

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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In the Matter of )  
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HOECHST MARION ROUSSEL, INC., )  
a corporation, )  
)

CARDERM CAPITAL L.P., )  
a limited partnership, )  
)

and )  
)

ANDRX CORPORATION, )  
a corporation. )  
\_\_\_\_\_ )

Docket No. 9293

**ORDER DENYING AVENTIS' MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS FROM COMPLAINT COUNSEL**

**I.**

On October 5, 2000, Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc., ("HMR") filed a motion to compel Complaint Counsel to produce documents responsive to Aventis' Third Request for the Production of Documents. Complaint Counsel filed its opposition to Aventis' motion to compel on October 16, 2000. For the reasons set forth below, Aventis' motion is DENIED.

**II.**

Aventis seeks documents concerning the existence and nature of FTC Investigation File No. 951-0057 and documents demonstrating the actions taken by Commission staff in pursuing that investigation. According to both parties to this dispute, Investigation No. 951-0057 was an FTC investigation into HMR's prosecution of patent enforcement litigation regarding terfenadine and diltiazem.

Aventis asserts that Investigation No. 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, Aventis contends that HMR took an interest in the financial viability of Respondent Andrx Corp. ("Andrx") pending resolution of the patent infringement litigation between HMR and Andrx in order to avoid charges that they used "hard-ball" tactics to drive Andrx to

extinction. Aventis further asserts that such interest “was the genesis of the Stipulation and Agreement at the heart of this case.” Aventis Memorandum at 4. For this reason, Aventis contends that it needs documents from FTC Investigation File No. 951-0057.

Complaint Counsel maintains that documents from FTC Investigation File No. 951-0057 are not relevant to the issues in this litigation because this litigation does not allege that Aventis engaged in unlawful or sham patent litigation. Complaint Counsel asserts that even if the documents from this prior investigation into HMR’s patent litigation tactics were relevant to the context in which the Stipulation and Agreement arose, the documents are protected from disclosure by various privileges, including the law-enforcement, work-product, and government informant privileges. Complaint Counsel argues that Aventis has not demonstrated substantial need for the documents to overcome these privileges.


### III.

The law enforcement investigatory files privilege protects from disclosure investigatory files compiled for law enforcement purposes that would tend to reveal law enforcement techniques or sources. *Black v. Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977). The government informer privilege protects from disclosure the identity of confidential government informants. *McCray v. Illinois*, 386 U.S. 300 (1967). Governmental privileges must be formally asserted and delineated in order to be raised properly. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)(citations omitted). The claiming official must have seen and considered the contents of the documents and himself have formed the view that, on grounds of public interest, they ought not be produced and state with specificity the rationale of the claimed privilege. *Id.* To the extent Complaint Counsel seeks to shield the withheld documents from discovery by asserting the law enforcement privilege, it must satisfy these procedural requirements. See Order on Motions to Compel Discovery From Complaint Counsel Filed by Andrx and by Aventis, Docket No. 9293, August 18, 2000.

The work product privilege protects from disclosure the work product of lawyers, but may be overcome by a showing of substantial need. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); 16 C.F.R. § 3.31(c)(3). From a review of the pleadings and the privilege log, it is evident that the withheld documents are protected from disclosure by the work product privilege. Even if relevant, Aventis has not demonstrated substantial need for the requested documents sufficient to overcome the work product privilege.

Accordingly, Aventis’ motion to compel is DENIED.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: October 31, 2000