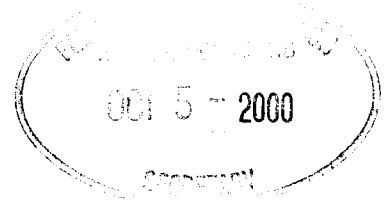


**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**



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


**AVENTIS PHARMACEUTICALS, INC.'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.22, Aventis Pharmaceuticals, Inc. hereby moves for an Order compelling Complaint Counsel to produce certain documents requested in Respondent's Third Request for the Production of Documents (the "Third Request").

WHEREFORE, Respondent respectfully requests that this Court enter an Order compelling Complaint Counsel to produce the documents requested by Respondent and grant such other and further relief as the Court may deem just and proper.

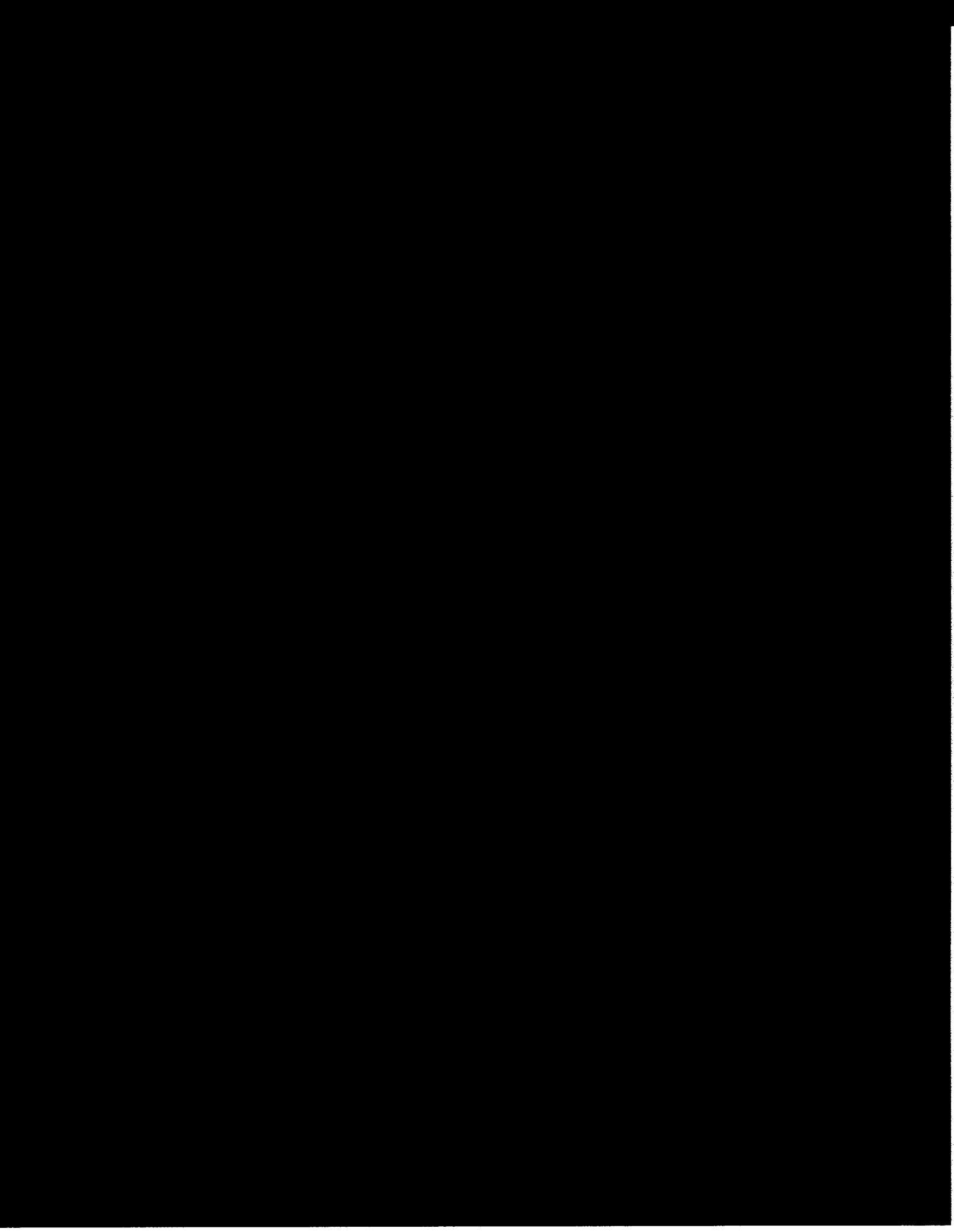
Dated: October 5, 2000

Respectfully Submitted,



James M. Spears
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D. Edward Wilson, Jr.
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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
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Docket No. 9293

**AVENTIS PHARMACEUTICALS, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to Rule 3.38(a) of the Federal Trade Commission's ("FTC") Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.38(a), Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("HMR"), submits this memorandum in support of its motion for an Order compelling Complaint Counsel to produce certain documents in response to Aventis' Third Request for the Production of Documents (the "Third Request").

BACKGROUND

The Third Request, served on August 2, 2000, sought: (a) documents concerning the existence and nature of FTC investigation File No. 951-0057; and (b) documents demonstrating the actions taken by Commission staff in pursuing that investigation.¹

On July 28, 1995, Commission staff notified HMR that the Commission was “investigating whether actions against manufacturers or suppliers of products competing or potentially competing with products of” HMR or its predecessor, Marion Merrell Dow, Inc. (“MMD”) – “includ[ing] . . . diltiazem, . . . and any other pharmaceuticals as to which MMD’s patent or other exclusive rights, whether personal or derivative, expired or are due to expire between January 1, 1990, and December 31, 1999” – violated the Federal Trade Commission Act.² On November 14, 1996, a year and a half after opening the investigation, the FTC advised HMR’s counsel that it was closing the investigation without action. As the Commission’s closing letter would later confirm, the investigation apparently centered upon “possible violations of the Federal Trade Commission Act by Marion Merrell Dow, through the prosecution of patent enforcement litigation regarding terfenadine and diltiazem.”³

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1. A copy of the Third Request is attached to the Declaration of Peter D. Bernstein in Support of Aventis Pharmaceuticals, Inc.’s Motion to Compel Production of Documents (the “Bernstein Declaration”) as Exhibit A.
 2. See Letter from Dennis F. Johnson, Deputy Assistant Director, Bureau of Competition to William K. Hoskins, Vice President, General Counsel and Secretary, Hoechst Marion Roussel, Inc., dated July 28, 1995 (the “Opening Letter”). Attached to the Bernstein Declaration as Exhibit D.
 3. Diltiazem is the active ingredient of Cardizem® CD, the product at the heart of this case. See Letter from Michael D. McNeely, Assistant Director, Bureau of Competition to Thomas B. Pahl, Esq., outside counsel for Aventis, dated November 14, 1996 (the “Closing Letter”) attached to the Bernstein Declaration as Exhibit E.

On August 22, 2000, Complaint Counsel served objections and responses to the Third Request⁴ and followed up with a log of privileged documents by letter of September 14, 2000.⁵ Complaint Counsel's log listed only four documents, for which it claimed privilege and stated that no non-privileged responsive documents exist. Complaint Counsel claimed it was unable to locate copies of the Opening and Closing Letters.

In lieu of the production of documents, Respondent proposed that Complaint Counsel provide a stipulation describing the nature of the Commission's investigation and stating that the Commission closed its investigation without taking action. Agreement could not be reached on the language of the stipulation and, in an October 4, 2000 telephone conference, it was confirmed that the parties reached an impasse as to these matters.⁶

ARGUMENT

The Commission's rules and the Federal Rules of Civil Procedure after which they are patterned adopt a liberal approach to discovery. Under both rules, discovery may be had of any material that is (1) relevant to the proceeding, (2) not privileged, and (3) not unduly burdensome.⁷ 16 C.F.R. § 3.31(c)(1). Relevancy is broadly construed to encompass any matter "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent," and includes potentially inadmissible

4. Attached to the Bernstein Declaration as Exhibit B.

5. Attached to the Bernstein Declaration as Exhibit C.

6. See Bernstein Declaration, ¶ 5.

7. Complaint Counsel has not suggested, and cannot suggest, that production of the only four documents that it has located after having already conducted what it purports to have been a "diligent search" would somehow impose an unreasonable burden on it.

evidence that “appears reasonably calculated to lead to the discovery of admissible evidence.”
Id.; see *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 19 (E.D. Pa. 1994).

The documents sought by the Third Request are clearly relevant to these proceedings. The Third Request only seeks documents prepared by or for, or obtained by, the Commission in connection with an FTC investigation into HMR’s “prosecution of patent enforcement litigation regarding terfenadine and diltiazem.” This investigation was coming to a close during the middle of HMR’s patent infringement litigation with Andrx Corporation (“Andrx”).

HMR’s patent infringement litigation with Andrx and the resulting Stipulation and Agreement did not arise in a vacuum; the practices now challenged by Complaint Counsel can only be understood by reference to the circumstances that the parties faced at the time they entered into the Stipulation, including the environment created by the Commission’s investigation of HMR’s diltiazem-related patent litigation practices. Investigation 951-0057 put HMR on notice that the Commission would scrutinize actions taken by HMR in the course of litigation to enforce its patents to ensure that such litigation did not become a vehicle to drive other manufacturers out of business. Accordingly, HMR took an interest in the financial viability of Andrx pending resolution of the patent infringement litigation in order to avoid charges that they used of “hard-ball” litigation tactics to drive Andrx to extinction. This was the genesis of the Stipulation and Agreement at the heart of this case.

Documents requested by the Third Request are therefore relevant to establishing HMR’s motivation and intent in entering into the Stipulation and in agreeing to payments that would ameliorate Andrx’s working capital squeeze, and to support the procompetitive efficiencies of a Stipulation that permitted a cash-strapped Andrx to litigate the patent dispute,

“invent around” HMR’s patents, and bring a non-infringing generic product to market at the earliest possible moment.

To date, Complaint Counsel has identified only four documents that it claims to be responsive to the Third Request.⁸ Complaint Counsel now asserts that each of these four documents is shielded from discovery by the work product doctrine and the investigatory files privilege, and that two of them are protected by the informant’s privilege.⁹ As this Court has previously noted, each of these privileges is qualified and will yield to a showing by Respondent of “substantial need” for the requested documents.¹⁰ Even if Complaint Counsel can ultimately demonstrate that these privileges apply to the withheld documents,¹¹ HMR submits that it needs

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8. The fact that Complaint Counsel has, to date, collected only four documents from a Commission investigation that spanned a year and a half casts doubt on the extent to which Complaint Counsel’s “search” for responsive documents was truly “diligent.”
 9. Aventis questions the claims of work product for each and every document for an investigation that was closed without action. Aventis also question whether claims on Law Enforcement/Investigatory Files privilege are well grounded given the dearth of information contained in the file. For example, the lack of the Opening and Closing letters demonstrates that there is no longer a compelling law enforcement purpose behind the assertion of this privilege. In addition, as discussed below, any claim of informants privilege only covers the materials inasmuch as they may ultimately reveal the identity of the informer. All other relevant information is discoverable unless protected under some other ground. Finally, Aventis questions whether these privileges have been properly asserted under the August 18, 2000 Order on Motions to Compel Discovery from Complaint Counsel Filed by Andrx and by Aventis.
 10. August 18, 2000 Order on Motions to Compel Discovery from Complaint Counsel Filed by Andrx and by Aventis, at 6 (the “Aug. 18 Order”); *see* 16 C.F.R. § 3.31(c)(3) (FTC work product rule). As the Court noted, cases construing these three privileges express the “substantial need” requirement in slightly different language. Thus, application of the investigatory files privilege requires a balancing of the public interest in non-disclosure against the litigant’s need for access to privileged information, and the unavailability of requested documents from other sources would support a claim of need. Aug. 18 Order, at 4. Similarly, the informant’s privilege will not bar discovery of information concerning confidential informants where disclosure of the informer’s identity or the contents of his communication is relevant and essential to a fair determination of the action. *Id.* Finally, work product is discoverable upon a showing that the requesting party has a substantial need for the discovery and is unable to obtain substantially equivalent materials by other means without undue hardship. *Id.* at 5.
 11. “The party claiming privilege has the burden to establish its existence.” *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984).

access to the requested documents or their substantive equivalent¹² to properly and adequately defend itself in this action, that its need is substantial, and that the information that HMR seeks is not available from other sources.

The Third Request is directed at two categories of documents concerning File No. 951-0057: (1) documents concerning the existence and nature of the investigation, the concerns and issues toward which it was directed, and (2) in the event that the Commission has not retained adequate records from this investigation, documents identifying and describing communications with third parties that may have participated in the investigation who may have relevant information concerning these issues. These documents are critical to HMR's defense against the Complaint in this matter, not only because they support HMR's evidence as to its intention and motivations in entering into the Stipulation and the procompetitive efficiencies furthered by the Stipulation, but also because Complaint Counsel and Commission staff have repeatedly challenged HMR's rendition as to these issues. During the investigative stage of this matter, Commission staff suggested that HMR should have been motivated to litigate Andrx into oblivion in the patent case, and that any notion that HMR would have been concerned over Andrx's continued viability pending judicial resolution of HMR's patent infringement claims at

12. As noted, HMR attempted to obviate the need for a motion to compel by means of a stipulation from Complaint Counsel describing the existence and nature of the Commission's investigation, but agreement could not be reached regarding the language of the stipulation. While HMR could also attempt to obtain substantive information concerning File No. 951-0057 by deposition of the FTC attorneys that conducted the investigation, HMR has attempted to secure relevant documents from the FTC's records to minimize any inconvenience or disruption that discovery of such information might pose the Commission. *Cf.* 16 C.F.R. § 4.11(e)(3) (suggesting preference for production of agency records in lieu of deposition testimony in response to third-party subpoenas). In addition, in light of the lapse of time and potential hostility of Commission staff to Respondents in these Commission proceedings, information obtained by way of such a deposition arguably is not substantially equivalent to the contemporaneous documents contained in the Commission's investigative file. *See Rexford v. Olczak*, 176 F.R.D. 90, 93 (W.D.N.Y. 1997). *Compare* Nov. 14, 1996 Closing Letter (describing investigation as encompassing MMD's "prosecution of patent enforcement litigation regarding terfenadine and diltiazem") with Complaint Counsel's Sept. 14, 2000 privilege list (describing File No. 951-0057 as "the MMD/Seldane investigation").

the time of the Stipulation is preposterous. Complaint Counsel similarly appears to suggest that HMR's concern with Andrx's continued viability would be irrational unless HMR was actually motivated by an intent to exclude lawful generic competitors.¹³

Complaint Counsel's posture places HMR in the untenable position of potentially being prosecuted in this matter for actions taken as a direct result of, and in response to, contemporaneous Commission enforcement activity -- and, if Complaint Counsel is sustained in its objections, without critical substantiating documentation to offer in its defense. A fair adjudication of this matter demands that HMR be given access to the specifically identified information in the Commission's possession that will permit HMR to substantiate its defenses and meet the allegations leveled by Complaint Counsel. Complaint Counsel should not be permitted to posit hypothetical challenges to HMR's rendition of events while withholding information in its control that would substantiate HMR's claims.¹⁴

Moreover, the requested information is not available from any other source. While piecemeal information concerning specific Commission inquiries may be available from third parties,¹⁵ only Commission records can describe definitively and authoritatively the nature

13. See Complaint Counsel's Statement of the Case, at 7.

14. Complaint Counsel's suggestion that documents from File No. 951-0057 are not subject to discovery because neither Complaint Counsel nor its experts intend to rely on them, ostensibly in reliance on this Court's Aug. 18 Order (*see* Objections at 3), is inapposite. In its Aug. 18 Order, this Court determined that, absent a showing of "substantial need" by Respondents for documents from unidentified Commission files, Complaint Counsel need only produce those relevant responsive documents that "Complaint Counsel intends to rely on or refer to" or that an FTC testifying expert has reviewed or relied upon. (Aug. 18 Order, at 6.) As more fully described above, HMR has a substantial need for the documents contained in File No. 951-0057 in order to adequately defend this action, and these documents are relevant to issues that are central to this litigation and that Complaint Counsel has placed in issue. Under such circumstances, "there is no principled basis for Complaint Counsel to restrict its search for documents to the material contained in the file of a single investigation." (Aug. 18 Order, at 5 (citing *Exxon Corp.*, 1980 FTC Lexis 121, at *5-6 (Feb. 8, 1980)).)

15. Complaint Counsel's privilege list indicates that Commission had some contact with employees of the U.S. Food and Drug Administration ("FDA") in connection with this investigation. Respondents' subpoenas to the
(continued...)

and objectives of its investigation under File No. 951-0057, the issues and facts that piqued staff's concern and the potential FTC Act violations that staff feared, and the efforts undertaken by staff to investigate these matters. Only the Commission can say what its investigation was about, and the existence and nature of this investigation are critical to understanding HMR's actions in its patent litigation with Andrx, including its motivations in entering into the Stipulation. The apparent inconsistency between contemporaneous descriptions of File No. 951-0057 (*see, e.g.*, Closing Letter (closing investigation of MMD practices involving "the prosecution of patent enforcement litigation regarding terfenadine and diltiazem")) and Complaint Counsel's current descriptions (*see, e.g.*, Complaint Counsel's privilege list (denominating File No. 951-0057 as "the MMD/Seldane investigation")) clearly demonstrates that the only reliable source of the information that HMR seeks is the contemporaneous documents themselves.

15. (...continued)

FDA are currently the subject of motions to quash filed by FDA, and respondents have been unable to obtain any documents from the FDA even after almost three months of effort. Complaint Counsel has also indicated that Commission staff contacted a third-party generic manufacturer in the course of the investigation. Because these parties are likely, at best, to be able to provide only a "snapshot" of one aspect of the Commission's investigation, they are a pale substitute for the authoritative documentation in the Commission's possession. Moreover, citing informant's privilege, the Commission has refused to produce information identifying others whom staff contacted during this investigation, thereby leaving HMR without alternative sources.

Complaint Counsel's selective invocation of the informant's privilege calls into question the significance of any putative public interest it may have in keeping the identities of the persons it contacted in this investigation secret. Even assuming that Complaint Counsel could plausibly maintain that a public interest in maintaining the confidentiality of some of the participants in its investigation outweighed HMR's legitimate need to obtain this information – which it demonstrably cannot – such a showing would not prevent Complaint Counsel from producing the *substance* of any information obtained. *See* 6 James Wm. Moore *et al.*, *Moore's Federal Practice* § 26.52[7], at 26-197 (3d ed. 2000) (informant's privilege "only protects the identities of informants," but "[a]ll other relevant information contained in the communication is discoverable, unless privileged on some other ground").

Documents withheld by Complaint Counsel, in particular those setting forth factual matters investigated by Commission staff,¹⁶ appear to provide the very factual information that HMR needs in order to defend itself against Complaint Counsel's hypothetical allegations of anticompetitive intent and to sustain its burden of demonstrating the procompetitive efficiencies of the Stipulation. Even if some responsive information might be available from third parties, Complaint Counsel further objects to divulging the identities of persons it contacted during the investigation, thereby effectively rendering any such hypothetical information sources unavailable. To the extent this information is factual, Complaint Counsel retains the ability to mask the identity of the informants.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent respectfully requests that this Court enter an Order compelling Complaint Counsel to produce the documents requested in the Third Request, and grant such further relief as the Court may deem just and proper.

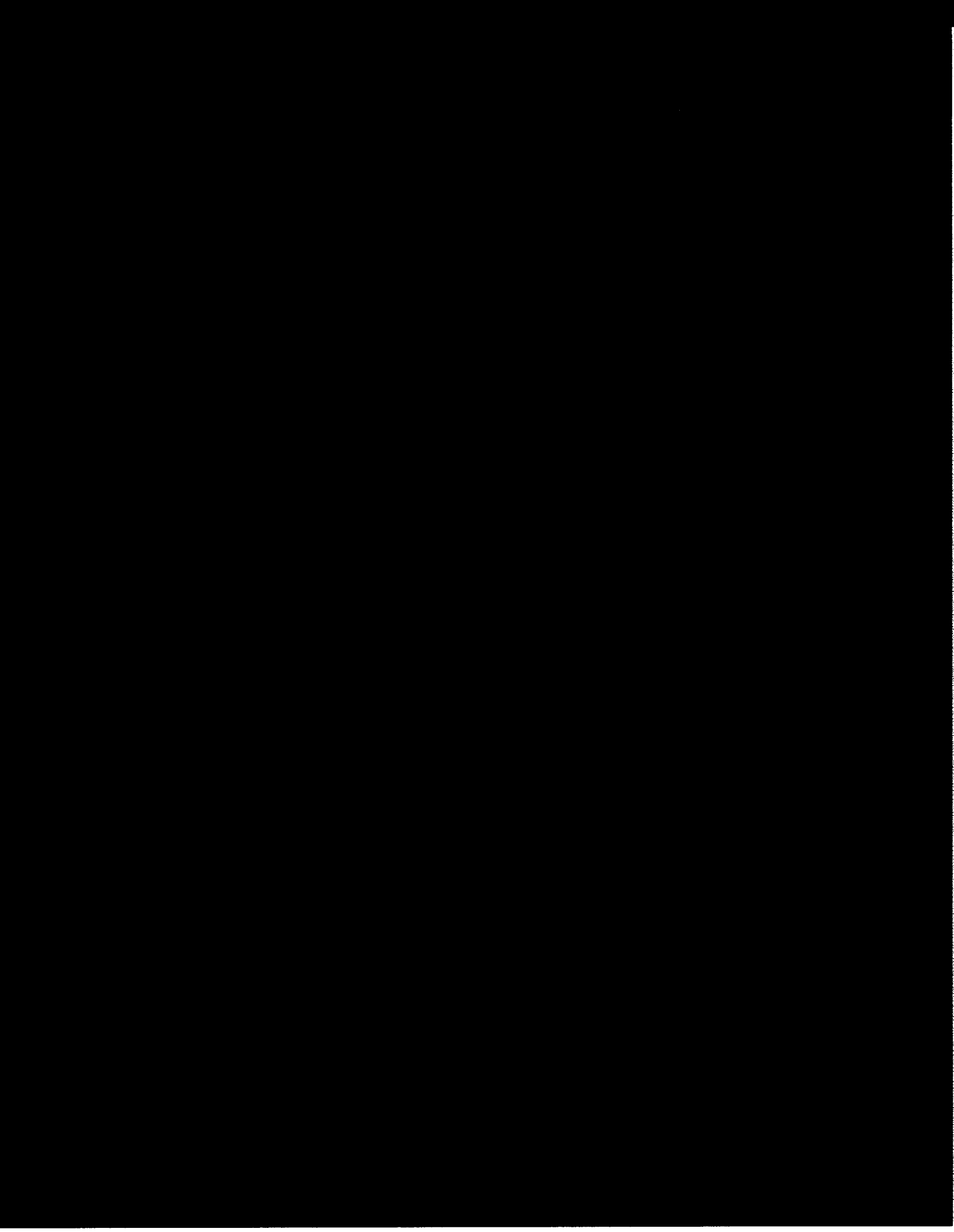
Dated: October 5, 2000

Respectfully Submitted,



James M. Spears
Paul S. Schleifman
D. Edward Wilson, Jr.
Peter D. Bernstein
SHOOK HARDY & BACON, LLP
600 Fourteenth Street, N.W., Suite 800
Washington, D.C. 20005-2004
(202) 783-8400

16. See, e.g., entry nos. 1 and 4 on Complaint Counsel's privileged document list (described as analyses of factual issues concerning the Commission's investigation).



**UNITED STATES OF AMERICA
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

**ORDER GRANTING AVENTIS PHARMACEUTICALS, INC.'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

On October 5, 2000, Aventis Pharmaceuticals, Inc. filed a motion to compel production of documents requested by Respondent's Third Request for the Production of Documents. Respondent's motion is GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October __, 2000



**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
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and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

**DECLARATION OF PETER D. BERNSTEIN IN SUPPORT
OF AVENTIS PHARMACEUTICALS, INC.'S
MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL PRODUCTION OF DOCUMENTS**

I, Peter D. Bernstein, pursuant to 28 U.S.C. § 1746, declare as follows,:

1. I am associated with the firm of Shook Hardy & Bacon LLP, counsel for respondent Aventis Pharmaceuticals, Inc. ("Aventis").
2. Stacy Ehrlich, counsel for Carderm Capital L.P., and Hal Shaftel, counsel for Andrx Corporation, have consented to the application. Bradley Albert, a Commission attorney serving as Complaint Counsel, has indicated that Complaint Counsel opposes this motion.
3. Respondent Aventis Pharmaceuticals, Inc.'s Third Request for the Production of Documents was served on August 2, 2000. (Exhibit A). Complaint Counsel's served Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s Third Request for the Production of Documents on August 22, 2000. (Exhibit B). During a telephone conference, counsel for Aventis requested that the Commission provide a stipulation to the effect that the Commission had opened an investigation into HMR's patent litigation practices, describing the nature of the Commission's investigation, and that the Commission had closed its investigation without taking action.

4. Following a series of telephone discussions, Complaint Counsel sent a letter dated September 14, 2000 forwarding a log of privileged documents. (Exhibit C). In that letter Complaint Counsel confirmed that the four privileged documents listed on the log represented the universe of responsive document in the possession of the Commission.

5. In lieu of the production of documents, Respondent proposed that Complaint Counsel provide a stipulation describing the nature of the Commission's investigation and stating that the Commission closed its investigation without taking action. Agreement could not be reached on the language of the stipulation and, in an October 4, 2000 telephone conference, it was confirmed that the parties reached an impasse as to these matters.


6. Annexed hereto as Exhibit D is a copy of a letter from Dennis F. Johnson, Deputy Assistant Director, Bureau of Competition to William K. Hoskins, Vice President, General Counsel and Secretary, Hoechst Marion Roussel, Inc., dated July 28, 1995.

7. Annexed hereto as Exhibit E is a copy of a letter from Michael D. McNeely Assistant Director, Bureau of Competition to Thomas B. Pahl, Esq., outside counsel for Aventis, dated November 14, 1996

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

Executed in Washington, D.C., on October 4, 2000

Respectfully Submitted,



Peter D. Bernstein

Exhibit A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
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DOCUMENT PROCESSING

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

**RESPONDENT AVENTIS PHARMACEUTICALS, INC.'S
THIRD REQUEST FOR THE PRODUCTION OF DOCUMENTS**

Pursuant to Federal Trade Commission ("FTC") Rules of Practice for Adjudicative Proceedings ("Rule of Practice") § 3.37, Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc., by counsel, submits these requests for production of documents to the FTC. Respondent requests that the FTC begin producing documents or things responsive to these requests, within its possession, custody or control, within twenty (20) business days for inspection and copying by counsel for respondent at the offices of Shook, Hardy & Bacon LLP, 600 14th Street, N.W., Suite 800, Washington, D.C. 20005, in accordance with the Instructions set forth below.

DEFINITIONS AND INSTRUCTIONS

1. As used herein, "Andrx" means Andrx Pharmaceuticals, Inc., and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

2. As used herein, "Biovail" shall refer to Biovail Corporation with its principal place of business in Mississauga, Ontario, Canada, and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

3. As used herein, "document" or "documents" shall include, without limitation, originals, masters and every copy of writings and printed, typed and other graphic or photographic matter, including microfilm of any kind or nature, recordings (tape, diskette or other) of oral communications, other data compilations and every other tangible thing from which information can be obtained, including, without limitation, magnetic or electronic media, in the possession, custody or control of plaintiff or any present or former officer, employees or agents thereof, or known by plaintiff to exist. The term "document" or "documents" shall include, without limiting the generality of the foregoing, all computer files, electronic mail, letters, telegrams, teletypes, correspondence, contracts, agreements, notes to the files, notebooks, reports, memoranda, mechanical and electronic sound recordings or transcripts thereof, blueprints, flow sheets, formal or information drawings or diagrams, calendar or diary entries, memoranda of telephone or personal conversations of meetings or conferences, studies, reports, interoffice communications, price lists, bulletins, circulars, statements, manuals, summaries of

compilations, minutes of meetings, maps, charts, graphs, order papers, articles, announcements, books, catalogs, records, tables, books of account, ledgers, vouchers, canceled checks, invoices or bills. A draft or nonidentical copy is a separate document within the meaning of this term.

4. As used herein, "Faulding" means Faulding Inc. and its predecessors, successors, assigns and present and/or former affiliates and subsidiaries and any of its respective officers, directors, employees, agents, attorneys, representatives, economic consultants, lobbyists, public relations consultants or any person acting or purporting to act on its behalf.

5. As used herein, "FTC" means the United States Federal Trade Commission, including without limitations its employees, investigators, agents, consultants and special governmental employees.

6. As used herein, "HMR" means Hoechst Marion Roussel, Inc., its successors, predecessors and the officers, directors, employees, partners, subsidiaries, corporate parents, affiliates and divisions of each of the foregoing, including but not limited to Marion Merrell Dow, Inc.

7. As used herein, "person" includes any natural person, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.

8. As used herein, "relate" means concerns, refers to, describes, forms the basis for, evidences or constitutes, and the term "relating" means concerning, referring to, describing, evidencing or constituting.

9. As used herein, "Third Parties" means any person that is not a named party in FTC File No. 951-0055 and includes, but is not limited to Andrx, Biovail, Faulding, and their respective officers, directors, employees, agents, attorneys, representatives, economic

consultants, lobbyists, public relations consultants or any person acting or purporting to act on their behalf.

10. 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.

11. The term “all” shall be construed as all and each, and the term “each” shall be construed as all and each.

12. The use of the singular form of any word includes the plural, and vice versa.

13. 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.

14. Unless otherwise stated, the scope of this request is from January 1, 1993 through the present and is continuing in nature. If, after producing documents, the FTC obtains or becomes aware of any further documents, or information responsive to this request for production of documents, the FTC is required to produce to HMR such additional documents and/or to provide HMR with such additional information.

15. Compliance with this document request requires a search of all documents in the possession, custody, or control of the FTC’s current or former officers, directors, employees, agents, or representatives, whether or not such documents are on the premises of the FTC. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive

documents, the FTC must provide counsel serving this request with the following information as to each such person: his or her name, address, telephone number, and relationship to the FTC.

This subpoena covers documents in your possession, custody or control, wherever the documents are located.

16. If any requested documents cannot be produced in full, produce the remainder and state whatever information, knowledge, or belief the FTC has concerning the unproduced portion.

17. In addition to hard-copy documents, the search will include all the FTC's electronically stored data. Sources of such data include, but are not limited to, the following:

- (a) Desktop personal computers ("PCs") and workstations; PCs, workstations, minicomputers and mainframes used as file servers, application servers, or mail servers; laptops, notebooks, hand-held devices and other portable computers available for shared use; and home computers used for work related purposes;
- (b) Backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether stored onsite with the computer used to generate them, stored offsite in another facility or stored offsite by a third-party, such as in a disaster recovery center; and
- (c) Computers and related offline storage used by agents, consultants, and other persons as defined herein, which may include persons who are not employees of the FTC or who do not work on FTC premises.

18. The FTC will submit all documents, including electronically-stored documents, in hard copy. In addition to the hard copies, the FTC will submit the electronically-stored documents in machine readable form.

19. The source and location of each responsive document shall be designated, including the person from which it was obtained. Responsive documents from each person's files shall be produced together, in file folders or with other enclosures that segregate the files by request number. If a document is responsive to more than one request, it shall be produced in

response to the request to which it is primarily responsive. An index of responsive documents is requested in hard copy and machine-readable form identifying for each document produced: (1) the identification and consecutive control number; (2) the numbered request(s) to which it is responsive; (3) the person from whom the document was obtained; and (4) for documents generated by the recipient, the person and/or file name or number from which it was obtained.

20. In the event that the FTC withholds any document on the basis that it is privileged, subject to work-product immunity, or is otherwise excludable from discovery, the FTC is requested to list such documents by request number and to provide the following information:

- (a) the identity of the authors;
- (b) the identity of all recipients;
- (c) the date of the document;
- (d) the subject matter or purpose of the document or report;
- (e) the nature of the relationship between the authors and counsel with sufficient particularity to sustain the asserted privilege;
- (f) whether direct quotes or paraphrases of advice from counsel were identified;
- (g) whether such quotes could be redacted, leaving non-privileged information; and,
- (h) any other information necessary to reveal the basis upon which the document is withheld to provide HMR with sufficient information to determine whether the stated basis for withholding the document is proper.

21. If any document responsive to these requests once existed but has been destroyed, lost, discarded or is otherwise not available for production, the recipient shall identify in writing each such document, including the date of the document's creation, a description of the document's subject matter, the name and address of each person who prepared, received, viewed,

or had possession, custody or control of the document or otherwise had knowledge of its subject matter, and a statement of the circumstances under which the document was destroyed, lost, discarded or why such document is otherwise not available for production.

22. If the FTC has produced documents to HMR responsive to this request as part of the Third Party materials collected during the course of the pre-complaint investigation of this matter, FTC File No. 981-0368, those documents need not be produced again, provided that the FTC clearly indicates in its answers to the document request the location within the Third Party materials where responsive information resides.

23. If the FTC believes documents responsive to this request originated from HMR, the FTC need not produce those documents, provided that the FTC provides the location within the HMR materials where responsive information resides.

DOCUMENT REQUESTS

Request No. 1: All documents submitted to the FTC voluntarily or through compulsory process by any Third Party in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 2: All transcripts of all depositions, investigational hearings, or formal, informal or sworn statements, including all exhibits thereto, taken by the FTC of or from Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 3: All statements, including but not limited to responses to interrogatories, responses to civil investigative demands and subpoenas, statements, memoranda and white papers, and affidavits and declarations provided to the FTC by Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 4: All communications, including but not limited to letters, notes, documents relating to telephonic communications or meetings, electronic mail messages or voice mail messages, between the FTC and any Third Party in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 5: All documents sufficient to identify each person with whom the FTC communicated in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 6: All documents reflecting statements made by third parties in meetings, interviews, or other communications with the FTC in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Request No. 7: All civil investigative demands, subpoenas or other formal or informal requests for materials and information issued by the FTC to Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Hoechst Marion Roussel, Inc., et al.,

Respondents.

Docket No. 9293

CERTIFICATE OF SERVICE

I, Peter D. Bernstein, hereby certify that on August 2, 2000, a copy of Aventis Pharmaceuticals, Inc.'s Third Request for Production was served upon the following persons by hand delivery and/or Federal Express as follows:

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

Markus Meier
Federal Trade Commission
Room 3017
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

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

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

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

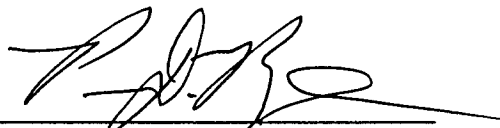

Peter D. Bernstein

Exhibit B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

HOECHST MARION ROUSSEL, INC.,
a corporation,

CARDERM CAPITAL L.P.,
a limited partnership,

and

ANDRX CORPORATION,
a corporation.

Docket No. 9293

**COMPLAINT COUNSEL'S OBJECTIONS AND RESPONSES TO
RESPONDENT AVENTIS PHARMACEUTICALS, INC'S
THIRD REQUEST FOR THE PRODUCTION OF DOCUMENTS**

Pursuant to Federal Trade Commission Rules of Practice Section 3.37(b), 16 C.F.R. § 3.37(b), complaint counsel submit these Objections and Responses to Respondent Aventis Pharmaceuticals, Inc.'s, formerly known as Hoechst Marion Roussel, Inc., Third Request for the Production of Documents. Our provision of a response and production of any document shall not constitute a waiver of any applicable objection, privilege or other right.

GENERAL OBJECTIONS

The following general objections apply to each of Aventis's document requests:

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

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

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

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

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

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

2. Complaint counsel object to each request, instruction, or definition to the extent it

seeks to impose obligations broader than those required or authorized by the Federal Trade Commission Rules of Practice for Adjudicatory Proceedings or any applicable order or rule of this Court.

3. Complaint counsel object to each request to the extent that it seeks information not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

4. Complaint counsel object to each request to the extent it seeks production of confidential information acquired through compulsory process, or produced voluntarily in lieu of compulsory process, in an unrelated investigation, FTC File No. 951-0057. Complaint counsel has no intention of relying on, or referring to, any documents from FTC File No. 951-0057 in prosecuting its case. No document from FTC File No. 951-0057 has been relied upon, reviewed, consulted, or examined by a testifying expert in connection with forming an opinion on the subject on which he is expected to testify. All documents produced in FTC File No. 951-0057 are privileged or confidential under 15 U.S.C. §§ 46(f), 57b-2(b), and 18a(h) as well as 16 C.F.R. § 4.10(d). Therefore, consistent with the Court's August 18, 2000 order, entered in FTC Docket No. 9293, documents from FTC File No. 951-0057 are not discoverable by respondents in this action. Complaint counsel further object to these requests because information obtained in other matters, not relied on by complaint counsel, is not reasonably calculated to lead to the discovery of admissible evidence.

5. The failure of complaint counsel to object to any specific request on a particular ground shall not be construed as a waiver of its rights to object on any additional ground(s).

Complaint counsel reserves its rights to amend or supplement its objections and responses to these requests consistent with further investigation and discovery.

6. Complaint counsels' decision to produce documents in response to Aventis's Third Request for the Production of Documents, notwithstanding any objections to any of the definitions, requests, or instructions, should not be construed as: (a) an admission that the produced documents are relevant; (b) a waiver of the general or specific objections asserted herein; or (c) an agreement that requests for similar information will be treated in a similar manner. Complaint counsel specifically reserve all objections as to the competency, relevancy, and admissibility of the information provided; all objections as to burden, vagueness, unintelligibility, over-breadth and ambiguity; and all rights to object to the use of any documents or information in any other proceeding.

OBJECTIONS TO INSTRUCTIONS

7. Complaint counsel object to Instruction 14 to the extent it requires complaint counsel to search for documents extending back to January 1, 1993 on the grounds that it is unduly burdensome and not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

8. Complaint counsel object to Instruction 19 to the extent it requires complaint counsel to sort or otherwise segregate documents. Complaint counsel will produce documents, if any, as they are kept in the ordinary course of business.

9. Complaint counsel object to Instruction 20 to the extent that it purports to require complaint counsel to identify, as to each document withheld based upon a claim of privilege, all

of the information set forth in the instruction as to each and every individual document. Appropriate categories of documents may be submitted where, as here, a full and complete log as to each withheld document would be unduly burdensome. This approach is particularly appropriate where the privileged nature of the materials that are combined in general categories is facially apparent.

10. Complaint counsel object to Instruction 21 on the ground that it is unduly burdensome.

OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

Request No. 1: All documents submitted to the FTC voluntarily or through compulsory process by any Third Party in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

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

Request No. 2: All transcripts of all depositions, investigational hearings, or formal, informal or sworn statements, including all exhibits thereto, taken by the FTC of or from Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

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

Request No. 3: All statements, including but not limited to responses to interrogatories, responses to civil investigative demands and subpoenas, statements, memoranda and white papers, and affidavits and declarations provided to the FTC by Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

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

Request No. 4: All communications, including but not limited to letters, notes, documents relating to telephonic communications or meetings, electronic mail messages or voice mail messages, between the FTC and any Third Party in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Response: In addition to the foregoing general objections, complaint counsel object to this request to the extent it seeks information protected from disclosure by the work-product and law-enforcement investigatory files privileges.

Request No. 5: All documents sufficient to identify each person with whom the FTC communicated in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Response: In addition to the foregoing general objections, complaint counsel object to this request to the extent it seeks information protected from disclosure by the work-product, law-enforcement investigatory files, and government-informant privileges.

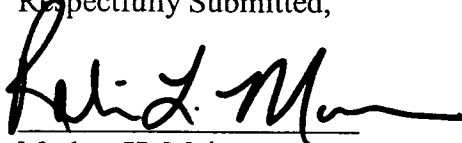
Request No. 6: All documents reflecting statements made by third parties in meetings, interviews, or other communications with the FTC in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

Response: In addition to the foregoing general objections, complaint counsel object to this request to the extent it seeks information protected from disclosure by the work-product, law-enforcement investigatory files, and government-informant privileges.

Request No. 7: All civil investigative demands, subpoenas or other formal or informal requests for materials and information issued by the FTC to Third Parties in connection with or relating in any manner to Hoechst Marion Roussel, Inc., FTC File No. 951-0057.

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

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Markus H. Meier", written over a horizontal line.

Markus H. Meier
Robin L. Moore

Counsel Supporting the Complaint

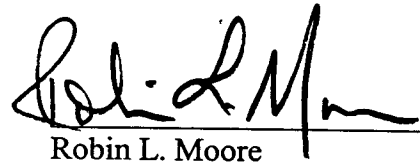
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: August 22, 2000

CERTIFICATE OF SERVICE

I, Robin L. Moore, hereby certify that on August 22, 2000, I caused a copy of Complaint Counsel's Objections and Responses to Respondent Aventis Pharmaceuticals, Inc's Third Request for the Production of Documents to be served upon the following person by Federal Express and by facsimile:

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



Robin L. Moore

Exhibit C



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

Bureau of Competition

September 14, 2000

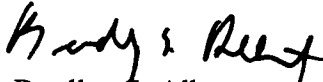
Peter D. Bernstein
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W.
Suite 800
Washington, DC 20005-2004

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

Dear Peter:

As we discussed today, this letter is in further response to Aventis' Third Request for the Production of Documents. Complaint counsel has made a diligent search of all FTC files where responsive documents might be kept. Based on this search, there exist no non-privileged documents responsive to your request. The attached privilege log identifies those documents which we have withheld on the basis of privilege. Should you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,


Bradley S. Albert

cc: Louis M. Solomon, Esq.
Peter O. Safir, Esq.

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

COMPLAINT COUNSELS' LIST OF PRIVILEGED DOCUMENTS

September 14, 2000

Privilege Abbreviations:
IP - Informants Privilege
LE - Law Enforcement/Investigatory Files Privilege
WP - Work Product

No.	Date	Title	Author	Recipient	Description	Privilege	Basis of Claim
1	5/4/94	Interview Report	Susan Pettee	File	Analysis of factual issues concerning MMD/Seldane investigation.	LE WP IP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation, and identifies informants.
2	Undated	Draft Memorandum	Susan Pettee		Analysis of legal and factual issues concerning MMD/Seldane investigation.	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
3	Undated	Letter	Susan Pettee	Gordon Johnston Division of Generic Drugs, FDA	Request for nonpublic information relating to the MMD/Seldane investigation	LE WP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation.
4	Undated	Interview Report	Susan Pettee	File	Analysis of factual issues concerning MMD/Seldane investigation.	LE WP IP	Reflects notes, impressions, or analyses prepared in anticipation of Commission litigation, and identifies informants.

Exhibit D



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

Bureau of Competition
~
Dennis F. Johnson
Deputy Assistant Director
~
Direct Dial:
(202) 326-2712

July 28, 1995

BY TELECOPY AND FIRST CLASS MAIL

William K. Hoskins, Esq.
Vice President, General Counsel and Secretary
Hoechst Marion Roussel, Inc.
9300 Ward Parkway
Kansas City, MO 64114

Re: File No. 951-0057

Dear Mr. Hoskins:

The Commission is currently investigating whether actions against manufacturers or suppliers of products competing or potentially competing with products of Hoechst Marion Roussel, Inc., or its predecessor, Marion Merrell Dow, Inc. ("MMD") are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The drugs at issue ("Subject Drugs") include terfenadine, diltiazem, sucralfate, nicotine polacrilox, and any other pharmaceuticals as to which MMD's patent or other exclusive rights, whether personal or derivative, expired or are due to expire between January 1, 1990, and December 31, 1999.

As part of its investigation, the Commission may require that your company submit documents in the future. We therefore request that your company and its affiliates preserve all documents that may pertain to this investigation, including but not limited to all documents relating to:

- A. Competition in the manufacture or sale of the Subject Drugs or their generic equivalents or therapeutic substitutes;
- B. Planning for the marketing or sale of the Subject Drugs by MMD;

Mr. William K. Hoskins
July 28, 1995
Page 2

C. Any efforts by MMD to prevent or delay the marketing of generic equivalents or therapeutic substitutes of any Subject Drug, including, without limitation, all documents relating to any litigation or administrative action concerning the right of any person to distribute any such drug in the United States. Specifically included in this paragraph are all documents filed with any court or agency, all discovery materials (documents produced by or to MMD, deposition or trial transcripts, etc.), and all materials relating to such actions in the possession of MMD or its agents (including lawyers and expert witnesses), whether or not you believe any such documents are protected by any claim of privilege or immunity;

D. Any patent, whether or not currently in force, relating to any of the subject drugs or its competitors;

E. Any right of exclusivity, whether or not currently available, relating to any of the subject drugs or its competitors;

F. Any plans, proposals, strategies, options or possible courses of conduct to respond to the lapsing or expiration of any patent or exclusivity right relating to the Subject Drugs;

G. Sales, costs, prices, margins and profits of the Subject Drugs.

This request to preserve documents includes all means of preserving information, whether written documents, audio or videotape or other media, or data compilations. Please preserve all versions of any such documents, including drafts, and whether in paper, electronic or other form.

Any destruction of relevant documents may violate 18 U.S.C. § 1505, which makes it unlawful for anyone to influence, obstruct or impede the due and proper administration of the law.

Please contact Richard Liebeskind at (202) 326-2441 if you have any questions regarding this letter. Thank you for your cooperation in this matter.

Sincerely,



Dennis F. Johnson
Deputy Assistant Director

Exhibit E



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

Bureau of Competition

Michael D. McNeely
Assistant Director

Direct Dial
(202) 326-2904

November 14, 1996

BY TELECOPY AND FIRST CLASS MAIL

Thomas B. Pahl, Esquire
Gadsby & Hannah, L.L.P.
1747 Pennsylvania Avenue, N.W.
Washington, DC 20006-4604

Re: Hoechst Marion Roussel
FTC File No. 951-0057

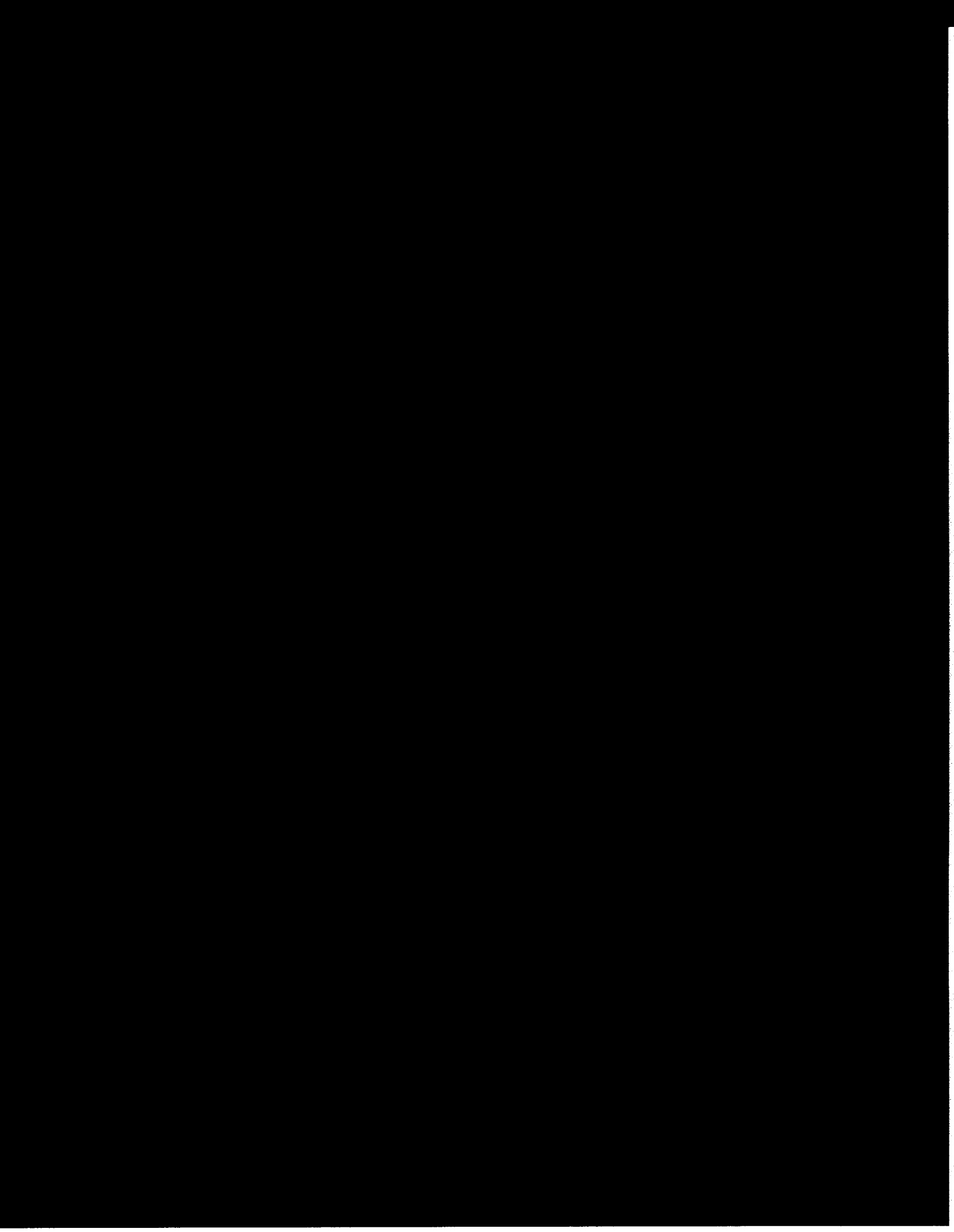
Dear Mr. Pahl:

The Commission has conducted a preliminary inquiry involving possible violations of the Federal Trade Commission Act by Marion Merrell Dow, through the prosecution of patent enforcement litigation regarding terfenadine and diltiazem.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, this investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

Handwritten signature of Michael D. McNeely in cursive script.
Michael D. McNeely



**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

Hoechst Marion Roussel, Inc., et al.,

Respondents.

Docket No. 9293

CERTIFICATE OF SERVICE

I, Peter D. Bernstein, hereby certify that on October 5, 2000, a copy of Aventis Pharmaceuticals, Inc.'s Memorandum in Support of Motion to Compel Production of Documents was served upon the following persons by hand delivery and/or Federal Express as follows:

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

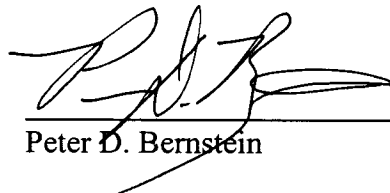
Markus Meier
Federal Trade Commission
Room 3017
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

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

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

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



Peter D. Bernstein