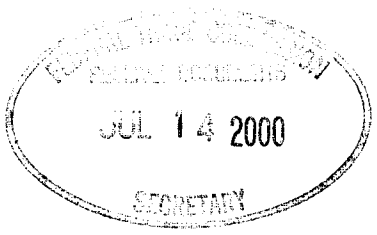
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

TO: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S RESPONSE TO HOECHST'S JULY 10 MOTION FOR LEAVE

Complaint counsel submits this response to the fifteen page "limited" Motion of Aventis Pharmaceuticals, Inc. for Leave to File Limited Reply to Complaint Counsel's Opposition to Respondents' Motions to Compel ("Hoechst's July 10 Motion for Leave"). Currently, pending before this Court are two separate motions for leave submitted by complaint counsel to file additional papers relating to our motion to strike as legally insufficient certain affirmative defenses raised by respondents. Hoechst has opposed both of these motions because they supposedly raise no "new point of fact or law which could not have been anticipated" in the original motion. *Litton Indus., Inc.*, 1979 FTC Lexis 333, *1 (June 12, 1979). Should the Court agree with Hoechst and deny complaint counsel's motions for leave on this basis, we respectfully submit that the Court also should deny Hoechst's July 10 Motion for Leave for the same reason. In fact, Hoechst's original Motion to Compel not only anticipated the very issues addressed in its

Motion for Leave, but it addressed these issues directly. Hoechst's attempt to manufacture issues for reply out of purported "mischaracterizations" and "a novel theory of law" (Motion for Leave at 2) is an attempt to end run the very legal standard Hoechst raised in its prior filings with this Court.

1. The "Burdensomeness" and "Relevancy" Arguments Raised in Hoechst's July 10 Motion for Leave Were Squarely Addressed by Hoechst in its Motion to Compel.

Although paying lip service to the legal standard for grant of a motion for leave – "rais[ing] some new point of fact or law which could not have been anticipated in the original motion"[1] – Hoechst claims that its Motion for Leave is warranted in part by a "novel theory of law" advanced by complaint counsel "to defeat the document request on grounds of burdensomeness and relevancy." (Motion for Leave at 2). This assertion is nothing more than an attempt by Hoechst to take another bite at the apple on issues that were squarely addressed in that Motion: "burdensomeness"[2] and "relevancy."[3]

Rehashing old arguments, Hoechst tries to cast its discovery requests as being "narrowly tailored." Hoechst's own two-page restatement of its so-called narrowly tailored requests confirm, however, the broad scope and burdensome nature of these requests. *See e.g.* Motion for Leave at 3-4. Indeed, Hoechst's requests would require complaint counsel to conduct a comprehensive sweep of the Commission's non-public investigations involving various

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[1] *Litton Indus., Inc.* 1979 FTC Lexis 333, *1 (June 12, 1979).

[2] *See e.g.,* Motion to Compel at 5 (challenging "Complaint Counsel's bald and unsupported protestations of the alleged *burdensomeness* of providing relevant discovery") (emphasis added).

[3] *See e.g.,* Motion to Compel at 4 ("Complaint Counsel has apparently taken the position that information pertaining to the claims in litigation here that is found in any Commission file other than File No. 981-0368 is *irrelevant* to these proceedings") (emphasis added).

participants in the pharmaceutical industry. In the past three years alone, the Commission has opened 164 investigatory files in this industry, eighteen of which remain open. In order to respond to Hoechst's discovery demands, we would need to review not only these files for responsive information, but also the countless other pharmaceutical industry investigations conducted by the FTC all the way back to 1993. Such a burden should not be imposed on complaint counsel where Hoechst's relevancy arguments are strained (*see* Op. to Motion to Compel at 20-25), and where complaint counsel has properly asserted numerous well-established privileges (*see* Op. to Motion to Compel at 2-13).

2. Hoechst Distorts the Nature of the Dispute over Its Broad Requests for Documents from Unrelated FTC Proceedings.

Hoechst's alternative basis for its Motion for Leave is the purported "mischaracteriz[ation]" by complaint counsel of "the scope and nature of the disputed document request." (Motion for Leave at 2). Again, under the *Litton Industries* standard cited by Hoechst, a purported "mischaracterization" is not a sufficient basis for grant of a motion for leave.

In any event, it is Hoechst that has distorted the scope of the disputed discovery requests in an effort to hide their actual breadth. In particular, Hoechst complains that it cannot "replicate, in a matter of a few short months, the sort of comprehensive document collection that has occupied the Commission's staff for years." (Motion for Leave at 9-10). But there is no need for Hoechst to "replicate" the Commission's pre-complaint investigation, because we already provided Hoechst with all non-privileged materials from that investigation. Instead, what Hoechst seeks to "replicate" through its overly expansive documents requests, is the sum total of the Commission's investigations of mergers and other conduct in the pharmaceutical industry for

the better part of the last decade.[4] Production of documents from unrelated, non-public Commission investigations is properly resisted on grounds of relevancy, burden, and privilege. Moreover, respondents have clearly demonstrated their ability to obtain similar information directly from the pharmaceutical and healthcare industry having issued over 80 subpoenas for documents and 50 subpoenas for testimony in this matter.

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For the reasons discussed above, Hoechst's July 10 Motion for Leave should be denied in its entirety.

Respectfully Submitted,

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Seth C. Silber

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Bureau of Competition
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Dated July 14, 2000

[4] In its reply memorandum, Hoechst relies heavily on a single decision, *Exxon Corp.*, 1980 FTC Lexis 121 (Feb. 8, 1980). Contrary to Hoechst's assertions, however, this case does not stand for the broad proposition that respondents are entitled to documents from investigative files other than from the file that gave rise to the complaint. *See id.* at *8 (Feb. 8, 1990) ("[r]espondents have enumerated *eight apparently relevant* petroleum-related matters in which the Commission has been involved") (emphasis added). Indeed, the same ALJ who issued the *Exxon Corp.* decision (Judge Timony) has limited respondents' access to Commission files in other decisions. *See Outdoor World Corp.*, 1989 FTC Lexis 142, *3 (Nov. 3 1989) (denying request of respondent for information from the Commission's files "which is available from public sources [and] the files of [respondent's] competitors"); *Flowers Indus.*, 1981 FTC Lexis 117, *1 (Sep. 11, 1981) (denying respondent's subpoena to the Commission for documents not in complaint counsel's files where "respondent has failed to make the required showing of need and of unavailability of the information elsewhere.")

CERTIFICATE OF SERVICE

I, Seth C. Silber, hereby certify that on July 14, 2000, I caused a copy of the Complaint Counsel's Response to Hoechst's July 10 Motion for Leave to be served upon the following persons via hand delivery or facsimile and overnight delivery.

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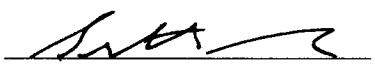

Seth C. Silber