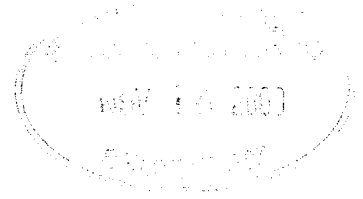


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

**MOTION *IN LIMINE* TO PRECLUDE SELECTED TESTIMONY
BY EDWARD STRATEMEIER**

Complaint counsel moves for an order precluding selected testimony by Edward Stratemeier concerning Hoechst Marion Roussel, Inc.'s purpose or intent in negotiating or entering into the Stipulation and Agreement dated September 24, 1997, and the existence or absence of any less restrictive alternative. The bases of this motion are set forth in the accompanying Memorandum in Support of Complaint Counsel's Motion to Preclude Selected Testimony by Edward Stratemeier.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Markus H. Meier". The signature is written in a cursive style with a horizontal line underneath.

Markus H. Meier
Geoffrey D. Oliver
Jon M. Steiger

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

Dated: November 16, 2000

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

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HOECHST MARION ROUSSEL, INC.,
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Docket No. 9293

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION *IN LIMINE* TO PRECLUDE
SELECTED TESTIMONY BY EDWARD STRATEMEIER**

Respondent Hoechst Marion Roussel, Inc. ("Hoechst") repeatedly has blocked discovery of oral and written communications relating to the intent and purpose of its in-house and outside counsel in negotiating and entering into the agreement at issue in this case. Hoechst has withheld discovery of the best evidence on these issues – oral and written communications among in-house and outside counsel – by claiming the attorney-client privilege and work-product protection. Now, after having frustrated all attempts at discovery, Hoechst proposes to offer at trial the testimony of Mr. Edward Stratemeier, Vice President and General Counsel of Hoechst, regarding the purpose of the Stipulation and Agreement. In investigational hearings and depositions thus far,¹ Mr. Stratemeier, Mr. James "Mit" Spears, outside counsel representing

¹ Messrs. Stratemeier and Spears could not be deposed prior to the deadline for filing motions *in limine*. Complaint counsel fully expects them to assert privilege in their depositions to the same extent that they asserted privileges in their investigational hearings, and to the same extent that other Hoechst witnesses have asserted privilege in their depositions. Complaint counsel therefore may seek leave to supplement this motion once all discovery has closed.

Hoechst in the negotiation of the Stipulation and Agreement, and Mr. Thomas Heyman, outside patent counsel representing Hoechst, testified whenever it was in Hoechst's interest to do so, but asserted privilege and refused to testify when complaint counsel sought to test the bases of their testimony. Hoechst cannot have it both ways. Hoechst's approach severely prejudices complaint counsel by prohibiting any probing of one of Hoechst's primary defenses. Having chosen to assert privileges against discovery, Hoechst must abide by the just consequences of that decision: Hoechst should be prohibited from presenting the testimony of Mr. Stratemeier² on Hoechst's purpose or intent in negotiating or entering into the Stipulation and Agreement and the existence or absence of any less restrictive alternative.

Complaint counsel alleges that Hoechst entered into an agreement (the "Stipulation and Agreement") with respondent Andrx Corporation that, at the time it was entered into, was likely to restrain competition significantly by reducing the incentive of Andrx to (1) introduce to market its FDA-approved generic version of Cardizem CD, (2) introduce to market any other generic version of Cardizem CD, without regard to whether it arguably infringed any of Hoechst's patents, and (3) relinquish its right to a period of exclusivity in order to permit any other FDA-approved manufacturer to introduce to market its generic version of Cardizem CD.

Hoechst admits that it entered into the Stipulation and Agreement, but asserts that the agreement was not anticompetitive because, *inter alia*, Hoechst's intent in entering into the agreement was to achieve certain legitimate business objectives. Specifically, Hoechst asserts

² While justice also requires preclusion of the testimony of Messrs. Spears and Heyman, such an order appears to be unnecessary because Hoechst has not designated either as a witness at trial. Complaint counsel reserves the right to seek preclusion if Hoechst attempts to call Mr. Spears or Mr. Heyman as a witness.

that, when Messrs. Stratemeier and Spears negotiated the Stipulation and Agreement, they intended it to settle the preliminary injunction portion of a pending patent infringement lawsuit, Aventis Answer at 2 (April 10, 2000); Aventis Statement of the Case at 4-5 (Sept. 14, 2000), even though no motion for a preliminary injunction was pending at the time. Further, Hoechst claims that Messrs. Stratemeier and Spears intended various other provisions of the Stipulation and Agreement to serve purposes ancillary to the settlement of a preliminary injunction. Hoechst apparently expects to present evidence on these issues in the form of testimony by Mr. Stratemeier. Aventis Preliminary Witness List (June 30, 2000).

Hoechst's conduct was unlawful even if it could demonstrate that its purposes were neutral or procompetitive, as it now asserts. *See In re Cardizem Antitrust Litigation*, 105 F. Supp. 2d 682, 685 (E.D. Mich. 2000). There is every reason to believe, however, that Mr. Stratemeier's true intent at the time Hoechst entered into the Stipulation and Agreement was far different than it now claims.³ Perhaps for that reason, Hoechst repeatedly has refused to reveal the contemporaneous discussions of the primary drafters and negotiators of the Stipulation and Agreement that would reveal their true purposes and intentions in negotiating and signing the agreement. Mr. Stratemeier is more than willing to testify as to his version of what he and others intended when the Stipulation and Agreement was negotiated. However, whenever questioned about the contemporary conversations or written communications that would either confirm or disprove his assertions, Mr. Stratemeier removes his businessman-witness hat, puts on his lawyer

³ For example, contemporaneous statements of Hoechst's General Counsel, Edward Stratemeier, to third party witnesses show that Hoechst's true intent was to prevent entry of generic competition until mid-1999 at the earliest, and preferably until January 2000. Stratemeier Inv. Hrg., p. 230, lines 6-13 (June 8, 1999); Cancellera Dep. Tr., Biovail Int'l v. Hoechst, et al., at 124-125 (June 23, 2000).

hat, and claims privilege. By asserting privilege for selected conversations and written communications regarding the purposes of the Stipulation and Agreement and the alternatives available, Hoechst has blocked complaint counsel's efforts to test the truthfulness of Mr. Stratemeier's testimony.

Did Hoechst representatives reasonably believe that, absent the Stipulation and Agreement, Andrx might have commenced sales of its allegedly infringing product before resolution of the patent infringement suit? Did Hoechst representatives truly believe they had no judicial alternative, when they still had eight months remaining to seek a preliminary injunction before Andrx could even consider entering the market? Mr. Stratemeier and others refuse to disclose any relevant discussions. Would Hoechst have sought a court-ordered preliminary injunction if it had not entered the Stipulation and Agreement? Did Hoechst representatives ever consider filing a motion for a preliminary injunction? What other alternatives (if any) did Hoechst representatives consider? Mr. Stratemeier and others object to these questions. Had Hoechst filed a motion for a preliminary injunction, did Mr. Stratemeier and others think that it would have been successful? Did Hoechst representatives even evaluate Hoechst's chances for success if it filed such a motion? Hoechst witnesses will not say.

If Hoechst did have to reach an agreement with Andrx, did it have any less restrictive alternatives available? Mr. Stratemeier refuses to reveal whether any alternatives were discussed. Why were the \$10 million quarterly payments from Hoechst to Andrx not contingent upon the outcome of the litigation, as they would be with a preliminary injunction? Why were the payments made up-front, on an on-going basis, rather than after conclusion of the litigation as they would with a preliminary injunction? How did the parties determine the amount of the

payments? Mr. Stratemeier and others refuse to reveal the contemporaneous conversations and written communications addressing these topics. Were the specific provisions of the Stipulation and Agreement necessary to achieving Hoechst's basic purpose? Why did Messrs. Stratemeier and Spears want the Stipulation and Agreement to cover not just the Andrx product subject to the patent litigation, but other versions (including potentially non-infringing versions of the product) as well? Why did they insist on including a provision requiring repayment in full if Andrx were to relinquish its right of exclusivity under the Hatch-Waxman Act (which might have permitted another generic to introduce its product to market)? What other compensation alternatives were considered? Messrs. Stratemeier and Spears refuse to disclose what was discussed at the time.

Hoechst's privilege claims not only obstruct complaint counsel's discovery of information necessary for the cross-examination of Mr. Stratemeier, but also serve to prevent this Court from being able to evaluate the veracity of Mr. Stratemeier's assertions. It would be patently unfair to allow Hoechst to block any examination of the underlying evidence while simultaneously allowing Hoechst to present self-serving argument and selective testimony regarding the alleged purpose of the Stipulation and Agreement. Having deliberately chosen to assert privilege to prevent full discovery of contemporaneous evidence, Hoechst should be precluded from presenting the untestable "testimony" of Mr. Stratemeier concerning the alleged purpose of the agreement.

Argument

A. A Party That Blocks Discovery Into a Matter Cannot Thereafter Itself Assert the Matter As An Affirmative Defense

Courts have routinely held that a party cannot assert legal privileges to frustrate discovery into a matter and then affirmatively place that matter at issue in the litigation. A party must choose between asserting privilege and keeping the matter secret, on the one hand, and offering a claim or defense, thereby opening the matter up to discovery, on the other. "It would be grossly unfair to allow the defendant to produce certain selected documents which it feels support its defense while withholding from the plaintiff possibly damaging communications which tend to disprove the defendant's theory." *FMT Corporation, Inc. v. Nissei ASB Co.*, No. 1: 90-cv-786-GET, 1992 U.S. Dist. LEXIS 21500, at * 7-8 (N.D. Ga. June 10, 1992) (citing cases).

The attorney-client privilege is intended to promote freedom of consultation between a client and his or her legal advisors by removing any fear that the legal advisors subsequently may be compelled to reveal the content of such consultations. See *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). However, "the privilege was intended as a shield, not a sword."⁴ *Int'l Tel. & Tel. v. United Tel. Co. of Florida*, 60 F.R.D. 177, 185 (M.D. Fla. 1973). Where a party claims to have a defense based on evidence that is privileged, the party must choose either to waive its claim of privilege or to forgo asserting the matter in litigation. See *Belmont Textile Machinery Co. v. Superba*, 48 F. Supp. 2d 521, 523 (W.D.N.C. 1999) (defendant asserting an

⁴ Judges have taken the same position regarding work-product protection. See, e.g., Order Denying Motion *in Limine* or For a Protective Order, *Motor Up Corp.*, Dkt. 9291, 1999 FTC LEXIS 207 at * 7 (Aug. 5, 1999) (work-product doctrine cannot be used "as both a sword and shield") (quoting *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)).

advice-of-counsel defense in patent litigation “must either (1) rely on such advice as a defense and thereby waive the attorney-client privilege as to the entire subject area or (2) relinquish the advice-of-counsel defense”) (citing *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991)).

Once a party chooses to shield a matter from inquiry pursuant to a privilege, that party is barred from subsequently introducing evidence on that matter. *See Mobil Oil Corp. v. Amoco Chemicals Corp.*, 779 F. Supp. 1429, 1485 n. 43 (D. Del. 1991) (“Amoco’s failure to clearly waive the privilege before the close of discovery prevented Mobil from taking any appropriate discovery regarding the [attorneys’] opinions The Court will grant Mobil’s motion *in limine* and will not consider the contents of the opinions in deciding the willfulness issue.”); *see also Int’l Tel. & Tel.*, 60 F.R.D. at 186 (“[T]he failure of a party to allow pre-trial discovery of confidential matter which that party intends to introduce at trial will preclude the introduction of that evidence.”) (citing Fed. R. Civ. P. 37(b)(2)(B)).

Even if the proposed testimony itself does not directly refer to privileged evidence, a defendant must choose between introducing testimony and asserting privilege if cross-examination of the testifying witness must fairly intrude on privileged matters. In *Bilzerian*, for example, the criminal defendant sought a ruling that he could testify regarding his belief in the lawfulness of his actions – without asserting a reliance on counsel defense or actually introducing the content or existence of privileged communications – and not be subjected to cross-examination on relevant privileged communications that he had with his attorney. *See* 926 F.2d at 1291.

The Court of Appeals for the Second Circuit affirmed the trial court's refusal to permit the defendant to both offer his proposed testimony and assert privilege for related communications. The court of appeals held that when privileged communications are "directly relevant" to an opponent's testing of issues affirmatively raised by a party, fairness prohibits allowing the party to both testify regarding those issues and use the attorney-client privilege to block discovery of those communications. *Id.* at 1292. *See also Pereira v. United Jersey Bank*, Nos. 94 Civ. 1565 (LAP) and 94 Civ. 1844 (LAP), 1997 WL 773716, at * 3 (S.D.N.Y. Dec. 11, 1997) (summarizing Second Circuit law as holding that a party cannot assert both a privilege and "a position 'the truth of which can only be assessed by examination of the privileged communication'"). Thus, even if a party's proposed testimony does not directly incorporate privileged information, "[a] defendant may not use the privilege to prejudice his opponent's case" and still expect to testify freely. *Bilzerian*, 926 F.2d at 1292. *See also Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *Bilzerian*).

B. Hoechst Deliberately Relies Upon Legal Privileges to Frustrate Discovery Into Their Affirmative Defenses

Hoechst's invocation of legal privileges has frustrated discovery into issues raised by Hoechst itself in this case and denied complaint counsel and Your Honor access to evidence crucial to test Hoechst's assertions. Apart from the drafts of the Stipulation and Agreement, Hoechst has produced no contemporaneous documentary evidence regarding its purposes and justifications for entering into the Stipulation and Agreement as written. Complaint counsel therefore has questioned the relevant witnesses – Hoechst General Counsel Mr. Edward Stratemeier, Mr. Mit Spears, outside counsel responsible for negotiating the Stipulation and

Agreement on behalf of Hoechst, and Mr. Thomas Heyman, outside counsel representing Hoechst in its patent infringement suit against Andrx – regarding contemporaneous conversations and other evidence relating to Hoechst’s intent and purposes. These witnesses, however, have refused to answer such questions.

Hoechst asserts that its purpose in entering into the agreement was to effect a stand-still in connection with its on-going patent litigation.⁵ Hoechst thereby places at issue its strategy of choosing not to file a motion for a preliminary injunction in its patent litigation as well as its assessment of the various legal and other options available to it. Specifically, Hoechst’s position is based on a series of inferences that it has been loathe to spell out:

- Hoechst reasonably believed that, absent the Stipulation and Agreement, Andrx might have commenced sales of its allegedly infringing product before resolution of the patent infringement suit;
- absent the Stipulation and Agreement, Hoechst would have sought a court-ordered preliminary injunction;
- had it done so, the court would have decided that Hoechst was likely to prevail on the merits of its patent infringement suit and that precluding Andrx from entering the market would be in the public interest;
- respondents had available no less restrictive alternatives than the Stipulation and Agreement as drafted;
- the Stipulation and Agreement was no more restrictive of competition than a court-ordered preliminary injunction;
- the specific provisions of the Stipulation and Agreement were necessary to achieving Hoechst’s basic purpose;

⁵ Aventis Answer at 1-2 (“The Stipulation and Agreement . . . was but an attempt by the litigants to fashion a negotiated preliminary injunction”), and 12-13; Aventis Statement of the Case at 23 (the Stipulation and Agreement’s “purpose and effect were to preserve and protect a valid intellectual property right”).

- entering into the Stipulation and Agreement involved considerable cost-savings and other efficiencies; and
- those cost savings and efficiencies benefitted consumers.

With the exception of the drafts of the Stipulation and Agreement and the damaging admissions made by Mr. Stratemeier to third parties,⁶ the primary, if not the sole, evidence on certain of these issues consists of the contemporaneous conversations and written communications among Messrs. Stratemeier, Spears and Heyman.⁷ Mr. Stratemeier, however, is the only witness that Hoechst expects to call to testify about its purpose and intent in entering into the Stipulation and Agreement. Aventis Preliminary Witness List (June 30, 2000); Notice of Amendment to Aventis Preliminary Witness List (Aug. 1, 2000).⁸

Mr. Stratemeier will likely testify that, in the time period leading up to the Stipulation and Agreement, he was greatly concerned with issues such as the likelihood that Andrx planned to enter the market before completion of the litigation, the prospects for success of a motion for a preliminary injunction, the various alternatives to a preliminary injunction available to Hoechst, and the relative benefits, costs and other disadvantages of entering into the Stipulation and Agreement rather than pursuing a preliminary injunction or other alternative. If Mr. Stratemeier

⁶ *See supra*, n. 3.

⁷ Mr. Spears testified that he was the principal drafter of the Stipulation and Agreement on behalf of Hoechst. Spears Inv. Hrg., pp. 18, line 24 to 19, line 2 (Feb. 23, 2000). He also testified that he and Mr. Stratemeier were the only people involved in negotiating the Stipulation and Agreement on behalf of Hoechst, and that he, Mr. Stratemeier, and Mr. Heyman reviewed the drafts of the Stipulation and Agreement on behalf of Hoechst. *Id.*, pp. 19, line 17 to 20, line 8.

⁸ Hoechst originally also listed Mr. Heyman as a potential witness, but subsequently removed him from its witness list. Notice of Amendment to Aventis Preliminary Witness List.

is to be believed, he would have discussed these issues at length with Messrs. Spears, Heyman and others. Indeed, these conversations and written communications would have formed the basis for Hoechst's decision to enter into the Stipulation and Agreement. Most importantly, these are the conversations and written communications in which Hoechst would have discussed and determined what provisions must be included in the Stipulation and Agreement in order to fulfill its purported goal of replicating a preliminary injunction.

These communications are therefore crucial to testing Hoechst's defenses, and complaint counsel should be allowed to explore them fully. However, as discussed below, these are precisely the communications that Hoechst has repeatedly concealed.

- Did Hoechst reasonably believe that, absent the Stipulation and Agreement, Andrx might have commenced sales of its allegedly infringing product before resolution of the patent infringement suit?

Mr. Stratemeier asserts that the purpose of entering into the Stipulation and Agreement was to prevent Andrx from coming to market with a potentially infringing product. Stratemeier Inv. Hrg., p. 63, lines 6-13; p. 73, lines 4-21 (May 13, 1999); *see also* Aventis Statement of the Case at 24. Mr. Stratemeier and others have refused to testify, however, regarding the substance of contemporaneous discussions (if any) concerning the basis for their alleged belief that Andrx would have come to market. Stratemeier Inv. Hrg., pp. 73, line 22 to 74, line 2; p. 79, lines 12-17; *see also* Spears Inv. Hrg., pp. 92, line 15 to 93, line 6; p. 93, lines 13-19; Heyman Dep. Tr., p. 59, lines 1-13 (Oct. 6, 2000). Hoechst also has asserted privilege with respect to any relevant written communications between Messrs. Spears and Stratemeier.

- Would Hoechst have sought a court-ordered preliminary injunction if it had not entered into the Stipulation and Agreement?

Mr. Stratemeier claims that the Stipulation and Agreement in essence settled the preliminary injunction portion of the patent infringement lawsuit, even though Hoechst never filed a motion for a preliminary injunction. Stratemeier Inv. Hrg., p. 36, lines 16-21; *see also* Aventis Statement of the Case at 5, 8-9, 20-21. Mr. Stratemeier and others, however, have refused to disclose even the existence, let alone the substance, of any conversations or written communications among legal counsel concerning whether to file a motion for a preliminary injunction. Stratemeier Inv. Hrg., p. 70, lines 4-7; *see also* Spears Inv. Hrg., pp. 93, line 24 to 97, line 2; Heyman Dep. Tr., p. 51, lines 5-17.

- Did Hoechst believe that, had it filed a motion for preliminary injunction, it would have been successful?

Mr. Stratemeier's position assumes both that Hoechst believed it was entitled to a preliminary injunction and that the court would have issued one, had Hoechst filed a motion for one. Hoechst witnesses refuse to reveal, however, whether Hoechst ever analyzed whether it had any chance of success if it were to file a motion for a preliminary injunction. Spears Inv. Hrg., p. 94, lines 10-18; pp. 95, line 18 to 96, line 16; *see also* Heyman Dep. Tr., pp. 51, line 18 to 52, line 1.

- Was the Stipulation and Agreement no more restrictive of competition than a court-ordered preliminary injunction?

Mr. Stratemeier insists that Hoechst intended certain provisions of the Stipulation and Agreement to parallel the provisions of a possible preliminary injunction. For example, he asserts that the parties intended the non-refundable, payments of \$10 million per quarter pursuant

to paragraph 4(A) of the Stipulation and Agreement to replicate a patent plaintiff's contingent obligation under a preliminary injunction to compensate the alleged infringer for actual lost profits, should the alleged infringer ultimately prevail in the litigation. *Stratemeier Inv. Hrg.*, p. 37, lines 5-11; pp. 42, line 20 to 43, line 1; pp. 47, line 22 to 48, line 7; *see also* *Aventis Statement of the Case* at 26-27. To evaluate this assertion, complaint counsel needs to explore a number of issues, including what other compensation alternatives were considered, how the parties determined the amount of the payments, why Hoechst agreed to make payments on a non-refundable basis and, most importantly, why the parties chose a payment structure that differed so considerably from what would have been the norm under a court-ordered preliminary injunction. However, Hoechst witnesses have refused to respond to attempts to discover the contemporaneous internal communications on these very topics. *Stratemeier Inv. Hrg.*, p. 48, lines 8-13; *see also* *Spears Inv. Hrg.*, p. 39, lines 1-11, p. 44, lines 5-15, and pp. 91, line 23 to 92, line 9.

- Were the specific provisions of the Stipulation and Agreement necessary to achieving Hoechst's basic purpose?

The deviation of the Stipulation and Agreement from a court-ordered preliminary injunction is shown most clearly by the provisions that include within the scope of the Stipulation and Agreement not only Andrx's FDA-approved product, which was subject to Hoechst's claims of patent infringement, but also any "bioequivalent or generic version of Cardizem CD" (including a potentially non-infringing product). Stipulation and Agreement ¶ 2(A). By requiring Andrx to forgo all future payments and to repay all amounts received from Hoechst if Andrx introduced any such product to the market, the Stipulation and Agreement, had

it remained in effect, would have eliminated Andrx's incentive to market its reformulated version of its product. Mr. Stratemeier claims that Hoechst's intent in insisting on such a provision was to prevent it from having to compensate Andrx if Andrx found another means of marketing its product. Stratemeier Inv. Hrg., pp. 85, line 16 to 86, line 14; *see also* Aventis Statement of the Case at 24, 29. Mr. Stratemeier's asserted justification is highly suspect in that it fails to explain why Hoechst insisted that Andrx be required to repay all past payments, rather than simply forgoing future payments. Not surprisingly, Hoechst has refused to reveal the substance of any contemporaneous discussions about the phrase "bioequivalent or generic version of Cardizem CD" that would allow the accuracy of this explanation to be tested. Spears Inv. Hrg., p. 50, lines 4-14.

Likewise, the Stipulation and Agreement required Andrx to forgo all future payments and repay all amounts received from Hoechst in the event that it relinquished its right of exclusivity. Stipulation and Agreement ¶ 2(A). Had the parties not abandoned the agreement after the FTC began questioning them about it, this provision would have eliminated any incentive of Andrx to enter into a deal with another generic manufacturer whereby Andrx would relinquish its right of exclusivity, thus permitting the other generic manufacturer to bring its product to market. Mr. Stratemeier claims that Hoechst's intent in insisting on this provision was to prevent it from having any obligation to compensate Andrx if Andrx found some other way to collect money or "game the system." Stratemeier Inv. Hrg., pp. 94, line 2 to 95, line 19; *see also* Aventis Statement of the Case, at 29-30. Again, this assertion is highly questionable, in that it fails to explain why Hoechst insisted that Andrx repay past payments, instead of simply forgoing future payments. Once again, however, Hoechst has stymied efforts to obtain discovery of the

contemporaneous discussions of this element of the Stipulation and Agreement, which would permit this assertion to be verified. Spears Inv. Hrg., p. 64, lines 8-19.

C. Hoechst Should Be Precluded from Offering Testimony by Edward Stratemeier on Hoechst's Asserted Business Justifications for the Stipulation and Agreement

A motion *in limine* is appropriate “to exclude anticipated prejudicial evidence before the evidence is actually offered.” Order Denying Motion *in Limine* or For a Protective Order, *Motor Up Corp.*, Dkt. 9291, 1999 FTC LEXIS 207 at *1 (Aug. 5, 1999) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Testimony from Mr. Stratemeier on the purpose and intent behind the Stipulation and Agreement would be prejudicial to complaint counsel because Hoechst has blocked all attempts to obtain the underlying evidence necessary to test the proposed testimony. Hoechst has raised as an affirmative defense the argument that the Stipulation and Agreement had a legitimate business purpose. *See supra* n. 5. Mr. Stratemeier and others are more than willing to claim, as fact witnesses, that the Stipulation and Agreement had a benign or neutral purpose. But at the first probing questions or requests for documents from complaint counsel on these issues, Mr. Stratemeier and others put on their lawyer hats, assert privilege, and block discovery. Hoechst has deliberately chosen to assert privilege on these issues, knowing full well that complaint counsel would be prejudiced in its ability to test the accuracy and veracity of Hoechst's arguments.

Whether Mr. Stratemeier's testimony will actually reveal privileged information is irrelevant. Mr. Stratemeier's past refusals, and his expected refusal when deposed, to provide information “directly relevant” to his expected testimony is unfair and prejudices complaint counsel. *Bilzerian*, 926 F.2d at 1292. Hoechst chose to shield information relevant to Mr.

Stratemeier's proposed testimony from discovery. It should therefore be barred from presenting that testimony. *See Motor Up Corp.*, 1999 FTC LEXIS 207 at * 7-8 (holding respondents cannot maintain privilege over evidence that is at issue because defenses rely on information contained in evidence).

An order requiring Hoechst to waive privilege and to produce documents and witnesses to testify with respect to these matters would not be appropriate and would not be sufficient to remedy the prejudice caused to complaint counsel. Counsel for Hoechst were aware even before the beginning of this litigation of the conflict between their claims of privilege and the arguments they seek to assert in litigation, and have made a deliberate decision to continue to assert privilege. Indeed, complaint counsel informed counsel for Hoechst during the investigational hearing of Mr. Spears in February 2000 that it would likely not be able to assert certain affirmative defenses and maintain privilege. *Spears Inv. Hrg.*, pp. 34, line 14 to 37, line 5. More recently, at the hearing held in this matter on October 5, 2000, Mr. Meier asserted complaint counsel's position that respondents could not use privilege as both a sword and a shield, and that in order to permit Mr. Stratemeier (and any other counsel representing Hoechst at the time of the negotiation of the Stipulation and Agreement) to testify as a fact witness with respect to the purposes and intentions in his mind during the negotiation of the Stipulation and Agreement, Hoechst would have to waive privilege. *Hearing Transcript* at 28-34. Despite having been put on full notice of complaint counsel's position, Hoechst deliberately decided to continue to assert privilege whenever possible.

At this late date, it is no longer an option to order Hoechst to waive privilege. After discovery of other witnesses has already closed, after experts have completed and been deposed

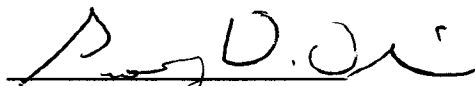
on their reports, and shortly before the start of trial, it is too late to wait for Hoechst to produce relevant documents and then repeat the depositions of Messrs. Stratemeier, Spears, and Heyman, and still expect complaint counsel to be able to make any meaningful use of contemporaneous evidence concerning Hoechst's true purpose in negotiating and entering into the Stipulation and Agreement. *See Mobil Oil*, 779 F. Supp. at 1485 n. 43. Therefore, the only appropriate remedy at this time is to order Hoechst to abide by the choice it has already knowingly made, and to preclude the introduction of evidence by Mr. Stratemeier with respect to issues on which he and others have asserted privilege to thwart discovery.

Conclusion

Hoechst cannot have it both ways. The most basic principles of discovery hold that Hoechst cannot deliberately, continuously block attempts to discover the factual basis for specific assertions, and then expect to be able affirmatively to raise those assertions during the course of litigation. Having chosen to rely on legal privileges repeatedly to deny all attempts at discovery of these issues over the course of the past 18 months, Hoechst must now accept the consequences of its choice.

For the reasons set forth above, complaint counsel respectfully requests this Court to preclude Mr. Stratemeier from testifying with respect to Hoechst's purpose or intent in negotiating or entering into the Stipulation and Agreement and the existence or absence of any less restrictive alternative to the Stipulation and Agreement.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "G.D. Oliver", written over a horizontal line.

Markus H. Meier
Geoffrey D. Oliver
Jon Miller Steiger

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: November 16, 2000

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

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a corporation.

Docket No. 9293

**ORDER GRANTING COMPLAINT COUNSEL'S
MOTION *IN LIMINE* TO PRECLUDE SELECTED TESTIMONY
BY EDWARD STRATEMEIER**

IT IS HEREBY ORDERED that complaint counsel's motion *in limine* to preclude testimony by Edward Stratemeier concerning Hoechst Marion Roussel, Inc.'s purpose or intent in negotiating or entering into the Stipulation and Agreement dated September 24, 1997, and the existence or absence of any less restrictive alternative is GRANTED.

Dated: _____, 2000

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Jon Miller Steiger, hereby certify that on November 16, 2000, I caused a copy of complaint counsel's Motion *in Limine* to Preclude Selected Testimony By Edward Stratemeier and supporting papers to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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