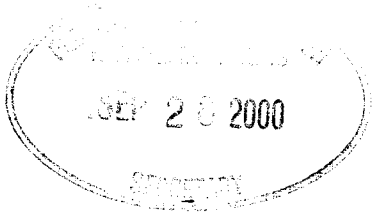
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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 MOTION REGARDING HOECHST'S WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Complaint counsel move for an order: (1) declaring that Hoechst has waived any claim of privilege to a letter that it voluntarily disclosed to the Commission in 1997; and (2) compelling James Spears and Edward Stratemeier to answer questions at deposition and at trial concerning the contents of the letter. Complaint counsel respectfully state:

1. On November 21, 1997, Hoechst produced to the Commission a letter from Mr. Spears to Mr. Stratemeier regarding the Stipulation and Agreement with Andrx.

2. Hoechst asserted a few weeks after its production that the document was privileged and its disclosure was "inadvertent."

3. Hoechst has never provided any factual foundation for its claim that the disclosure was inadvertent. Complaint counsel concluded that, in light of the circumstances of

Hoechst's disclosure of the document, Hoechst waived any claim of privilege for the letter.

4. In a February 23, 2000 deposition, Hoechst counsel James M. Spears refused to answer questions regarding the document. Mr. Stratemeier can be expected to take the same position.

Therefore, and as more fully discussed in the memorandum accompanying this motion, complaint counsel request that Your Honor issue an order ruling that Hoechst has waived any privilege for the letter and requiring Mr. Spears and Mr. Stratemeier to submit to questions regarding the contents of the letter.[1]

Respectfully submitted,

Markus H. Meier
Bradley S. Albert

Counsel Supporting the Complaint

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

Dated: September 27, 2000

[1] In *Complaint Counsel's Consolidated Response to Respondents' Motions for Protective Orders,* filed today, we explain why this Court should reject Hoechst's argument that Messrs. Spears and Stratemeier should not be deposed.

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MEMORANDUM IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION REGARDING
HOECHST'S WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND
MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

Complaint counsel seek a ruling that we may use, in depositions and at trial, a document that Hoechst disclosed to the Commission in 1997. Although the circumstances surrounding the production suggest that this disclosure may have been the result of a strategic decision, Hoechst asserted a few weeks after its production that the document was privileged and its disclosure was "inadvertent." Hoechst has never provided any factual foundation for its claim that the disclosure was inadvertent. Indeed, in a February 23, 2000 investigational hearing, Hoechst counsel James M. Spears refused to answer questions regarding the circumstances underlying Hoechst's claim of inadvertent production. Complaint counsel concluded that

Hoechst's disclosure of the document waived privilege, and have relied on the document in preparation of our case.

This motion is based on a few fundamental principles: An essential element of the attorney-client privilege is the maintenance of the confidentiality of the communication. Voluntary disclosure of confidential attorney-client communications works as a forfeiture of the privilege. There need not be an intention to waive for a waiver of privilege to occur. What is key is the conduct of the privilege holder in failing to maintain the confidentiality of privileged communications.[1]

Given the available evidence and Hoechst's refusal to substantiate its claim of inadvertent production, we cannot rule out the possibility that this may have been a strategic disclosure. But whether the disclosure was intentional or merely careless, the confidentiality of the document has been destroyed by the acts of Hoechst or its agents, and the privilege has therefore been waived. Waiver is particularly appropriate here, because the document is directly relevant to Hoechst's claimed business justifications for its agreement with Andrx, and the Commission staff has justifiably relied on the document as part of the investigatory record in this case.

Complaint counsel therefore request that Your Honor issue an order: (1) declaring that Hoechst's disclosure of the document to the Commission has waived its claim of privilege and the document may be used in the litigation; and (2) requiring Mr. Spears (the document's author) and Mr. Stratemeier (the recipient) to submit to questioning concerning the

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[1] *See, e.g., F.C. Cycles Int'l, Inc. v. Fila Sport, S.P.A.*, 184 F.R.D. 64, 73 (D. Md. 1998). *See also* Paul R. Rice, *Attorney Client Privilege in the United States*, § 9:19 at 44.

contents of the document.[2] We are not asserting a broad subject matter waiver at this time, given the current uncertainty at this time about the extent to which the disclosure may have been intentional. Rather, this motion is based on a limited waiver relating to the contents of the document actually disclosed.

We set forth below facts regarding the disclosure of the document to the Commission, and then address the applicable law regarding waiver of attorney client privilege, as well as the limited arguments that Hoechst has made to date regarding the document. Because Hoechst bears the burden of establishing that the document is protected by privilege despite its disclosure, we anticipate the need to file a reply after Hoechst reveals the basis for its claim that disclosure of the document was inadvertent and did not waive the privilege.

I. Factual Background

A. The Disclosure to Commission Staff

The document at issue is a nine-page letter dated September 25, 1997 from Hoechst outside counsel James Spears to Hoechst General Counsel Edward Stratemeier, concerning the September 24, 1997 Stipulation and Agreement between Hoechst and Andrx. Hoechst produced the letter to Commission staff in the Mergers I Division of the Bureau of Competition in November 1997 in connection with an Commission review of the proposed acquisition of a Hoechst subsidiary, the Rugby Group, by Watson Pharmaceuticals, Inc. As the attached affidavit from Commission staff attorney David Inglefield describes, in connection with this merger review, Hoechst provided the Commission with information regarding competition in

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[2] In *Complaint Counsel's Consolidated Response to Respondents' Motions for Protective Orders,* filed today, we explain why this Court should reject Hoechst's argument that Messrs. Spears and Stratemeier should not be deposed.

the once-a-day diltiazem market, including the September 25, 1997 Stipulation and Agreement between Hoechst and Andrx that is the subject of this proceeding.[3]

Hoechst's production of information to the Commission in this matter was done under a "quick-look" approach to merger review. Under this approach, instead of a comprehensive production of documents under a "second request" for information (a formal step under the Hart-Scott-Rodino merger review procedures), the parties make a more limited production relating to issues that may be dispositive. Hoechst's total production of documentary material under its phased quick-look submission amounted to five boxes, and the schedule and timing of the production was within the control of the parties.[4]

Hoechst submitted approximately 50 documents (totaling less than 500 pages) from the files of its general counsel, Edward Stratemeier.[5] As the Inglefield affidavit explains, Hoechst outside counsel advised Mr. Inglefield that submission of the Stratemeier materials would be delayed to allow additional time for outside counsel to review those documents for privileged material. Documents from Mr. Stratemeier's files were ultimately given to the Commission on November 21, 1997.[6]

The materials from Mr. Stratemeier included the letter from Mr. Spears to Mr. Stratemeier dated September 25, 1997, the day after the Stipulation and Agreement between Hoechst and Andrx was finalized. On its face, the letter bears the designation "Confidential and

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[3] Attachment A, Affidavit of David Inglefield, ¶ 2.

[4] Inglefield Affidavit, ¶ 3, 4.

[5] Inglefield Affidavit, ¶ 6.

[6] Inglefield Affidavit, ¶ 5

Privileged Attorney Client Communications." Each page of the letter is Bates stamped according to the numbering system Hoechst used for all of the documents it produced from Mr. Stratemeier's files. The letter is designated "HMRI Spec 20 Stratemeier 000283" through "HMRI Spec 20 Stratemeier 000291."[7] Commission staff reviewed the Stratemeier materials, including the Spears letter, in the normal course of the investigation.[8]

B. Hoechst's Belated Assertion of Privilege

Over three weeks after Hoechst gave the Commission the Stratemeier materials – and well after Commission staff had reviewed the letter – Mr. Inglefield received a voice-mail message from Hoechst outside counsel James Eiszner stating that the Spears letter was privileged and had been submitted to the Commission in error. In his voice-mail message and in subsequent letters, Mr. Eiszner requested that Commission staff return the document.[9] Mr. Eiszner provided no information showing the production of the Spears letter was the result of some excusable error. Commission staff concluded that it was appropriate for them to retain and use the document.[10]

The Mergers I Division's investigation of the Watson-Rugby transaction closed in February 1998. As frequently occurs, Commission staff retained copies of certain documents obtained during the investigation, including the Spears letter.[11] In the Health Care Division's

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[7] Inglefield Affidavit, ¶ 6

[8] Inglefield Affidavit, ¶ 8

[9] Ingelfield Affidavit, ¶ 9.

[10] Inglefield Affidavit ¶ 11.

[11] *Id.*

subsequent investigation of the Stipulation and Agreement, Hoechst continued to assert that the document is privileged.[12] In a February 23, 2000 deposition, Mr. Spears refused to answer questions regarding the circumstances of the document's production to the Commission.[13]

II. Disclosure of the Spears Letter Waived the Privilege

The attorney client privilege protects confidential communications from the client to the attorney. The privilege is narrowly construed:

> Since the privilege impedes the full and free discovery of the truth and is in derogation of the public's right to every person's evidence, it is not favored by the federal courts. Accordingly, the privilege is to be strictly confined within the narrowest possible limits consistent with the logic of its principle.[14]

Voluntary disclosure of a privileged communication waives the attorney-client privilege.[15] This is not because disclosure necessarily reflects an intention to waive. As one court has explained, waiver would almost never occur if intent to waive were required:

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[12] HRMI Privilege Log in Commission File No. 981-0368, Spec 9 at 2, 3, 4 (Feb. 16, 1999).

[13] Transcript of Investigational Hearing of James M. Spears (February 23, 2000) at p. 103-105 (Attachment B).

[14] *In re Grand Jury Proceedings,* 727 F.2d 1252, 1355 (4th Cir. 1984) (footnotes and internal quotations omitted).

[15] A party does not waive privilege for documents that it is compelled to produce. In *Transamerican Computer Co. v. IBM*, 573 F.2d 646, 651 (9th Cir. 1978), the court held that under the extraordinary circumstances of a court-compelled accelerated discovery schedule, the disclosure of certain privileged documents (in a production of 17 million pages) was, in effect, "compelled" rather than voluntary, and thus there was no waiver of privilege. There is no basis for a de facto compulsion argument in the context of the limited "quick look" production that disclosed the disputed letter here, particularly since the timing of the production was entirely within the control of the parties.

> [a] privileged person would seldom be found to waive if his intention not to abandon could alone control the situation. There is also always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.[16]

Instead, waiver arises because disclosure destroys the confidentiality upon which the privilege is premised. This fundamental concern about maintaining confidentiality means that even so-called "inadvertent" disclosures will often waive privilege.

Where the privilege holder establishes that the disclosure was inadvertent, courts have taken essentially two approaches regarding waiver. Some take a strict approach, and reject any notion of an inadvertence exception to the general rule that disclosure waives privilege.[17] Other courts consider inadvertent disclosure claims on case-by-case basis, and evaluate the circumstances surrounding the disclosure, and in particular whether reasonable steps were taken to protect the confidentiality of privileged documents.[18] To these courts, an inadvertent disclosure waives the privilege "if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted."[19] Although some district courts have suggested that inadvertent disclosure never waives privilege (on the theory that waiver must be based on the client's intentional relinquishment of a known right),[20] this view has not been

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[16] *F.C. Cycles Int'l,* 184 F.R.D. at 73, *quoting Duplan Corp. v. Deering Milliken Research Corp.*, 397 F. Supp. 1146, 1162 (D.S.C. 1974).

[17] *See, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

[18] *See, e.g., Allread v. City of Grenada*, 988 F.2d 1425, 1434-35 (5th Cir. 1993).

[19] *See, e.g., id.* at 1434 (5th Cir. 1993).

[20] *See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc.,* 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982).

accepted by any circuit courts. This lenient approach has been widely criticized, in part because it confuses privilege waivers with waiver of constitutional rights, but more importantly because such a lenient rule would drastically reduce incentives for clients and attorneys to exercise care to preserve the confidentiality of information.[21]

A. Hoechst Bears the Burden of Establishing Inadvertence

Hoechst bears the burden of proof on its claim that its production of the Spears letter was inadvertent.[22] The inclusion in a relatively small production of a letter that carried on its face a prominent designation of "privilege" raises substantial questions about how such a document could have been produced by mistake. Moreover, given the circumstances, it is plausible that the Spears letter was produced intentionally because Hoechst believed it was in its interest to do so. The letter from outside counsel to Hoechst's chief legal officer analyzing the agreement with Andrx was written while the Watson-Rugby transaction was pending before the Commission. Hoechst was eager to expedite the merger review in order to complete the transaction with Watson, and could have believed that the letter would allay possible Commission staff concerns. To date, however, Hoechst has merely asserted that the production was "inadvertent" and declined to provided any facts to substantiate that assertion.

Mere assertions by a Hoechst attorney that he was unaware the Spears letter was included in the Stratemeier production will not suffice. On the contrary, "[i]t is the responsibility of the

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[21] *See, e.g., Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 442-43 (S.D.N.Y. 1995); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) ("a test for waiver which turns exclusively on the intention of the client . . . is too extreme").

[22] *See, e.g., Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 289 (D. Mass. 2000), *aff'd*, 2000 App. LEXIS 5102 (Fed. Cir. 2000); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn, Inc.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990).

privilege proponent to specifically delineate the screening measures that were undertaken."[23] Unless and until Hoechst comes forward with evidence to satisfy its burden of proving that its disclosure of the Spears letter was inadvertent, the letter must be presumed to have been intentionally produced.

B. Even if Inadvertent, the Disclosure Waived the Privilege

Assuming that Hoechst can establish that the production of the Spears letter was inadvertent, it has still waived any claim to attorney-client privilege. Under either the strict rule or the case-by-case approach, the disclosure results in a waiver because the circumstances suggest that Hoechst failed to take reasonable precautions to protect the document from disclosure.

Under the strict rule used in the D.C. Circuit – where the disclosure occurred in this case – inadvertent disclosure of privileged documents always waives attorney-client privilege.[24] The D.C. Circuit and other courts have noted that once the confidentiality has been

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[23] Rice, supra note 1, § 9:72 at 320. *See also International Business Machines Corp. v. United States,* 37 Fed. Cl. 599, 602 (1997) ("Having failed to educate the court about its screening procedures, plaintiff has not established that it took sufficient steps to prevent the disclosure of the privileged documents").

[24] *See, e.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989); *Wichita Land Cattle Co. v. American Federal Bank, F.S.B.,* 148 F.R.D. 456, 457 (D.D.C. 1992) ("While Steptoe attempts to distinguish its actions from the circumstances set forth in the relevant cases where waiver was found, . . . the rule in this Circuit is clear. Disclosure of otherwise privileged materials, even where the disclosure was inadvertent, serves as a waiver of the privilege."). *See also Ares-Serano, Inc. v. Organon Intern B.V.,* 160 F.R.D. 1, 4 (D. Mass. 1994) ("In this district, disclosure of documents subject to an attorney-client privilege operates as a waiver to any documents disclosed by inadvertence."); *F.D.I.C. v. Singh*, 140 F.R.D. 252, 253 (D. Me. 1992); International *Digital Sys. Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449 (D. Mass. 1988); *Thomas v. Pansy Ellen Products, Inc.*, 672 F. Supp. 237, 243 (W.D.N.C. 1987) ("Voluntary production, even where inadvertent, effects a waiver of the privilege.").

breached, the basis for the privilege has been destroyed. Moreover, once opposing counsel gain the knowledge of the contents of the privileged document, it is impossible to "unring the bell."[25]

Under the case-by-case approach, the party claiming privilege has the burden of proving that the disclosure was truly inadvertent and that the privilege has not been waived.[26] Courts consider: (1) the adequacy of the precautions taken to prevent inadvertent disclosure; (2) the scope of the discovery; (3) the time taken to rectify the error; (4) the extent of the disclosure; and (5) overriding issues of fairness.[27] Analysis of these factors demonstrates that Hoechst cannot sustain its claim of privilege for the Spears letter.

- *Reasonableness of Precautions*: To date, Hoechst has not offered any explanation of how the document that it contends is obviously privileged came to be included in a relatively small submission of materials from the files of the company's general counsel. Nor has it offered any evidence of the procedures that were used to screen documents before production to ensure that privileged materials were adequately protected. The circumstances of the production, however, by themselves raise serious doubt about the screening procedures used.

  Even a cursory review of the Stratemeier materials would have revealed the Spears letter. Thus, the unexplained failure to exclude a document that (as Hoechst has emphasized) was labeled "Confidential and Privileged Attorney Client Communications" suggest, at a minimum, a failure to take reasonable precautions to protect privileged material. Indeed, as the court in *Draus v. Healthtrust, Inc.*, 172 F.R.D. 384, 388 (S.D. Ind. 1997), noted, the production of a document bearing such a clear designation in itself suggests that reasonable precautions were not taken to protect privileged material. Having observed that "the privileged character of [the document] is as open and obvious as can be imagined," the court concluded:

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[25] *See International Digital Systems,* 120 F.R.D. at 449 ("there is no Order I can enter which erases from defendant's counsel's knowledge what has been disclosed").

[26] *See Golden Valley Microwave Foods Inc. v. Weaver Popcorn Co.* , 132 F.R.D. 204, 207 (N.D. Ind. 1990); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.* 116 F.R.D. 46, 50 (M.D.N.C. 1987), aff'd 878 F.2d 801 (4th Cir. 1989).

[27] *See, e.g., Allread*, 988 F.2d at 1434.

> even keeping in mind the deceptive clarity of hindsight, the thing speaks for itself. In the absence of any extenuating circumstances, such as extraordinary time pressure, production of a document like this one to opposing counsel in litigation shows that the steps taken to avoid inadvertent production were not reasonable.[28]

This conclusion is even more compelling given the source of the document in question. One would expect that documents from the files of the company's chief legal officer would receive a particularly careful screening for privileged material. This fact further supports the conclusion that Hoechst waived any privilege by failing to take reasonable precautions to avoid disclosure of confidential material.

- *Time Taken to Rectify the Error*: Hoechst counsel notified Commission staff of their inadvertence claim over three weeks after the letter was produced. By that time, the letter had been read and analyzed by Commission staff. Where the privileged documents had already been used by the opposing party before the error was discovered, courts have found this fact supported a finding of waiver.[29] In addition, while asserting inadvertence, Hoechst did not (and still has not) provided any information to show that the disclosure was an excusable mistake and should not be considered a waiver.

- *Scope of Discovery:* The Hoechst submission was a relatively small production, amounting to five boxes in total. Materials from the Hoechst General Counsel's files, which would be expected to receive the greatest scrutiny for privileged materials, amounted to less than 500 pages. In addition, the Commission set no deadline for submission of the materials; the timing was within the control of the parties. These facts also support a finding of waiver

- *Extent of Disclosure:* Courts applying this factor have suggested that where documents were designated for copying but the essence of the document's contents was not disclosed, waiver might not be justified.[30] In this case, however,

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[28] 172 F.R.D. at 388.

[29] *See, e.g., Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990) ("While plaintiffs acted to recover the Letter as soon as they found it had been inadvertently produced, this was not until six weeks after production. By that time, the letter had been thoroughly analyzed by defendant's attorney, and the client had been informed of its contents.").

[30] *See, e.g., Parkway Gallery,* 116 F.R.D. at 51-52.

the disclosure of the document was complete. Commission staff had read and analyzed the document before Hoechst counsel demanded its return.

- *Overriding Issue of Fairness:* As one court has observed, "[i]t is seldom - 'fundamentally unfair' to allow the truth to be made public," and "it would not be fair to reward [a party's] carelessness with a protective order."[31] Moreover, in assessing fairness, courts have considered the extent of reliance on the document by the opposing party, and thus the harm that would result from preventing use of the document.[32] Here, the document in question is directly relevant to a key issue in the case: respondents' business justifications for entering into the Stipulation and Agreement. Complaint counsel have relied on the document and seek to use it to cross-examine Hoechst representatives regarding Hoechst's claimed business justification for its agreement with Andrx. A finding that there has been no waiver here would essentially require Commission attorneys to pretend to forget the contents of a critical document. Thus, considerations of fairness further support the conclusion that Hoechst has waived the privilege.

In sum, analysis of the particular circumstances of this case weighs heavily in favor of finding waiver. Accordingly, regardless of whether a strict or case-by-case approach is used, Hoechst's claim of privilege for the Spears letter has been waived.

C. Hoechst's Assertions Regarding the D.C. Ethics Rules

Hoechst has asserted that Commission staff was required by District of Columbia ethics rules – in particular, a 1995 D.C. Bar Opinion – to return the Spears letter. While the issue before Your Honor is one of waiver law, not application of D.C. Bar ethics rules, we explain briefly why Hoechst's contentions about the D.C. ethics rules are incorrect.

The 1995 D.C. Bar Opinion relied upon by Hoechst holds that where:

> the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's

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[31] *F.D.I.C. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991).

[32] *See, e.g., F.C. Cycles Int'l,* 184 F.R.D. at 78-79; *Bud Antle, Inc. v. Grow-Tech*, 131 F.R.D. at 183-84.

> attention, the receiving lawyer engages in no ethical violation by retaining and using those documents.[33]

Under this standard, there has been no ethical violation.

First, the Inglefield affidavit makes it clear that Commission attorneys had read and analyzed the document before Hoechst made its assertion that the Spears letter had been produced by mistake. That belated assertion of privilege came over three weeks after the production of a relatively small production of documents from Hoechst's chief legal officer. It is not surprising that Commission attorneys had by that time already read the letter.

Second, Commission staff acted in good faith when reviewing the document. Any suggestion by Hoechst that the designation of privilege on the face of the document makes the Commission attorneys' review of the document in bad faith is without support, under the DC Bar Opinion or common sense. The opinion expressly recognizes that a lawyer is entitled to presume that materials delivered in ordinary course – even though marked privileged – were intended to be so delivered:

> the receiving lawyer may be entitled to assume that any privilege that did exist with respect to the document was being voluntarily

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[33] D.C. Bar Opinion #256 (May 16, 1995). The D.C. Bar, and several other bars, have disagreed with a 1992 opinion of the American Bar Association that suggested that a receiving lawyer should return a document even where there was no notice of an inadvertent disclosure until after the document had been read. The ABA has now proposed a different approach to inadvertent disclosure. A draft provision of the ABA Model Rules of Professional Conduct, Proposed Rule 4.4(c), states: "A lawyer who receives a document and has reason to believe that the document was inadvertently sent shall promptly notify the sender." *See* www.abanet.org/cpr/rule44draft.html. The Ethics 2000 Commission's comments on the proposal notes the criticism of the 1992 Opinion, and expressly states that the issue of waiver of privilege and any obligation of the receiving lawyer to return the document are matters of law and beyond the scope of the model ethics rules. *See id.* and www.abanet.org/cpr/rule44memo.html.

> waived, to further the interests of the sending lawyer, by inclusion in the document production.[34]

The particular circumstances here plainly contradict any suggestion that Commission staff review was not undertaken in good faith. The letter was included with other documents that were intended to be provided to Commission staff. Nothing suggested that the letter was not intended to be included in the production. Thus, it is entirely unlike the case of a misdirected fax or e-mail obviously intended for another recipient. Moreover, as noted above, Hoechst outside counsel had specifically advised Commission staff that the Stratemeier production was being delayed to allow outside counsel to review the material for privileged material. Given these circumstances, Commission attorneys were entitled to assume that any privileged materials that might be included in the production were there because Hoechst had decided to produce them. Thus, the staff's review of the Spears letter and its retention and use of that document is entirely proper under the D.C. ethics opinion relied on by Hoechst.

III. Scope of the Waiver

An intentional disclosure generally results in a broad waiver as to the entire subject matter addressed in the communication that is disclosed.[35] A showing of inadvertence, however, may affect the scope of the waiver. Although most of the cases address only the waiver as to the documents that were disclosed (because they involve a request to return the document that was disclosed), some courts have considered issues of the scope of waiver. Some suggest

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[34] D.C. Bar Opinion #256 at n.12.

[35] *See, e.g., United States v. Plache,* 913 F.2d 1375, 1380 (9th Cir. 1990).

that a finding of inadvertence may result in only a limited waiver.[36] Other courts hold that even an inadvertent disclosure gives rise to a broad subject matter waiver.[37]

Here, there is uncertainty about the extent to which the disclosure of the Spears letter may have been intentional. Complaint counsel, however, are not asserting a broad subject matter waiver here. Instead, we merely seek a finding of waiver as to the document that was disclosed and the right to question Mr. Spears and Mr. Stratemeier concerning the basis for certain factual statements in the letter.

Courts construe the scope of the waiver of attorney-client privilege in light of considerations of fairness.[38] In this case, the letter that was disclosed directly bears on Hoechst's asserted business justifications. Questioning Mr. Spears and Mr. Stratemeier concerning the basis for statements made in the letter is consistent with the fairness concerns that underlie waiver of privilege analysis.

Mr. Spears has already refused to answer any questions regarding his September 25, 1997 letter to Mr. Stratemeier.[39] Mr. Stratemeier can be expected to take the same position, given Hoechst's continued assertion of privilege for the letter. Accordingly, we request a ruling

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[36] *See, e.g., In re Souse Bros. Ocean Towing*, 144 F.R.D. 111, 115-16 (D. Or. 1991) (broad subject matter waiver inappropriate in context of inadvertent disclosures).

[37] *See, e.g., In re Sealed Case*, 877 F.2d at 980-981; *United States v. Western Elec. Co., Inc.*, 132 F.R.D. 1, 2 (D.D.C. 1990) ("To the extent that US West has inadvertently or deliberately disclosed attorney-client communications, it has waived attorney-client privilege as to all communications on the subject covered by these communications.").

[38] Rice, supra note 1, § 9.70 at 309.

[39] Transcript of Investigational Hearing of James M. Spears (February 23, 2000) at p. 103-105 (Attachment B).

on whether Hoechst has waived privilege and an order compelling these individuals to answer questions regarding the contents of the letter.

Respectfully submitted,

Markus H. Meier
Bradley S. Albert

Counsel Supporting the Complaint

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

Dated: September 27, 2000

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

AFFIDAVIT OF DAVID INGLEFIELD

DAVID INGLEFIELD, being duly sworn, says:

1. I am an attorney in the Bureau of Competition of the Federal Trade Commission ("FTC"). I have personal knowledge of the facts stated in this affidavit.

2. In 1997-98, I worked on an investigation concerning the proposed acquisition of the Rugby Group, Inc., a subsidiary of Hoechst Marion Roussel, Inc. ("Hoechst"), by Watson Pharmaceuticals, Inc. ("Watson"). I worked on this matter with Elizabeth Jex, also an attorney in the Bureau of Competition of the FTC. The investigation was initiated when Hoechst and Watson filed Hart-Scott-Rodino ("HSR") Premerger Notification and Report forms on August 28, 1997, FTC File Number 981-0006. In connection with that HSR investigation, Hoechst provided the FTC staff with documents and information relating to competition in the once-a-day diltiazem market, including the September 24, 1997 Stipulation and Agreement between Hoechst and Andrx Pharmaceuticals, Inc.

3. The Commission issued a "second request" for information to each of the parties to the transaction on October 8, 1997. By October 17, 1997, the FTC staff had agreed on "a quick look" approach for the parties' initial response to the second requests. The "quick look" approach offered the parties the opportunity to provide a limited document submission relating to dispositive issues, which resulted in a shortened investigation and eliminated the need for full compliance with the second requests.

4. The Commission staff imposed no deadline for Hoechst's submission of documents. Hoechst stated that the transaction was at risk if it did not occur by November 30, 1997, but did not complete its production of documents (a series of submissions) called for under the quick look approach until November 24, 1997, and did not provide a privilege log until December 10, 1997. The transaction ultimately took place in February 1998.

5. During the investigation, I had several telephone conversations with attorneys for Hoechst from Shook, Hardy & Bacon regarding the production of documents and information to the Commission. On one occasion, I recall Mr. James Eiszner, one of the attorneys at Shook, Hardy & Bacon, explaining that the production of documents from the files of Edward H. Stratemeier, Hoechst's General Counsel, would be delayed to allow additional time for his firm to review the production for privileged material before turning these documents over to us. Several days later, on November 21, 1997, the production was delivered to our offices.

6. Hoechst's November 21, 1997 submission of documents included approximately 50 documents (totaling slightly less than 500 pages) from Mr. Stratemeier's files. One of these documents was a letter dated September 25, 1997, from James M. Spears of Gadsby and Hannah, L.L.P., to Mr Stratemeier. Each page of the document had been stamped according to the numbering system used in the production and was numbered sequentially, beginning with "HMRI Spec 20 Stratemeier 000283" and ending with "HMRI Spec 20 Stratemeier 000291."

7. The total submission by Hoechst on November 21, 1997, including the documents from Mr. Stratemeier's files, was approximately 4400 pages, or roughly one box. The entire Hoechst submission was less than 5 full boxes of material.

8. Documents produced in the investigation were reviewed by three attorneys: Elizabeth Jex, Julie McConnell, and myself. Some of the documents from Mr. Stratemeier's files carried the designation "confidential" or "privileged." In my experience, it is typical in FTC investigations for documents that carry such designations to be intentionally produced to us. Typically, the documents that parties contend are subject to the attorney-client or other privilege are not produced, or are redacted in whole or in part, and are listed in the privilege log. In the production from Mr. Stratemeier's files, there were documents carrying the designation "Redacted -- Attorney/Client Privilege."

9. On December 16, 1997, some time after Elizabeth Jex and I had reviewed the Stratemeier documents, I received a voice-mail message from Hoechst outside counsel James Eiszner, in which he stated that one of the documents that was submitted to the FTC from Mr. Stratemeier's files (HMRI Spec 20 Stratemeier 000283-291) had been produced by mistake and requested its return. He reiterated his request in letters dated December 16 and 19, 1997, and February 10, 1998. Mr. Eiszner provided no explanation regarding the circumstances surrounding the document's production to the FTC. He asserted that the document had been produced inadvertently and referred to a privilege log submitted on December 10, 1999, which indicated that the document had been withheld from materials produced from the files of James

M. Spears.

10. At the time Ms. Jex and I reviewed the document, we had no knowledge that Hoechst did not intend to produce the document to us. The document production was relatively small, and a screening for privileged material would be expected to have identified the document. Moreover, as explained above, Mr. Eiszner had advised me that the submission of materials from General Counsel Stratemeier's files was be delayed for the specific purpose of permitting Hoechst outside counsel to conduct a privilege review of materials from Mr. Stratemeier's files.

11. The investigation was closed in February 1998. At the conclusion of the investigation, we returned the original documents to Hoechst. As is often done in FTC practice, we retained copies of some of the documents, including HMRI Spec 20 Stratemeier 000283-291. As I stated in a letter to Mr. Eiszner dated March 16, 1998, we concluded, after consultation with the FTC General Counsel's Office, that there were no ethical constraints on our retention and use of HMRI Spec. 20 Stratemeier 000283-291.

David Inglefield

David Inglefield

Sworn to before me this
27th day of September, 2000.

Ruth S. Sacks

Notary Public of the District of Columbia

RUTH S. SACKS
Notary Public, District of Columbia
My Commission Expires July 14, 2004