in the control of the Commission. We will produce copies of documents specified in §3.31(b) once a protective order is in place. We will send you a draft protective order for your consideration later this week. To the extent your letter calls for the production of documents not required by §3.31(b), we will respond, as appropriate, to such requests after making our initial disclosures.

If you have any questions or concerns, do not hesitate to call me at (202) 326-3670.

Sincerely,

A handwritten signature in cursive script that reads "Bradley S. Albert".

Bradley S. Albert
Complaint Counsel

EXHIBIT E

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

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OF COUNSEL

WRITER'S DIRECT DIAL

(212) 424-0755

May 4, 2000

WAYNE M. AARON
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EMILY STERN

VIA FACSIMILE

Bradley S. Albert, Esq.
Health Care Services and Products Division
Federal Trade Commission
601 Pennsylvania Avenue, Room 3116
Washington, DC 20580

Re: Andrx-Hoechst Generic Cardizem
Docket No. D-09293

Dear Brad:

I was disturbed by our telephone conversation today, in which you unilaterally selected May 16 as the date by which the Complaint Counsel will respond to Andrx's outstanding discovery. Not only is your position inconsistent with Judge Chappell's scheduling order, but it engenders unnecessary delay in the discovery process. That delay is prejudicial to my client, which promptly requires the information being sought in order to prepare for a trial scheduled for December -- particularly given the vagueness of Complaint Counsel's pleading.

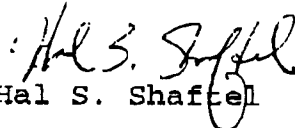
As I expressed to you on the telephone, there is no legitimate reason for Complaint Counsel to wait until May 16 (rather than May 9 as I believe is required) to serve any objections it may have to Andrx's document requests. That schedule only wastes valuable time before the parties can meet and confer on your objections and, if necessary, engage in motion practice. Accordingly, we reiterate that it is fair and sensible for Complaint Counsel, at the very least, to serve any objections by no later than May 9. You cannot

Bradley S. Albert, Esq.
May 4, 2000
Page 2

seriously contend that Complaint Counsel requires more time than that to put together mere objections.

We reserve all our rights.

Sincerely yours,


Hal S. Shaffel

HSS/gcc

cc: All counsel

EXHIBIT F

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CHARLES D. STAR
EMILY STERN

May 12, 2000

To: All Counsel

Re: Hoechst-Andrx

Counselors:

I am enclosing a draft stipulation regarding service-related issues, which, I believe, is faithful to our telephone discussion earlier this week. Please let me know if you have any comments. I have not included language that the parties shall use their "best efforts" to coordinate and cooperate on scheduling because I assume we will all attempt to do so as a matter of practice and professional courtesy.

On the issue of privilege logs, I reiterate that it is important for Complaint Counsel to provide its log promptly. On the phone, Brad advised that Complaint Counsel could do so next week or, at the very least, (early) the following week. To the extent they believe there may be any slippage in that schedule (and I hope we can avoid that), Complaint Counsel should quickly raise it with us. Thank you.

Sincerely yours,

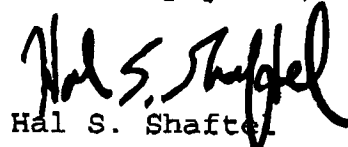

Hal S. Shaftel

EXHIBIT G

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

RICHARD T. SHARP
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May 28, 2000

WRITER'S DIRECT DIA
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Bradley Albert, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

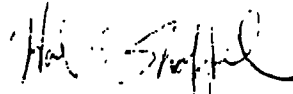
Re: FTC - HMR and Andrx

Dear Brad:

You and Marcus advised me that you have found additional documents to produce out of the files of David Balto and (I assume) other FTC staff members. These are documents that should have been provided already. We are working under a tight time frame for discovery and any delay is prejudicial to Andrx. Please provide the documents immediately without further delay. To that end, you can transmit the documents by facsimile.

Additionally, we also continue to wait for a copy of the FTC statement allegedly read to witnesses prior to the giving of testimony during the non-public investigative stage of this matter. Thank you.

Sincerely,


Hal S. ShafTEL

HSS/bp
cc: Other Counsel

EXHIBIT H

SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

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May 31, 2000

Markus Meier, Esq.
Bradley Albert, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.,
Room 3116
Washington, D.C. 20580

Re: FTC - HMR and Andrx

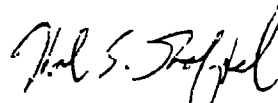
Dear Markus and Brad:

We are forced to press Complaint Counsel -- yet again -- to produce documents from the files of David Balto and other FTC staff members. Complaint Counsel first claimed not even to have searched those files, then you claimed last week to have found documents but needed more time to review them, and we still -- four days after that -- do not have anything. Complaint Counsel's continued delay is part of an apparent game plan to obstruct the discovery process and thereby prejudice respondents' ability to prepare for a trial only six months away. Indeed, Complaint Counsel's conduct is particularly disturbing because you, on one hand, argue (incorrectly) that respondents lack evidence of the FTC staff's improper conduct during the investigation, and then delay in producing documents regarding that very conduct.

Markus Meier, Esq.
May 31, 2000
Page 2

Please advise me promptly (today) as to when the documents will be provided, which we certainly expect Complaint Counsel to do within the next two business days.

Sincerely,

A handwritten signature in cursive script, appearing to read "Hal S. Shaftel".

Hal S. Shaftel

HSS/se
cc: Other Counsel