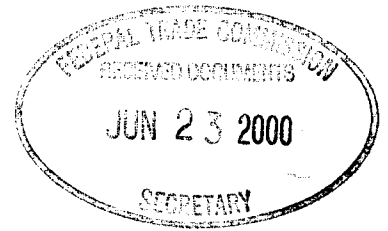


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
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

TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**COMPLAINT COUNSEL'S OPPOSITION  
TO RESPONDENTS' MOTIONS TO COMPEL**

In their motions to compel, respondents seek documents to which they are not entitled.<sup>1</sup> By May 31, 2000 complaint counsel already has fully responded to Andrx's first request for documents, as well as Hoechst's first and second requests for documents, providing over 28 boxes constituting all of the non-privileged documents compiled during the investigation giving rise to the complaint in this matter. Not satisfied with only the non-privileged documents, however, respondents now demand: (1) privileged materials from the Commission's pre-complaint investigation, including internal legal analyses prepared in anticipation of this litigation, internal staff memoranda recommending Commission action, attorney notes, and notes

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<sup>1</sup> We submit this memorandum in opposition to both Andrx's Motion to Compel filed on June 1, 2000, and Hoechst's Motion to Compel filed on June 16, 2000.

of interviews with third parties; and (2) materials from various open and closed Commission non-public law enforcement investigations that are not related or relevant to this case.

Respondents also attack complaint counsel's privilege log – despite the fact that the log provides sufficient information to evaluate each claim of privilege – because we have grouped by category documents that are clearly privileged on their face. Finally, respondent Hoechst seeks enforcement of some instructions from its document request that are unduly burdensome.

As set forth in detail below, we ask that respondents' motions be denied in their entirety. First, all documents from the Commission's pre-complaint investigation that have not been given to respondents are protected from disclosure by a host of privileges, including work-product, deliberative process, attorney-client, and law enforcement privileges. Respondents have offered no valid basis on which to overcome any of the legitimate and well-established privileges we have asserted for the internal FTC staff legal analyses prepared in anticipation of this litigation, internal staff memoranda recommending Commission action, attorney notes, and notes of interviews with third parties.

Second, our privilege log fully complies with the Commission's rules of practice. Grouping documents by category is proper where the documents are privileged on their face, and, in any event, the privilege log provides respondents with sufficient information needed to evaluate each claim of privilege.

Third, the confidential and competitively sensitive information respondents' seek from unrelated FTC investigations is not relevant to the issues in this proceeding – i.e., whether respondents' conduct, as charged in the complaint, violates Section 5 of the FTC Act.

Additionally, even if files from any other non-public FTC investigation did contain some relevant

information, respondents have not (and cannot) show the compelling need required to overcome the many statutory and regulatory confidentiality provisions and privileges that protect from disclosure the Commission's non-public investigatory files from disclosure.

Finally, the instructions from Hoechst's document request that it seeks to enforce are unduly burdensome and unnecessary.

TABLE OF CONTENTS

I. Complaint Counsel Already Has Produced All Non-Privileged Documents from the Pre-Complaint Investigatory File ..... 1

II. Complaint Counsel Properly Asserts Legitimate and Well-Established Privileges for All Documents that Were Not Produced ..... 2

A. Complaint Counsel Properly Asserts the Work Product Privilege for Notes from Interviews with Third Party ..... 3

1. The notes from interviews with third-parties are not subject to the Jencks Act ..... 3

2. The notes from interviews with third parties are subject to the work-product privilege ..... 5

3. Respondents have failed to show “substantial need” necessary to overcome the work product privilege for the notes from interviews with third parties ..... 6

B. Complaint Counsel Properly Asserts the Deliberative Process Privilege for Internal FTC Memoranda that Reflect Recommendations and Deliberations that Were Part of the Commission’s Decision-Making Process ... 8

C. Complaint Counsel Properly Asserts the Law Enforcement Investigatory Privilege for Files Compiled for Law Enforcement Purposes .... 13

III. Complaint Counsel’s Privilege Log Complies with the Commission’s Rules of Practice ..... 14

A. Listing Documents by Category is Proper Where the Documents Are Privileged on their Face ..... 15

B. The Privilege Log Provides Sufficient Information to Evaluate Each Claim of Privilege ..... 17

IV. Respondents Improperly Seek Access to Files of Other Commission Non-Public Investigations that Are Not Relevant to this Case ..... 20

A. The Files Respondents Seek Are Not Relevant to this Proceeding ..... 20

B. The Files Respondents Seek Are Protected from Disclosure by  
Many Privileges and Statutory Provisions ..... 23

V. Complaint Counsel Properly Objects to the Burdensome  
Instructions in Hoechst's Document Request ..... 26

VI. Conclusion ..... 27

**I. Complaint Counsel Has Already Produced All Non-Privileged Documents from the Pre-Complaint Investigatory File**

During the short life of this proceeding, respondents have served on complaint counsel over 160 separately numbered document requests, over 20 interrogatories, and over 60 requests for admissions.<sup>2</sup> Despite this deluge of discovery demands, we have fully, diligently, and timely responded to each and every request. As of May 31, 2000, we have produced to respondents all non-privileged documents from FTC File No. 981-0368 (the investigatory file which gave rise to this proceeding). These materials include:

- 20 boxes of documents, consisting of all materials produced by third parties during the pre-complaint investigation (produced on May 8, 2000 - the earliest date permissible under this Court's protective order).
- 18 boxes of materials, including *all* documents produced by HMR and Andrx during the investigation of this matter (produced on May 4, 2000).
- 2 boxes of documents in response to Andrx's first request for production, consisting of correspondence, all civil investigatory demands and other discovery issued to respondents and third parties during the pre-complaint investigation (including the responses thereto), and other non-privileged materials, such as pleadings, trade press and articles compiled by FTC staff during the investigation (produced on May 11, 2000).
- 1+ boxes of documents in response to HMR's second request for production, including: the rest of the non-privileged documents from the pre-complaint investigatory file (produced on May 31, 2000).

We also have agreed to produce non-privileged documents from another Commission investigation (Watson's acquisition of the Rugby Group, FTC File No. 981-0006), which touched upon the Hoechst - Andrx agreement. At this point, the only documents withheld are those clearly identified on our privilege log, which also has been provided to respondents. Having

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<sup>2</sup> Andrx selectively attaches its own correspondence to support its one-sided view of the discovery history in this proceeding. We attach the remaining correspondence from both parties to put this dispute in its proper context. (*See Ex. 4*).

already received all non-privileged documents relevant to this proceeding, respondents now seek only those documents which either are privileged, irrelevant to this matter – or both.

## **II. Complaint Counsel Has Properly Asserted Legitimate and Well-Established Privileges For All Documents that Were Not Produced**

Without challenging the privilege assertion for any particular document or category of documents, Andrx simply asserts that it is entitled to every document withheld by complaint counsel. *See* Andrx Mem. at 14-22.<sup>3</sup> In support of this position, however, Andrx cites to no case granting the type of wholesale disclosure of privileged materials sought here. Nor does Andrx even articulate any purported need – beyond preparing its defense and “leveling the playing field” – for those documents subject to a qualified privilege. *See, e.g.*, Andrx Mem. at 21. While disclosure of complaint counsel’s privileged investigatory materials might be “convenient” for Andrx, such a rationale “does not meet the ‘substantial need’ test that has been long established as the cornerstone of” overcoming qualified privileges asserted by complaint counsel. *See Gillette Co.*, 98 F.T.C. 875, 880 (1981); *see also Chuck Full O’Nuts Corp.*, 82 F.T.C. at 747 (quashing respondents’ subpoena); *Outdoor World Corp.*, FTC Dkt. No. 9229, 1989 FTC Lexis 142, at \*3 (Nov. 3, 1989) (rejecting respondents’ “fairness” argument as a basis to order production of complaint counsel’s privileged documents). Because complaint counsel has

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<sup>3</sup> In one fell swoop, Andrx seeks to circumvent the FTC’s legitimate, and well-recognized, claims of privilege in order to gain unlimited access to the FTC’s internally created documents. By setting up a false dichotomy between complaint counsel and FTC investigatory staff, Andrx argues that any right to assert privilege claims was waived when the pre-complaint investigatory files were shared with complaint counsel. This argument already has been considered and rejected by this Court in denying Andrx’s May 30<sup>th</sup> Motion.

properly asserted legitimate and well-established privileges for those documents not produced, respondents motions should be denied.

**A. Complaint Counsel Properly Asserts the Work Product Privilege for Notes From Interview with Third Parties**

Respondents are not entitled to complaint counsel’s pre-complaint notes or reports of communications with third parties.<sup>4</sup> These interview notes and reports are not “substantially verbatim” witness statements which could be discoverable under the Jenks Act. Rather, they are typed notes of third-party communications prepared by, or under the direction of, attorneys with an eye towards litigation that – by highlighting and omitting certain facts and issues – reflect our own considerations of the relative importance of these issues. As such, these interview notes are shielded from discovery under the work-product privilege. Respondents have had, and continue to have, equal opportunity to gather factual information to support their position and have not demonstrated the “substantial need” required to overcome our properly invoked work product privilege. For the reasons discussed below, respondents’ motions to compel should be denied to the extent they seek pre-complaint notes or reports of communications with third parties which are protected by the work product privilege.

1. The notes from interviews with third-parties are not subject to the Jencks Act

Respondents claim that complaint counsel’s pre-complaint notes from interviews with third parties must be turned over under the Jencks Act. The Jencks Act, however, requires only that a narrow group of witness statements, commonly referred to as “Jencks statements,” be

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<sup>4</sup> As complaint counsel previously informed Andrx, we have no FTC “Form 74’s.” The only documentation of third-party informant conversations are our attorney interview notes, which are protected from disclosure under the work-product privilege.



produced to opposing counsel after direct examination at trial to provide a fair opportunity for cross-examination.<sup>5</sup> By statute, Jencks statements are limited to (1) a written statement adopted or approved by a witness; or (2) a “substantially verbatim” recital of a witness statement “recorded contemporaneously” with the making of such oral statements. *See* 18 U.S.C. § 3500(e)(1) and (e)(2).<sup>6</sup>

The Commission has recognized that “[f]ew reports meet [this] test . . . since interview reports ordinarily consist of summarizations of the attorney’s interpretation of what was said by a witness rather than accurate reproductions of the witness’ statement.” *The Reuben H. Donnelley Corp.* FTC Dkt. No. 9079 (July 29, 1977) (denying respondent’s subpoena directed at interview reports). That is the situation here. None of the notes were shown to, discussed with, or approved by, any interviewee. (Albert Decl. ¶ 5 (Ex. 3)). Nor do these notes constitute “substantially verbatim” recitals of the witness’ story. (Albert Decl. ¶ 5). Instead, they are “fragmentary and do not indicate that they conform to the language of the interviewee”;<sup>7</sup> they

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<sup>5</sup> Complaint counsel already has produced to respondents the “Jencks statements” which exist – *i.e.*, the pre-complaint investigational hearing transcripts.

<sup>6</sup> The Supreme Court explained the rationale behind the narrow statutory definition of Jencks statements: it would be “grossly unfair to allow the defense to use statements to impeach a witness which could not be said to be the witness’ own rather than the product of the investigator’s selections, interpretations and interpolations.” *Palermo v. United States*, 360 U.S. 343, 350 (1959).

<sup>7</sup> *L.G. Balfour Co.*, 69 F.T.C. 1118, 1124 (notes are not substantially verbatim recitals of the witness’ statement when they “are fragmentary and do not indicate that they conform to the language of the interviewee”); *Brunswick Corp.*, FTC Dkt. No. 9028, 1976 FTC Lexis 265 at \*14 (“A Jencks ‘statement’ means a fairly comprehensive reproduction of the witness’ words and does not include fragmentary notes,” *citing United States v. Thomas*, 282 F.2d 191, 194 (2d Cir. 1960)).

omit certain facts and highlight others;<sup>8</sup> and they are organized by legal or economic subject matter rather than as a “continuous narrative statement of the witness.”<sup>9</sup> (Albert Decl. ¶ 5). In short, the interview notes cannot “fairly be deemed to reflect fully and without distortion what had been said to the government agent” *Palermo v. United States*, 360 U.S. at 352-53.

Therefore, these interview notes are not discoverable as Jencks statements.<sup>10</sup>

2. The notes from interviews with third-parties are subject to the work-product privilege

The work product privilege provides a lawyer with a degree of privacy to assemble information, sift the facts, prepare legal theories, and plan strategy free from unnecessary intrusion by opposing counsel. *United States v. Nobles*, 422 U.S. 225, 238 (1975) (the work-product privilege “shelters the mental processes of the attorney, providing a privileged area” within which to prepare for possible litigation).

The Commission has long held that complaint counsel’s interview notes, such as those at issue here, qualify for work-product protection. See *Mesa County Physicians IPA*, FTC Dkt. No. 9284 (August 4, 1997); *Gillette Co.*, 98 F.T.C. 875 (1981); *Flowers Indus.*, 1981 FTC Lexis 117.

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<sup>8</sup> *Inter-State Builders, Inc.* 69 F.T.C. 1152, 1164 (denying respondent access to complaint counsel’s interview summaries at least in part because complaint counsel’s interview summaries “by the very fact of selection, omission and emphasis” may more accurately reflect the attorney’s own views of the case than it will of the witness); *Brunswick Corp.*, 1976 FTC Lexis 265 at \*6 (an interview report with omissions from an interview indicate “that the reports are not complete statements of the witness”); *L.G. Balfour Co.*, 69 F.T.C. at 1124.

<sup>9</sup> *The Reuben H. Donnelley Corp.*, FTC Dkt. No. 9079 (July 29, 1977) (order denying respondent access to complaint counsel’s interview report); *Brunswick Corp.*, 1976 FTC Lexis 265 at \*7 (interview reports are presumptively summaries when nothing indicates “that they are intended to be a continuous narrative statement of the witness”).

<sup>10</sup> We are prepared to make available to Your Honor examples of our third party interview notes for *in camera* inspection if so desired.

They are prepared by, or under the direction of, attorneys with an eye towards litigation, and organized such that their disclosure to respondents would likely reveal our legal theories, impressions, and strategies. As the Commission has explained:

There is little doubt that any attorney's summaries of interviews which he conducts will inevitably, by the very fact of selection, omission and emphasis, reflect the attorney's own state of knowledge at the time of the interview and also his own thoughts and subjective impressions of what he is being told influenced as well by the type and form of the questions which he posed during the interview. To this extent, his summary may more accurately reflect his own views of the case and state of knowledge of the issues at the time of the interview than it will of the witnesses' state of knowledge.

*Inter-State Builders, Inc.* 69 F.T.C. at 1164 (denying respondent access to complaint counsel's third-party interview notes).

3. Respondents have failed to show "substantial need" necessary to overcome the work product privilege for the notes from interviews with third-parties

Under the Commission's rules, complaint counsel's confidential work product is discoverable only if respondents can demonstrate that they "ha[ve] substantial need of the materials in the preparation of its case." *See* 16 C.F.R. § 3.31(c)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *Schering Corporation*, FTC Dkt. No. 9232, 1990 FTC Lexis 133, at \*2 (May 10, 1990) (respondent must show an inability, without undue hardship, to obtain information that is the "substantial equivalent" of the information contained within the confidential work product). Instead of even attempting to make such a showing, respondents complain only that the FTC has had an unfair "head start" in discovery. *See Andrx Mem.* at 21.

This tired refrain ignores the reality that most of the factual evidence to be presented in this case comes out of respondents' own files, from their own employees, and from their own attorneys who negotiated the agreement at issue. Respondents also conveniently ignore the fact

that, for more than two years, they have been substantially involved in defending, before the Commission and in courts around the country, the same Stipulation and Agreement that forms the basis of the antitrust charges here. For years, Andrx and Hoechst have been marshaling factual evidence and developing legal theories to try to convince fact finders that their conduct does not run afoul of the antitrust laws. Indeed, the Hoechst-Andrx agreement already has been the subject of a number of judicial opinions, including the recent decision by the U.S. District Court for the Eastern District Court of Michigan finding that the Hoechst - Andrx agreement to allocate markets “constitutes a restraint of trade that has long been held to be illegal *per se* under established Supreme Court precedent.”<sup>11</sup>

Moreover, this justification for obtaining complaint counsel’s work product has been rejected in FTC administrative adjudication as legally insufficient. As one ALJ stated: “Respondent can obtain the substantial equivalent of the material which it seeks by conducting its own investigation rather than relying on complaint counsel’s work product or other privileged information.” *Mesa County Physicians IPA*, FTC Dkt. No., at 3. As in *Mesa*, respondents are free at all times to interview any and all industry members, such as those identified in our initial disclosures or preliminary witness list, who may have facts that bear on the issues in the complaint or on respondents’ defense. Although it may be more convenient for respondents to short-cut the appropriate discovery process by “cherry picking” off our pre-complaint efforts, it has long been established that mere convenience does not meet the “substantial need” standard

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<sup>11</sup> See *In re Cardizem Antitrust Litigation*, MDL No. 1278, slip op at 1 (E.D. Mich. June 6, 2000) (Memorandum Opinion and Order Granting Plaintiffs’ Motions for Partial Summary Judgment). See also *Biovail Corp. Int’l v. Hoechst*, 49 F. Supp. 2d 750 (D.N.J. 1999); *Andrx Pharmaceuticals, Inc. v. Friedman*, 83 F. Supp. 2d 179 (D.D.C. 2000).

put forth in the Commission rules.<sup>12</sup> In denying a similar request for access to interview reports in *Gillette Company*, the Commission explained:

There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a 'need' nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions. Therefore, recognizing a categorical 'need' for all information gathered during the investigation, without a showing of 'substantial need,' would directly contradict the purpose of Section 3.31[(c)](3). . . . At best, respondent's strongest argument is merely one of convenience. This rationale, however, does not meet the 'substantial need' test that has been long established as the cornerstone of the work product privilege.

*Gillette Co.*, 98 F.T.C. at 880; *see also Inter-State Builders*, 69 F.T.C. at 1167 (“[R]espondent has no need in preparing its case for trial to have access to any statements which Commission counsel has procured in the course of his investigation”). Since respondents fail to show a “substantial need” for complaint counsel’s confidential work product, their motions to compel should be denied to the extent they seek documents protected by this privilege.

**B. Complaint Counsel Properly Asserts the Deliberative Process Privilege for Internal FTC Memoranda that Reflect Recommendations and Deliberations That Were Part of the Commission’s Decision-Making Process**

The deliberative process privilege protects from disclosure internal agency memoranda that reflect the government’s decision and policy-making processes. *The Coca-Cola Co.*, 85 F.T.C. 398, 399-400 (1975). This privilege is an “ancient [one] . . . predicated on the recognition ‘that the quality of administrative decision-making would be seriously undermined if agencies

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<sup>12</sup> *Mesa County Physicians IPA*, FTC Dkt. No. at 2 (rejecting respondents’ claim that the time constraints imposed by the scheduling order gave rise to a “substantial need” for fact portions of interviews and denying respondent access to such reports); *Diran M. Seropian, M.D.*, FTC Dkt. No. 9248 (October 18, 1991); *Gillette Co.*, 98 F.T.C. 875 (1981); *Flowers Indus.*, 1981 FTC Lexis 117; *Schering Corp.*, 1990 FTC Lexis 133.

were forced to operate in a fishbowl.” *Dow Jones & Co. v. Dept. of Justice*, 917 F.2d 571, 573 (D.C. Cir. 1990) (quoting *Wolfe v. HHS*, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc)).

Disclosure of deliberative materials would “inevitably inhibit[] frank discussion essential to the development of carefully formulated, coherent agency policy.” *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974). As a result, policy information, such as “the reasons for taking certain actions, the decision making process, and intra-governmental memoranda and evaluative reports and the like,” will rarely be subject to discovery. *Chock Full O’Nuts*, 82 F.T.C. at 747.<sup>13</sup>

Despite our legitimate assertion of this privilege, Andrx tries to gain unlimited access to the FTC’s internal deliberative materials by advancing a series of factually and legally deficient arguments. Andrx Mem. at 17-19. First, Andrx raises the puzzling argument that the deliberative process privilege may not be asserted in cases involving the government. Andrx Mem. at 17. In fact, the opposite is true: this privilege is only available to the government to preclude disclosure of appropriate decision-making documents. *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994).<sup>14</sup>

Second, Andrx claims that any factual material in internal agency materials is not entitled to deliberative process protection. Andrx Mem. at 17. Factual information, however, can be so

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<sup>13</sup> See also, *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973).

<sup>14</sup> See also, *Chock Full O’Nuts Corp.*, 82 F.T.C. 747 (1973) (quashing subpoena duces tecum on, *inter alia*, deliberative process grounds); *The Coca-Cola Company*, 85 F.T.C. 398 (1975) (applying deliberative process to various FTC internal memoranda); *Champion Spark Plug Co.*, FTC Dkt. 9141, 1980 FTC Lexis 200 (Dec. 16, 1980) (holding internal memoranda protected by deliberative process privilege).

closely aligned with the policy making process that “[t]he very choice of facts reveals the concerns of the agency and the deliberations of staff personnel.” *Koch v. Department of Justice*, 376 F. Supp. 313, 317 (D.D.C. 1974). Indeed, courts have long recognized that the “disclosure of purely factual material may so expose the deliberative process within an agency” that it enjoys protection. *Mead Data Central, Inc. v. Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). For that reason, even purely factual material is discoverable only if the facts are severable from that material protected by privilege. *Champion Spark Plug Co.*, 1980 FTC Lexis 200, at \*11 (refusing to compel production where factual material was not “segregable from the deliberative material”).

Here, Andrx seeks intra-agency memoranda prepared expressly to aid the Commission’s decision-making process. The facts chosen and highlighted in these memoranda reflect the deliberations of staff personnel on potential legal theories and serve as support for the staff recommendations for Commission action. See Declaration of Richard G. Parker at ¶¶ 4-9 (Ex. 1); Declaration of Jeremy Bulow at ¶¶ 4-9 (Ex. 2). Where, as here, the facts are not severable, but rather intertwined with the deliberative material, the privilege protects the entire document. See *Montrose Chemical Corp.*, 491 F.2d at 63 (refusing to disclose written summaries of factual evidence provided to the EPA administrator because they were prepared for the sole purpose of assisting the Administrator).

Third, Andrx argues that use of the deliberative process privilege is inappropriate because of “allegations of government misconduct.” As Andrx’s own cases show, however, the “government misconduct” exception to the privilege is limited to those cases involving charges of government misconduct that place the “deliberative process itself directly in issue.” *Dominion*

*Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995).<sup>15</sup> In this case, the only issue is whether respondents violated the antitrust laws by entering into an agreement not to compete with one another. The alleged misconduct – supposed press leaks and disclosure of non-public information by FTC staff – has absolutely nothing to do with this. Moreover, by its own admission, Andrx wants the withheld deliberative materials only to inquire “into mental processes” of the Commission, which (according to the courts and the Commission) Andrx is legally prohibited from doing in any event. *Bendix Corp.*, 82 F.T.C. 1123 (1973); *see also School Services, Inc.*, 71 F.T.C. 1703, 1705-06 (1967); *Champion Spark Plug Co.*, 1980 FTC Lexis 200, at \*11.<sup>16</sup> Andrx’s demand for internal agency documents within the scope of the deliberative process should be rejected.

Finally, Andrx contends that the Commission somehow waived its deliberative process privilege as to all deliberative materials because a member of the FTC staff (Mr. Balto)

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<sup>15</sup> *See also In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) (involving claim of whether the former Secretary of Agriculture improperly accepted gifts from individuals and organizations with business before the USDA); *Alexander v. FBI*, 186 F.R.D. 154 (D.D.C. 1999) (involving claim that the FBI violated plaintiffs’ privacy interests by improperly turning over FBI files to the White House); *Bank of Dearbourne v. Saxon*, 244 F. Supp 394 (E.D. Mich. 1965) (in a case with allegations that the defendant violated Michigan law and that the Comptroller knowingly acquiesced and implemented the alleged violation, the court noted “the charge of. . . sham and subterfuge, [was] the gravaman of the complaint”).

<sup>16</sup> In addition, a mere allegation of misconduct, without any concrete showing, is not sufficient to pierce the deliberative process privilege. While Andrx has tried to piece together some theory of wrongdoing from FTC staff communications with Biovail (one of Andrx’s competitors), communications with complainants are routine during the course of investigations and are in fact recommended by the Federal Trade Commission’s Operating Manual. *See* Section 3.6.6.4.1 (“[I]nterviews with persons who may be able to furnish relevant information concerning the subject of the investigation are one of the most effective tools used in the conduct of investigations.”). Frequently, market participants, such as Biovail, can be valuable sources of information that assist the staff in assessing potentially illegal conduct.



supposedly communicated “details of the FTC deliberations” with Biovail. This argument fails both as a matter of fact and law. First, Andrx presents no facts that an FTC staff member conveyed to a third party details of the FTC’s deliberations. At most, the so-called “evidence” shows only that Mr. Balto discussed antitrust case law with Biovail’s counsel. Discussions with third parties and complainants are routine during investigations, and do not waive the deliberative process privilege.

In any event, the law is clear that even if deliberative information was improperly communicated to a third-party, “an unauthorized ‘leak’ does not constitute a waiver of the [deliberative process] exemption.” *Safeway v. F.T.C.*, 428 F. Supp. 346, 347 (D.D.C. 1977) (finding no waiver of deliberative process even though Washington Post published a story based on leaked information); *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 211 (D. Del. 1991) (finding waiver of deliberative process only “[w]here an authorized disclosure is voluntarily made to a non-federal party”) (emphasis added). The deliberative process privilege belongs to the Commission (*see United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)), and cannot be destroyed by the unauthorized statement of a staff member. Moreover, because a “waiver should not be lightly inferred” or broadly applied, the release of certain information “only waives. . . [deliberative process] privileges for the . . . information specifically released, and not for related materials.” *In re Sealed Case*, 121 F.3d at 741 (finding that the privilege still existed for those documents not “identical” to the disclosed document); *Army Times Publishing Co. v. Dep’t of Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993) (an agency does not waive its deliberative process privilege “simply because it has released information similar to that requested”). Thus, in order to establish waiver, Andrx would need to come forward with hard evidence (not conjecture) that

specific identifiable materials were disclosed. Andrx has failed to do so, and therefore, its motion to compel should be denied to the extent it seeks documents protected by the deliberative process privilege.

**C. Complaint Counsel Properly Asserts the Law Enforcement Investigatory Privilege for Files Compiled for Law Enforcement Purposes**

Investigatory files compiled for law enforcement purposes are privileged under what is commonly referred to as the investigatory files or law enforcement privilege. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). This privilege recognizes that premature disclosure of investigatory files would undercut the Commission's prosecutory role by revealing investigative techniques and deterring witnesses and informants from coming forward. The importance of this privilege has been recognized by Congress,<sup>17</sup> and its use to protect law enforcement files has been upheld by the Commission in similar circumstances. *The Seeburg Corp.*, 70 F.T.C. 1809 (October 25, 1966).

Respondents argue that complaint counsel misapplies the privilege by failing to produce a privilege log or otherwise identify the items for which the privilege is claimed. This argument is moot. We provided a privilege log before respondents filed their motions to compel. In this log, complaint counsel properly asserts the law enforcement investigatory privilege by separately identifying each item subject to the privilege and the basis for the claim. *See In re Sealed Case*, 856 F.2d at 272 (*citing Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973)). These items have been duly considered and approved by the department head having control over the information. Parker Decl. at ¶¶ 10-11 ; *see also In re Sealed Case*, 856 F.2d at 271; *Black v.*

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<sup>17</sup> *See Freedom of Information Act*, 5 U.S.C. §552(b)(7) (exemption covering "records or information compiled for law enforcement purposes").

*Sheraton Corp.*, 564 F.2d 531, 542-43 (D.C. Cir.1977)). Andrx's motion to compel fails to identify any need that outweighs the importance of the privilege, and therefore should be denied to the extent it seeks production of documents protected by the law enforcement privilege.

### **III. Complaint Counsel's Privilege Log Complies with the Commission's Rules of Practice**

On May 31, 2000, complaint counsel submitted a comprehensive log of documents withheld from its several productions based on assertions of privilege.<sup>18</sup> On this log, we identified ninety-two specific documents or categories of documents which are properly protected from disclosure by a host of privileges, including work-product, agency deliberative process, law enforcement investigatory file, attorney-client, and informants privileges. Under Commission and federal case law, and according to respondents' own motions to compel, complaint counsel provided sufficient information on which to evaluate the applicability of the claimed privileges, including the documents' date, title, author(s), recipient(s), description, privilege claims, and bases of each privilege claim. Even though this initial log complies with the Commission's Rules of Practice, complaint counsel has prepared a revised privilege log in

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<sup>18</sup> Andrx's contention that our legitimate privilege claims have been waived by the short delay in providing a privilege log is without merit. Waiver of privilege is "a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." *First Savings Bank v. First Bank Sys., Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995). None of those elements are present here. Like other Commission investigations, the pre-complaint investigation here generated many documents protected from disclosure by various privileges. We diligently reviewed these hundreds of privileged documents and produced a log as soon as it was feasible. Our good faith efforts to comply with our discovery obligations cannot constitute a waiver of our properly asserted privileges. Aside from the legal deficiencies in Andrx's argument, we find Andrx's position ironic in light of its failure to provide a privilege log (or produce a single document) in the nearly two months since we issued a document request to Andrx.

order to address certain concerns raised by respondents during the parties' meet and confer.<sup>19</sup>

This revised log (1) provides the date ranges and approximate number of documents for the various categories of withheld documents; (2) identifies separately, or by category, those materials which were prepared by, and distributed among, only non-attorneys in the Bureau of Economics; and (3) identifies privileged documents from another Commission investigation (FTC File No. 981-0006) from which we have agreed to produce responsive documents because that investigation touched upon the Hoechst-Andrx agreement.

Respondents argue that our privilege log is deficient and should be supplemented because (1) it identifies certain internal FTC materials by category, rather than individually; and (2) it does not provide enough information to permit respondents to evaluate complaint counsel's asserted privilege claims. These arguments are factually and legally without merit.

**A. Listing Documents by Category is Proper Where the Documents Are Privileged on their Face**

While respondents insist they are entitled to an individualized log entry for each of the pre-complaint documents that has been identified by category, they fail to articulate how knowing each e-mail or memoranda which has remained at all times internal to the FTC (as well as each particular FTC staff member or members who authored or received such document), will assist them in evaluating whether a particular privilege applies. The privilege analysis is the same whether applied to individually identified documents or to a category of documents that consists only of documents identified by similar information. Our log identifies whether a particular document or category of documents was created or seen by: an outside entity, a

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<sup>19</sup> See Attachment A to Parker Declaration.

Commissioner, a Commissioner's attorney advisor, Bureau of Competition management, Bureau of Economics management, a member of the Commission's General Counsel's office, attorneys from the Bureau of Competition not directly affiliated with the investigation leading to this litigation, or the Bureau of Competition staff who directly worked on the investigation leading to this litigation. Further, we identified each group member listed in the log, the person's position, and whether the person is a lawyer. Work at the Commission is a team effort and all members of a group may have contributed to or viewed a particular document. Respondents therefore have everything they need to challenge any privilege assertion they feel is inappropriate.

This approach of categorizing certain types of privileged materials follows well-established Commission precedent.<sup>20</sup> Contrary to respondents' argument, this precedent holds that complaint counsel need not perform the unnecessary, burdensome task of individually detailing information for hundreds of documents that are privileged on their face (such as those at

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<sup>20</sup> See also *R.J. Reynolds Tobacco Co.*, FTC Dkt. No. 9285 (Sept. 24, 1998) (finding sufficient a privilege log organized by category of documents where literal application of Rule 3.38A would be unduly burdensome); *Tower Loan of Mississippi, Inc.*, FTC Dkt. No. 9241, 1991 FTC Lexis 24, at \*4 (Order Denying Tower Loan's Amended Motion to Compel) ("Since there is no warrant for overturning the privileges claimed by complaint counsel, requiring them to list those documents . . . would be senseless"); *TK-7 Corp.*, FTC Dkt. No. 9224, 1990 FTC Lexis 20, at \*4-5 (March 9, 1990) (rejecting argument that complaint counsel failed to comply with Rule 3.38A); *Exxon Corp.*, FTC Dkt. No. 8934, 1980 FTC Lexis 121 at \*18 n. 28 (Feb. 8, 1980) (document withheld "by reason of any claim of privilege. . . shall be identified either by category or a short description"); *National Tea Co.*, FTC Dkt. No. 9126, 1979 FTC Lexis 140, at \*3 (Oct. 31, 1979) ("documents withheld on grounds of immunity or privilege [were to] be identified by category as to type of document but need not be individually identified"); *Safeway Stores, Inc.*, FTC Dkt. No. 9053, 1976 FTC Lexis 78, at \*9-10 (Nov. 8, 1976) (rejecting respondent's contention that complaint counsel need to identify on privilege log each document withheld); *Sterling Drug, Inc.*, FTC Dkt. No. 8919, 1976 FTC Lexis 460 at \*7 (March 17, 1976) (rejecting respondents' demand that complaint counsel identify and list all documents as to which privilege is claimed because "imposition of such substantial burden upon complaint counsel in these circumstances would not serve any useful purpose and is not justified").

issue here). The reason for this is simple – individually cataloguing each of the hundreds of privileged documents would be a huge task. And at the end of the day, nothing would have been accomplished (except for distracting us from the merits of the case) because the documents at issue – internal Commission staff notes and memoranda prepared, and relied on, by the Commission or its staff – are clearly protected by various privileges.

Because this kind of additional detail of privileged pre-complaint documents is of little or no value, the Commission and administrative law judges routinely reject respondents' demands where complaint counsel, like here, have identified categories of documents and the type of privilege claimed. As one ALJ stated, in denying a similar demand for the type of information sought here: "In these circumstances, there is no need for further burdening complaint counsel with furnishing the kind of detailed information for each withheld document." *Olin Corporation*, FTC Dkt. No. 9196 (Nov. 26, 1985).

**B. The Privilege Log Provides Sufficient Information to Evaluate Each Claim of Privilege**

The key to determining the sufficiency of a privilege log is whether it provides enough information to permit the recipient to evaluate "whether the document is at least potentially protected from disclosure."<sup>21</sup> The Commission's Rules of Practice adopt this standard in Rule 3.38A (16 C.F.R. § 3.38A(a)). The cases cited by Hoechst go no further than these requirements, and indeed, respondents are entitled to no more.<sup>22</sup> Complaint counsel's privilege log (together

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<sup>21</sup> *United States v. Construction Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (citing *Bowne of New York City, Inc. v. Ambase Corp.*, 150 F.R.D. 465, 474 (S.D.N.Y. 1993)). See also HMR's Mem. at 11, 13 n.18.

<sup>22</sup> See *Weight Watchers Int'l, Inc.*, FTC Dkt. 9261, 1995 FTC Lexis 131, at \*2 (May 15, 1995) (Order Ruling On Complaint Counsel's Motion to Compel Weight Watchers to

with the list of persons identified in the log) provides all the information respondents need to see that the documents withheld are at least “potentially entitled” to the privileges being claimed.

- Attorney Client Privilege. Each entry claiming the attorney-client privilege identifies that the document withheld (1) was communicated (2) between a Commission lawyer and a Commission employee responsible for providing legal advice (3) not communicated beyond the Commission and (4) concerned legal analysis. *See Construction Prods. Research, Inc.*, 73 F.3d at 473; HMR Mem. at 17. HMR does not, and cannot, identify what necessary information complaint counsel omits.
- Work Product Privilege. Each entry for which the work-product privilege is claimed clearly describes the document as being “prepared in anticipation of Commission litigation.” This is all that is necessary to show entitlement to the privilege, as HMR itself admits. *See* HMR Mem. at 18 (*citing Coastal States Gas Corp.*, 617 F.2d 854, 864 (D.C. Cir. 1980)). While HMR is correct that the work-product privilege is qualified, complaint counsel’s only obligation at this point is to show that the documents are entitled to work-product protection.<sup>23</sup> Respondents bear the burden of showing whether they are entitled to the documents in spite of that protection.<sup>24</sup>

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Supplement Its Privilege Log) (finding that complaint counsel was not entitled to more information than was required under Commission rules).

<sup>23</sup> HMR further confuses issues when it wrongly asserts that four documents contain segregable factual information. HMR Mem. at 19 n. 23. In fact, three of these documents – entries 33, 67, and 83 – identify summaries of information the attorney-authors felt would be important in this litigation, and which are therefore protected as opinion work product. *See In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997). The entry for the fourth document – entry 92 – a letter from one of the respondents with a Commission attorney’s notes in the margins – only claims privilege for those notes, which the log states “[r]eflects notes, impressions, or analyses prepared in anticipation of Commission litigation.” The log also clearly identifies that a version of the document without the notes had already been produced.

<sup>24</sup> *See United States v. Adlman*, 134 F.3d 1194, 1203 (2d Cir. 1998) (after the withholding party shows entitlement to work product, the party seeking discovery must make “an adequate showing of substantial need for the document and an inability to obtain its contents elsewhere without undue hardship”); Fed. R. Civ. P. 26(b)(3). This is true for all of the qualified privileges. *See, e.g., United States v. Farley*, 11 F.3d 1385, 1389-90 (7th Cir. 1993) (holding party seeking discovery did not make sufficient showing to overcome the deliberative process privilege).

- Deliberative Process Privilege. The log contains information sufficient to show that documents are entitled to protection under the deliberative process privilege. Each entry specifies that the document is (1) predecisional, in that it reflects “notes, impressions, or analyses prepared in anticipation of Commission decision,” and (2) deliberative, in that it “[r]eflects agency deliberation.” While this privilege must be invoked formally by the proper Commission personnel, there is no obligation to do so until after a motion to compel is filed. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (government not required to formally claim executive privileges until motion to compel filed). Richard Parker, Director of the Bureau of Competition, and Jeremy Bulow, Director of the Bureau of Economics, formally claim the deliberative process privilege in the attached declarations. *See Parker Decl.* (Ex. 1); *Bulow Decl.* (Ex. 2).
- Law Enforcement Privilege. Like the deliberative process privilege, the law enforcement privilege must be formally claimed by the appropriate Commission personnel after a motion to compel has been filed. This also has been done in the attached declaration. (*See Parker Decl.* at ¶¶ 10-11 (Ex. 1)). Each entry for which the law enforcement privilege is claimed makes clear that the document or privileged information arises from the Commission’s law enforcement investigations.<sup>25</sup>

HMR argues that this Court cannot evaluate complaint counsel’s privilege assertions until our privilege log has been supplemented. HMR Mem. at 16, 22. An ALJ, rejecting this same argument in *Safeway Stores, Incorporated*, concluded: “[I]t is unnecessary to require identification of each allegedly privileged document before I can rule on complaint counsel’s claims of privilege.”<sup>26</sup> We urge this Court to deny respondents’ attempt for another bite at the

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<sup>25</sup> HMR’s argument that “categorical assertions” of the law enforcement privilege are “inadequate” (HMR Mem. at 19), is not supported by its own cite. The treatise cited explains only that documents which have nothing to do with the law enforcement action at issue cannot obtain protection by their mere presence in particular files. *See* 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5681, at 169-170 (1992). In this case, each document for which the law enforcement privilege is claimed was created in connection with either the investigation that led to this litigation, or another one of the Commission’s law enforcement investigations (FTC File No. 981-0006).

<sup>26</sup> 1976 FTC Lexis at \*8.



apple, and resolve the disputes relating to complaint counsel's privilege log during its review of these filings.

#### **IV. Respondents Improperly Seek Access to the Files of Other Commission Non-Public Investigations that Are Not Relevant to this Case**

In their document requests, respondents seek access to the files of any Commission proceeding, investigation, or enforcement action since January 1, 1993 that related, among other things, to:

- “cardiovascular products,”
- selection of pharmaceutical products for managed care formularies, or
- any “settlement or partial settlement of patent litigation.”<sup>27</sup>

Contrary to respondents' arguments, the law does not require complaint counsel to review the many files of nonpublic law enforcement investigations that are irrelevant to this proceeding, that Congress and the Commission have presumed confidential, and that are most likely privileged in any event. Respondents are entitled to non-privileged documents from this case file, and that is exactly what we have already provided to them.

##### **A. The Files Respondents Seek Are Not Relevant to this Proceeding**

The Commission's rules plainly state that discovery is allowed only to the extent it may reasonably yield information relevant to the complaint allegations, the proposed relief, or respondents' defenses. *See* 16 C.F.R. § 3.31(c)(1). Discovery is further limited to the extent it is “unreasonably cumulative,” “obtainable from some other source that is more convenient, less burdensome, or less expensive,” or where the burden and expense of the proposed discovery

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<sup>27</sup> *See* HMR's second request for documents at nos. 23-27; 33-36 (cardiovascular products); HMR Nos. 28-32 (formularies); HMR No. 40, Andrx Nos. 47-48 (settlement agreements).

outweigh its likely benefit. *See* 16 C.F.R. § 3.31(c)(1). Our search for, and production of, documents in response to respondents' various requests is consistent with these discovery limitations.

First, we properly objected to respondents' demands for privileged and confidential documents from the files of other Commission non-public investigations into patent settlement agreements in the pharmaceutical industry. The existence of, as well as the internal FTC analyses of, other patent settlements is irrelevant to whether Andrx and Hoechst violated the antitrust laws, and discovery of similar types of information has consistently been denied by administrative law judges at the FTC.<sup>28</sup> Our complaint is based on the activities of respondents and respondents alone; whether the Stipulation and Agreement is the only such document or not, its illegality is the same. Nor does respondents' asserted "selective prosecution" defense allow them to expand discovery. This defense has been consistently rejected as irrelevant. *See Moog Industries Inc. v. F.T.C.*, 355 U.S. 411, 413 (1958) (holding selective prosecution is not a valid defense); *Outdoor World Corporation*, 1989 FTC Lexis 142, at \*2 (finding discovery demand for documents of other investigations "irrelevant" since there is no valid defense of selective enforcement absent a clear abuse of discretion).<sup>29</sup>

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<sup>28</sup> *See, e.g., The Kroger Co.*, FTC Dkt. No. 9102, 1977 FTC Lexis 55 at \*4-5 (October 27, 1977) (denying discovery of the FTC's "prior proceedings, including formal proceedings, investigations, compliance proceedings, and proposed rulemaking proceedings" as beyond the scope of legitimate discovery and denying discovery of the FTC's pending investigations because of the absence of showing good cause); *Sterling Drug, Inc.*, FTC Dkt. No. 8919, 1976 FTC Lexis 460 at \*7-8 (March 17, 1976) (same).

<sup>29</sup> *See also* Complaint Counsel's Memorandum in Support of Their Motion to Strike Certain Affirmative Defenses, at 5-6 (filed April 28, 2000).

Complaint counsel also properly objected to respondents' demand for all documents in any Commission investigatory file for the past seven years relating to "cardiovascular products" or managed care "formularies." Responding to these sweeping discovery requests would require complaint counsel to scour the Commission's files of dozens of closed and open non-public merger and non-merger investigations which involved any pharmaceutical manufacturer, pharmacy benefit manager, or managed care organization. Over a thousand boxes of materials would need to be reviewed from the Commission's ongoing investigations. And for those investigatory files which have been closed for years, this massive search would turn up mostly, if not only, privileged internal FTC staff documents – for those documents produced by parties and third-parties likely would have been destroyed or returned long ago. To the extent that respondents believe they need any of this information, "testimony concerning the ubiquity and value of the challenged practices could be readily obtained from other industry members or experts." *Chock Full O'Nuts*, 82 F.T.C. at 748. Indeed, that is what respondents already are doing. So far, they have issued at least 30 third-party subpoenas to pharmaceutical companies and managed care organizations looking for the same type of information they seek from the Commission's privileged and confidential files.<sup>30</sup>

Finally, Andrx mistakenly argues that we have conceded the relevance of other settlement agreements by requesting from Andrx other such agreements to which it is a party. Unlike

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<sup>30</sup> See, e.g., HMR Subpoena to Abbott Laboratories No. 1 ("all documents that reflect or relate to marketing cardiovascular pharmaceutical products"); No. 9 ("all documents that reflect or relate to in any way standards of care for the treatment of hypertension and/or angina through the use of cardiovascular products") (attached as Ex. 5); HMR Subpoena to Aetna U.S. Healthcare No. 1 ("all documents that reflect or relate to determining pharmaceutical products for inclusion in, or exclusion from, formularies") (attached as Ex.5).

respondents' all-encompassing document requests, we carefully limited our discovery to the settlement agreement entered into by the parties in this case. Our request, therefore, is directly relevant to a number of issues in this litigation, including respondents' intent and knowledge in entering such agreements, the types and terms respondents' typically included in such agreements, and respondents' alleged defenses for entering such agreements.

In light of respondents' ability to obtain information directly from industry participants, and the irrelevance of the Commission's other non-public investigatory files, there is no basis to impose on complaint counsel the extreme burden of responding to these requests.

**B. The Files Respondents Seek Are Protected from Disclosure by Many Privileges and Statutory Provisions**

Aside from relevance considerations, respondents' discovery of the Commission's non-public investigatory files is shielded from discovery by the attorney-client and work-product privileges, the investigatory files privilege, and the deliberative process privilege.<sup>31</sup> *See Exxon*, 1980 FTC Lexis 121, at \* 7-8.

Providing respondents access to these investigatory files would (1) undermine the Commission's ongoing and future, non-public, law enforcement activities by disclosing

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<sup>31</sup> All of the files from which respondents seek production are presumptively confidential and can be disclosed only in limited circumstances. *See, e.g.*, 15 U.S.C. 46(f) ("the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential"); 15 U.S.C. 57b-2(b) ("Except as otherwise provided in this section . . . no documentary material . . . shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material"); 15 U.S.C. §§ 18a(h) ("no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding"); 16 C.F.R. § 4.10(d) (barring disclosure except for limited circumstances). Though disclosure in administrative litigation may be allowed under the Commission's Rules of Practice, the confidentiality statutes and regulations establish the proper context in which to evaluate respondents' motion.

confidential investigative techniques and targets, deterring witnesses from sharing necessary information for fear of being revealed, and prematurely revealing investigation results; (2) disrupt the Commission's decision-making process by inhibiting frank and candid discussions and prematurely disclosing the Commission's views on investigations that are not yet complete; and (3) interfere with the Commission's ability to prepare for possible litigation by intruding into the mental processes of the FTC staff.

For these reasons, the Commission and the courts have long held that one must show a "substantial need" to gain access to information protected by the law enforcement, deliberative process, and work-product privileges.<sup>32</sup> And, of course, no showing of need can overcome the attorney-client privilege. *Moody v. IRS*, 654 F.2d 795, 798 n.10 (D.C. Cir. 1981). Respondents have made no such showing here, claiming only they are entitled to this information out of "fairness" and "due process." Again, respondents are wrong as a matter of law and fact. As a long-standing legal principle, a respondent is not entitled to privileged information from the Commission's files even though complaint counsel has sought similar information from respondents. *See Flowers Indus., Inc.*, FTC Dkt. 9148 at 2, 6 (rejecting argument that respondent is entitled to subpoena with specifications "identical" to complaint counsel investigational request for documents).<sup>33</sup> And factually, respondents are simply wrong when they say that

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<sup>32</sup> 16 C.F.R. § 3.31(c)(3) (work product); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss*, 40 F.R.D. 318, 328-29 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir. 1967) (deliberative process).

<sup>33</sup> *See also Exxon Corp.*, 1980 FTC Lexis 121 at \*7-8 n.9 (finding no due process right to "access to all materials which complaint counsel have examined"); *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261, 1275 (N.D. Ind. 1979) (rejecting due process argument that respondents "are entitled to 'any evidence' in the hands of complaint counsel, or that . . . [respondents] are entitled to discovery 'equal' to the discovery of complaint counsel"); *Sperry and Hutchinson Co. v. F.T.C.*, 256 F. Supp. 136, 143-44 (S.D.N.Y. 1966) (rejecting argument that respondents are

complaint counsel is relying on information that was not part of the investigation that led to this litigation. Complaint counsel has repeatedly assured respondents that “it intends to rely solely on documents that were or should have been produced” in the investigation that led to issuance of the complaint in this case. *See* Reply Memorandum in Support of Motion to Strike Certain Defenses, at 4.<sup>34</sup>

The burdens of discovery are properly imposed when there are discoverable, relevant documents at issue. Here, however, respondents seek to impose the immense burden of forcing complaint counsel to review tens of thousands of documents that are most likely irrelevant to this litigation and could be obtained through third-party discovery, and that are mostly privileged in any event. Neither the law nor the facts supports respondents’ position that the files of other Commission investigations must be opened.

**V. Complaint Counsel Properly Objects to the Burdensome Instructions Accompanying Hoechst’s Document Requests**

To date, respondents have served over 160 separately numbered document requests on us. In its most recent document request, Hoechst expects us to comply with various instructions that would: (1) require us to identify by number the request to which each document produced is

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entitled to identical discovery because that would “appear[] to be tantamount to a complete disclosure of the Commission’s [investigatory] files”).

<sup>34</sup> Andrx’s only cited example is a document that HMR withheld – on claim of privilege – in the Andrx/HMR investigation, FTC File No. 981-0368, but which was produced in the FTC’s investigation of Watson’s acquisition of The Rugby Group. As we indicated in previous filings, we believe HMR’s production of the document, which it asserts was inadvertent, waives any privilege claim. Thus, we believe this document should have been produced in this matter. In any event, we have agreed to provide respondents access to the files in which this document was produced – the Commission’s investigation into Watson’s acquisition of The Rugby Group.

responsive and the source of each responsive document (Inst. 35);<sup>35</sup> (2) require us to identify documents that have been destroyed, lost, or discarded (Inst. 37); and (3) require us to identify the location of previously produced documents (Inst. 38-39).<sup>36</sup> In light of the volume of materials we already have produced (more than 25 boxes) and the duplicative nature of respondents' various document requests, complying with these instructions would be unduly burdensome and would serve no legitimate purpose.

For example, compliance with Instruction No. 37 would require us to reconstruct all documents – primarily e-mails and early drafts of internal memoranda – that were routinely destroyed on an ongoing basis in the ordinary course of the pre-complaint investigation. Such a task would not only be impossible, but also pointless since most, if not all, of these documents would be privileged in any event. And, although Hoechst did not object to a similar instruction in our request for production, we note that Hoechst chose not to follow this instruction either in its production to us.

Similarly, complying with Instruction Nos. 38-39 would require us to re-review the more than 25 boxes of materials already produced to Hoechst, and identify by bates number which among Hoechst's 56 document requests the various documents are responsive to. What possible purpose can be served by requiring this at this time?

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<sup>35</sup> We already have complied with Instruction No. 35. As we specifically disclosed in our response, all of the documents produced are responsive to Hoechst's Request No. 20, and these documents came from our general file room.

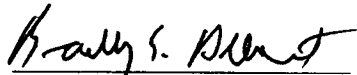
<sup>36</sup> Hoechst also seeks complaint counsel to comply with Instruction 36, which relates to our privilege log. We address this issue in Section III of this response.

It is time to move this case past the jockeying for position implied by Hoechst's insistence that we follow instructions that no longer serve any legitimate purpose. Accordingly, we ask this Court to deny Hoechst's request that we follow these unduly burdensome and unnecessary instructions.

## VI. CONCLUSION

For the reasons discussed above, Andrx's Motion to Compel and Hoechst's Motion to Compel should be denied in their entirety.

Respectfully Submitted,



Markus H. Meier

Bradley S. Albert

Jon M. Steiger

Daniel Kotchen

Robin Moore

Counsel Supporting the Complaint

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

Dated: June 23, 2000



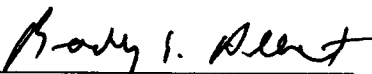
## CERTIFICATE OF SERVICE

I, Bradley S. Albert, hereby certify that on June 23, 2000, I caused a copy of the Complaint Counsels' Opposition to Respondents' Motions to Compel to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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New York, NY 10111

  
\_\_\_\_\_  
Bradley S/Albert

# **EXHIBIT 1**

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

In the Matter of	)	
	)	
HOECHST MARION ROUSSEL, INC.,	)	
a corporation,	)	
	)	
CARDERM CAPITAL L.P.,	)	Docket No. 9293
a limited partnership,	)	
	)	
and	)	
	)	
ANDRX CORPORATION,	)	
a corporation.	)	
	)	

TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**DECLARATION OF RICHARD G. PARKER CLAIMING  
PRIVILEGE FOR CERTAIN DOCUMENTS**

I, Richard G. Parker, declare:

1. I am Director of the Bureau of Competition of the Federal Trade Commission ("Commission"), a multi-member agency composed of a Chairman and up to four other Commissioners. As such, I have the authority to assert government privileges over documents in the custody and control of the Bureau of Competition.

2. I submit this declaration and formal claim of privilege to prevent the release of certain privileged documents, which are more fully described in Attachment A, and which are contained in the Commission's files. Respondents have sought to obtain these documents by way of discovery requests made on April 17 and May 12, 2000, pursuant to Section 3.37 of the Federal Trade Commission's Rules of Practice for Adjudicatory Proceedings.

3. The statements made herein are based upon my personal knowledge (including my review of the documents described in Attachment A), and upon the knowledge of persons who report directly or indirectly to me or on whom I rely in the ordinary course of carrying out my duties as Bureau Director.

4. The authors and the addressees of these documents – to the best of my knowledge – were employed by the Commission when they drafted or reviewed these documents. In the investigation that preceded the commencement of this case, the authors and addressees of the documents listed in Attachment A were responsible for advising the Commission and Bureau of Competition management on what course to pursue, based upon their evaluation of the evidence and consultation with other staff members. The documents described in Attachment A reflect internal discussions bearing upon this advice, including discussions on how to obtain and interpret the evidence needed to establish violations of law, as well as determining the appropriate standard of law to apply in scrutinizing the Hoechst-Andrx agreement. In addition, the documents generally provide the authors’ appraisals of and recommendations concerning proposed courses of action.

**Deliberative Process Privilege**

5. The documents described below (which are identified in Attachment A) consist of materials prepared by Commission employees and relied upon by the Commission or management of the Bureau of Competition in deciding whether to proceed with filing an administrative complaint, as well as by Bureau of Competition management and staff in deciding whether to proceed with certain courses of action or recommendations to the Commission. More specifically, the documents described in Attachment A for which the deliberative process privilege is claimed consist of:

- Item (1) various e-mail messages among the Hoechst-Andrx investigatory team, Bureau of Competition (“BC”) management, and/or Bureau of Economics (“BE”) management discussing legal and enforcement issues relating to the Commission’s investigation of

the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;

- Item (2) various e-mail messages among the Hoechst-Andrx investigatory team, BC management, and/or BE management discussing the FDA's proposed Hatch-Waxman regulations and the Commission's draft comment to these proposed regulations: prepared in aid of Commission comment on proposed regulations;
- Item (3) various e-mail messages from the Hoechst-Andrx investigatory team, BC management, and/or BE management to the attorney advisors to the Commissioners discussing legal and enforcement issues relating to the Commission's investigation of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (10) drafts of the Commission's "Comment of the Staff of the Bureau of Competition and of Policy Planning of the Federal Trade Commission" distributed amongst the Hoechst-Andrx investigatory team, BC management, and BE management: prepared in aid of Commission comment on proposed regulations;
- Item (12) memos and memo drafts created by the Hoechst-Andrx investigatory team, BC management, and/or BE management and sent to the Commission discussing legal and enforcement issues relating to the Commission's investigation of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (13) a binder of materials prepared by the Hoechst-Andrx investigatory team for the Commissioners as part of a briefing to discuss legal and enforcement issues relating to Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (18) memos and memo drafts created by the Hoechst-Andrx investigatory team and sent to BC management and BE management, discussing legal and enforcement issues relating to the Commission's investigation of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (21) memos from the Hoechst-Andrx investigatory team and BC management to the Hoechst-Andrx investigatory team, BC management, BE management, and the Commission attorney advisors, analyzing recent court decisions interpreting the FDA's Hatch-Waxman regulations and discussing the Commission's draft comment to the FDA's proposed Hatch-Waxman regulation: prepared in aid of Commission comment on proposed regulations;
- Item (23) drafts of the administrative complaint issued by the Commission on March 16, 2000, challenging the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;

- Item (24) draft consent order created by the Hoechst-Andrx investigatory team and sent to BC management and BE management prior to the issuance of a complaint: prepared in aid of Commission vote on issuing a complaint;
- Item (27) memo from Rob Kneuper to the Hoechst-Andrx investigatory team and BE management discussing an economic analysis of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (30) memo from BE staff to the Hoechst-Andrx investigatory team and BE management discussing financial analyses of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (31) draft memo from BE staff to the Hoechst-Andrx investigatory team, BC management, and BE management discussing financial analyses of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (34) power-point presentation created by the Hoechst-Andrx investigatory team and sent to BC management, BE management, and the Commission presenting factual and legal analyses of the Hoechst-Andrx agreement prepared in aid of Commission vote on issuing a complaint;
- Item (36) Draft Opposition to HMR's Petition to Quash Subpoena *ad testificandum* of James M. Spears created by Geoffrey Oliver and distributed to the Hoechst-Andrx investigatory staff: prepared in aid of Commission ruling on petition to quash;
- Item (37) memo from Robin Moore and David Balto to the attorney advisors to the Commissioners analyzing the FDA's proposed Hatch-Waxman regulation: prepared in aid of Commission comment on proposed regulations;
- Item (38) memo and memo drafts from Michael Wroblewski to the Commission requesting authority to submit a comment to the FDA's proposed Hatch-Waxman regulation: prepared in aid of Commission comment on proposed regulations;
- Item (39) Opposition to HMR's Petition to Quash Subpoena *ad testificandum* of James M. Spears created by Geoffrey Oliver and Brad Albert and sent to the Hoechst-Andrx investigatory team and Commissioner Sheila Anthony: prepared in aid of Commission ruling on petition to quash;
- Item (40) Opposition to HMR's Petition for Full Commission Review created by Geoffrey Oliver and Brad Albert and distributed to the Commission and the Hoechst-Andrx investigatory team: prepared in aid of Commission ruling on petition to quash;
- Item (41) cover memo from Richard Feinstein, David Pender, and the Hoechst-Andrx investigatory team to the Commission, BC management, and BE management providing a recommendation to the Commission concerning the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;

- Item (42) memo from the Hoechst-Andrx investigatory team to the Commission, BC management, and BE management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (43) memo from BE staff to the Hoechst-Andrx investigatory team, Commission, BC management, and BE management discussing economic, legal, and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (44) memo from Richard Parker, Molly Boast, and Michael Antalics to the Commission, the Hoechst-Andrx investigatory team, BC management, and BE management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (45) memo from Willard Tom to the Commission, the Hoechst-Andrx investigatory team, BC management, and BE management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (46) memo from Jeremy Bulow and Gregory Vistnes to the Commission, the Hoechst-Andrx investigatory team, BC management, and BE management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (48) memo from Willard Tom to the Hoechst-Andrx team, BC management, and BE management discussing legal and enforcement issues relating to the Hoechst-Andrx agreement, including appropriate remedies: prepared in aid of Commission vote on issuing a complaint;
- Item (49) draft memos from Willard Tom and BC management to BC management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding an antitrust enforcement action based on the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (50) memo created by the Hoechst-Andrx investigatory team to BC management discussing legal issues raised in BC management memo relating to the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;

- Item (51) memo from Willard Tom to the Hoechst-Andrx investigatory staff discussing legal issues, litigation readiness, and remedies related to the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (55) memo from Geoffrey Oliver to Willard Tom, David Balto, and the Hoechst-Andrx investigatory team summarizing legal theories relating to the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (63) memo from Robin Moore to the Hoechst-Andrx investigatory team and BC management analyzing the FDA's proposed Hatch-Waxman regulations: prepared in aid of Commission comment on proposed regulations;
- Item (66) memo from the Hoechst-Andrx investigatory team to Richard Feinstein and David Pender analyzing the Hoechst-Andrx agreement and discussing possible remedies if the Commission were to issue a complaint: prepared in aid of Commission vote on issuing a complaint;
- Item (68) memo from Gregory Vistnes to BE management and the Hoechst-Andrx investigatory team discussing possible economic effects stemming from the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (69) memo from Rich Parker to the Commission and the Hoechst-Andrx investigatory team discussing legal and remedial issues related to the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (72) memo from the Hoechst-Andrx investigatory team to BC management analyzing the Hoechst-Andrx agreement and suggesting possible remedies if the Commission were to issue a complaint: prepared in aid of Commission vote on issuing a complaint;
- Item (79) memo from Commissioner Sheila Anthony to the Commission, BC management, BE management, and the Hoechst-Andrx investigatory team discussing legal and remedial issues related the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (80) memo from the Hoechst-Andrx investigatory team to BC management and BE management discussing legal and factual issues and requesting compulsory process authority in the Hoechst-Andrx investigation: prepared in aid of Commission decision on issuing compulsory process;
- Item (81) memo from Fred Martin to the Commission, Hoechst-Andrx investigatory team, BC management, and BE management discussing economic issues and requesting compulsory process authority in the Hoechst-Andrx investigation: prepared in aid of Commission decision on issuing compulsory process;
- Item (82) memo from the Hoechst-Andrx investigatory team to the Commision, BC management and BE management discussing legal and factual issues and requesting



compulsory process authority in the Hoechst-Andrx investigation: prepared in aid of Commission decision on issuing compulsory process;

- Item (84) memo from the Hoechst-Andrx investigatory team to the Commission requesting the issuance of subpoenas *duces tecum* and civil investigative demands to Hoechst and Andrx: prepared in aid of Commission decision on issuing compulsory process;
- Item (85) memo from BC management to the Commission requesting the issuance of subpoenas *duces tecum* and civil investigative demands to Hoechst and Andrx: prepared in aid of Commission decision on issuing compulsory process;
- Item (86) memo from the Hoechst-Andrx investigatory team to the Commission requesting the issuance of subpoenas *duces tecum* and civil investigative demands to various third-party competitors to Hoechst and Andrx: prepared in aid of Commission decision on issuing compulsory process;
- Item (87) memo from the Hoechst-Andrx investigatory team to the Commission requesting the issuance of subpoenas *duces tecum* to pharmaceutical trade associations: prepared in aid of Commission decision on issuing compulsory process;
- Item (88) memo from BC management to the Commission requesting issuance of a subpoena *ad testificandum* to James M. Spears: prepared in aid of Commission decision on issuing compulsory process;
- Item (89) memo from Karen Bokar and Brad Albert to the Commission requesting authority to provide requested confidential briefing material related to the Commission's investigation of the Hoechst-Andrx agreement to the Senate Special Subcommittee on Aging: prepared in aid of Commission decision whether to authorize confidential briefing;
- Item (100) memos from the Watson-Rugby investigatory team to BC management discussing legal issues relating to the proposed acquisition of the Rugby Group by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006): prepared in aid of Commission vote on issuing a complaint;
- Item (104) memo from the Watson-Rugby investigatory team to the Commission discussing legal issues relating to the proposed acquisition of the Rugby Group by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006) and providing a recommendation: prepared in aid of Commission vote on issuing a complaint;
- Item (109) memo from the Watson-Rugby investigatory team to BC management and BE management discussing legal issues relating to the proposed acquisition of the Rugby Group by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006): prepared in aid of Commission vote on issuing a complaint; and

Item (111) memo from BC management and the Watson Rugby investigatory team to the Commission requesting the issuance of subpoenas in connection with the proposed acquisition of the Rugby Group by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006): prepared in aid of Commission decision on issuing compulsory process.

The deliberative process privilege is likewise claimed for earlier drafts of the documents discussed above, as these drafts reflect tentative versions of the same recommendations ultimately made by staff.

6. The documents described above – as well as any earlier drafts of such documents – are of a deliberative nature and communicate the authors’ legal analyses, theories, opinions, conclusions, and recommendations to the Commission or to intermediate superiors. Insofar as the documents recite factual materials, such materials either (a) are interwoven with the authors’ own evaluations, analyses, and recommendations, or (b) disclose an element of the Commission’s deliberations by revealing which facts were selected for discussion, as well as the particular interpretation and distillation of the testimony and contents of numerous witness interviews or documents.

7. In my judgment, the effective functioning of the Commission requires that the confidentiality of the aforementioned documents be preserved. The disclosure of these documents would inhibit the Commission’s and the Commission staff’s ability to conduct the open and frank discussion of important issues that is necessary for effective law enforcement. These documents express the candid and confidential legal policy advice of the authors, and are part of the Commission’s and the Commission staff’s pre-decisional deliberative process. These documents advise and assist the appropriate decision makers. Although such documents are generally reviewed by the Commission or the involved superiors, the recommendations contained therein are not always followed. Further, while the documents reflect the thoughts of certain members of the Commission

staff, they do not necessarily reflect the thoughts or opinions of the Commission itself or of any individual Commissioner.

8. Among the Commission's responsibilities are the detection and investigation of violations of the FTC Act. Inherent in the effective discharge of these responsibilities is the ability to formulate and implement sound law enforcement strategies and policy. A requirement of this process is the assurance that the Commission and its staff will be able to engage in a free and candid exchange of views and deliberations over enforcement policy and its implementation. Such an exchange would be severely restricted by the disclosure of documents such as those listed in Attachment A. This would be the case even if the documents responsive to respondents' request were made available under a protective order forbidding their public disclosure. I am concerned that exposing inter- and intra-agency deliberations and recommendations to persons having interests adverse to those of the government would inhibit frank and full exchange of legal advice, and would not be conducive to the formulation and implementation of sound law enforcement policy.

9. Considering the pre-decisional, internal deliberative nature of the documents described above in Paragraph 5, and my personal judgment that their disclosure would be injurious to the effective discharge of the responsibilities of the Commission – and, ultimately, to the public interest in effective and proper law enforcement – I assert a formal claim of deliberative process privilege with respect to the contents of the documents described in Paragraph 5, above.

#### **Law Enforcement Investigatory File Privilege**

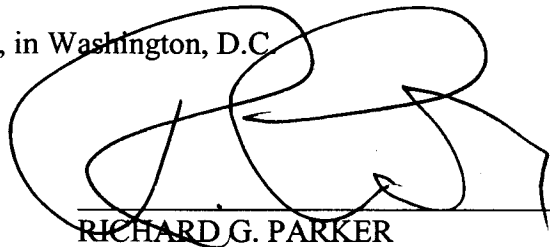
10. David Pender, an attorney within the Bureau of Competition who indirectly reports to me, controls the investigatory files compiled for the law enforcement investigation in the matter of Hoechst Marion Roussel and Andrx Corporation, FTC File No. 981-0368. Ann Malester, also an attorney within the Bureau of Competition who indirectly reports to me, controls the investigatory

files compiled for the law enforcement investigation of the Proposed Acquisition of the Rugby Group by Watson Pharmaceuticals, FTC File No. 981-0006. I have considered the necessity of asserting the law enforcement investigatory privilege for the investigatory files of these two investigations. In my judgment, the effective law enforcement functioning of the Commission requires that the confidentiality of the documents identified in Attachment A be preserved. Production of these investigatory files would severely inhibit the Commission's ability to conduct law enforcement activities by revealing investigative techniques and deterring cooperation in our law enforcement activities.

11. I formally claim the law enforcement investigatory files privilege with respect to the items listed in Attachment A. The basis for the claims of privilege for these items are set forth in Attachment A.

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

Executed this 22<sup>nd</sup> day of June, 2000, in Washington, D.C.



RICHARD G. PARKER



In the Matter of Hoechst Marion Roussel, Inc., et al.  
Docket No. 9293

**COMPLAINT COUNSELS' REVISED LIST OF PRIVILEGED DOCUMENTS**

June 23, 2000

Privilege Abbreviations:  
 AC - Attorney Client Privilege  
 DP - Deliberative Process Privilege (factual material non-existent or inexorably intertwined with deliberative materials)  
 IP - Informants Privilege  
 LE - Law Enforcement/Investigatory Files Privilege  
 WP - Work Product

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
1	9/98 - 3/00	Internal e-mail (approx. 200+)	Hoechst-Andrx Team, BC Management, BE Management <sup>1</sup>	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning Hoechst- Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
2	12/98 - 1/00	Internal e-mail (approx. 20-25)	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and/or legal analysis prepared in anticipation of Commission decision.
3	3/99 - 2/00	Internal e-mail (approx. 25-30)	Hoechst-Andrx Team, BC Management, BE Management	Commission attorney advisors	Miscellaneous e-mails concerning Hoechst- Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

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<sup>1</sup> When a group is identified in this log (e.g., Hoechst-Andrx Team, BC Management, BE Management) as Author or Recipient of a document, not every member of such group necessarily drafted or received the document.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
4	8/99 & 4/00	e-mail (approx. 3-5)	State Attorney General's office	Bradley Albert	Request for information relating to Hoechst - Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
5	Various	e-mail	BC Management	Department of Justice	Miscellaneous e-mails concerning Hoechst- Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
6	7/98 - 10/99	Notes (approx. 55-60)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Interview notes and reports	IP LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation, and identifies informants.
7	4/99 - 2/00	Notes (approx. 25-35)	Hoechst-Andrx Team	File	Investigational Hearing notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
8	4/99 - 8/99	Notes (approx. 8-12)	Hoechst-Andrx Team	File	Miscellaneous team meeting notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
9	11/98 - 12/99	Notes (approx. 25-30)	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous notes on various legal and factual issues concerning Hoechst- Andrx investigation and litigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
10	9/99 - 11/99	Memoranda (approx. 15-20)	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Drafts of FTC comment on FDA proposed rule changes	DP LE	Reflects agency deliberation prepared in anticipation of Commission decision.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
11	12/21/99	Memorandum	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Discussion concerning retention of experts for Hoechst - Andrx investigation and litigation.	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
12	2/00 - 3/00	Memoranda (approx. 5-7)	Hoechst-Andrx Team, BC Management, BE Management	Commission, Hoechst-Andrx Team, BC Management, BE Management	Memoranda to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
13	1/00	Memoranda (1 binder)	Hoechst-Andrx Team	Commission, BC Management	Briefing materials	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
14	7/98 - 2/00	Memoranda (approx. 17-22)	Hoechst-Andrx Team	File	Analysis of various legal issues related to investigation of and litigation against Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
15	11/98 - 8/99	Outlines (approx. 20-25)	Hoechst-Andrx Team	File	Draft outlines of legal and factual issues concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
16	Various	Charts (approx 10-12)	Hoechst-Andrx Team	File	Draft charts concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
17	1/99 - 9/99	Status Reports (approx. 3-5)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Status reports of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.



No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
18	5/99 - 12/99	Memoranda (approx. 10-15)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft recommendations regarding Hoechst- Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
19	7/99	Correspondence (approx. 3-5)	Hoechst-Andrx Team	Hoechst-Andrx Team BC Management	Drafts of letters to Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
20	Various	Correspondence	John D. Graubert	State Attorneys General	Access letters	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
21	Various	Memoranda	Robin Moore	Hoechst-Andrx Team, BC Management, BE Management, Commission attorney advisors	Legal analysis of Hatch-Waxman cases and regulations	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
22	Various	Draft memoranda (approx. 3-5)	Jon Miller Steiger, Elizabeth Hilder	Hoechst-Andrx Team	Draft legal analysis of attorney-client privilege waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
23	3/00	Draft complaints (approx. 3-5)	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Draft complaints	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
24	3/00	Draft consent order	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft consent orders	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
25	3/00	Draft motions, subpoenas and orders (approx. 10-13)	Hoechst-Andrx Team	File	Draft motions, subpoenas and orders	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
26	Undated	Memoranda (approx. 15-29)	Robert Kneuper	File	Drafts of summary market share data relating to Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
27	Undated	Memorandum to BE Management	Robert Kneuper	Hoechst-Andrx Team, BE Management	Analysis of Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
28	Undated	Memorandum	Daniel Kotchen	Hoechst-Andrx Team	Hoechst-Andrx discovery plan	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
29	Undated	Memorandum	Roy Levy	BE Management David Balto, Michael Wroblewski	Comments on draft discussion of Hatch-Waxman issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
30	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management DOJ	Financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
31	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management	Draft financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
32	Undated	Memorandum	Jon Miller Steiger	Hoechst-Andrx Team	Legal analysis of Hoechst's privilege log from investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
33	Undated	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of various drafts of Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
34	Undated	Presentation	Hoechst-Andrx Team	Commission attorney advisors, BC Management, BE Management	Legal and factual analysis of Hoechst-Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
35	4/14/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team, BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
36	9/99 11/99	Draft Opposition to HMR's Petition to Quash Subpoena of James M. Spears	Geoffrey Oliver	Hoechst-Andrx Team	Multiple drafts of Opposition to HMR's Petition to Quash Subpoena of James M. Spears	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
37	10/21/99	Memorandum	David Balto Robin Moore	Commission attorney advisors	Summary of FTC's proposed comment on FDA proposed rule changes on Hatch-Waxman	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
38	10/28/99	Memorandum	Michael Wroblewski	Commission	Request for authority to submit FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
39	9/27/99	Opposition to HMR's Petition to Quash	Geoffrey Oliver Bradley Albert	Commissioner Sheila Anthony, Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition to Quash Subpoena of James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
40	11/18/99	Opposition to HMR's Petition for Full Commission Review	Geoffrey Oliver Bradley Albert	Commission Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition for Full Commission Review	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
41	12/20/99	Cover Memorandum to Commission	Richard Feinstein, David Pender, Bradley Albert, Daniel Kotchen, Robin Moore	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
42	12/20/99	Memorandum to Commission	Bradley Albert, Daniel Kotchen, Robin Moore, Geoffrey Oliver	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Staff Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
43	12/20/99	Memorandum to Commission	Robert Kneuper	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Economics Staff Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
44	1/24/00	Memorandum to Commission	Richard G. Parker, Molly S. Boast, Michael Antalics	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
45	Undated	Memorandum to Commission	Will Tom	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
46	12/20/99	Memorandum to Commission	Jeremy Bulow Gregory Vistnes	Commission Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Economics Management Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
47	2/26/99	Memorandum	Gregory Vistnes	Robert Kneuper, BE Management DOJ	Analysis of relief options by Bureau of Economics	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
48	10/27/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
49	12/99 - 1/00	Memoranda	BC Management	BC Management	Drafts of Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
50	11/99	Memorandum	Hoechst-Andrx Team	Hoechst - Andrx Team BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
51	7/19/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
52	6/4/99	Memorandum	Michael Kades	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
53	5/7/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
54	2/26/99	Memorandum	Joanne Levine	David Balto, Hoechst-Andrx Team DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
55	8/27/99	Memorandum	Geoffrey Oliver	Will Tom, David Balto, Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
56	8/99	Memorandum	Kirsten Nussbaumer	Geoffrey Oliver Hoechst-Andrx Team	Legal analysis of FTC Act	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
57	8/6/99	Memorandum	Stephan Meisner	Bradley Albert	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
58	7/29/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
59	8/11/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
60	9/27/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
61	10/1/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
62	1/19/00	Memorandum	Bradley Albert	Hoechst-Andrx Team	Analysis of Hoechst/Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
63	8/10/99	Memorandum	Robin Moore	Hoechst-Andrx Team, BC Management	Analysis of FDA proposed regulations	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
64	1/29/99	Memorandum	Bradley Albert	Hoechst-Andrx Team,	Legal analysis of product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
65	3/99	Memorandum	Robin Moore	Hoechst-Andrx Team	Summary analysis of documents relating to product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
66	2/8/99	Memorandum	Bradley Albert	Richard Feinstein, David Pender	Legal analysis of licensing provisions in Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
67	3/00	Memorandum	Hoechst-Andrx Team	State Attorney General's office	Summary of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
68	5/21/99	Memorandum	Gregory Vistnes	BE Management, Robert Kneuper	Economic analysis of issues relating to settlement of litigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
69	3/00	Memorandum	Richard G. Parker	Commission, Hoechst-Andrx Team	Draft memorandum on issues raised by investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
70	3/9/98	Memorandum	Christian White, Debra Valentine, Marc Winerman	Richard Feinstein, David Pender, Bradley Albert, Geoffrey Oliver	Legal discussion of attorney-client waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
71	4/9/99	Memorandum	Roy Levy	Robert Kneuper BE Management	Analysis of Hatch-Waxman issues	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
72	2/23/99	Memorandum	Bradley Albert, Daniel Kotchen	BC Management DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
73	4/00	Discovery	Hoechst-Andrx Team	File	Draft initial disclosures	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
74	9/9/98	Correspondence	Bradley Albert	Gordon Johnston	Request for nonpublic information relating to Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
75	3/4/99	Correspondence	Daniel Kotchen	David K. Haggard	Request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
76	3/8/99	Correspondence	David K. Haggard	Daniel Kotchen	Responding to request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
77	10/28/99	Draft Discussion	Commissioner Sheila Anthony	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
78	12/16/99	Draft Discussion	Commission	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
79	2/10/00	Memorandum	Commissioner Sheila Anthony	Commission BC Management, BE Management	Analysis of Hoechst - Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.



No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
80	9/10/98	Memorandum	Hoechst-Andrx Team	BC Management, BE Management	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
81	9/29/98	Memorandum	Fred Martin	Commission	Request for compulsory process	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
82	10/8/98	Memorandum	Hoechst-Andrx Team	Commission DOJ	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
83	1/26/99	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of events relating to Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
84	10/22/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
85	10/22/98	Memorandum	BC Management	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
86	11/2/98 & 12/9/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
87	11/12/98 & 12/11/98	Memorandum	BC Management	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
88	9/3/99	Memorandum	BC Management	Commission	Request for issuance of Subpoena <u>Ad Testificandum</u> for James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
89	3/2/00	Memorandum	Karen Bokat Bradley Albert	Commission	Request for authority to provide requested confidential briefing to Congressional sub-committee	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
90	1/14/99	Correspondence	Kenneth P. Ewing	Daniel Kotchen, Jon Miller Steiger	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
91	11/10/99	HMR's Request for Full Commission Review	Michael Koon	Commission	HMR's Request for Full Commission Review (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
92	11/12/98	Correspondence	Louis M. Solomon	Bradley Albert	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
93	9/99	Memoranda (2)	Robert Kneuper	BE Management	Drafts of Bureau of Economics Staff Recommendation to Commission	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
94	1/99 - 11/99	Notes (approx. 5-7)	Robert Kneuper	File	Investigational Hearing and interview notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
95	Undated	Notes (approx 5-7)	Robert Kneuper	File	Miscellaneous notes on various factual and economic issues concerning Hoechst- Andrx investigation and litigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
96	2/99 - 2/00	e-mail (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of various issues raised by Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
97	1/99 - 3/00	Memoranda (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
98	7/99 - 11/99	e-mail (approx. 10-12)	BE Staff BE Management	BE Staff BE Management	Comments on draft BE Staff recommendation memorandum on Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
99	2/99 - 3/00	e-mail (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
100	10/97 & 12/97	Memoranda (2)	Watson-Rugby Team	BC Management	Analysis of various legal issues relating to the proposed acquisition of The Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
101	Undated	Notes (approx. 5-7)	Watson-Rugby Team	File	Interview notes and reports	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
102	12/97	Outlines (approx. 3-5)	Watson-Rugby Team	File	Draft outlines of legal and factual issues concerning the proposed acquisition of the Rugby Group by Watson	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
103	3/9/98	Memorandum	Marc Winerman, Ira S. Kaye, Christian White, Debra Valentine	Elizabeth Jex, David Inglefield, Julie McConnell	Legal discussion of attorney-client waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
104	2/98	Memorandum to Commission	Watson-Rugby Team	Commission, BC Management, BE Management	Bureau of Competition Staff Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
105	10/97	Draft Correspondence to James M. Spears	Secretary	Watson-Rugby Team	Response to HMR's Petition to Quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
106	3/98	Draft Correspondence to James Eiszner	Marc Winerman	David Inglefield	Draft correspondence relating to waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
107	12/22/97	Memorandum	Watson-Rugby Team	Debra Valentine	Request for legal advice regarding waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
108	2/20/98	e-mail	Marc Winerman	Debra Valentine David Inglefield	Legal advice regarding waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
109	10/97	Memorandum	Watson-Rugby Team	BC Management BE Management	Analysis of legal and factual issues concerning the proposed acquisition of the Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
110	10/24/97	Memorandum	Fred Martin	Lou Silvia Malcolm Coate	Analysis of various issues concerning the proposed acquisition of the Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
111	Undated	Memorandum	Watson-Rugby Team BC Management	Commission	Request for authority to issue subpoenas in connection with investigation of the proposed acquisition of the Rugby Group by Watson	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
112	6/16/99	e-mail	Barry Nalebuff	Jeremy Bulow	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
113	1/6/00	e-mail	David Balto	Jonathan Steiger Bradley Albert	Request for legal advice concerning confidentiality provisions	AC	Reflects legal analysis.

ATTACHMENT A

Identification of Individuals Listed in Privilege Log

Hoechst-Andrx Team

Bradley Albert, attorney  
Daniel Kotchen, attorney  
Markus Meier, attorney  
Suzanne Michel, attorney  
Robin Moore, attorney  
Jon Miller Steiger, attorney  
Meleah Geertsma, paralegal  
Jennifer Johnson, paralegal  
Robert Kneuper, economist  
Fred Martin, economist  
Elizabeth Schneirov, economist

Watson-Rugby Team

Claudia R. Higgins, attorney  
David L. Inglefield, attorney  
Elizabeth A. Jex, attorney  
Julie McConnell, attorney  
Richard Levy, research assistant  
Robert R. Pickett, merger analyst  
Fred Martin, economist

BC Management

Michael E. Antalics, Senior Litigation Counsel  
William Baer, Former Director  
David A. Balto, Assistant Director for Policy and Evaluation  
Molly S. Boast, Senior Deputy Director  
Richard B. Dagen, Assistant to the Director  
Richard Feinstein, Assistant Director for Health Care Services and Products  
Ann Malester, Assistant Director for Mergers I  
Geoffrey Oliver, Assistant to the Director  
Richard G. Parker, Director  
David R. Pender, Deputy Assistant Director for Health Care Services and Products  
Willard K. Tom, Former Deputy Director

BC Staff

Karen Bokar, attorney  
Elizabeth Hilder, attorney

Michael Kades, attorney  
Kirsten Nussbaumer, attorney  
Michael Wroblewski, attorney  
Stephan Meisner, intern  
David Tomar, intern

BE Staff

Malcolm Coate, economist  
Alan Fisher, economist  
Charlotte Wojcik, economist  
Chrystal Meadows, secretary

BE Management

Jeremy I. Bulow, Director  
Roy Levy, Acting Deputy Assistant Director for Antitrust II  
Daniel O'Brien, Assistant Director for Antitrust II  
Louis Silvia, Assistant Director for Antitrust I  
Gregory S. Vistnes, Deputy Director for Antitrust  
Charissa Wellford, Deputy Assistant Director

General Counsel's Office

Debra Valentine, General Counsel  
John D. Graubert, Deputy General Counsel  
Christian S. White, Assistant General Counsel for Legal Counsel  
Joanne Levine, attorney  
Jon Miller Steiger, attorney  
Marc Winerman, attorney

Commission

Robert Pitofsky, Chairman  
Sheila F. Anthony  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary

Commission Attorney Advisors

Alicia Batts  
Sean D. Hughto  
Thomas J. Klotz  
Michael McFalls  
John H. Seesel  
Holly Vedova  
Gregg Vicinanza



Non-Party Outside Entities

Kenneth P. Ewing, attorney at Steptoe & Johnson, representing PhRMA

David K. Haggard, Director, Division of Compliance Policy, Food and Drug Administration

Gordon Johnston, Former Deputy Director of the Office of Generic Drugs, FDA

Barry Nalebuff, Professor, Yale University, consultant



# **EXHIBIT 2**

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

In the Matter of	)	
	)	
HOECHST MARION ROUSSEL, INC.,	)	
a corporation,	)	
	)	
CARDERM CAPITAL L.P.,	)	Docket No. 9293
a limited partnership,	)	
	)	
and	)	
	)	
ANDRX CORPORATION,	)	
a corporation.	)	
	)	

TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**DECLARATION OF JEREMY BULOW CLAIMING  
PRIVILEGE FOR CERTAIN DOCUMENTS**

I, Jeremy Bulow, declare:

1. I am Director of the Bureau of Economics of the Federal Trade Commission ("Commission"), a multi-member agency composed of a Chairman and up to four other Commissioners. As such, I have the authority to assert government privileges over documents in the custody and control of the Bureau of Economics.

2. I submit this declaration and formal claim of privilege to prevent the release of certain privileged documents, which are more fully described in Attachment A, and which are contained in the Commission's files. Respondents have sought to obtain these documents by way of discovery requests made on April 17 and May 12, 2000, pursuant to Section 3.37 of the

Federal Trade Commission's Rules of Practice for Adjudicatory Proceedings.

3. The statements made herein are based upon my personal knowledge (including my review of the documents described in Attachment A), and upon the knowledge of persons who report directly or indirectly to me or on whom I rely in the ordinary course of carrying out my duties as Bureau Director.

4. The authors and the addressees of these documents – to the best of my knowledge – were employed by the Commission when they drafted or reviewed these documents. In the investigation that preceded the commencement of this case, the authors and addressees of the documents listed in Attachment A were responsible for advising the Commission and Bureau of Economics management on what course to pursue, based upon their evaluation of the evidence and consultation with other staff members. The documents described in Attachment A reflect internal discussions bearing upon this advice, including discussions on how to obtain and interpret the evidence needed to establish violations of law, as well as determining the appropriate standard of law to apply in scrutinizing the Hoechst-Andrx agreement. In addition, the documents generally provide the authors' appraisals of and recommendations concerning proposed courses of action.

5. The documents described below (which are identified in Attachment A) consist of materials prepared by Commission employees and relied upon by the Commission or management of the Bureau of Economics in deciding whether to proceed with filing an administrative complaint, as well as by Bureau of Economics management and staff in deciding whether to proceed with certain courses of action or recommendations to the Commission. More specifically, the documents described in Attachment A for which the deliberative process privilege is claimed consist of:

- Item (27) memo from Rob Kneuper to the Hoechst-Andrx investigatory team and BE management discussing an economic analysis of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (30) memo from BE staff to the Hoechst-Andrx investigatory team and BE management discussing financial analyses of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (31) draft memo from BE staff to the Hoechst-Andrx investigatory team, BC management, and BE management discussing financial analyses of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (43) memo from BE staff to the Hoechst-Andrx investigatory team, Commission, BC management, and BE management discussing economic, legal, and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding the antitrust enforcement of the Hoechst-Andrx: prepared in aid of Commission vote on issuing a complaint;
- Item (46) memo from Jeremy Bulow and Gregory Vistnes to the Commission, the Hoechst-Andrx investigatory team, BC management, and BE management discussing legal and factual issues relating to the Hoechst-Andrx agreement and providing a recommendation to the Commission regarding the antitrust enforcement of the Hoechst-Andrx agreement: prepared in aid of Commission vote on issuing a complaint;
- Item (68) memo from Gregory Vistnes to BE management and the Hoechst-Andrx investigatory team discussing possible economic effects stemming from the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (71) memo from Roy Levy to Rob Kneuper and BE management discussing economic issues related to the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (81) memo from Fred Martin to the Commission, Hoechst-Andrx investigatory team, BC management, and BE management discussing economic issues and requesting compulsory process authority in the Hoechst-Andrx investigation: prepared in aid of Commission decision on issuing compulsory process;
- Item (93) drafts of memo from Rob Kneuper to BE management discussing economic and factual issues relating to the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;
- Item (96) various e-mail messages amongst BE staff and BE management discussing

economic issues relating to the Hoechst-Andrx investigation: prepared in aid of Commission vote on issuing a complaint;

- Item (97) memo (with attachments) from Roy Levy to Jeremy Bulow and Gregory Vistnes relating “game theory” economic analysis of the Hoechst-Andrx agreement: prepared in aid of Commission vote on approving a staff report;
- Item (98) various e-mail messages amongst BE staff and BE management discussing comments to Rob Kneuper’s draft recommendation memo to the Commission: prepared in aid of Commission vote on issuing a complaint;
- Item (99) various e-mail messages amongst BE staff and BE management discussing economic issues relating to the Hoechst-Andrx agreement: prepared in aid of Commission vote on approving a staff report; and
- Item (110) memo from Fred Martin to BE management discussing economic and legal issues relating to the proposed acquisition of the Rugby Group by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006): prepared in aid of Commission vote on issuing a complaint.

The deliberative process privilege is likewise claimed for earlier drafts of the documents discussed above, as these drafts reflect tentative versions of the same recommendations ultimately made by staff.

6. The documents described above – as well as any earlier drafts of such documents – are of a deliberative nature and communicate the authors’ legal and economic analyses, theories, opinions, conclusions, and recommendations to the Commission or to intermediate superiors. Insofar as the documents recite factual materials, such materials either (a) are interwoven with the authors’ own evaluations, analyses, and recommendations, or (b) disclose an element of the Commission’s deliberations by revealing which facts were selected for discussion, as well as the particular interpretation and distillation of the testimony and contents of numerous witness interviews or documents.

7. In my judgment, the effective functioning of the Commission requires that the confidentiality of the aforementioned documents be preserved. The disclosure of these

documents would inhibit the Commission's and the Commission staff's ability to conduct the open and frank discussion of important issues that is necessary for effective law enforcement. These documents express the candid and confidential legal policy advice of the authors, and are part of the Commission's and the Commission staff's pre-decisional deliberative process. These documents advise and assist the appropriate decision makers. Although such documents are generally reviewed by the Commission or the involved superiors, the recommendations contained therein are not always followed. Further, while the documents reflect the thoughts of certain members of the Commission staff, they do not necessarily reflect the thoughts or opinions of the Commission itself or of any individual Commissioner.

8. Among the Commission's responsibilities are the detection and investigation of violations of the FTC Act. Inherent in the effective discharge of these responsibilities is the ability to formulate and implement sound law enforcement strategies and policy. A requirement of this process is the assurance that the Commission and its staff will be able to engage in a free and candid exchange of views and deliberations over enforcement policy and its implementation. Such an exchange would be severely restricted by the disclosure of documents such as those listed in Attachment A. This would be the case even if the documents responsive to respondents' request were made available under a protective order forbidding their public disclosure. I am concerned that exposing inter- and intra-agency deliberations and recommendations to persons having interests adverse to those of the government would inhibit frank and full exchange of legal advice, and would not be conducive to the formulation and implementation of sound law enforcement policy.


9. Considering the pre-decisional, internal deliberative nature of the documents described above in Paragraph 5, and my personal judgment that their disclosure would be



injurious to the effective discharge of the responsibilities of the Commission – and, ultimately, to the public interest in effective and proper law enforcement – I assert a formal claim of deliberative process privilege with respect to the contents of the documents described in Paragraph 5, above.

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

Executed this 23<sup>rd</sup> day of June, 2000 in Washington, D.C.

  
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JEREMY BULOW



In the Matter of Hoechst Marion Roussel, Inc., et al.  
Docket No. 9293

**COMPLAINT COUNSELS' REVISED LIST OF PRIVILEGED DOCUMENTS**

June 23, 2000

Privilege Abbreviations:

- AC - Attorney Client Privilege
- DP - Deliberative Process Privilege (factual material non-existent or inexorably intertwined with deliberative materials)
- IP - Informants Privilege
- LE - Law Enforcement/Investigatory Files Privilege
- WP - Work Product

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
1	9/98 - 3/00	Internal e-mail (approx. 200+)	Hoechst-Andrx Team, BC Management, BE Management <sup>1</sup>	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning Hoechst- Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
2	12/98 - 1/00	Internal e-mail (approx. 20-25)	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous e-mails concerning FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and/or legal analysis prepared in anticipation of Commission decision.
3	3/99 - 2/00	Internal e-mail (approx. 25-30)	Hoechst-Andrx Team, BC Management, BE Management	Commission attorney advisors	Miscellaneous e-mails concerning Hoechst- Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

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<sup>1</sup> When a group is identified in this log (e.g., Hoechst-Andrx Team, BC Management, BE Management) as Author or Recipient of a document, not every member of such group necessarily drafted or received the document.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
4	8/99 & 4/00	e-mail (approx. 3-5)	State Attorney General's office	Bradley Albert	Request for information relating to Hoechst - Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
5	Various	e-mail	BC Management	Department of Justice	Miscellaneous e-mails concerning Hoechst-Andrx investigation for law enforcement purposes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
6	7/98 - 10/99	Notes (approx. 55-60)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Interview notes and reports	IP LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation, and identifies informants.
7	4/99 - 2/00	Notes (approx. 25-35)	Hoechst-Andrx Team	File	Investigational Hearing notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
8	4/99 - 8/99	Notes (approx. 8-12)	Hoechst-Andrx Team	File	Miscellaneous team meeting notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
9	11/98 - 12/99	Notes (approx. 25-30)	Hoechst-Andrx Team, BC Management, BE Management	Hoechst-Andrx Team, BC Management, BE Management	Miscellaneous notes on various legal and factual issues concerning Hoechst-Andrx investigation and litigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
10	9/99 - 11/99	Memoranda (approx. 15-20)	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Drafts of FTC comment on FDA proposed rule changes	DP LE	Reflects agency deliberation prepared in anticipation of Commission decision.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
11	12/21/99	Memorandum	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Discussion concerning retention of experts for Hoechst - Andrx investigation and litigation.	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
12	2/00 - 3/00	Memoranda (approx. 5-7)	Hoechst-Andrx Team, BC Management, BE Management	Commission, Hoechst-Andrx Team, BC Management, BE Management	Memoranda to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
13	1/00	Memoranda (1 binder)	Hoechst-Andrx Team	Commission, BC Management	Briefing materials	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
14	7/98 - 2/00	Memoranda (approx. 17-22)	Hoechst-Andrx Team	File	Analysis of various legal issues related to investigation of and litigation against Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
15	11/98 - 8/99	Outlines (approx. 20-25)	Hoechst-Andrx Team	File	Draft outlines of legal and factual issues concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
16	Various	Charts (approx 10-12)	Hoechst-Andrx Team	File	Draft charts concerning Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
17	1/99 - 9/99	Status Reports (approx. 3-5)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management	Status reports of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
18	5/99 - 12/99	Memoranda (approx. 10-15)	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft recommendations regarding Hoechst-Andrx investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
19	7/99	Correspondence (approx. 3-5)	Hoechst-Andrx Team	Hoechst-Andrx Team BC Management	Drafts of letters to Hoechst and Andrx	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
20	Various	Correspondence	John D. Graubert	State Attorneys General	Access letters	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
21	Various	Memoranda	Robin Moore	Hoechst-Andrx Team, BC Management, BE Management, Commission attorney advisors	Legal analysis of Hatch-Waxman cases and regulations	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
22	Various	Draft memoranda (approx. 3-5)	Jon Miller Steiger, Elizabeth Hilder	Hoechst-Andrx Team	Draft legal analysis of attorney-client privilege waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
23	3/00	Draft complaints (approx. 3-5)	Hoechst-Andrx Team, BC Management	Hoechst-Andrx Team, BC Management, BE Management	Draft complaints	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
24	3/00	Draft consent order	Hoechst-Andrx Team	Hoechst-Andrx Team, BC Management, BE Management	Draft consent orders	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
25	3/00	Draft motions, subpoenas and orders (approx. 10-13)	Hoechst-Andrx Team	File	Draft motions, subpoenas and orders	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
26	Undated	Memoranda (approx. 15-29)	Robert Kneuper	File	Drafts of summary market share data relating to Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
27	Undated	Memorandum to BE Management	Robert Kneuper	Hoechst-Andrx Team, BE Management	Analysis of Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
28	Undated	Memorandum	Daniel Kotchen	Hoechst-Andrx Team	Hoechst-Andrx discovery plan	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
29	Undated	Memorandum	Roy Levy	BE Management David Balto; Michael Wroblewski	Comments on draft discussion of Hatch-Waxman issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
30	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management DOJ	Financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
31	Undated	Memorandum	Robert Kneuper	Hoechst-Andrx Team BE Management	Draft financial and economic analysis of Hoechst - Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
32	Undated	Memorandum	Jon Miller Steiger	Hoechst-Andrx Team	Legal analysis of Hoechst's privilege log from investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
33	Undated	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of various drafts of Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
34	Undated	Presentation	Hoechst-Andrx Team	Commission attorney advisors, BC Management, BE Management	Legal and factual analysis of Hoechst-Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
35	4/14/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team, BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
36	9/99 11/99	Draft Opposition to HMR's Petition to Quash Subpoena of James M. Spears	Geoffrey Oliver	Hoechst-Andrx Team	Multiple drafts of Opposition to HMR's Petition to Quash Subpoena of James M. Spears	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
37	10/21/99	Memorandum	David Balto Robin Moore	Commission attorney advisors	Summary of FTC's proposed comment on FDA proposed rule changes on Hatch-Waxman	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
38	10/28/99	Memorandum	Michael Wroblewski	Commission	Request for authority to submit FTC comment on FDA proposed rule changes	AC DP LE	Reflects agency deliberation and legal analysis prepared in anticipation of Commission decision.
39	9/27/99	Opposition to HMR's Petition to Quash	Geoffrey Oliver Bradley Albert	Commissioner Sheila Anthony, Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition to Quash Subpoena of James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
40	11/18/99	Opposition to HMR's Petition for Full Commission Review	Geoffrey Oliver Bradley Albert	Commission Hoechst-Andrx Team	Memorandum in Opposition to HMR's Petition for Full Commission Review	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.



No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
41	12/20/99	Cover Memorandum to Commission	Richard Feinstein, David Pender, Bradley Albert, Daniel Kotchen, Robin Moore	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
42	12/20/99	Memorandum to Commission	Bradley Albert, Daniel Kotchen, Robin Moore, Geoffrey Oliver	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Staff Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
43	12/20/99	Memorandum to Commission	Robert Kneuper	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Economics Staff Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
44	1/24/00	Memorandum to Commission	Richard G. Parker, Molly S. Boast, Michael Antalics	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
45	Undated	Memorandum to Commission	Will Tom	Commission, Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
46	12/20/99	Memorandum to Commission	Jeremy Bulow Gregory Vistnes	Commission Hoechst-Andrx Team, BC Management, BE Management DOJ	Bureau of Economics Management Recommendation to Commission	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
47	2/26/99	Memorandum	Gregory Vistnes	Robert Kneuper, BE Management DOJ	Analysis of relief options by Bureau of Economics	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
48	10/27/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
49	12/99 - 1/00	Memoranda	BC Management	BC Management	Drafts of Bureau of Competition Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
50	11/99	Memorandum	Hoechst-Andrx Team	Hoechst - Andrx Team BC Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
51	7/19/99	Memorandum	Will Tom	Hoechst-Andrx Team, BC Management, BE Management	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
52	6/4/99	Memorandum	Michael Kades	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
53	5/7/99	Memorandum	Geoffrey Oliver	Hoechst-Andrx Team DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
54	2/26/99	Memorandum	Joanne Levine	David Balto, Hoechst-Andrx Team DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
55	8/27/99	Memorandum	Geoffrey Oliver	Will Tom, David Balto, Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
56	8/99	Memorandum	Kirsten Nussbaumer	Geoffrey Oliver Hoechst-Andrx Team	Legal analysis of FTC Act	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
57	8/6/99	Memorandum	Stephan Meisner	Bradley Albert	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
58	7/29/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
59	8/11/99	Memorandum	David Tomar	Hoechst-Andrx Team	Analysis of legal theories re: Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
60	9/27/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
61	10/1/99	Memorandum	Geoffrey Oliver	File	Draft discussion of investigational issues	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
62	1/19/00	Memorandum	Bradley Albert	Hoechst-Andrx Team	Analysis of Hoechst/Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
63	8/10/99	Memorandum	Robin Moore	Hoechst-Andrx Team, BC Management	Analysis of FDA proposed regulations	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
64	1/29/99	Memorandum	Bradley Albert	Hoechst-Andrx Team,	Legal analysis of product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
65	3/99	Memorandum	Robin Moore	Hoechst-Andrx Team	Summary analysis of documents relating to product market	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
66	2/8/99	Memorandum	Bradley Albert	Richard Feinstein, David Pender	Legal analysis of licensing provisions in Hoechst-Andrx Stipulation and Agreement	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
67	3/00	Memorandum	Hoechst-Andrx Team	State Attorney General's office	Summary of Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
68	5/21/99	Memorandum	Gregory Vistnes	BE Management, Robert Kneuper	Economic analysis of issues relating to settlement of litigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
69	3/00	Memorandum	Richard G. Parker	Commission, Hoechst-Andrx Team	Draft memorandum on issues raised by investigation and litigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
70	3/9/98	Memorandum	Christian White, Debra Valentine, Marc Winerman	Richard Feinstein, David Pender, Bradley Albert, Geoffrey Oliver	Legal discussion of attorney-client waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
71	4/9/99	Memorandum	Roy Levy	Robert Kneuper BE Management	Analysis of Hatch-Waxman issues	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
72	2/23/99	Memorandum	Bradley Albert, Daniel Kotchen	BC Management DOJ	Analysis of legal theories re: Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
73	4/00	Discovery	Hoechst-Andrx Team	File	Draft initial disclosures	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
74	9/9/98	Correspondence	Bradley Albert	Gordon Johnston	Request for nonpublic information relating to Hoechst-Andrx investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
75	3/4/99	Correspondence	Daniel Kotchen	David K. Haggard	Request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
76	3/8/99	Correspondence	David K. Haggard	Daniel Kotchen	Responding to request for nonpublic information	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
77	10/28/99	Draft Discussion	Commissioner Sheila Anthony	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
78	12/16/99	Draft Discussion	Commission	Geoffrey Oliver	Response to HMR's petition to quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
79	2/10/00	Memorandum	Commissioner Sheila Anthony	Commission BC Management, BE Management	Analysis of Hoechst - Andrx investigation	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
80	9/10/98	Memorandum	Hoechst-Andrx Team	BC Management, BE Management	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
81	9/29/98	Memorandum	Fred Martin	Commission	Request for compulsory process	DP LE WP	Reflects agency deliberation and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
82	10/8/98	Memorandum	Hoechst-Andrx Team	Commission DOJ	Request for compulsory process	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
83	1/26/99	Chronology	Bradley Albert	Hoechst-Andrx Team	Chronology of events relating to Hoechst-Andrx Stipulation and Agreement	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
84	10/22/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
85	10/22/98	Memorandum	BC Management	Commission	Request for issuance of Hoechst and Andrx subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
86	11/2/98 & 12/9/98	Memorandum	Hoechst-Andrx Team	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
87	11/12/98 & 12/11/98	Memorandum	BC Management	Commission	Request for issuance of third-party subpoenas and CIDs	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
88	9/3/99	Memorandum	BC Management	Commission	Request for issuance of Subpoena <u>Ad Testificandum</u> for James M. Spears	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
89	3/2/00	Memorandum	Karen Bokat Bradley Albert	Commission	Request for authority to provide requested confidential briefing to Congressional sub-committee	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
90	1/14/99	Correspondence	Kenneth P. Ewing	Daniel Kotchen, Jon Miller Steiger	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
91	11/10/99	HMR's Request for Full Commission Review	Michael Koon	Commission	HMR's Request for Full Commission Review (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
92	11/12/98	Correspondence	Louis M. Solomon	Bradley Albert	Compulsory process (marginalia on already-produced document)	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
93	9/99	Memoranda (2)	Robert Kneuper	BE Management	Drafts of Bureau of Economics Staff Recommendation to Commission	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
94	1/99 - 11/99	Notes (approx. 5-7)	Robert Kneuper	File	Investigational Hearing and interview notes	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
95	Undated	Notes (approx 5-7)	Robert Kneuper	File	Miscellaneous notes on various factual and economic issues concerning Hoechst- Andrx investigation and litigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
96	2/99 - 2/00	e-mail (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of various issues raised by Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
97	1/99 - 3/00	Memoranda (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
98	7/99 - 11/99	e-mail (approx. 10-12)	BE Staff BE Management	BE Staff BE Management	Comments on draft BE Staff recommendation memorandum on Hoechst-Andrx investigation	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
99	2/99 - 3/00	e-mail (approx. 20-25)	BE Staff BE Management	BE Staff BE Management	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.



No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
100	10/97 & 12/97	Memoranda (2)	Watson-Rugby Team	BC Management	Analysis of various legal issues relating to the proposed acquisition of The Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
101	Undated	Notes (approx. 5-7)	Watson-Rugby Team	File	Interview notes and reports	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
102	12/97	Outlines (approx. 3-5)	Watson-Rugby Team	File	Draft outlines of legal and factual issues concerning the proposed acquisition of the Rugby Group by Watson	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
103	3/9/98	Memorandum	Marc Winerman, Ira S. Kaye, Christian White, Debra Valentine	Elizabeth Jex, David Inglefield, Julie McConnell	Legal discussion of attorney-client waiver issues	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
104	2/98	Memorandum to Commission	Watson-Rugby Team	Commission, BC Management, BE Management	Bureau of Competition Staff Recommendation to Commission	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
105	10/97	Draft Correspondence to James M. Spears	Secretary	Watson-Rugby Team	Response to HMR's Petition to Quash	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
106	3/98	Draft Correspondence to James Eiszner	Marc Winerman	David Inglefield	Draft correspondence relating to waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
107	12/22/97	Memorandum	Watson-Rugby Team	Debra Valentine	Request for legal advice regarding waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
108	2/20/98	e-mail	Marc Winerman	Debra Valentine David Inglesfield	Legal advice regarding waiver of attorney-client privilege	AC LE WP	Reflects legal analysis and/or notes, impressions, or analyses prepared in anticipation of Commission litigation.
109	10/97	Memorandum	Watson-Rugby Team	BC Management BE Management	Analysis of legal and factual issues concerning the proposed acquisition of the Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
110	10/24/97	Memorandum	Fred Martin	Lou Silvia Malcolm Coate	Analysis of various issues concerning the proposed acquisition of the Rugby Group by Watson	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
111	Undated	Memorandum	Watson-Rugby Team BC Management	Commission	Request for authority to issue subpoenas in connection with investigation of the proposed acquisition of the Rugby Group by Watson	AC DP LE WP	Reflects agency deliberation, legal analysis, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.
112	6/16/99	e-mail	Barry Nalebuff	Jeremy Bulow	Analysis of antitrust issues relating to litigation settlement in Hatch-Waxman context.	DP LE WP	Reflects agency deliberation, and/or notes, impressions, or analyses prepared in anticipation of Commission decision or litigation.

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
113	1/6/00	e-mail	David Balto	Jonathan Steiger Bradley Albert	Request for legal advice concerning confidentiality provisions	AC	Reflects legal analysis.

ATTACHMENT A

Identification of Individuals Listed in Privilege Log

Hoechst-Andrx Team

Bradley Albert, attorney  
Daniel Kotchen, attorney  
Markus Meier, attorney  
Suzanne Michel, attorney  
Robin Moore, attorney  
Jon Miller Steiger, attorney  
Meleah Geertsma, paralegal  
Jennifer Johnson, paralegal  
Robert Kneuper, economist  
Fred Martin, economist  
Elizabeth Schneirov, economist

Watson-Rugby Team

Claudia R. Higgins, attorney  
David L. Inglefield, attorney  
Elizabeth A. Jex, attorney  
Julie McConnell, attorney  
Richard Levy, research assistant  
Robert R. Pickett, merger analyst  
Fred Martin, economist

BC Management

Michael E. Antalics, Senior Litigation Counsel  
William Baer, Former Director  
David A. Balto, Assistant Director for Policy and Evaluation  
Molly S. Boast, Senior Deputy Director  
Richard B. Dagen, Assistant to the Director  
Richard Feinstein, Assistant Director for Health Care Services and Products  
Ann Malester, Assistant Director for Mergers I  
Geoffrey Oliver, Assistant to the Director  
Richard G. Parker, Director  
David R. Pender, Deputy Assistant Director for Health Care Services and Products  
Willard K. Tom, Former Deputy Director

BC Staff

Karen Bokar, attorney  
Elizabeth Hilder, attorney

Michael Kades, attorney  
Kirsten Nussbaumer, attorney  
Michael Wroblewski, attorney  
Stephan Meisner, intern  
David Tomar, intern

BE Staff

Malcolm Coate, economist  
Alan Fisher, economist  
Charlotte Wojcik, economist  
Chrystal Meadows, secretary

BE Management

Jeremy I. Bulow, Director  
Roy Levy, Acting Deputy Assistant Director for Antitrust II  
Daniel O'Brien, Assistant Director for Antitrust II  
Louis Silvia, Assistant Director for Antitrust I  
Gregory S. Vistnes, Deputy Director for Antitrust  
Charissa Wellford, Deputy Assistant Director

General Counsel's Office

Debra Valentine, General Counsel  
John D. Graubert, Deputy General Counsel  
Christian S. White, Assistant General Counsel for Legal Counsel  
Joanne Levine, attorney  
Jon Miller Steiger, attorney  
Marc Winerman, attorney

Commission

Robert Pitofsky, Chairman  
Sheila F. Anthony  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary

Commission Attorney Advisors

Alicia Batts  
Sean D. Hughto  
Thomas J. Klotz  
Michael McFalls  
John H. Seesel  
Holly Vedova  
Gregg Vicinanza

Non-Party Outside Entities

Kenneth P. Ewing, attorney at Steptoe & Johnson, representing PhRMA

David K. Haggard, Director, Division of Compliance Policy, Food and Drug Administration

Gordon Johnston, Former Deputy Director of the Office of Generic Drugs, FDA

Barry Nalebuff, Professor, Yale University, consultant

# **EXHIBIT 3**

**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

TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**DECLARATION OF BRADLEY S. ALBERT**

I, Bradley S. Albert, declare:

1. I am a staff attorney employed by the Federal Trade Commission. In this position, I served as the lead attorney of the Federal Trade Commission's pre-complaint investigation into whether the conduct of Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation violated Section 5 of the Federal Trade Commission Act (FTC File No. 981-0368). As lead attorney, I delegated assignments and supervised the work of staff members assigned to the investigation.

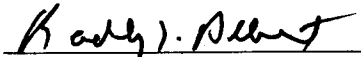
2. I submit this declaration to explain the circumstances under which the staff's interview summaries were prepared during the course of the pre-complaint investigation. Respondents have sought to obtain these documents by way of discovery requests made on April 17 and May 12, 2000, pursuant to Section 3.37 of the Federal Trade Commission's Rules of Practice for Adjudicatory Proceedings.



selection and omission of facts for these summaries reflect our own consideration of the relative importance of certain issues. Finally, these summaries are often organized by subject matter, rather than as a continuous narrative statement of the interviewee.

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

Executed in Washington, D.C., on the 25<sup>th</sup> of June, 2000.

  
\_\_\_\_\_  
Bradley Albert

# **EXHIBIT 4**



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





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

May 4, 2000

**VIA OVERNIGHT DELIVERY**

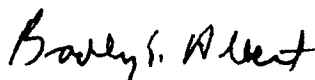
Hal Shaftel, Esq.  
Colin Underwood, Esq.  
Solomon, Zauderer, Ellenhorn, Frischer & Sharp  
45 Rockefeller Plaza  
New York, NY 10111

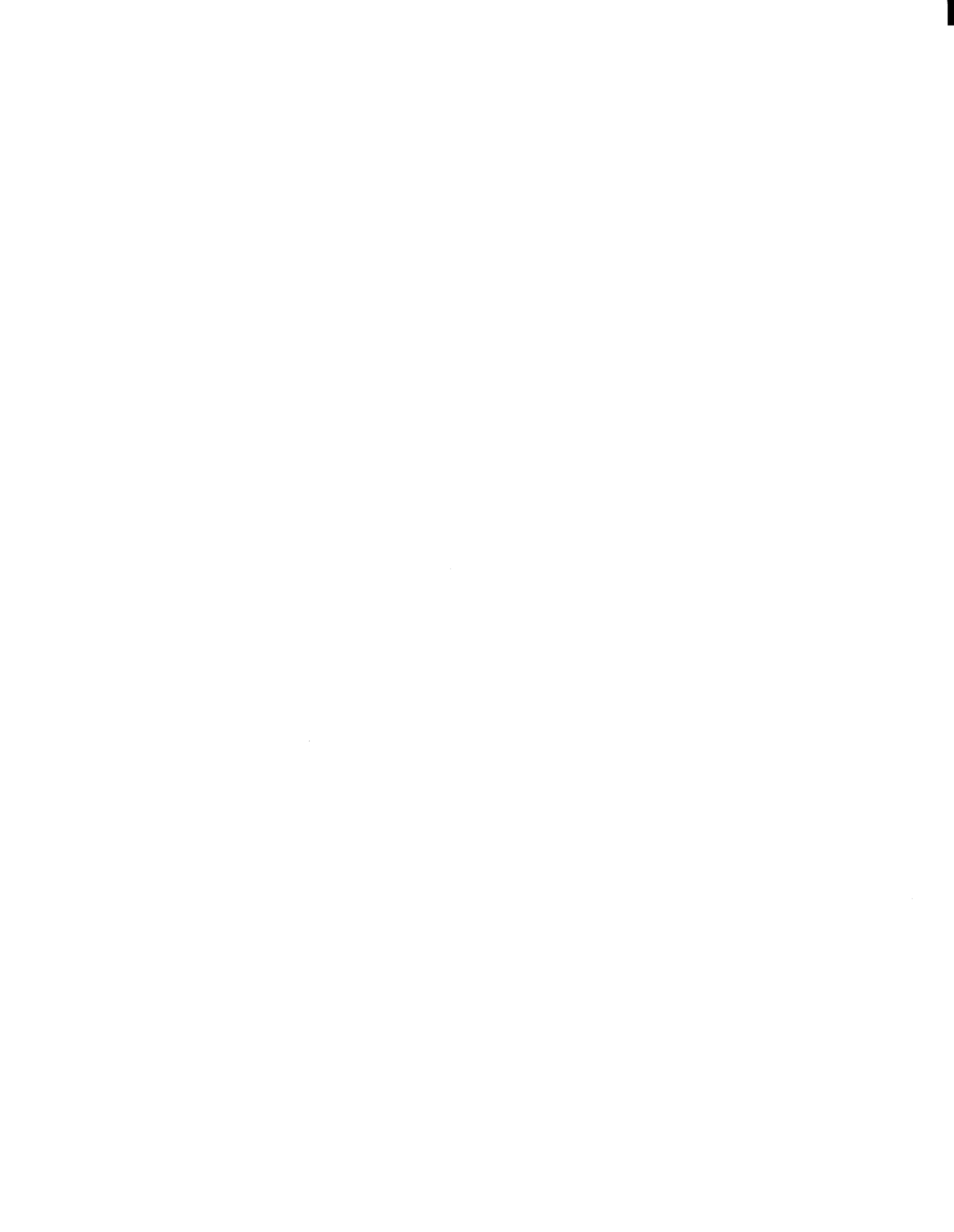
Re: Hoechst Marion Roussel, Inc., Carderm Capital, L.P., Andrx Corporation  
Docket No. 9293

Dear Hal and Colin:

Attached please find 13 boxes of documents, which consist of those documents produced by Hoechst Marion Roussel, Inc. (HMRI) during the pre-complaint investigation of File No. 981-0368. Please note that I have sent today to HMRI the documents produced by Andrx. We intend to produce the third-party documents on May 15, 2000 – the earliest date permitted under the Protective Order.

Sincerely,

  
Bradley S. Albert





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

May 4, 2000

**VIA COURIER**

James M. Spears  
Shook, Hardy & Bacon LLP  
600 14<sup>th</sup> Street, NW  
Suite 800  
Washington, DC 20005-2004

Re: Hoechst Marion Roussel, Inc., Carderm Capital, L.P., Andrx Corporation  
Docket No. 9293

Dear Mit:

Attached please find 5 boxes of documents, which consist of those documents produced by Andrx Corporation during the pre-complaint investigation of File No. 981-0368. Please note that I have sent today to Andrx the documents produced by Hoechst Marion Roussel, Inc. We intend to produce the third-party documents on May 15, 2000 – the earliest date permitted under the Protective Order.

Sincerely,

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

Bradley S. Albert







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

May 4, 2000

VIA FACSIMILE

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

Re: Hoechst Marion Roussel, Inc., Carderm Capital, L.P., Andrx Corporation  
Docket No. 9293

Dear Hal:

This letter responds to your correspondence today regarding the timing of our response to Andrx's outstanding discovery. As you know, Andrx's own discovery requests require a response by May 17, 2000. Nonetheless, we are prepared to respond to these requests by May 15<sup>th</sup> (not May 16<sup>th</sup> as you indicated in your letter). We did not arbitrarily select this date, as you suggest. Rather, it falls twenty days after the parties' scheduling conference with Judge Chappell. Prior to this scheduling conference, we had no expectation that discovery responses would be due under an accelerated schedule. To the contrary, the Court's draft Scheduling Order, which was circulated prior to the conference – as well as your own requests – provided for the typical 30 day response period. Given our reliance on the 30-day time frame, we believe it is entirely reasonable (and consistent with the Court's Scheduling Order) to begin the 20 day clock as of the scheduling conference.

Regardless of our obligations under the Scheduling Order, we will make every reasonable effort, as I explained during our conversation today, to provide you responses and objections to Andrx's discovery requests as soon as possible. If you have any further questions, please 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





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

May 8, 2000

**VIA COURIER**

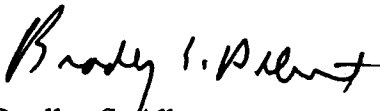
James M. Spears  
Shook, Hardy & Bacon LLP  
600 14<sup>th</sup> Street, NW  
Suite 800  
Washington, DC 20005-2004

Re: Hoechst Marion Roussel, Inc., Carderm Capital, L.P., Andrx Corporation  
Docket No. 9293

Dear Mit:

Attached please find 20 boxes of documents, which consist of those documents produced by third parties during the pre-complaint investigation of File No. 981-0368. This production fulfills Complaint counsel's Initial Disclosure obligations pursuant to Section 3.31(b) of the Federal Trade Commission's Rules of Adjudicative Proceedings.

Sincerely,

  
Bradley S. Albert





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

Bureau of Competition

May 11, 2000

**VIA OVERNIGHT DELIVERY**

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

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm  
Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Lou:

Subject to the specific and general objections set forth in Complaint counsel's Objections and Responses to Respondent Andrx's First Request for the Production of Documents and Things, we are producing the documents responsive to Andrx's requests. We will forward a log of documents withheld on privilege grounds as soon as it is completed.

We note that this production contains certain documents that were produced to the FTC by third parties or respondents, either voluntarily or through compulsory process, during the pre-complaint phase of this matter, FTC File No. 981-0368. These documents should be treated as confidential pursuant to paragraph 3 of the amended protective order entered on May 8, 2000. The bates numbers for these documents are listed below:

FTC0001837-FTC0001843	FTC0001844-FTC0001845
FTC0001861-FTC0001868	FTC0001888-FTC0001909
FTC0002011-FTC0002022	FTC0002023-FTC0002060
FTC0002061-FTC0002069	FTC0002070-FTC0002071
FTC0002102-FTC0002169	FTC0002170-FTC0002174
FTC0002175-FTC0002205	FTC0002214-FTC0002233
FTC0002244-FTC0002257	FTC0002266-FTC0002270
FTC0002313-FTC0002321	FTC0002478-FTC0002480
FTC0002589-FTC0002594	FTC0002777
FTC0002902-FTC0002908	FTC0002957-FTC0002958
FTC0003004-FTC0003005	FTC0003066-FTC0003067
FTC0003421-FTC0003453	FTC0004610-FTC0004634

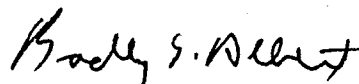
In addition, we refer you to two documents which were copied improperly: (1) a letter dated January 20, 2000 from Brad Albert to Lou Solomon bearing the bates number

Louis M. Solomon  
May 11, 2000  
Page 2

FTC0002309-2310; and (2) a letter dated March 13, 2000 from Lou Solomon to Brad Albert bearing the bates number FTC0002340-FTC0002341. We reproduced both of these documents at FTC0004635-FTC0004641.

If you have any questions concerning this production, please do not hesitate to contact me at (202) 326-3670.

Sincerely,

  
Bradley S. Albert

Enclosures

cc: James M. Spears (w/enclosures)  
Peter O. Safir





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

May 24, 2000

**VIA FACSIMILE**

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

Re: Hoechst Marion Roussel, Inc., Carderm Capital, L.P., Andrx Corporation  
Docket No. 9293

Dear Hal:

I was surprised to learn yesterday that Andrx does not intend to respond to Complaint Counsel's First Request for the Production of Documents within the 20 days required by the Court's Scheduling Order. As I am sure you recall, it was your suggestion to reduce the response time for discovery from 30 to 20 days due to the expedited hearing schedule in this matter.

You stated that your position is justified because we did not respond within 20 days after receiving Andrx's initial discovery requests. I have previously explained to you how we calculated the appropriate deadline for responding to these requests given that they were received prior to the Court's entry of the revised Scheduling Order, and I will not repeat those reasons here. See 5/4/00 Letter from Brad Albert to Hal Shaftel. If you objected to our position, you were free to raise this issue with the Court. Instead of doing so, however, you chose to deliberately disregard the Court's established deadline for discovery responses.

We look forward to receiving your responses as soon as possible. I ask that you inform me whether Andrx intends to abide by the terms of the Court's Scheduling Order with respect to future discovery requests.

Sincerely,

A handwritten signature in black ink that reads "Bradley S. Albert".

Bradley S. Albert





SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP

45 ROCKEFELLER PLAZA  
NEW YORK, NEW YORK 10111  
(212) 956-3700  
FACSIMILE: (212) 956-4068

RICHARD T. SHARP  
HARRY FRISCHER  
DAVID N. ELLENHORN  
MARK C. ZAUDERER  
LOUIS M. SOLOMON  
BERTRAND C. BELLIER  
DAVID E. NACHMAN  
EDWIN M. BAUM  
HAL S. SHAFFEL  
ROBERT L. MAZZEO  
JONATHAN F. HUGHES  
LEONARD S. BAUM  
MARGARET A. DALE  
COLIN A. UNDERWOOD

JOHN J. O'CONNELL  
OF COUNSEL

WRITER'S DIRECT DIAL  
(212) 424-0755

WAYNE M. AARON  
LISA M. BABISKIN  
JESSICA L. BIER  
JEREMY I. BOHRER  
DEAN T. CHO  
ANDRE K. CIZMARIK  
ROBERT S. FRENCHMAN  
STEVEN H. HOLINSTAT  
MICHAEL S. LAZAROFF  
SERGIO A. LLORIAN  
JONATHAN O. LUPKIN  
CAROLINE S. PRESS  
SHARON M. SAEH  
CHARLES D. STAR  
EMILY STERN

May 24, 2000

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

Re: FTC - HMR and Andrx

Dear Brad:

I write concerning three items:

1. I am in receipt of your letter of today, in which you claim to have been "surprised" by Andrx's position on its document responses. However, I am equally surprised -- in fact, more so -- to hear your position. As you know, Complaint Counsel unilaterally decided, over Andrx's objections, that the extant scheduling order did not cover the timing of its document responses. Our objections to your delay, as outlined in phone calls and prior correspondence, were particularly well-founded, given the over two year head start the FTC has had in discovery. Andrx now is doing nothing more than having the same rules -- the ones Complaint Counsel applied to itself -- also apply to Andrx. To accommodate Complaint Counsel, I advised you that Andrx would undertake to provide its responses in a shorter time frame if, in light of all the other work that needs to get done, it reasonably could do so. That is good faith. That is what I am prepared to give you.

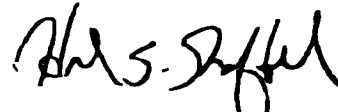
Bradley Albert, Esq.  
May 24, 2000  
Page 2

2. We remain eager to learn, as we repeatedly have advised you, when Complaint Counsel intends to provide a privilege log -- and to actually receive it. As I explained to you on the phone yesterday, your delay in doing so is a real obstacle to determining where discovery disputes exist and pressing the discovery process forward. The failure to advance discovery because of that delay is seriously prejudicial to Andrx.

3. On the telephone yesterday, Complaint Counsel undertook to search the files of David Balto and other FTC staff potentially having information pertinent to this matter. We were disturbed to learn that Complaint Counsel had not diligently done so already. In performing that task, Complaint Counsel of course should review computer files (and ensure that no such files are destroyed).

Thank you.

Sincerely,



Hal S. Shafter

HSS/gcc

cc: Other counsel

**SOLOMON, ZAUDERER, ELLENHORN, FRISCHER & SHARP**  
45 Rockefeller Plaza  
New York, NY 10111

Phone No. (212) 956-3700  
Telecopier No. (212) 956-4068

**TELECOPY TRANSMISSION COVER SHEET**

**DATE:** May 24, 2000

<u>TO</u>	<u>FAX NO.:</u>	<u>TEL NO.:</u>
Bradley Albert, Esq.	(202) 326-3384	(202) 326-3759
James M. Spears, Esq.	(202) 784-4211	(202) 662-4884
Peter O. Safir, Esq.	(202) 223-5619	(202) 223-5120

**FROM:**  
Hal S. Shaftel, Esq. (212) 956-4068 (212) 424-0755

**COMMENTS:**

**Number of Pages:**  
(incl. cover sheet)

**CLIENT/MATTER NO.** 0228/003

**Fax Operator:** Joyce Ashman

**Secretary:** S. Eliopoulos

THE FOLLOWING MATERIAL IS INTENDED FOR THE USE OF THE ADDRESSEE ONLY AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL OR OTHERWISE EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF YOU ARE NOT THE INTENDED RECIPIENT, DO NOT READ THE FOLLOWING MATERIAL, AND DO NOT DISSEMINATE THIS MATERIAL TO ANYONE OTHER THAN THE INTENDED RECIPIENT. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND MAIL THIS COMMUNICATION TO US AT THE ABOVE ADDRESS. THANK YOU.

40455v1 05/24/00 7:48 PM

NO. 4252 P. 1/3

SOLOMON ZAUDERER

MAY 24 2000 7:34PM

# **EXHIBIT 5**



# SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO Custodian of Records for:  
Abbott Laboratories Inc.  
100 Abbott Park Road  
Abbott Pk. IL 60064-3500  
c/o CT Corporation System  
208 South Lasalle Street  
Chicago, IL 60604-1136

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION

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

4. MATERIAL WILL BE PRODUCED TO

Shook, Hardy & Bacon L.L.P.  
Attn: D. Edward Wilson, Counsel for Hoechst Marion Roussel, Inc.

5. DATE AND TIME OF PRODUCTION OR INSPECTION

June 26, 2000 at 10:00 a.m.

6. SUBJECT OF PROCEEDING

In the matter of Hoechst Marion Roussel, Inc., et al.

7. MATERIAL TO BE PRODUCED

See Exhibit "A" attached hereto

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission  
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPCENA

Shook, Hardy & Bacon L.L.P.  
James M. Spears  
D. Edward Wilson  
Peter D. Bernstein  
Counsel for Hoechst Marion Roussel

DATE ISSUED

MAY 17 2000

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

**Exhibit A to Subpoena Duces Tecum**

_____ )	
In the Matter of )	
Hoechst Marion Roussel, Inc., et al., )	Docket No. 9293
Respondents )	
_____ )	

**HMRI'S FIRST DOCUMENT PRODUCTION REQUEST  
TO ABBOTT LABORATORIES INC.**

Respondent Hoechst Marion Roussel, Inc. ("HMRI"), pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.34(b), requests that Abbott Laboratories Inc. (hereinafter referred to as "the company") produce documents and other things for inspection and copying, within 20 days, in response to the Document Requests set forth below, and in accordance with the Definitions and Instructions following thereafter, at the offices of Shook, Hardy & Bacon, L.L.P., 600 14th Street, N.W., Washington, D.C. 20005, or such location as may be mutually agreed upon.

**DOCUMENT REQUESTS**

**Request No. 1.:** All documents that reflect or relate to marketing cardiovascular pharmaceutical products to any entity on Attachment 1, attached, including but not limited to

marketing plans and budgets, sales forecasts, pricing and contracting strategies, brochures and marketing materials of any kind.

**Request No. 2.:** All documents which relate to the effect of bioequivalent or generic versions of pioneer cardiovascular pharmaceutical products on the market and/or price for those pioneer cardiovascular pharmaceutical products.

**Request No. 3.:** All documents that reflect or relate to the actual or potential effect on competition with, or on sales, prices or market share for the company's cardiovascular pharmaceutical products by any actual or potential prescription or non-prescription drugs for the treatment of hypertension and angina.

**Request No. 4.:** All documents that reflect or relate to the actual or potential effect on competition with, or on sales, prices or market share for the company's cardiovascular pharmaceutical products by Cardizem® CD or a bioequivalent or generic version of Cardizem® CD.

**Request No. 5.:** All documents that reflect or relate to the following sales and marketing information:

- (a) annual (and, for the current year, monthly) sales (in units), revenue, and profit information for each stock keeping unit relating to the sale of each of the company's cardiovascular pharmaceutical products;
- (b) prices, pricing plans, pricing policies, pricing forecasts, pricing strategies, and pricing decisions for each of the company's cardiovascular pharmaceutical products;
- (c) projected or anticipated prices, sales (in units), revenues, and profits for each stock keeping unit relating to the sale of each of the company's cardiovascular pharmaceutical products;
- (d) strategic and marketing plans for each of the company's cardiovascular pharmaceutical products; and,



- (e) promotional materials of any kind, including but not limited to brochures, print advertisements, transcripts of electronic media advertisement.

**Request No. 6.:** All documents that reflect or relate to the introduction or sale of bioequivalent or generic versions of Cardizem® CD by any person, including, but not limited to:

- (a) attempts to introduce a bioequivalent or generic version of Cardizem® CD to the commercial market;
- (b) the historical projections or anticipated dates of entry into the commercial market of each bioequivalent or generic version of Cardizem® CD;
- (c) any analysis, study, projection, forecast, budget or plan on the affect of the introduction of a bioequivalent or generic version of Cardizem® CD on the company's sales, revenues or profits;
- (d) for each of the first three years following the projected or anticipated introduction or sale of bioequivalent or generic version of Cardizem® CD:
  - (i) the projected or anticipated market share (measured in terms of unit sales and revenues) of the bioequivalent or generic version of Cardizem® CD;
  - (ii) projected or anticipated price of the bioequivalent or generic version of Cardizem® CD;
  - (iii) projected or anticipated price of Cardizem® CD;
  - (iv) the company's projected or anticipated lost annual revenues and profits.

**Request No. 7.:** All documents that, as to any cardiovascular pharmaceutical products, analyze, study, reflect, or relate to any one or more of the following:

- (a) gross and net sales to all customers in units and dollars;
- (b) gross number and dollar value of promotional sample units distributed;
- (c) sales returns in units and dollars;
- (d) cost of goods sold in dollars;
- (e) gross and net profit in dollars;
- (f) sales, promotion, or marketing expenses;

- (g) the list price and wholesale acquisition cost;
- (h) product returns in units and dollars;
- (i) rebates, credits, allowances, charge backs, and any other adjustment to price; and,
- (j) total research and development cost for each cardiovascular pharmaceutical product.

**Request No. 8.:** All data and reports, including but not limited to data and reports provided by third-party vendors such as IMS, that that reflect or relate to the sales of any cardiovascular pharmaceutical product and any analysis that might consider: (1) the extent to which these products compete against each other and compete against Cardizem® CD and other sustained release diltiazem products; (2) the extent to which sales of the products respond to/or are affected by variations in price or manufacturer discounts, rebates, credits or other price adjustments; and (3) the extent to which sales of the products respond to changes in the manner in which they are listed in formularies maintained by third-party payors, insurers and other health care providers.

**Request No. 9.:** All documents that reflect or relate to in any way standards of care for the treatment of hypertension and/or angina through the use of cardiovascular pharmaceutical products.

**Request No. 10.:** All documents sufficient to show the name and chemical entity of all products which the company believes competes with Cardizem® CD. For each product, produce documents sufficient to explain why the company believes that product competes with Cardizem® CD.

**Request No. 11.:** All documents sufficient to show the name and chemical entity of all products which the company believes competes with the company's cardiovascular pharmaceutical products. For each product, produce documents sufficient to explain why the company believes that product competes with the company's cardiovascular pharmaceutical products.

**Request No. 12.:** All documents that reflect or relate to, in any way, the substitutability or exchangeability of any actual or potential cardiovascular pharmaceutical product for Cardizem® CD.

**Request No. 13.:** All documents that reflect or relate to, in any way, the substitutability of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

**Request No. 14.:** All documents that reflect or relate to, in any way, programs, campaigns or activities undertaken by you which are designed to encourage the use or substitution of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

**Request No. 15.:** All documents that reflect or relate to agreements or contracts between you and any entity on Attachment 1, attached, concerning or relating to cardiovascular pharmaceutical products.

**Request No. 16.:** All documents that reflect or relate to, in any way, the negotiation of contracts or other agreements regarding discounts, rebates, credits, allowances, charge backs and other price adjustments between you and any entity on Attachment 1, attached, with regard to cardiovascular pharmaceutical products.

**Request No. 17.:** All documents sufficient to identify the individual(s) (by name, address, position and date) who supervise the negotiation of contracts and/or agreements between you and any entity on Attachment 1, attached, with regard to cardiovascular pharmaceutical products.

## DEFINITIONS AND INSTRUCTIONS

1. Unless otherwise stated, the requests herein refer to the time period of January 1, 1992 through present, and pertain to activities in the United States.
2. As used herein, the words "you" or "your" shall Mean Abbott Laboratories Inc.. and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates.
3. As used herein, "HMRI" shall mean the Respondent Hoechst Marion Roussel, Inc. and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates.
4. As used herein, the term "payor" means any entity with which you have a contractual or other relationship setting the terms by which prescription pharmaceutical products are provided to members pursuant to plans, including, without limitation, insurance companies, pharmaceutical benefit companies, and managed care organizations.
5. As used herein, "cardiovascular pharmaceutical products" means the products within code 31000 of the IMS Uniform System of Classification.
6. As used herein, "Cardizem® CD" means the diltiazem formulation sold under this name.
7. As used herein, "person" means all employees, individuals, and entities, including but not limited to corporations, associations, companies, partnerships, joint ventures, trusts and estates.
8. As used herein, the terms "document" or "documents" or "documentation" include these terms as defined by 16 C.F.R. § 3.34(b) and, in addition, the original or drafts or any kind of written, printed, recorded or graphic matter or sound reproduction, however produced or reproduced,

whether sent or received or neither, and all copies thereof which are different in any way from the original (whether by notation, indication of copies sent or received or otherwise) regardless of whether designated "Confidential," "Privileged" or otherwise and including, but not limited to, any correspondence, paper, book, account, drawing, agreement, contract, e-mail, handwritten notes, invoice, memorandum, telegram, object, opinion, purchase order, report, records, transcript, summary, study, survey recording of any telephone or other conversation, interviews or notes of any conference. The terms "document" or "documents" shall also include data stored, maintained or organized electronically or magnetically or through computer equipment, translated, if necessary, by you into reasonably usable form, and film impressions, magnetic tape and sound or mechanical productions of any kind or nature whatsoever.

9. Except for privileged materials, produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Submit any appendix, table, or other attachment by either physically attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, do not mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

10. As used herein, the words "describe", "relates to", "relating to", "reflecting", "regarding" or equivalent language shall mean constituting, reflecting, respecting, supporting, contradicting, referring to, stating, describing, recording, noting, containing, monitoring, studying, analyzing, discussing, evaluating or relevant to.

11. As used herein, the connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. As used herein, the term "communication" means every manner of transmitting or receiving information, opinions, and thoughts whether orally or in writing.

13. As used herein, the term "health benefit plan" refers to any plan which you operate or administer which provides for the payment or reimbursement of health care related expenses.

14. As used herein, the term "prescription benefit plan" refers to any plan which you operate or administer, either solely or in conjunction with another entity, which provides for the payment of or reimbursement for pharmaceutical products dispensed pursuant to doctors' prescriptions.

15. As used herein, the term "plan" or "plans" refers jointly to the health benefit plan and prescription benefit plan.

16. As used herein, the term "members" refers to individuals who are enrolled in and eligible to receive benefits through a health benefit plan and/or prescription benefit plan.

17. As used herein, the term "substitutability" refers to the degree to which doctors, patients, pharmacies, wholesalers, PBMs, and/or health benefit plans shift purchases between or among pharmaceutical products based on considerations including, but not limited to, cost, efficacy, and side effects.

18. The response to each document production request is to be numbered in a manner consistent with these requests and is to be preceded by the specific request.

19. If any form of privilege or immunity is claimed as ground for withholding a response, submit a written statement that describes the factual basis of the purported privilege or claim of immunity in sufficient detail to permit the court to adjudicate the validity of the claim.

20. If a request is deemed objectionable, state the reasons for the objection. If a portion of a request is deemed objectionable, state the objection, and answer the remaining unobjectionable portion of the request.

SHOOK, HARDY & BACON L.L.P.

By: \_\_\_\_\_

James M. Spears  
Paul S. Schleifman  
D. E. Wilson, Jr.  
Peter D. Bernstein  
600 14th Street, N.W.  
Washington, D.C. 20005-2004  
202-783-8400

Attorneys for Respondent Hoechst Marion Roussel, Inc.

Dated: June \_\_, 2000

Attachment 1, attached

**Attachment 1 to Subpoena Duces Tecum  
Issued on Behalf of HMRI**

Merck-Medco Managed Care, Inc.  
PCS Health Systems Inc.  
Express Scripts, Inc.  
Aetna US Healthcare  
United HealthCare Services, Inc.  
Humana, Inc.  
Healthsource, Inc.  
Caremark Inc.  
Pacificare Health Systems, Inc.  
Kaiser Permanente Insurance Company  
Foundation Health Systems, Inc.  
Blue Cross and Blue Shield of Michigan  
Empire Blue Cross Blue Shield  
Blue Cross/Blue Shield of Florida  
Blue Cross/Blue Shield of California  
Advance Paradigm, Inc.







# SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO Custodian of Records for:  
Aetna U.S. Healthcare  
980 Jolly Road  
Blue Bell, PA 19422-0000  
c.o. Aetna U.S. Healthcare  
980 Jolly Road  
Blue Bell, PA 19422-0000

2. FROM  
  
**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION  
  
Shook, Hardy & Bacon L.L.P.  
600 14th Street, N.W., Suite 800  
Washington, DC 20005-2004

4. MATERIAL WILL BE PRODUCED TO  
Shook, Hardy & Bacon L.L.P.  
Attn: D. Edward Wilson, Counsel for Hoechst Marion Roussel, Inc.

5. DATE AND TIME OF PRODUCTION OR INSPECTION  
  
June 26, 2000 at 10:00 a.m.

6. SUBJECT OF PROCEEDING  
  
In the matter of Hoechst Marion Roussel, Inc., et al.

7. MATERIAL TO BE PRODUCED  
  
See Exhibit "A" attached hereto

8. ADMINISTRATIVE LAW JUDGE  
  
The Honorable D. Michael Chappell  
  
Federal Trade Commission  
Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA  
  
Shook, Hardy & Bacon L.L.P.  
James M. Spears  
D. Edward Wilson  
Peter D. Bernstein  
Counsel for Hoechst Marion Roussel

DATE ISSUED  
  
**MAY 17 2000**

SECRETARY'S SIGNATURE  
  
*Donald S. Clark*

### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

**Exhibit A to Subpoena Duces Tecum**

_____	)	
In the Matter of	)	
	)	Docket No. 9293
Hoechst Marion Roussel, Inc., et al.,	)	
	)	
Respondents	)	
_____	)	

**HMRI'S FIRST DOCUMENT PRODUCTION REQUEST  
TO AETNA US HEALTHCARE**

Respondent Hoechst Marion Roussel, Inc. ("HMRI"), pursuant to the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.34(b), requests that Aetna US Healthcare (hereinafter referred to as "the company") produce documents and other things for inspection and copying, within 20 days, in response to the Document Requests set forth below, and in accordance with the Definitions and Instructions following thereafter, at the offices of Shook, Hardy & Bacon, L.L.P., 600 14th Street, N.W., Washington, D.C. 20005, or such location as may be mutually agreed upon.

**DOCUMENT REQUESTS**

**Request No. 1.:** All documents that reflect or relate to determining pharmaceutical products for inclusion in, or exclusion from, formularies, including but not limited to contract manuals, contract training manuals, account training manuals, standard form contracts, discount grids, market share tiers, and market segment listings.

**Request No. 2.:** All documents comprising pharmaceutical product formularies used in connection with any health benefit plan or prescription benefit plan through which you reimburse pharmacies and/or individuals for pharmaceutical products dispensed pursuant to doctors' prescriptions.

**Request No. 3.:** All documents that reflect or relate in any manner to the classification of prescription pharmaceutical products in formularies, including the classification of pharmaceutical products for treatment purposes and for determining co-payments or reimbursement amounts for individual participants and/or payments to pharmacies.

**Request No. 4.:** All documents that reflect or relate to any process or criteria, whether clinical or economic, including those documents relating to any internal organization such as a Pharmacy Quality Advisory Committee ("PQAC" or "QC") or Pharmacy and Therapeutics Committee ("P & T"), used to determine the cardiovascular pharmaceutical products to be included in, or excluded from, any formulary.

**Request No. 5.:** All documents that reflect or relate to the policies or criteria for making any initial classification in formularies as well as any reclassification of any previously classified pharmaceutical product in subsequent formulary listings.

**Request No. 6.:** All documents that reflect or relate to the formularies in which Cardizem® CD has been listed, including but not limited to documents identifying all classifications or categories in which Cardizem® CD has been listed in each formulary, as well as the other pharmaceutical products included in each category so described.

**Request No. 7.:** All documents that reflect or relate to standards of care for the treatment of hypertension and/or angina through the use of cardiovascular pharmaceutical products.

**Request No. 8.:** All documents that reflect or relate, in any way, the substitutability of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

**Request No. 9.:** All documents that reflect or relate in any way to programs, campaigns or activities undertaken by you which are designed to encourage the use or substitution of any cardiovascular pharmaceutical product for any other cardiovascular pharmaceutical product.

**Request No. 10.:** All documents that reflect or relate to agreements or contracts between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

**Request No. 11.:** All documents that reflect or relate in any way to the negotiation of contracts or other agreements regarding discounts, rebates, credits, allowances, charge backs and other price adjustments between you and any of the entities listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

**Request No. 12.:** All data and reports, including but not limited to data and reports provided by third-party vendors such as IMS, that reflect or relate to the sales of any cardiovascular pharmaceutical product and any analysis that might consider: (1) the extent to which these products compete against each other and compete against Cardizem® CD and other sustained release diltiazem products; (2) the extent to which sales of the products respond to/or are affected by variations in price or manufacturer discounts, rebates, credits or other price adjustments; and (3) the extent to which sales of the products respond to changes in the formulary classifications maintained by third-party payors, insurers and other health care providers.

**Request No. 13.:** All documents sufficient to identify the individual(s) (by name, address, position and date) who supervise the negotiation of contracts and/or agreements between you and any entity listed on Attachment 1 with regard to cardiovascular pharmaceutical products.

### **DEFINITIONS AND INSTRUCTIONS**

1. Unless otherwise stated, the requests herein refer to the time period of January 1, 1992 through present and to information relating to the

2. As used herein, the words "you" or "your" shall mean Aetna, and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates, including Prudential HealthCare.

3. As used herein, "HMRI" shall mean the Respondent Hoechst Marion Roussel, Inc. and each of its predecessors, successors, groups, divisions, subsidiaries and affiliates.

4. As used herein, the term "formulary" means a list of prescription pharmaceutical products generally covered under a health or prescription benefit plan subject to applicable limits and conditions. For the purposes of this document request, the term "formulary" excludes pharmaceutical products in classifications other than "cardiovascular pharmaceutical products" but includes all descriptive material, including but not limited to operating guidelines, definitions and lists of abbreviations.

5. As used herein, "cardiovascular pharmaceutical products" means the products within code 31000 of the IMS Uniform System of Classification.

6. As used herein, "Cardizem® CD" means the diltiazem formulation sold under this name.

7. As used herein, "person" means all employees, individuals, and entities, including but not limited to corporations, associations, companies, partnerships, joint ventures, trusts and estates.

8. As used herein, the terms "document" or "documents" or "documentation" include these terms as defined by 16 C.F.R. § 3.34(b) and, in addition, the original or drafts or any kind of written, printed, recorded or graphic matter or sound reproduction, however produced or reproduced, whether sent or received or neither, and all copies thereof which are different in any way from the original (whether by notation, indication of copies sent or received or otherwise) regardless of whether designated "Confidential," "Privileged" or otherwise and including, but not limited to, any correspondence, paper, book, account, drawing, agreement, contract, e-mail, handwritten notes, invoice, memorandum, telegram, object, opinion, purchase order, report, records, transcript, summary, study, survey recording of any telephone or other conversation, interviews or notes of any conference. The terms "document" or "documents" shall also include data stored, maintained or organized electronically or magnetically or through computer equipment, translated, if necessary, by you into reasonably usable form, and film impressions, magnetic tape and sound or mechanical productions of any kind or nature whatsoever.

9. Except for privileged materials, produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Submit any appendix, table, or other attachment by either physically attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, do not mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.

10. As used herein, the words “describe”, “relates to”, “relating to”, “reflects”, “regarding”, or equivalent language shall mean constituting, reflecting, respecting, supporting, contradicting, referring to, stating, describing, recording, noting, containing, monitoring, studying, analyzing, discussing, evaluating or relevant to.

11. As used herein, the connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. As used herein, the term “communication” means every manner of transmitting or receiving information, opinions, and thoughts whether orally, in writing, or electronically.

13. As used herein, the term “health benefit plan” refers to any plan which you operate or administer which provides for the payment or reimbursement of health care related expenses.

14. As used herein, the term “prescription benefit plan” refers to any plan which you operate or administer, either solely or in conjunction with another entity, which provides for the payment of or reimbursement for pharmaceutical products dispensed pursuant to doctors’ prescriptions.

15. As used herein, the term “plan” or “plans” refers jointly to the health benefit plan and prescription benefit plan.

16. As used herein, the term “substitutability” refers to the degree to which doctors, patients, pharmacies, wholesalers, pharmacy benefit managers (“PBMs”), and/or health benefit plans shift purchases between or among pharmaceutical products based on considerations including, but not limited to, cost, efficacy, and side effects.

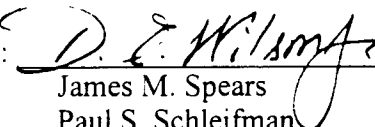


17. The response to each document production request is to be numbered in a manner consistent with these requests and is to be preceded by the specific request.

18. If any form of privilege or immunity is claimed as ground for withholding a response, submit a written statement that describes the factual basis of the purported privilege or claim of immunity in sufficient detail to permit the court to adjudicate the validity of the claim.

19. If a request is deemed objectionable, state the reasons for the objection. If a portion of a request is deemed objectionable, state the objection, and answer the remaining unobjectionable portion of the request.

SHOOK, HARDY & BACON L.L.P.

By:   
James M. Spears  
Paul S. Schleifman  
D. E. Wilson, Jr.  
Peter D. Bernstein  
600 14th Street, N.W.  
Washington, D.C. 20005-2004  
202-783-8400

Attorneys for Respondent Hoechst Marion Roussel, Inc.

Dated: June 5, 2000

Attachment 1, attached

**Attachment 1 to Subpoena Duces Tecum  
Issued on Behalf of HMRI**

Pfizer, Inc.  
Merck & Co., Inc.  
Astra Zeneca Pharmaceuticals LP  
Novartis Pharmaceuticals Corporation  
Abbott Laboratories Inc.  
Mylan Pharmaceuticals Inc.  
Parke-Davis  
Key Pharmaceutical, Inc.  
Bayer Corporation  
G. D. Searle & Co.  
Watson Laboratories, Inc.  
Zenith Goldline Pharmaceuticals Inc.  
Forest Pharmaceuticals, Inc.  
Biovail Corporation  
Teva Pharmaceuticals USA, Inc.

# **EXHIBIT 6**

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

Sept 24, 1998

In the Matter of	)	
R.J. REYNOLDS TOBACCO COMPANY,	)	DOCKET NO. 9285
a corporation.	)	

ORDER RE PRIVILEGE LOG

Respondent moves, without citing new law or facts, to reconsider the order denying respondent's motion to compel a more complete privilege log. Complaint counsel object, arguing that this issue has been decided in previous rulings.

Documents in complaint counsel's files are subject to Rule 3.38A. Commission Rule 3.38A states, in part:

Any person withholding material responsive to a subpoena . . . shall assert a claim of privilege [and submit] a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.<sup>2</sup>

<sup>1</sup> Other offices of the Commission, being third persons to this litigation, and not parties, need not be specific in describing items withheld for privilege. Champion Spark Plug Company, Docket No. 9141, Order re Access to Documents, pp. 4-5 (December 16, 1980) (JPT No. 140); Flowers Industries, Inc., Docket No. 9148, Order Quashing Subpoena at note 3, page 2 (September 11, 1981) (JPT No. 150); Outdoor World Corp., Docket No. 9229, Order Quashing Subpoena (November 3, 1989) (JPT No. 141).

<sup>2</sup> The Federal Rules of Civil Procedure also cover this issue. Rule 26(b)(5) of the Federal Rules of Civil Procedure states that:

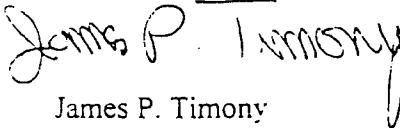
When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party . . . shall describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Rule 45(d)(2) of the Federal Rules of Civil Procedure states that:

(continued...)

Complaint counsel must comply with Rule 3.38A, by providing information sufficient to identify each item responsive to a subpoena duces tecum, in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. The administrative law judge retains the discretion to ease the requirements for privilege logs if a literal application of the rule would be unduly burdensome or if the administrative law judge's experience indicates that a description of a category of items (e.g., staff memos to the Commission recommending issuance of a complaint) is sufficient. Rule 3.42(c). Further, respondent was not able to explain how a more detailed privilege log would assist it in determining whether the privileges claimed were applicable to documents withheld. Burden of Producing Privilege Log, Michael C. Silverberg, 215 N.Y.L.J. 2, 3 (May 9, 1996). The privilege log submitted by complaint counsel, attached hereto, complies with Rule 3.38A.<sup>3</sup>

Having considered respondent Reynolds' motion for reconsideration or certification of my September 4, 1998 order denying Reynolds' "Motion to Compel the Production of a Complete Privilege Log" dated August 24, 1998, and complaint counsel's opposition thereto dated September 21, 1998, it is hereby ORDERED that respondent's motion for reconsideration is DENIED. Further, there is no basis for certification of this issue to the Commission for decision pursuant to the requirements of Rule 3.23(b). This issue does not involve a controlling question of law or policy as to which there is substantial ground for difference of opinion; an immediate appeal from the ruling will not materially advance the ultimate termination of the litigation; such an appeal might delay the imminent trial date; and subsequent review will afford an adequate remedy. Moreover, given my previous rulings, Reynolds' motion for review is untimely under Rule 3.23(b).

  
James P. Timony  
Administrative Law Judge

Dated: September 24, 1998

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(...continued)

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

<sup>3</sup> In the event that the categories of items withheld were unfamiliar to the administrative law judge or that respondent was able to explain how more detail would assist it in determining whether the privileges claimed were applicable to items withheld, without revealing information itself privileged, those items could be produced in camera to the administrative law judge for determination of the privilege. None of the items described on the privilege log requires such treatment.

**ATTACHMENT A: PRIVILEGE LOG**

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
BCP Staff and BCP Management	Commission	Memoranda recommending that the Commission issue a complaint against R.J. Reynolds Tobacco Co. alleging that the Joe Camel campaign was unfair	Deliberative process privilege; work product privilege
BCP Staff and BCP Management	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege
BE Staff and BE management	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege; non-testifying expert
GC Staff and GC management.	Commission or individual Commissioners	Memoranda and other internal documents concerning the recommendation to issue a complaint.	Deliberative process privilege; work product privilege.
BCP Staff	BCP Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
BE Staff	BE Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative process privilege; work product privilege
GC Staff	GC Management	Memoranda, draft memoranda and other internal documents regarding the Joe Camel campaign and/or youth smoking or other issues concerning the recommendation to issue a complaint	Deliberative privilege; work product privilege.
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Internal documents, including memoranda, notes, e-mail communications and facsimiles, regarding the Joe Camel matter or issues raised therein	Deliberative process privilege; work product privilege
Commission Attorneys and/or Other Commission Staff	None	Personal internal documents, including memoranda, notes, articles, or other writings regarding the Joe Camel matter or issues raised therein	Deliberative process privilege; work product privilege
Commission Attorneys	Commission Attorneys and/or Other Commission Staff	Notes, correspondence, e-mail communications, facsimiles, summaries or other documents concerning conferences, meetings or other discussions with experts regarding the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert

AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
Commission Attorneys	None	Notes, summaries or other documents concerning conferences, meetings or other discussions with experts regarding the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert
Law Enforcement Agencies	Federal Trade Commission and/or staff of the FTC	Official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; work product privilege
Commission Attorneys and/or Other Commission Staff	Law Enforcement Agencies	Correspondence, notes or other writings prepared pursuant to or in connection with official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; deliberative process privilege and work product privilege
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Memoranda, notes or other writings prepared pursuant to or in connection with official requests under §§ 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Law enforcement privilege; deliberative process privilege and work product privilege



AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE
Commission Attorneys and/or Other Commission Staff	Commission Attorneys and/or Other Commission Staff	Memoranda, notes or other writings prepared pursuant to or in connection with official requests from Members or Committees of Congress under § 6(f) and 21(b) of the FTC Act seeking access to non-public information in connection with official law enforcement matters	Deliberative process privilege
Experts	Commission Attorneys and/or Other Commission Staff	Resumes, correspondence, e-mail communications, facsimiles, articles, analyses, summaries or other writings concerning the Joe Camel matter or issues raised therein	Non-testifying expert; work product privilege
Commission Attorneys and/or Other Commission Staff	Experts	Correspondence, e-mail communications, facsimiles or other documents or writings concerning the Joe Camel matter or issues raised therein	Work product privilege; non-testifying expert

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of	)	
	)	
MESA COUNTY PHYSICIANS INDEPENDENT	)	Docket No. 9284
PRACTICE ASSOCIATION, INC.,	)	
a corporation.	)	

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ORDER DENYING RESPONDENT'S  
MOTION TO COMPEL DISCLOSURE

Complying with the Commission's recently revised Rules of Practice, complaint counsel have disclosed to respondent:

"The name . . . address and telephone number of each individual likely to have discoverable information. . . ." (§ 3.31(b)(1))

and: "A copy of, or a description . . . of, all documents . . . that are relevant. . . ." (§ 3.31(b)(2))

Complaint counsel's initial disclosure listed 558 individuals, 50 of whom (unnamed) have been deposed or interviewed.

Citing the time constraints imposed by my scheduling order, respondent seeks an order which would compel complaint counsel to reveal the fact portions of the interviews and depositions of the 50 individuals.<sup>1</sup> If respondent is not given this information, it fears that it cannot comply with the scheduling order.

---

<sup>1</sup> Motion for order to compel. A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, or an interrogatory under § 3.35. Rules of Practice, § 3.38(a).

Respondent suggests that, by limiting its request to facts, the usual prohibition against the disclosure of privileged information can be ignored. See, Rules of Practice, § 3.31(c)(3):

Hearing preparations: Materials. Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. \* \* \*

I disagree, for the Commission has held that factual discussions in staff interviews or depositions should be exempt from discovery because their disclosure would reveal attorney work product, Gillette Co., 98 F.T.C. 875 (1981); Allied Chemical Corp., 75 F.T.C. 1055, 1057 (1969); Diran M. Seropian, M.D., Dkt No. 9248 (October 18, 1991), or because of the government informant's privilege. See In Re Harper & Row, Publishers, Inc., et al., Dkt Nos. 9217-22 (Interlocutory Order, June 27, 1990); Gillette Co., 98 F.T.C. 875, 876-78 (1981).

A district court decision, Butterworth v. Industrial Chemicals, Inc., 145 F.R.D. 585 (N.D. Fla. 1991), does support the release of pretrial depositions, but it does not overrule Commission precedent which prohibits the disclosure of such information.

Thus, I find that respondent has failed to establish that the release of privileged information is justified. See Gillette Co., 98 F.T.C. 875 (1981):

There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a 'need' nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions. Therefore, recognizing a categorical 'need' for all information gathered during the investigation, without a showing of 'substantial need,' would directly contradict the purpose of Section 3.31[(c)](3). . . . At best, respondent's strongest argument is merely one of convenience. This rationale, however, does not meet the 'substantial need' test that has been long established as the cornerstone of the work product privilege. Id. at 880.

Respondent can obtain the substantial equivalent of the material which it seeks by conducting its own investigation rather than relying on complaint counsel's work product or other privileged information.<sup>2</sup> Given the information which can be obtained from its doctor members, and the professional qualifications of its attorneys, this requirement is not onerous.

Finally, respondent's suggestion that the documents be redacted to prevent the disclosure of the mental impressions, conclusions, opinions or legal theories of complaint counsel would involve them in a cumbersome procedure which is not required by any Commission precedent of which I am aware. Therefore,

IT IS ORDERED that respondent's motion to compel disclosure be, and it hereby is, denied.

Lewis F. Parker  
Administrative Law Judge

Dated: August 4, 1997

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<sup>2</sup> I reject the argument that the extent of complaint counsel's initial disclosures justifies the release of privileged information, for that would create an obligation which the Commission did not intend when it adopted that procedure.

Search Result

Rank 23 of 26

Database  
FATR-FTC

In the Matter of  
OLIN CORPORATION, a corporation.  
DOCKET NO. 9196

ORDER RULING ON RESPONDENT'S MOTION TO COMPEL COMPLAINT COUNSEL TO PRODUCE  
CERTAIN ADDITIONAL DOCUMENTS

By Motion To Compel Complaint Counsel To Submit Complete Answers To Respondent's Voluntary Request For Documents And Information Or, In The Alternative, For Authorization To Serve Interrogatories On Complaint Counsel, dated November 13, 1985, and filed pursuant to Section 3.38 of the Commission's Rules of Practice, respondent seeks an order directing complaint counsel to furnish respondent certain classes of documents which have been withheld under claims of informant's privilege or work product privilege. By Opposition dated November 25, 1985, complaint counsel opposed the instant motion. For reasons discussed hereinbelow, respondent's motion will be denied except with respect to certain documents of exculpatory nature.

The general schedule of proceedings agreed to by counsel for the parties and incorporated in the September 17, 1985 Prehearing Conference Order contemplates an extensive initial discovery by the parties. Following a period of general discovery and exchange of lists of witnesses and documents, additional discovery, including voluntary interviews and depositions of witnesses and document production, is contemplated in order to enable the parties to prepare for cross-examination and prosecution of their respective cases on a more particularized basis. Pursuant to the discovery schedule, a large amount of documents and information is being produced on a voluntary basis.

More specifically, it appears that complaint counsel have agreed to furnish respondent the following:

1. all responsive documents which were received from various sources in response to compulsory processes;
  2. all documents submitted to the Commission on a voluntary basis where the submitter's identity is not disclosed on the face of the document and the contents thereof would not readily disclose the submitter's identity, or where the submitter's identity or identifying material can be readily excised;
  3. all FMC documents and narrative submissions obtained under the Hart-Scott-Rodino provisions;
  4. all transcripts of investigational hearing testimony given by FMC employees.
- With respect to the withheld documents, complaint counsel have provided a respondent information regarding seven major categories of privileged documents, privilege(s) claimed, and the request item numbers to which each category of withheld documents are responsive to.

In addition, complaint counsel have agreed to provide Olin with specific document citations supporting complaint allegations some six weeks before proposed document lists are exchanged. Complaint counsel also have agreed to produce all Jencks Act material at the appropriate time.

Against the above background respondent now seeks compulsory disclosure of the following:

upheld.

In this connection, respondent's request for more detailed information, including the times, authors, recipients, subject matters and privilege(s) claimed for each of the withheld documents will be denied. Complaint counsel have provided information regarding the seven categories of documents being withheld and the type(s) of privilege being claimed for each category. In these circumstances, there is no need for further burdening complaint counsel with furnishing the kind of detailed information for each withheld document. See *Great Atlantic & Pacific Tea Co.*, 82 F.T.C. 1860-1862 (1973).

Fourth, respondent also seeks documents of exculpatory nature that may be found in the Commission's files. While a suggestion that officials of a law enforcement agency may deliberately withhold from respondent a document they believe to be clearly exculpatory is repugnant to any notion of fair administration of justice, it would also be grossly unfair to impose upon complaint counsel now the horrendous burden of undertaking a de novo review of all documents in their files and determining whether any information found in any of them may arguably be inconsistent with or tend to refute or disprove any of the allegations in the complaint. Having weighed these considerations, the administrative law judge has determined that complaint counsel should be required to furnish to respondent those documents which are now known to them to be clearly exculpatory in the sense that the information clearly refutes or disproves any of the allegations in the complaint. Needless to say, this requirement does not contemplate that complaint counsel conduct a de novo document research. Accordingly, it is ordered as follows:

1. Respondent's November 13, 1985 motion to compel is hereby denied except with respect to those documents in complaint counsel's files which are believed by complaint counsel to refute or disprove any of the allegations in the complaint based on their past review of such documents.

2. Complaint counsel shall provide respondent, within two weeks from the date of receipt of this order, with all documents in their files which they believe clearly to refute or disprove any of the allegations in the complaint to the extent that such documents are known to complaint counsel at the present time.

3. Respondent's alternative request for authorization to serve interrogatories on complaint counsel is hereby denied.

Montgomery K. Hyun  
Administrative Law Judge

DATED: November 26, 1985

FTC  
END OF DOCUMENT

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

\_\_\_\_\_) )  
In the Matter of ) )  
THE REUBEN H. DONNELLEY CORPORATION) DOCKET NO. 9079  
a corporation. ) )  
\_\_\_\_\_)

ORDER DENYING RESPONDENT'S MOTION FOR SUBPOENA  
DIRECTED TO THE FEDERAL TRADE COMMISSION  
BUT ORDERING PRODUCTION OF INFORMATION

On July 7, 1977, counsel for respondent, The Reuben H. Donnelley Corporation, filed a motion requesting issuance of a subpoena duces tecum directed to the Secretary of the Federal Trade Commission seeking production of: (1) all Jencks statements of complaint counsel's listed witnesses not heretofore produced; and (2) the names, addresses, telephone numbers and business affiliations of all persons with whom complaint counsel communicated in connection with the preparation of this case and any, "Jencks" type statements made by such persons in complaint counsel's possession.

Complaint counsel filed their opposition to this motion on July 20, 1977, and simultaneously delivered to me six interview reports of listed witnesses for an in camera determination as to whether such documents qualify as Jencks statements. On July 26, 1977, respondent filed a reply clarifying the scope of information sought in the second specification of the requested subpoena.

I

Respondent's first specification seek production of:

"All written statements made and signed or otherwise adopted or approved by those persons whom complaint counsel have listed as hearing witnesses, and any stenographic, mechanical, electrical or other recordings, or transcripts thereof, which are substantially verbatim recitals, contemporaneously recorded, or oral statements made by such persons."

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of  
DIRAN M. SEROPIAN, M.D.  
\_\_\_\_\_

)  
)  
)                   Docket No. D-9248  
)  
)

ORDER RULING ON RESPONDENT'S  
MOTIONS FOR ACCESS TO DOCUMENTS

Pursuant to Sections 3.36 and 3.37(a) of the Rules of Practice, Dr. Seropian has moved for orders requiring access to 1) the audio tape record and transcription thereof of the January 24, 1989 open meeting of the physicians of North Broward Hospital District at Holy Cross Hospital and 2) the transcript of the testimony given by certain individuals during the investigation which led to the complaint in this case.

Complaint counsel oppose disclosure of the investigational hearing transcripts, arguing that they are protected from disclosure by the attorney work product and informant's privileges.

The work product privilege has been recognized by the Commission and its ALJs in many cases, including Gillette Co., 98 F.T.C. 875 (1981):

There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a 'need' nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions. Therefore, recognizing a categorical 'need' for all information gathered during the investigation, without a showing of 'substantial need,' would directly contradict the purpose of Section



3.31(b)(3). . . .<sup>1</sup> At best, respondent's strongest argument is merely one of convenience. This rationale, however, does not meet the 'substantial need' test that has been long established as the cornerstone of the work product privilege.

The Commission has also held that the disclosure of documents which might reveal the identity of its informants is prohibited, absent a showing that the information sought is essential to a fair determination of the issues. Harper & Row, FTC Dkts 9217-22, pp. 4, 7 (Interlocutory Order, June 27, 1990).

Dr. Seropian's motion does not establish that the information he seeks is essential and that he cannot obtain it by other means. Indeed, Dr. Seropian has received permission from me to depose four of the seven individuals whose transcripts of testimony he seeks, and he could have sought permission to depose all of them.

Since Dr. Seropian can obtain, through depositions, the information which he seeks from the privileged transcripts of the investigational hearings held by complaint counsel, I will not order their production.

Complaint counsel have agreed to give Dr. Seropian a tape of the January 24, 1989 meeting. Therefore,

IT IS ORDERED that Dr. Seropian's motion for access to investigational hearing transcripts be, and it hereby is, denied.

Lewis F. Parker  
Administrative Law Judge

Dated: October 18, 1991

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<sup>1</sup> "a party may obtain discovery of documents . . . prepared in anticipation of litigation . . . only upon a showing that the party . . . has substantial need . . . and . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means."