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

RESPONDENT AVENTIS PHARMACEUTICALS, INC.'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION REGARDING WAIVER OF PRIVILEGE

Pursuant to Rules 3.22(c) and 3.31(d) of the Federal Trade Commission's ("FTC") Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §§ 3.22(c) & 3.31(d), Respondent Aventis Pharmaceuticals, Inc., formerly known as Hoechst Marion Roussel, Inc. ("HMR"), submits this memorandum in opposition to Complaint Counsel's motion regarding waiver of privilege and to compel answers to deposition questions.

For the reasons set forth below, HMR respectfully requests that this Court deny Complaint Counsel's motion and enter a protective order: (i) compelling Complaint Counsel to return or destroy the original and all copies of the privileged document that was inadvertently produced to FTC staff; and (ii) prohibiting Complaint Counsel from using the inadvertently produced privileged document in any manner in this case.

PRELIMINARY STATEMENT

In November, 1997, a letter containing legal analyses which was sent by outside counsel to HMR's general counsel was inadvertently produced to FTC staff during a merger investigation. HMR learned of the inadvertent production three weeks later and immediately called and wrote FTC staff advising of the inadvertent production and seeking the return of the letter. FTC refused to return the letter and said the matter was under consideration. Shortly thereafter, FTC questioned Edward Stratemeier, HMR's general counsel and the recipient of the letter, about the letter's contents. HMR's counsel refused to permit Mr. Stratemeier to answer any substantive questions about the letter once again claiming that the letter was inadvertently produced and was protected by the attorney-client and attorney work product privileges. In February, 1998, at the close of the merger investigation, HMR once again asked for the return of the letter. In March, 1998, FTC staff advised that the letter would not be returned.

On October 15, 1998, the FTC issued a Resolution Authorizing Use of Compulsory Process in a Nonpublic Investigation focusing on the Stipulation and Agreement which HMR and Andrx entered into on or around September 24, 1997. During the investigation, FTC attorneys asked James Spears, HMR's outside counsel and the author of the letter, questions concerning the letter's contents. Mr. Spears was instructed not to answer any questions relating to the letter on privilege grounds.

On March 15, 2000, Complaint Counsel filed the instant Complaint. On September 28, 2000, Complaint Counsel filed the instant motion seeking to compel Messrs. Stratemeier and Spears to answer questions concerning the letter in any upcoming depositions. According to Complaint Counsel, the letter is fair prey since any privileges attaching to the letter were waived by its production. Specifically, Complaint Counsel asserts: (i) HMR has the burden to prove the

production was inadvertent and has failed to meet its burden; (ii) even if HMR's burden has been met, a waiver has occurred under either the "strict rule" or the "case-by-case" approach for determining waiver. Complaint Counsel also contends that they have no ethical obligation to return the inadvertently produced document.

Complaint Counsel's arguments are frivolous and entirely without merit. The facts surrounding the production of the letter unequivocally show:

- neither HMR nor its counsel ever intended to waive any privilege associated with the document;
- HMR was under extreme time pressures at the time the production was made;
- the inadvertently produced document was one of over 20,000 documents produced to staff during the merger investigation;
- HMR undertook reasonable efforts, using personnel experienced in HMR document productions, to screen out privileged documents from the production;
- the document was conspicuously labeled as a privileged document and was unambiguously described as such on a privilege log HMR delivered to Commission staff shortly after the production;
- HMR took appropriate action immediately upon discovery of the inadvertent production – and continually and repeatedly thereafter – to seek return of the document and maintain its confidentiality;
- the document has not served as the basis for any motion or pleading, other than Complaint Counsel's present motion, nor has it been a subject of substantive interrogation in any deposition;
- Complaint Counsel has not specifically demonstrated any detrimental reliance on the document, nor can it demonstrate any prejudice that it may suffer from a finding of non-waiver that was not of its own making.

In determining whether waiver has occurred, the Commission and a majority of federal and state courts which have considered the issue, have applied a test which evaluates all of the circumstances surrounding an inadvertent production, including the precautions taken to protect

applicable privileges, the overall context in which the inadvertent production occurred, and the relative fairness to the parties of maintaining or waiving applicable privileges. The flexible standard that courts and Commission tribunals typically apply in inadvertent disclosure cases is intended to achieve a fair result by "strik[ing] the appropriate balance between protecting attorney-client privilege" and other valid privileges, on the one hand, and sanctioning "carelessness with privileged material as an indication of waiver," on the other. *Gray v. Bicknell,* 86 F.3d 1472, 1484 (8th Cir. 1996). HMR respectfully submits, that when this standard is properly applied to facts surrounding the production of the privileged letter, the balance tips overwhelmingly in favor of preserving the privileges and a finding of no waiver.

I. BACKGROUND

A. The Rugby Investigation

In the Summer of 1997, HMR was negotiating the sale of one of its subsidiaries, The Rugby Group, Inc. ("Rugby"), to Watson Pharmaceuticals, Inc. ("Watson"). On or about August 28, 1997, HMR filed a premerger notification report pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a ("HSR Act") with the FTC and the U.S. Department of Justice.[1] On October 9, 1997, the FTC issued a request for additional information to HMR (the "Second Request") and advised that it had commenced an investigation into HMR's proposed sale of Rugby to Watson (FTC File No. 981-0006). Although HMR's patent litigation with Andrx and the Stipulation were ancillary, at best, to the Rugby transaction, the Second Request specifically sought documents concerning diltiazem, the molecule which was the subject of the Stipulation.

---

1. During this same time period, HMR entered into the Stipulation and Agreement with Andrx Pharmaceuticals, Inc. which serves as the basis for the Complaint in this action.

B. Circumstances Surrounding Production of the Letter

In an effort to expedite the expiration of the waiting period applicable to the transaction under the HSR Act, HMR approached Watson about the possibility of modifying the acquisition so that HMR would retain the Rugby diltiazem product line. It took some time to negotiate these matters with Watson, but ultimately Watson agreed to the concept in light of concerns that delays caused by the issuance of the second request would harm the competitive viability of Rugby. *See* Declaration of James R. Eiszner at ¶ 4 attached hereto as Exhibit 1. ("Eiszner Declaration").

Accordingly, James Eiszner, HMR's outside counsel, asked Commission staff responsible for the Rugby investigation whether, if the parties agreed to modify the acquisition agreement so that HMR retained the Rugby diltiazem business, the Commission would delete matters relating to diltiazem products from the Second Request. Mr. Eiszner also advised staff that time was of the essence as HMR and Watson had previously agreed that Watson could abandon the Rugby acquisition if the transaction did not close by November 30, 1997. Eiszner Declaration at ¶ 5.

Confident that its proposal to restructure the transaction was reasonable, HMR began to focus on obtaining information relating to matters other than diltiazem that was sought by the Second Request. In the meantime, concerns about the competitive viability of Rugby continued to grow as increasing numbers of Rugby employees resigned their positions in light of the uncertainty created by the Commission's investigation. Eiszner Declaration at ¶ 6.

On November 18, 1997, six business days prior to the walk-away date, Mr. Inglefield finally replied staff was concerned that there was a relationship between HMR's agreement to sell Rugby to Watson and HMR's stipulation with Andrx Corporation in the HMR/Andrx patent litigation. Accordingly, he advised that a production of the diltiazem-related documents would need to be made even if the parties modified the transaction to exclude Rugby's diltiazem business from the sale. As

a result of Mr. Inglefield's demand, HMR hurriedly searched for and collected the requested diltiazem-related information from internal and outside counsel files. Eiszner Declaration at ¶¶ 7 and 8.

In a November 21, 1997 fax, HMR asked Mr. Inglefield to consider several additional modifications to the Second Request and to consider scheduling any necessary depositions for the following week in light of the November 30, 1997 walk-away date which by now was only three business days away. HMR also asked whether privilege logs were necessary for a number of the productions. Eiszner Declaration at ¶ 9.

Mr. Inglefield responded by facsimile the same day demanding that HMR produce "all non-privileged materials" and insisting that HMR "produce a privilege log covering all documents withheld from production based on a claim of privilege."[2] Eiszner Declaration at ¶10.

On November 21, 1997, Mr. Eiszner received over 4500 pages of documents from HMR which were responsive to the Second Request. These documents came from the files of HMR's senior executives including Edward Stratemeier, the General Counsel. Prior to receiving these documents, several legal assistants, who routinely work on document productions and are trained and responsible for identifying potentially privileged information, tabbed those documents which they believed were privileged. Mr. Eizsner reviewed the tabbed documents to ensure that they were, in fact, privileged communications, pulled the tabbed documents from the production, had the

---

2. In a Declaration attached to Complaint Counsel's Motion, Mr. Inglefield recalls he was told the production of documents from Mr. Stratemeier's files would be delayed because of the need for a privilege review. Mr. Inglefield's recollection is in error. Mr. Inglefield was never told that the production of documents from Mr. Stratemeier's files would delay the production of those documents because of the need for an extensive privilege review. Instead, several days after Stratemeier Specification 20, No. 000283-291 was produced, Mr. Inglefield was told that compliance with the Quick Look would be materially delayed if submission of a privilege log that catalogued all of the privileged documents relating to patent litigations involving diltiazem to which HMR was a party were required to be prepared. Eiszner Declaration at ¶ 21.

remaining documents numbered and copied, and, because the walk-away date was three business days away, express shipped these documents to Mr. Inglefield for Saturday delivery. Eiszner Declaration at ¶ 11.

Unbeknownst to HMR and Mr. Eiszner late that Friday night when the documents were shipped to Mr. Inglefield, was the fact that one privileged document, a copy of a September 25, 1997 opinion letter sent to Mr. Stratemeier from his outside counsel, James M. Spears of Gadsby & Hannah LLP, had inadvertently not been tabbed as privileged and was therefore not pulled from the production. The inadvertently produced document bore bates number "HMRI Spec 20 Stratemeier 000283 - 291." The document was marked "CONFIDENTIAL AND PRIVILEGED ATTORNEY CLIENT COMMUNICATIONS" at the top of each page. Eiszner Declaration at ¶ 12. Mr. Eiszner had no authority to waive any privileges on behalf of HMR and neither Mr. Eiszner nor HMR had any intention of waiving the privileges attached to the inadvertently produced opinion letter. Eiszner Declaration at ¶ 13.

On December 9, 1997, a privilege log covering HMR's internal files and the files of several of HMR's outside counsel including Mr. Spears was finalized. One of the documents listed on the privilege log was the September 25, 1997 opinion letter. While this document is listed only once on the privilege log, there were multiple identical copies that had been withheld on the ground of privilege. The privilege log was sent to Mr. Inglefield on December 11, 1997, along with a Declaration from Mr. Stratemeier wherein he attested to the fact that, with the exception of privileged documents noted on the attached privilege log, HMR fully complied with the "Quick Look" procedure. Eiszner Declaration at ¶ 14.

C. HMR's Efforts to Retrieve the Inadvertently Produced Document

Although the Letter was clearly marked "privileged," contained numerous other indications that both demonstrated its privileged character and set it apart from the other documents produced to the FTC in the November 21 production, was easily identified on HMR's privilege log, and in content, character and context possessed numerous features that should have sounded the peal of warning bells to any reasonable and prudent attorney who cared to heed them that the document was produced by mistake and that further inquiry of HMR was appropriate, the FTC did nothing following its receipt to bring the matter to HMR's attention. Rather than notify HMR, the FTC allegedly promptly set about reviewing the document. (FTC Br. at 5, 13.)

On December 16, 1997, while reviewing the November 21, 1997 production in anticipation of the scheduled deposition of HMR's general counsel in the Rugby investigation, Mr. Eiszner discovered that the September 25, 1997 letter from Mr. Spears to Mr. Stratemeier was inadvertently produced. Mr. Eiszner immediately called David Inglefield of the FTC investigative staff. Unable to reach Mr. Inglefield directly, Mr. Eiszner left a message explaining production of the letter was inadvertent, HMR did not intend to waive any privileges, and that outside counsel was not authorized to waive any privileges on behalf of HMR. Mr. Eiszner requested the FTC to immediately return the letter. He followed up with a facsimile letter the same day, which reiterated this information and reminded Mr. Inglefield that HMR had asserted that the letter was privileged on HMR's privilege log. Eiszner Declaration at ¶¶ 15 and 16.

Mr. Eiszner's December 16 call and correspondence would be the first of numerous attempts by HMR and its representatives to recover the letter and continue in place all applicable privileges. Among other things:

- On December 19, 1997, three days after his December 16 notice to FTC staff, Mr. Eiszner sent Mr. Inglefield another letter seeking the document's return and reminding the staff of its ethical obligations under District of Columbia Bar rules.[3]

- In a December 22, 1997 investigational hearing with Mr. Stratemeier, Mr. Eiszner again asserted the privileged nature of the letter and demanded that staff return it immediately. Mr. Eiszner did not permit Mr. Stratemeier to answer questions concerning the substance of the letter. He did, however, permit Mr. Stratemeier to answer questions concerning circumstances surrounding its production, but only after reaching a "standing agreement" on the record that answers to such questions would be "without prejudice to the issue of the inadvertent production of" the letter and without waiving any privileges. The letter was not marked as an exhibit at Mr. Stratemeier's deposition.[4]

- The Commission closed the Rugby investigation on or about February 10, 1998 without taking further action. By letter of February 10, 1998, Mr. Eiszner repeated his request that staff return the letter.[5] Two weeks after the close of the FTC's investigation, and more than two months after Mr. Eiszner first notified staff of the inadvertent production and requested that the letter be returned, FTC staff advised Mr. Eiszner that the matter was still "under review" inside the Commission.[6] Finally, three months to the day after Mr. Eiszner first requested that the document be returned, FTC staff finally informed Mr. Eiszner that it would not return the document.[7]

- On or about October 15, 1998, the Commission opened its investigation into the HMR/Andrx Stipulation and Agreement (FTC File No. 981-0368), the investigation that preceded the Complaint in this matter, and shortly thereafter it issued an investigative subpoena *duces tecum* to HMR. In responding to the Commission's subpoena, HMR withheld the letter and once again claimed it as privileged on an accompanying privilege log.

- In the course of discussions with FTC staff over its stated interest in deposing Mr. Spears in the HMR/Andrx investigation, Michael L. Koon, outside counsel to HMR and a partner of Mr. Eiszner's, wrote to FTC staff to "renew HMRI's objections to the FTC's refusal to return a privileged document which was inadvertently produced

---

3. Eiszner Declaration at ¶ 17.

4. Eiszner Declaration at ¶ 19.

5. Eiszner Declaration at ¶ 20.

6. Id.

7. Id.

to the Commission in connection with" the Rugby investigation and reminding staff that, in light of the D.C. Bar rules and opinion of which Mr. Eiszner had advised the staff, "any use of this document in any manner whatsoever or the failure of the Commission staff to promptly return this document may result in the disqualification of counsel and sanctions for the attorneys involved."[8] When staff's reply failed even to acknowledge Mr. Koon's concerns over the inadvertently produced document, Mr. Koon tersely reminded staff in a September 14, 1999 follow-up letter that "the FTC's handling of the inadvertently disclosed privileged document" remained an open issue.[9]

- At a February 23, 2000 investigational hearing of Mr. Spears in the Hoechst/Andrx investigation, counsel to Mr. Spears refused to permit him to answer any questions concerning the letter. Commission investigative staff marked the letter as an exhibit to Mr. Spears' deposition over the objections of the Mr. Spears' counsel.

- Complaint Counsel included the letter on its September 8, 2000 list of confidential documents that it may use in an exhibit or document to be filed with the Court. In a memorandum in support of a motion for *in camera* treatment filed with this Court on October 6, 2000, HMR once again "assert[ed] that this [] inadvertently produced, privileged document must be immediately returned."

II. ARGUMENT

It is beyond any reasonable dispute that the letter is privileged and was inadvertently produced.[10] In its Motion, however, Complaint Counsel asserts that even if the privileged letter was inadvertently produced, the privileges no longer apply since: (a) under an alleged *per se* rule, the privileges disappeared upon production regardless of inadvertence; and (b) under the case-by-case approach, the letter lost its privileges because (i) HMR did not take reasonable precautions to protect the letter; (ii) HMR waited three weeks after making the inadvertent production to notify

---

8. A copy of Mr. Koon's September 1, 1999 letter to staff in the Hoechst/Andrx investigation is attached hereto as Exhibit 2.

9. A copy of Mr. Koon's September 14, 1999 letter to staff in the HMR/Andrx investigation is attached hereto as Exhibit 3.

10. Complaint Counsel does not challenge the fact that the letter is subject to the attorney-client and attorney work product privileges.

Commission staff; (iii) the production was small and its timing was within HMR's control; (iv) Commission staff read and analyzed the document before HMR's counsel demanded its return; and (v) if the letter is returned Commission attorneys would have "to pretend to forget the contents" of the letter. Complaint Counsel's arguments are specious at best.

A. The *Per Se* Waiver and Non-Waiver Rules Do Not Apply.

Complaint Counsel gently suggest this Tribunal should adopt a rigid *per se* rule recognized by a minority of federal courts. Under this rule, disclosure of a privileged communication, whether voluntary or inadvertent, automatically and irrevocably sweeps away all privileges otherwise attaching to the communication. (*See* FTC Br. at 9-10). The rule is premised on the theory that disclosure under any circumstances "breaches the confidentiality of the document and destroys the purpose of the privilege"[11] and that the producing party should be held accountable for errors in production.[12] While the *per se* rule is easy to apply, "its pronounced lack of flexibility and its significant intrusion on the attorney-client relationship"[13] produces harsh results in cases of inadvertent production.[14] Moreover, while purporting to be true to the foundations of the attorney-client privilege, the *per se* waiver rule "sacrifices the value of protecting client confidences for the sake of certainty of results."[15] As a result, most courts have rejected the *per se* waiver rule in favor

---

11. *Asian Vegetable Res. & Dev. Ctr.*, No. 94 CIV. 6551 (RWS), 1995 WL 491491, at *7 (S.D.N.Y. Aug. 17, 1995) ("*Asian Vegetable*").

12. *Gray*, 86 F.3d at 1483.

13. Id.

14. *See, e.g., Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 n.8 (N.D. Ill. 1982) (rejecting *per se* waiver rule because it "generat[es] (in much the same way as a flawed pleading in the era of common law pleading) harsh results out of all proportion to the mistake of inadvertent disclosure").

15. *Id.*; *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993).

of the "middle-of-the-road" balancing test.[16] No Commission tribunal has ever embraced a *per se* waiver rule for inadvertent disclosure issues.

Not only does Complaint Counsel fail to advise this Tribunal that the *per se* waiver rule has never been applied by a Commission tribunal, Complaint Counsel also fails to advise of another *per se* rule which has been adopted by some courts. Under this *per se* non-waiver rule, an inadvertent disclosure of a privileged communication never waives the privilege.[17] This *per se* non-waiver rule is premised on the theory that the concept of waiver requires an intentional relinquishment of a known right by the holder of the privilege, and that, by definition, "[i]nadvertent production is the antithesis of that concept."[18] Like the *per se* waiver rule, the non-waiver rule has the advantage of being relatively simple and straightforward to apply, and it furthers one of the policies of the attorney-client privilege, namely, the privilege exists to protect the client and may only be waived by or at the direction of the client (rather than as a result of counsel's error).[19] Like the *per se* waiver rule, a majority of courts have rejected the *per se* non-waiver rule, finding the non-waiver rule to provide inadequate incentives to handle privileged documents with care.[20] And, finally, like the *per se* waiver rule, no Commission tribunal has ever adopted the *per se* non-waiver rule to resolve inadvertent disclosure disputes.

---

16. *Alldread v. City of Grenada,* 988 F.2d 1425, 1434 (5th Cir. 1993).

17. *See, e.g., Mendenhall,* 531 F. Supp. at 954-55; *Dunn Chemical Co. v. Sybron Corp.*, Misc. No. 8-85, 1975 WL 970, at *5-6 (S.D.N.Y. Oct. 9, 1975).

18. *Mendenhall,* 531 F. Supp. at 955.

19. *See Gray,* 86 F.3d at 1483.

20. *See Gray,* 86 F.3d at 1483; *Asian Vegetable,* 1995 WL 491491, at *6.

Although the *per se* non-waiver rule is as beneficial to HMR as the *per se* waiver rule is to Complaint Counsel, since neither rule is consistent with Commission precedent or the sound reasoning of a substantial majority of federal courts, HMR does not urge the application of either rule in these proceedings.[21]

B. Under the Majority Rule, the Attorney-Client and Attorney Work Product Privileges were Not Waived by the Inadvertent Production of the Letter

In recent years, as the pace, volume and complexity of modern[22] litigation has accelerated, courts have increasingly been called upon to decide whether a party's mistaken production of a privileged communication to its opponent in discovery effects a waiver of the attorney-client privilege or work product protection for the communication. By far the most widely adopted

---

21. Complaint Counsel impliedly suggests this Tribunal should abandon precedent and adopt the *per se* waiver rule because the inadvertent disclosure "occurred" in the District of Columbia. (FTC Br. at 9.) Complaint Counsel offers no support for this assertion, however, and it is not self-evident whether disclosure would be deemed to have occurred in the District of Columbia, where Commission staff are headquartered, or in Missouri, the place at which HMR surrendered dominion and control over the documents to the Commission. Were it the latter, by Complaint Counsel's reasoning, Missouri or Eighth Circuit law would apply. Both Missouri and Eighth Circuit courts adopt the balancing test favored by most courts. *See Gray,* 86 F.3d at 1483-84; *Starway v. Independent Sch. Dist. No. 625,* 187 F.R.D. 595, 596-97 (D. Minn. 1999).

    Moreover, the law of the D.C. Circuit does not control these proceedings. Although federal privilege and other evidentiary interpretations may be persuasive in Commission proceedings, the Commission adheres to its own evidentiary rules and interpretations and follows Commission precedent where such authority exists. *See, e.g.,* 2 Federal Trade Comm'n, *Operating Manual* ch. 10.6, 10.7 (1991); *cf.* 16 C.F.R. § 3.31(c)(2)&(3) (FTC privilege and work product rules). As discussed herein, Commission tribunals have previously spoken on the issue of inadvertent disclosure, and have joined most courts in adopting the "middle-of-the-road" balancing test. In addition, because HMR may seek judicial review of adverse Commission action in any Circuit in which HMR resides or conducts business (*see* 15 U.S.C. § 45(c)) – which, in HMR's case, effectively encompasses virtually every federal circuit – Complaint Counsel's advocacy of a standard expressly rejected by most federal courts finds no support in logic or common sense.

22. Under the balancing test, courts only consider waiver of the specific document. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987). *Accord Martin v. Valley Nat'l Bank of Ariz.,* No. 89 Civ. 8361 (PKL), 1992 WL 196798, at *4 (S.D.N.Y. Aug. 6, 1992); *Colt Indus., Inc. v. Aetna Cas. & Surety Co.,* CIV. A. No. 87-4107, 1989 WL 46189, at *2 (E.D. Pa. Apr. 28, 1989); *International Digital Sys. Corp. v. Digital Equip. Corp.,* 120 F.R.D. 445, 446 n.1 (D. Mass. 1988). Inasmuch as Complaint Counsel is not seeking waiver beyond the letter itself, no discussion of scope is necessary. (See FTC Br. at 15).

standard for determining questions of waiver in cases of inadvertent production[23] – and the one previously embraced by Commission tribunals[24] – is a balancing test, referred to as the "middle-of-the-road," "case-by-case," "balancing" or "totality of the circumstances" test. These "tests" represent an attempt by Commission and the judiciary to reach a fundamental fairness[25] and a recognition of the potential for human error in complex, accelerated and document-intensive proceedings[26] and the important societal interests served by these privileges in encouraging citizens to seek legal guidance to conform their conduct to the law.[27] The appeal of these tests lay in thier flexibility, permitting courts to consider the totality of the circumstances surrounding a particular inadvertent production on a case-by-case basis and make decisions that are fair and just under the particular circumstances. As the Eighth Circuit noted,

> This test strikes the appropriate balance between protecting attorney-client privilege and allowing, in certain situations, the unintended release of privileged documents to waive that privilege. The [balancing] test is best suited to achieving a fair result. It accounts for the errors that inevitably occur in modern, document-intensive litigation, but treats carelessness with privileged material as an indication of waiver. The [balancing] test provides the most thoughtful approach, leaving the trial court broad discretion as to whether waiver occurred and, if so, the scope of that waiver.

---

23. *See, e.g., Asian Vegetable,* 1995 WL 491491, at *7.

24. *See, e.g., Atlantic Richfield Co.,* 1978 FTC Lexis 560 (Sept. 12, 1978).

25. *See, e.g., Baker's Aid v. Hussmann Foodservice Co.,* No. CV 87-0937 (JMM), 1988 WL 138254, at *6 (E.D.N.Y. Dec. 19, 1988).

26. *See, e.g., Gray v. Bicknell,* 86 F.3d at 1483.

27. *See, e.g., Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.,* 133 F.R.D. 171, 174 (D. Kan. 1989).

Gray, 86 F.3d at 1484.[28] The balancing test favors neither party and is fair to both. It not only is the test that has been used in Commission proceedings, but is also consistent with a more generalized Commission sensitivity toward avoiding the potentially harsh consequences of a waiver of privilege in circumstances arising from human error and inadvertence.[29]

For these reasons, HMR respectfully submits that the balancing test is best suited to facilitate the efficient and proper conduct of this Commission proceeding.

1. Application of the "Totality of the Circumstances" Test Unequivocally Shows There Was No Waiver in This Case

In considering whether a party has waived applicable privileges by the inadvertent disclosure of an otherwise privileged document, courts typically evaluate the totality of the circumstances surrounding the inadvertent disclosure[30] under the rubric of a five-factor balancing test. The factors considered include: (1) the reasonableness of the precautions undertaken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the "overreaching issue of fairness and the protection of an appropriate privilege." *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.,* 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *see also*

---

28. *See also Alldread,* 988 F.2d at 1434; *Asian Vegetable,* 1995 491491, at *7 ("This rule best reconciles the principles underlying the attorney-client privilege with the realities of the discovery process in complex litigation.").

29. *See, e.g., Harold Honickman,* 1990 FTC Lexis 61, at *8 (Apr. 3, 1990) (providing, in court's Order for the Protection of Confidential Documents and Information, that "[t]he inadvertent disclosure of privileged documents or information by a party or its counsel shall not constitute a waiver of any applicable privilege"); *cf. National Dietary Res., Inc.,* 1994 FTC Lexis 126, at *1, 6 (July 18, 1994) (noting that protective order, which includes provision that "[i]nadvertent production of documents or information which do not contain a designation of confidential will not waive a party's claim that the documents or information are confidential or estop a party from designating the documents or information confidential at a later date" – "comports with existing law regarding the treatment of confidential information" and "provides adequate safeguards against unauthorized disclosure of such information").

30. *See, e.g., Telephonics Corp. v. United States,* 32 Fed. Cl. 360, 361 (1994) ("All circumstances that surround an inadvertent disclosure must be considered.").

Gray, 86 F.3d at 1484; *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.,* 133 F.R.D. 171, 172 (D. Kan. 1989) ("*KCP&L*"). No single factor is determinative. The reviewing court must weigh all relevant circumstances on a case-by-case basis.

When these factors are considered in this case, it is clear that the inadvertent production of the letter HMR did not operate to waive the attorney-client or attorney work product privileges.

a. The Precautions Taken by HMR were Reasonable

In applying the balancing test, "inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the asserted privilege." *Desai v. American Int'l Underwriters,* No. 91 CIV. 7735 (LBS), 1992 WL 110731, at *1 (S.D.N.Y. May 12, 1992).[31]

Here, the procedures adopted by HMR to protect its privileged documents were reasonable. HMR used trained and experienced paralegal personnel to collect and review responsive documents. These personnel had significant prior experience with the collection and privilege review of HMR's internal files. They were familiar with the company as well as the types and locations of documents responsive to the Second Request. In light of the time pressures HMR faced, these individuals were well suited to identify privileged documents in HMR's internal files in the most efficient manner. Moreover, once the initial review was in place, the identified privileged documents were then reviewed by outside counsel to confirm that a privilege applied. The procedures HMR put in place to control the production and review for privileged documents were very successful. In this ongoing

---

31. *See also Asian Vegetable,* 1995 WL 491491, at *7 (most courts hold that inadvertent disclosure waives attorney-client privilege "only if the disclosing party failed to take reasonable steps to maintain the confidentiality of the assertedly privileged documents"); *KCP&L,* 133 F.R.D. at 174 ("If the attorney-client privilege is to serve its purpose of fostering attorney-client communications, then documents inadvertently produced should not lose their privileged status without some substantial reason.").

rolling production that ultimately produced some 20,000 pages of documents, only one privileged document, totaling nine pages, inadvertently slipped through.

The record further demonstrates the time pressures HMR faced at the time of the Second Request. Hopeful that the "quick look" review could be completed before the "walk away" date was triggered, HMR began a rolling production as it continued to negotiate with staff. When the last of its attempts to bring the scope of staff's requests within reasonable limits failed -- with 6 business days remaining before the November 30 "walk-away" date and an ongoing "brain drain" of employee resignations from Rugby -- HMR stepped up its efforts to collect, review and produce non-privileged responsive documents. Within 24 hours of its failed last attempt to limit the scope of staff's requests, HMR had collected, reviewed and produced to Commission staff roughly one-third of the remaining internal HMR documents which were responsive to staff's request, a collection totaling some 4,500 pages.[32]

Moreover, the letter was always treated by HMR and its counsel as subject to the attorney-client and attorney work product privileges. At the time the letter was created, counsel conspicuously marked each page with a privilege legend and accompanied this with enough other indicia of the document's privileged character to put the recipient on notice of the validity of the asserted privileges. The facial and contextual features of this document were more than adequate to cause a reasonably prudent recipient of this document during the course of an accelerated document production to question whether its production was voluntary and knowing.[33]

---

32. Outside counsel also coordinated the production that same day of another 1,000 pages of materials from outside patent counsel and had begun the process of collecting and producing in the coming days an additional 12,500 additional pages of responsive materials.

33. *See Telephonics Corp.*, 32 Fed. Cl. at 361-62 (document that "was stamped with an appropriate protective legend in bold capital letters so that even someone taking a cursory review of the document would recognize (continued...)

HMR also buttressed facial indications of privilege with the clear and unambiguous identification of the letter on the privilege log it produced in the Rugby investigation. "Including privileged material on a privilege log puts the opposing party on notice that if any document listed on the log is produced, its production was inadvertent and the document should be returned." *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064, 1996 WL 668862, at *4 (S.D.N.Y. Nov. 19, 1996).[34]

Finally, it is undisputed that neither HMR nor its outside counsel intended to waive the privileges attaching to the document. Contrary to the suggestion in Complaint Counsel's brief (FTC Br. at 7-8), the intent of the disclosing party is one element that should be factored into the Court's evaluation of the totality of the circumstances. *See, e.g., Telephonics Corp. v. United States,* 32 Fed. Cl. 360, 362 (1994); *Lois Sportswear, U.S.A., Inc.*, 104 F.R.D. at 106; *KCP&L,* 133 F.R.D. at 174 (in applying balancing test, court factors in "the modern trend that focuses on the intent of the producing party"); *cf. Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576 (D. Kan. 1997) (disclosure of work product "was inadvertent, inasmuch as such disclosure was not intended by IBP's attorneys"); *Baker's Aid v. Hussmann Foodservice Co.*, No. CV 87-0937 (JMM), 1988 WL 138254, at *6 (E.D.N.Y. Dec. 19, 1988) ("A predominant theme of all these [inadvertent production] cases is one of fundamental fairness. It is for this reason that I must accord great weight to defendants [*sic*] subjective intent in producing the [privileged] document." (citation omitted)). As Judge Sweet of

---

33. (...continued)
the protected nature of the material" put recipient on notice that further inquiry might be appropriate and constituted an element supporting court's finding of "reasonable and careful" procedures).

34. *See United States v. Pepper's Steel & Alloys, Inc.*, 742 F. Supp. 641, 642-43, 645 (S.D. Fla. 1990) (facts that inadvertently produced documents were included on producing party's privilege log and that it was clear on the face of the documents that they were privileged supported finding that producing party "made every effort to protect its privilege").

the Southern District of New York has pointed out, the Proposed Rules of the Federal Evidence concerning attorney-client privilege, which "were approved by the Supreme Court and are accepted as a restatement of the law applied in the federal courts," emphasizes intent as a factor in the creation of the privilege and "would appear to make that factor equally crucial to destruction of the privilege through forfeiture." *Lois Sportswear, U.S.A., Inc.*, 104 F.R.D. at 106.[35]

b. HMR Attempted to Retrieve the Letter Immediately Upon Discovering its Inadvertent Production.

Complaint counsel argues that the privilege should be waived because HMR waited until three weeks after the production to notify FTC staff of the inadvertent production. Complaint Counsel misstates the proper inquiry. The issue is not whether HMR waited one day, one week or one year after *producing* the document to before notifying the FTC of the inadvertent production,[36] the issue is whether HMR acted promptly to retrieve the document after *discovering* the inadvertent production.[37] As the record demonstrates, the letter was inadvertently sent to FTC staff on

---

35. Complaint Counsel hypothesizes that HMR's production of the letter was not inadvertent and was intended as a means of obtaining some sort of strategic advantage. Complaint Counsel fails to define or describe, much less support these statements with any hard evidence. (*See* FTC Br. at 2, 8, 14-15.) The record, in fact, contradicts Complaint Counsel's hypothetical ruminations. HMR never sought to use the letter or the information contained in it during the Rugby investigation, during the Commission's investigation that preceded these proceedings, during these proceedings, or at any other time. To the contrary, HMR immediately sought to retrieve the document upon discovery of its disclosure and repeatedly thereafter, HMR claimed the document on its privilege log and repeatedly removed copies of the letter from its productions to the FTC whenever such copies were found, and HMR's representatives have refused to answer deposition questions concerning the letter in both the Rugby investigation and the investigation that preceded these proceedings.

36. *See, e.g., Asian Vegetable,* 1995 WL 491491, at *7 (actions taken promptly after discovering erroneous production, which was within two weeks after making privileged documents available to opposing counsel, held sufficiently prompt upon balancing of *Lois Sportswear* factors); *Bayer AG v. Barr Labs., Inc.*, No. 92 Civ. 0381 (WK), 1994 WL 705331, at *3 (S.D.N.Y. Dec. 16, 1994) (where only apparent specific use of inadvertently produced documents was to prepare a motion based on their contents, producing party did not behave negligently in waiting more than one year before moving to compel return of the documents).

37. *See, e.g., In re Southeast Banking Corp. Secs. & Loan Loss Reserves Litig.*, 212 B.R. at 393 (prompt action to rectify found where, "after it learned of the inadvertent disclosure, [the producing party] immediately and persistently took steps to recover the documents"); *Chavez v. Illinois State Police,* No. 94CV5307, 1996 WL (continued...)

November 21, 1997. On December 16, 1997, while reviewing the November 21 production in the course of preparing HMR's general counsel for an investigational hearing requested by FTC staff, Mr. Eiszner discovered the inadvertent production of the letter.[38] Mr. Eiszner immediately attempted to call David L. Inglefield, one of the principal FTC staff attorneys assigned to the Rugby investigation. Upon reaching Mr. Inglefield's voicemail, Mr. Eiszner left a message explicitly advising him that the letter had been inadvertently produced and requesting the return of the produced copy and all copies made by FTC staff. Mr. Eiszner followed this call with a letter, which he sent by facsimile to Mr. Inglefield that same day, in which he unambiguously identified the letter, reiterated that the document had been inadvertently produced to the FTC, directed Mr. Inglefield's attention to HMR's explicit claims of attorney-client privilege and work product protection on HMR's privilege log to the FTC, and again requested return of the document.

---

37. (...continued)
65992, at *2 (N.D. Ill. Feb. 12, 1996) (producing counsel found to have acted promptly to rectify when he "called [recipient's] attorney as soon as he was aware of the error – the evening he arrived from his vacation" – and counsel "called [recipient's] attorney again the next day, and finally spoke to him the following day"); *KCP&L,* 133 F.R.D. at 172 (noting that "the relevant time should begin when plaintiff discovered or with reasonable diligence should have discovered the inadvertent disclosure" because the producing party "could not have taken action to rectify the error until it learned of it," court finds that actions by producing party to rectify inadvertent disclosure 14 months after production but two weeks after producing party's discovery of the error constituted action "within a reasonable amount of time"); *Data Sys. of N.J., Inc. v. Philips Bus. Sys.,* No. 78 Civ. 6015-CSH, 1981 U.S. Dist. Lexis 10290, at *17 (S.D.N.Y. Jan. 8, 1981) (finding no slothfulness where "plaintiffs' counsel raised the claim as soon as the matter was brought to his attention").

38. Mr. Eiszner's discovery was obviously inconvenient to FTC staff. During the entire period that staff possessed the letter, it never once brought the matter to HMR's attention, despite the fact that each page carried a privilege legend, HMR had clearly claimed attorney-client and work product protection for the document on its privilege log, and FTC investigative staff remained in contact with HMR's counsel as to related matters throughout this period. With an investigational hearing of the letter's only recipient scheduled to occur on December 22, 1997, FTC staff evidently hoped to use the letter to "bushwhack" Mr. Stratemeier, and perhaps resolve any issue of inadvertent disclosure by effecting a waiver from an unwary deponent at deposition. This Court should not sanction such questionable litigation tactics. "Such a result would give recognition and reward to defendant's sharp practices at the examination, and is contrary to standards reasonably pertaining to discovery conduct." *Telephonics Corp.,* 32 Fed. Cl. at 362.

Three days later, on December 19, 1997, Mr. Eiszner again sent Mr. Inglefield another letter, repeating his request for the return of the letter and all copies. Mr. Eiszner reminded Mr. Inglefield that the letter was included on HMR's privilege log and the FTC was notified of the error immediately upon discovery. He further advised Mr. Inglefield that FTC staff had an ethical obligation to not review the privileged document and to return it to HMR.

Three days after that, on December 22, 1997, Mr. Eiszner stated on the record of Mr. Stratemeier's deposition that FTC staff was required to return the inadvertently produced document. Mr. Eiszner did not permit the FTC to question Mr. Stratemeier concerning the letter, and permitted questioning as to the Stipulation only after FTC staff agreed on the record that such questioning would not be deemed to constitute a waiver of privilege as to the letter.[39]

Accordingly, HMR's actions to recover the letter were taken promptly upon learning of the inadvertent disclosure. No waiver should be found on these facts.[40]

c. HMR Was Not Required to Provide the FTC with a Detailed Factual Explanation of the Circumstances of the Inadvertent Production

Throughout its Brief, Complaint Counsel asserts that the privileges no longer apply since HMR never produced evidence to the FTC's satisfaction of the circumstances surrounding the inadvertent production. (FTC Br. at 1, 5, 8-9, 11). Complaint Counsel's assertions are disingenuous and misleading. First of all, FTC staff never asked for a detailed factual explanation of the circumstances surrounding the inadvertent production. Moreover, the law neither imposes such an

---

39. *See Desai,* 1992 WL 110731, at *1 ("once defendants learned, in the course of a deposition, of the disclosure of the document, they promptly invoked the privilege and refused to permit the deposition witness to answer any questions about it. This is not tantamount to a waiver.").

40. *See, e.g., Asian Vegetable,* 1995 WL 491491, at *7; *Bayer AG,* 1994 WL 705331, at *3; *In re Southeast Banking Corp. Secs. & Loan Loss Reserves Litig.,* 212 B.R. at 393; *Chavez* 1996 WL 65992, at *2; *KCP&L,* 133 F.R.D. at 172; *Data Sys. of N.J., Inc.*, 1981 U.S. Dist. Lexis 10290, at *17; *Telephonics Corp.,* 32 Fed. Cl. at 362; *Desai,* 1992 WL 110731, at *1.

obligation on HMR, nor creates the adverse "presumption" which Complaint Counsel now contends. In addition, the sources cited by Complaint Counsel in support of this proposition merely address who has the burden of persuasion in the event of a motion to compel or motion for protective order.[41] HMR *was* obligated to assert the privilege and to seek return of the document from the FTC reasonably promptly following its inadvertent production and to refrain from answering deposition questions or responding to other discovery requests directed at the substance of the letter. That is exactly what HMR did.[42]

On the other hand, FTC staff counsel, who practice in the District of Columbia, violated their ethical obligations to call to HMR's attention the inadvertently produced letter and return the document and all copies upon HMR's request. As Complaint Counsel acknowledges in its opening brief, the District of Columbia Bar has recently spoken on this issue. In a 1995 ethics opinion, the D.C. Bar determined, in pertinent part, that

> where the receiving lawyer has not examined the misdirected material before gaining knowledge of the inadvertence of the disclosure, it is our opinion that the lawyer should, at a minimum, seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material, unread, the receiving lawyer should do so.

---

41. *See, e.g., IBM v. United States,* 37 Fed. Cl. 599, 605 (1997) (producing party's failure "to *educate the court* about its screening procedures" was fatal to its motion for a protective order (emphasis added)); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.,* 190 F.R.D. 287, 289 (D. Mass. 2000), *appeal dismissed*, Nos. 610 and 611, 2000 WL 290346 (Fed. Cir. Feb. 25, 2000), *and appeal dismissed*, No. 00-1230, 2000 WL 290804 (Fed. Cir. Mar. 3, 2000) (on motion to compel return of documents, producing party has burden to demonstrate no waiver); *Golden Valley Microwave Foods, Inc. v. Weaver Popocorn Co.,* 132 F.R.D. 204, 207 (N.D. Ind. 1990) (same); 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:72, at 320, 328 (2d ed. 1999) (describing burden of persuasion in litigated cases).

42. For example, HMR has once again included the letter on its privilege log in this action, and Mr. Spears, the author of the letter, refused to answer questions concerning the letter at his investigational hearing in the investigation that culminated in the Commission's Complaint.

Legal Ethics Comm. of the D.C. Bar, Op. No. 256 (1995). As the Bar Opinion notes, the critical factors in determining a lawyer's ethical duty in cases of inadvertent disclosure rests with "the receiving lawyer's knowledge of the inadvertence of the disclosure" and his "good faith" in utilizing the document. "Thus, for example, *where the document has no facial or contextual indication of privilege* and the receiving lawyer has not learned of its inadvertent disclosure, the receiving lawyer who reads such a document commits no breach of ethics." *Id.* (emphasis added).

The letter carried *both* facial *and* contextual indications of privilege. Each page was conspicuously marked "Confidential and Privileged Attorney Client Communications." The letter was transcribed on law firm stationary, specifically identified the recipient as the general counsel of HMR, specifically identified the author (who, as a former FTC general counsel, was well known to be a member of the bar), and specifically identified the litigation to which it pertained. Even if all these features, readily identifiable from a cursory glance, did not commence the ringing of warning bells, the document's introductory paragraph, which indicated that the letter responded to a request by HMR for legal advice, should have signaled prudent and conscientious counsel to proceed no further. Its inclusion on HMR's privilege log provided further confirmation to FTC staff that the production of the document was a product of inadvertence.

Everything about the letter ought to have put Commission staff on inquiry.[43] Staff's failure to seek guidance from HMR as to the inadvertence of the document's disclosure in the face of such tell-tale signs of inadvertence, and in light of the time sensitivities repeatedly expressed by HMR to Commission staff, is contrary to both the staff's ethical obligations and professional litigation practice.[44]

---

43. Complaint Counsel cites to a footnote in the Bar Opinion in support of its assertion that its silence and inaction in the face of these numerous warning signs were appropriate because the letter was produced to Commission staff as part of a larger production of documents by HMR. (FTC Br. at 13-14.) When taken in context, however, the language from the Bar Opinion cited by Complaint Counsel does not support Complaint Counsel's proposition. As the footnote makes clear, in circumstances where the only potential sign of inadvertence is a privilege legend and such legend has been indiscriminately used, the legend loses its legal significance and "the receiving lawyer *may* be entitled to assume with respect to the document was being voluntarily waived." Legal Ethics Comm. of the D.C. Bar, Op. No. 256, n.12 (1995) (emphasis added). Here, by contrast, the privilege legend was just one of a series of facial and contextual features that put FTC staff on notice of its inadvertent production, those features confirmed that the document was privileged and that the privilege marking was not used "without regard to whether the document was actually entitled to some legal evidentiary privilege" (*id.*), and the "privilege" stamp was not indiscriminately used in the production. As the collection of facial and contextual characteristics makes clear, Complaint Counsel's suggestion that "[n]othing suggested that the letter was not intended to be included in the production" (FTC Br. at 14) is without foundation.

44. *See Telephonics Corp.*, 32 Fed. Cl. at 361-62 (criticizing defendant-recipient's failure to act following inadvertent disclosure of privileged document by producing plaintiff as part of larger document production; "Notwithstanding plaintiff's steps to mark the document and notify defendant of its intent not to produce privileged material, and notwithstanding plaintiff's counsel being on site during the actual production or otherwise available, defendant did not alert plaintiff when it found the [privileged document]. Instead, defendant shared the document with its several representatives at the production and took notes on the document."); *First of America Bank,* 868 F. Supp. at 220 (where seven-page, clearly marked litigation strategy letter from attorney to client was inadvertently produced to RTC, "common sense and a high sensitivity toward ethics and the importance of attorney-client confidentiality and privilege should have immediately caused the [RTC's] attorneys to notify defendant's counsel of his office's mistake. . . . While lawyers have an obligation to vigorously advocate the positions of their clients, this does not include the obligation to take advantage of a clerical mistake in opposing counsel's office where something so important as the attorney-client privilege is involved."); *Hydraflow, Inc. v. Enidine Inc.,* 145 F.R.D. 626, 638 (W.D.N.Y. 1993) (noting that, even while asserting waiver, "Defendant's counsel promptly, and commendably, . . . informed the court and Plaintiff's counsel that the [privileged] documents [that were the subject of a motion to compel filed by defendant] filed with the court . . . had also been delivered to his office"); *Pepper's Steel & Alloys, Inc.,* 742 F. Supp. at 645 (critical of recipient's failure to return privileged documents mistakenly included in larger document production; "At best, these situations are resolved amicably, by counsel returning documents which are obviously privileged and inadvertently produced. It is unfortunate that such could not be the case here and that the Court was forced to expend a great deal of time on this relatively minor matter. However, such has been the case throughout the course of this litigation."); *see also In re Southeast Banking Corp. Secs. & Loan Loss Reserves Litig.,* 212 B.R. at 396 (counsel given access to documents should have known from circumstances "that he had accidentally come into possession of privileged materials" and "admit[ted] that the documents were conspicuously labeled as confidential and privileged," but nevertheless failed to notify producing party (continued...)

d. Waiver is Inappropriate Since Only One Document Among a Significant, Accelerated and Time-Sensitive Production was Inadvertently Produced

The "scope of discovery" element is intended to evaluate the volume of discovery between the parties as compared to the amount of privileged material inadvertently disclosed in the matter. *See Asian Vegetable,* 1995 WL 491491, at *7. The inadvertent disclosure here occurred in the late stages of a rolling production that produced approximately 20,000 pages of documents. Only one copy of one privileged document – a nine-page legal opinion letter – fell through the cracks when it was produced as part of a set of documents that were collected, reviewed by Legal Department personnel for privilege, Bates-stamped, copied and sent to FTC staff in a 24-hour period.

The November 21 stage of the production was accelerated because, by the time the FTC had responded to HMR's repeated efforts to modify the transaction and/or the scope of the second request to expedite antitrust clearance of the Rugby transaction, HMR was facing a "drop dead" provision in its sale agreement that would go into effect less than 10 days from the production date. HMR also felt pressured to produce documents quickly because each day of delay beyond this "walk-away" date was expected to result in an erosion of Rugby's value as key personnel responded to the uncertainty presented by FTC's drawn-out review.

When viewed in light of the significant volume of documents collected (both internally and from outside sources such as outside counsel and securities professionals) and reviewed by HMR in-house and outside legal personnel and produced to the FTC in the few weeks following the determination of the scope and procedures of the "quick look" review, HMR's inadvertent

---

44. (...continued)
(FDIC) of disclosure and made copies of privileged documents; recipient discounted conspicuous privilege legend on the grounds that "the FDIC would have put that label on a roll of toilet paper"; court concludes that "[t]his type of conduct is unacceptable").

production of a single nine-page privileged document constitutes "a relatively small number of privileged documents [that] were disclosed in comparison to the total number of documents produced." *See Asian Vegetable,* 1995 WL 491491, at *7; *see Starway,* 187 F.R.D. at 596-97 (inadvertent production of four-page memorandum from attorney to client that was conspicuously labeled attorney-client privileged as part of a document production that totaled approximately 541 pages – which the court called "a significant number of documents" – in response to 10 requests for production did not give rise to waiver of privilege as to that document).[45]

e. The Letter Has Not Played Any Significant Role in this Case

The fourth factor, concerning the "extent of the disclosure,"considers the extent to which the document has been incorporated into the recipient's case preparation at the time the disclosing party brought its error to the recipient's attention. *See, e.g., In re Grand Jury Investigation,* 142 F.R.D. at 281. Courts typically evaluate the extent to which the recipient has incorporated privileged materials into its case preparation, such as by use at deposition or as an integral part in framing dispositive motions.[46]

---

45. *See also In re Grand Jury Investigation,* 142 F.R.D. 276 (M.D.N.C. 1992) (no waiver by inadvertent disclosure where 18 privileged documents produced out of 22,000 pages of documents produced); *Lois Sportswear, U.S.A., Inc.,* 104 F.R.D. at 105 (no waiver by inadvertent disclosure where 22 privileged documents produced out of 16,000 pages of documents reviewed); *Data Sys. of N.J., Inc.,* 1981 U.S. Dist. Lexis 10290, at *9-17 (no waiver by inadvertent disclosure of "only one five-page document" amidst a production requiring review of "thousands of documents"); *see generally* 2 Paul R. Rice, *supra* § 9:72, at 333-34 ("the fewer the number of undetected privileged communications relative to the total volume of production, the more conscientious the client seems to have been").

46. *See, e.g., Zapata,* 175 F.R.D. at 578 ("extent of disclosure" element does not support waiver where "the use of [the privileged material] has been minimal" and "the brief questioning by [opposing counsel] during . . . deposition [of disclosing party's expert] is the only use of the [privileged material] in the entire case"); *Hydraflow, Inc.,* 145 F.R.D. at 637-38 (noting that court must consider "[t]he degree to which the disclosed information has been allowed to 'weave itself into the fabric' of pre-trial discovery so as to create reliance by the opponent," failure to demonstrate that inadvertently disclosed documents "have become directly involved in the discovery process" results in conclusion that "there is no showing of any significant reliance on the documents"); *In re Grand Jury Investigation,* 142 F.R.D. at 281 (documents inadvertently produced to government investigator that had not been presented to grand jury nor shown to witnesses or experts "have not (continued...)

Here, the letter was produced during a merger investigation which was unrelated to this case. In fact, FTC staff was aware of HMR's inadvertent production claim (December 16, 1998) ten months before FTC began its formal investigation into the Stiipulation and Agreement (October 15, 1998) and fifteen months before it filed the instant Complaint (March 15, 2000). Thus, FTC was well aware of the inadvertency of the production long before it commenced this case. Moreover, it begs to be noted that the letter was introduced as an exhibit in Mr. Stratemeier's deposition in the Rugby investigation and in a deposition of Mr. Spears in the investigation that preceded the Commission's Complaint. Counsel for HMR objected to staff's use of the document in each case and neither deponent was permitted by counsel to answer any questions concerning the substance of the letter.[47] While Complaint Counsel has included the letter on its list of confidential documents that it may later include in a motion or other document to be filed with the Court, to date the document has not been referred to in any motion, pleading or other document in these or any other proceedings. Finally, the letter has not been identified as a document upon which any party's expert has relied. Under these circumstances, disclosure must be considered to be minimal.

Complaint Counsel suggests that the letter has permeated this case because Commission attorneys have "read and analyzed" it (FTC Br. at 11, 12, 13). Yet Complaint Counsel cannot point to a single deposition, pleading, motion, or other concrete aspect of this case in which the letter has

---

46. (...continued)
worked their way into the fabric of the case," thereby minimizing extent of disclosure); *KCP&L,* 133 F.R.D. at 172-73 (on balance, extent of disclosure weighs against waiver where (i) one privileged document, though identified in one deposition, was met with objection from disclosing party's counsel and testimony concerned foundational and incidental, rather than substantive, details of the document and (ii) though the privileged documents were allegedly used to prepare an amended counterclaim, the documents were neither crucial to nor even referred to in such counterclaim).

47. *See* FTC Br. at 15.

played a significant, much less critical, role.[48] Regardless, intensive review is not the same as extensive disclosure. *KCP&L,* 133 F.R.D. at 173. Since the letter "ha[s] not worked [its] way into the fabric of th[is] case" and can therefore "be protected from becoming, in [itself], evidence in the case,"[49] the extent of disclosure in this case tips decidedly in favor of preserving the letter's privileges.

48. In its brief, Complaint Counsel describes the letter as "a critical document" (FTC Br. at 12), yet nowhere demonstrates any concrete, significant role that the document has played in any deposition, motion, filing with this Court, or any other objective indicator of case preparation. Such bare, unsupported hyperbole carries no weight in determining whether the privileges attaching to the letter will be waived.

49. *See In re Grand Jury Investigation,* 142 F.R.D. at 281.

f. Considerations of Fairness Demand that the Privileges Attaching to the Opinion Letter be Preserved.

Finally, HMR respectfully submits that fundamental fairness and the interests of justice demand that the attorney-client privilege and work product protection be preserved for the letter and that Complaint Counsel be prohibited from retaining the document or using it in its case.

i. A Waiver of Privileges Would Prejudice HMR and Ultimately Impair the Commission's Performance of its Investigative Activities.

This document contained all the earmarks of an inadvertent production – from the privilege header, to the identity of the correspondents, to the case caption, to the explicit response to a request for advice, to its listing on HMR's privilege log – and a prudent recipient would have been alerted by these glaring "red flags." Rather than notify, and seek guidance from, HMR, however, Commission counsel allegedly spent three weeks reviewing the document before HMR's counsel discovered the inadvertent production and sought the document's return. By failing to notify HMR of its receipt of such an auspicious document, Commission staff deprived HMR of the very meaningful opportunity to object that Complaint Counsel now alleges that HMR failed timely to exercise. *See KCP&L,* 133 F.R.D. at 174 ("Defendant fortuitously obtained the privileged documents. It could not have expected to obtain them and could not have reasonably relied on them. To the extent defendant did rely on them, it did so without plaintiffs' knowledge or consent. Thus plaintiffs had no opportunity to object to defendant's use of them."). Fairness dictates that such practices should not be rewarded with a waiver.

Moreover, the policy behind the privilege – one of the factors to be weighed in a fairness analysis[50] – weighs in favor of maintaining the privileges. "There is an important societal need for people to be able to employ and fully consult with those trained in the law for advice and guidance." *Gray,* 86 F.3d at 1483. Accordingly, standards for waiver of privilege must be wielded with care to avoid "chilling communications between attorneys and clients." Id. HMR acted with prudence and in accordance with the fundamental objectives of the privilege when it sought advice of counsel as to any legal implications presented by the Stipulation – all the more so since the Commission had only recently closed an investigation into HMR's patent litigation practices concerning diltiazem and other products. In light of the reasonable procedures followed by HMR to maintain applicable privileges and the time pressure that it faced during this accelerated production of documents, the interests of justice would not be served by a finding of waiver.

ii. Complaint Counsel's Claims of Reliance and Prejudice are Without Merit.

Complaint Counsel essentially makes three fairness arguments. First, Complaint Counsel asserts that the letter "is directly relevant to a key issue in the case." (FTC Br. at 12.) Second, Complaint Counsel alleges that it relied on the letter in some unspecified way and that a finding of non-waiver would require Complaint Counsel to engage in a fiction of expunging from its mind any memory of the document's content. (*See id.* at 1-2, 12.) Third, Complaint Counsel suggests that, in any event, it is not inherently unfair to "allow the truth to be made public." (*Id.* at 12.) Complaint Counsel's arguments are not persuasive.

---

50. *KCP&L,* 133 F.R.D. at 174.

As to Complaint Counsel's first fairness justification, while courts will consider the relevance and probativeness of an inadvertently produced document in evaluating the relative fairness of maintaining or waiving the privilege, even a finding

> [t]hat the documents are relevant and probative does not determine the waiver question. The court also weighs other factors, such as the policy behind the privilege. If the attorney-client privilege is to serve its purpose of fostering attorney-client communications, then documents inadvertently produced should not lose their privileged status without some substantial reason.

KCP&L, 133 F.R.D. at 174; *see also Starway,* 187 F.R.D. at 598 (rejecting recipient's fairness argument that inadvertently produced privileged document was favorable to, and would help recipient prove, recipient's case; "The interests of justice does [*sic*] not weigh in [the recipient's] favor where the outcome of the dispute is to deny him something to which he was never entitled.").

Complaint Counsel's argument that it relied on the document also falls short of the showing necessary to find a waiver. Complaint Counsel must demonstrate that its alleged reliance was reasonable.[51] It cannot do so. HMR first acted to obtain the document's return a mere three and a half weeks after its production, and immediately upon discovery of its error, and has made repeated efforts thereafter to obtain its return. Because of the FTC staff's silence, this was effectively HMR's first opportunity to object to the FTC's possession and use of the letter. Any alleged element of "reliance" resulting from the FTC staff's review of the document during the period that staff failed to disclose its production and verify its inadvertence cannot be reasonable. Moreover, HMR's earliest efforts to recover the letter, in December 1997, preceded the opening of the Commission investigation that culminated in this Complaint (October 1998) by almost a year. Despite HMR's

---

51. *See, e.g., KCP&L,* 133 F.R.D. at 174 (fairness militates against waiver where recipient could not have *reasonably* relied on inadvertently produced document).

repeated efforts to retrieve the document in what even Complaint Counsel has referred to as a separate and unrelated investigation, Complaint Counsel now alleges that it has relied on the document in unspecified ways in this investigation. Under these circumstances, any prejudice that might result to Complaint Counsel from recognition of the privileges is a prejudice of its own creation.

Complaint Counsel's suggestion that knowledge of the letter cannot be expunged from the minds of Commission staff who improperly reviewed the document does not preclude the entry of effective relief to prevent waiver of the privilege. Since the letter has not figured prominently to date in any motion or other document filed with the Court or in any deposition in this action,

> confidentiality can in some measure be restored, or at least further erosion can be prevented. Of course, the minds of the government attorney and investigator cannot be expunged, but the document[] can be protected from becoming, in [itself], evidence in the case. The restoration of privilege that would be effected by a court order would not be meaningless or an empty gesture.

In re Grand Jury Investigation, 142 F.R.D. at 281. Conversely, any alleged prejudice to Complaint Counsel that might arise from denying its waiver claim is a result of staff's and Complaint Counsel's own improper review of the document before (and without) notifying HMR, their improper refusal to return the document upon HMR's prompt request, and their commingling of a document that was the subject of an outstanding privilege dispute with a second, separate investigation. In light of these circumstances, to find waiver because "it is impossible to 'unring the bell'" (FTC Br. at 10) "would give recognition and reward to [such] sharp practices . . ., and is contrary to standards reasonably

pertaining to discovery conduct." *Telephonics Corp.*, 32 Fed. Cl. at 362.[52] The interests of justice would not be served by such a result.

Finally, Complaint Counsel's third justification – that waiver of privilege is inherently fair because it furthers the truth-seeking process – is little more than another attempt, however indirect, to argue for the application of a *per se* rule of waiver[53] – a rule of decision that, as previously noted, Commission tribunals and most courts have refused to embrace. Many rules of evidence, and virtually every privilege, arguably impair some pure "truth-seeking" ideal, yet this surely cannot justify their abandonment. The evaluation of the effect (if any) that an inadvertently disclosed privileged document may have "on the search for truth" must be tempered, at the very least, by considerations of the policies served by the asserted privileges. *See KCP&L,* 133 F.R.D. at 174.

On balance, therefore, the interests of justice heavily favor the maintenance of the privileges and the return or destruction of the letter.

III. CONCLUSION

WHEREFORE, for the reasons set forth herein, Respondent HMR respectfully requests that this Court enter an Order (i) denying Complaint Counsel's motion regarding waiver of attorney-client privilege and to compel answers to deposition questions, (ii) compelling Complaint Counsel to return or destroy the original and all copies of, and notes, entries and other materials

---

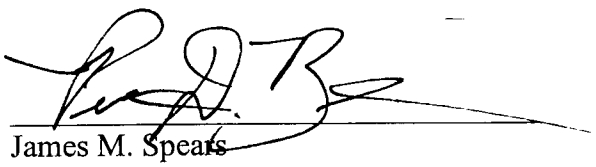
52. Moreover, any prejudice to Complaint Counsel "is minimal, inasmuch as they are not entitled to discover privileged material, and their receipt of the[] document[] was a windfall." *Pepper's Steel & Alloys, Inc.*, 742 F. Supp. at 645.

53. *Cf. Floyd v. Coors Brewing Co.*, 952 P.2d 797, 808 (Colo. Ct. App. 1997), *rev'd on other grounds en banc*, 978 P.2d 663 (Colo. 1999) (describing case quoted by Complaint Counsel for this proposition – *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D. Va. 1991) – as a *de facto per se* case in the same category as *In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989)).

relating to, the inadvertently produced letter, and (iii) prohibiting Complaint Counsel from using the letter during any deposition, during the presentation of evidence in this case, or in any other manner.

Dated: October 11, 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

James R. Eiszner
Scott E. DuPree
SHOOK, HARDY & BACON L.L.P.
1200 Main Street
Kansas City, MO 64105-2118
(816) 474-6550

Exhibit 1

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

DECLARATION OF JAMES R. EISZNER

James R. Eiszner, pursuant to 28 U.S.C. § 1746(2), declares as follows:

1. I am a partner in the law firm of Shook, Hardy & Bacon LLP, which has represented Hoechst Marion Roussel, Inc. ("HMR"), predecessor to Aventis Pharmaceuticals, Inc., on a variety of matters for many years.

2. In October 1997, I was asked by Randall Sunberg, one of my partners, to work on the response to a request for additional information (or "second request") that had been issued by the Commission pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") in connection with the sale by HMR of The Rugby Group, Inc. ("Rugby") to Watson Pharmaceuticals, Inc. ("Watson").

3. The second request sought information regarding a number of products.

In discussions with Commission staff, however, it became clear that the primary interest of the staff was to take a "quick look" approach to the second request by focusing on certain second request specifications, most of which related to diltiazem.

4. In an effort to expedite the expiration of the waiting period applicable to the transaction under the HSR Act, Mr. Sunberg and HMR personnel approached Watson about the possibility of modifying the acquisition so that HMR would retain the Rugby diltiazem product line. It took some time to negotiate these matters with Watson, but ultimately Watson agreed to the concept in light of concerns that delays caused by the issuance of the second request would harm the competitive viability of Rugby.

5. I thereupon inquired of David Inglefield, a lawyer on the Commission staff responsible for the Rugby investigation whether, if the parties agreed to modify the acquisition agreement so that HMR retained the Rugby diltiazem business, the Commission would delete matters relating to diltiazem products from the second request and the resolution of the Commission's investigation would be expedited. I further advised Mr. Inglefield that as part of the Rugby acquisition agreement, HMR and Watson had previously agreed that Watson could abandon the Rugby acquisition if the transaction did not close by November 30, 1997. Thus, time was of the essence.

6. Mr. Inglefield did not respond to my inquiry relating to diltiazem for a number of days. Confident that its proposal to restructure the transaction was reasonable, HMR began to focus on obtaining information relating to matters other than diltiazem that was sought by the second request. In the meantime, the concerns about the competitive viability of Rugby continued to grow as increasing numbers of Rugby employees resigned their positions in light of the uncertainty created

by the Commission's investigation. I informed Commission staff of these concerns on several occasions.

7. On November 18, 1997, six business days prior to the walk-away date, Mr. Inglefield finally replied staff was concerned that there was a relationship between HMR's agreement to sell Rugby to Watson and HMR's stipulation with Andrx Corporation in the HMR/Andrx patent litigation. Accordingly, he advised that Specifications 17 and 20 of the second request would stay in place and a production of the diltiazem-related documents would need to be made even if the parties were to modify the transaction so that HMR would retain the Rugby diltiazem business.

8. As a result of Mr. Inglefield's demand, HMR searched for and collected the requested diltiazem-related information. By the terms of the second request, this required a search of both internal and outside counsel files for responsive documents.

9. On November 21, 1997, I wrote to Mr. Inglefield seeking several additional modifications to the second request and asked him to consider scheduling any necessary depositions for the following week in light of the November 30, 1997 walk-away date which by now was only three business days away. I also asked whether privilege logs were necessary for a number of the productions. See copy of my November 21, 1997 letter attached hereto as Exhibit A.

10. Mr. Inglefield responded by facsimile the same day demanding that we produce "all non-privileged materials" and insisting that we "produce a privilege log covering all documents withheld from production based on a claim of privilege." See copy of Mr. Inglefield's November 21, 1997 letter attached hereto as Exhibit B.

11. On November 21, 1997, I received over 4500 pages of documents from HMR which were responsive to the second request. These documents came from the files of HMR's

senior executives including Edward Stratemeier, the General Counsel. Prior to the time I received these documents, several legal assistants, who routinely work on document productions and are trained and responsible for identifying potentially privileged information, tabbed those documents in the files which they believed were privileged. In light of Mr. Inglefield's demand that we produce these documents and the fact that the walk-away date was now three business days away, I reviewed the tabbed documents to ensure that they were, in fact, privileged communications, pulled the tabbed documents from the production, had the remaining documents numbered and copied, and express shipped these documents to Mr. Inglefield for Saturday delivery.

12. Unbeknownst to me and HMR late that Friday night when I shipped the documents to Mr. Inglefield was the fact that one privileged document, a copy of a September 25, 1997 opinion letter sent to Mr. Stratemeier from his outside counsel, James M. Spears of Gadsby & Hannah LLP, had inadvertently not been tabbed as privileged and therefore had not pulled from the production. The inadvertently produced document bore bates number "HMRI Spec 20 Stratemeier 000283 - 291." The document was clearly privileged, and was properly marked "CONFIDENTIAL AND PRIVILEGED ATTORNEY CLIENT COMMUNICATIONS" at the top of each page.

13. I did not have any authority to waive any privilege on behalf of HMR and certainly had no intention of waiving any privileges as to the inadvertently produced opinion letter.

14. On December 9, 1997, a privilege log was finalized covering all the documents produced by HMR pursuant to the "Quick Look." The privilege log covered both HMR's internal files and the files of several of HMR's outside counsel including Mr. Spears. One of the documents listed on the privilege log was the September 25, 1997 opinion letter. While this document is listed only once on the privilege log, there were multiple identical copies that had been

withheld on the ground of privilege. On December 11, 1997, I sent Mr. Inglefield a Declaration from Mr. Stratemeier wherein he attested to the fact that, with the exception of privileged documents noted on the attached privilege log, HMR fully complied with the "Quick Look" procedure. See copy of Declaration of Edward H. Stratemeier and appended privilege log (Item 22) attached hereto as Exhibit C.

15. On December 16, 1997, in preparation for FTC's deposition of Mr. Stratemeier which had been requested and scheduled the previous day, I began reviewing copies of the documents produced by HMR during the investigation including documents produced to the FTC several weeks earlier from Mr. Stratemeier's files. During this review, I discovered that a copy of the September 25, 1997 opinion letter had been inadvertently produced on November 21, 1997.

16. I immediately called Mr. Inglefield and left him a voice mail notifying him of the inadvertent production and requesting the document's return. I then faxed to Mr. Inglefield a letter requesting the return of the document and directing his attention to HMR's privilege log entry concerning this document. A true and correct copy of my December 16, 1997 letter to Mr. Inglefield is attached hereto as Exhibit D.

17. Three days later, on December 19, 1997, I once again wrote Mr. Inglefield requesting that the document be returned. Mr. Inglefield informally advised that he was not inclined to return the opinion letter. A true and correct copy of my December 19, 1997 letter to Mr. Inglefield is attached hereto as Exhibit E.

18. At no time in any discussions with Mr. Inglefield did he state that he did not believe that the document was inadvertently produced, nor did he ever indicate that he wanted further details regarding the circumstances of the document's inadvertent production.

19. On December 22, 1997, the Commission took Mr. Stratemeier's deposition. Once again I asked that the document be returned, and once again I was told that the matter was being considered. I also objected to staff's use of the document on the record at Mr. Stratemeier's deposition and refused to permit substantive questioning of Mr. Stratemeier concerning the document. Attached hereto as Exhibit F is a true and correct excerpt from the transcript of Mr. Stratemeier's investigational hearing.

20. On or about February 10, 1998, I was advised that the Commission concluded its investigation of the Rugby transaction without taking further action. In a letter of the same date, I asked Mr. Inglefield to once again return the inadvertently produced privileged document. On March 16, 1998, Mr. Inglefield finally advised that the FTC would not be returned as staff did "not believe that there are ethical constraints on our retention and use of the document." Copies of the February 10, 1998 and March 16, 1998 correspondence are attached hereto as Exhibits G and H respectively.

21. I understand that Mr. Inglefield has provided an affidavit attesting that he recalls that I told him that the production of documents from Mr. Stratemeier's files would be delayed because of the need for a privilege review. While I do not dispute Mr. Inglefield's *bona fides*, I very much dispute his recollection. At no time did I tell Mr. Inglefield that the production of documents from Mr. Stratemeier's files would delay the production of those documents because of the need for an extensive privilege review.[1] I did, however, tell Mr. Inglefield several days after

---

1. My concern was that delays caused by preparation of a privilege log would prolong the waiting period. Indeed, as evidenced by my November 21, 1997 letter to Mr. Inglefield (Exhibit A), I asked Mr. Inglefield to delete the requirement of a privilege log and expressly told him we would be producing "non-privileged information responsive to Specifications 17 and 20 that pertain to the HMRI-Andrx stipulation."

Stratemeier Specification 20, No. 000283-291 had been produced, that compliance with the quick look would be materially delayed if submission of a privilege log that catalogued all of the privileged documents relating to patent litigations involving diltiazem to which HMR was a party had to be prepared.

22. Lastly, it is important to note that many of the delays experienced in this investigation were due to the failure of the Commission and its staff initially to provide HMR with a copy of the Commission's authorization for investigation in connection with the acquisition. That authorization was not provided to HMR until Mr. Stratemeier's investigational deposition in late December 1997. See Exhibit I. The authorization indicated that the staff had authority to investigate not only the Rugby/Watson transaction but also the stipulation between HMR and Andrx relating to their patent infringement litigation over diltiazem. Had HMR been given access to this authorization in October 1997 when the second request issued, HMR would not have wasted precious weeks trying to persuade Watson to except diltiazem from the transaction and the Commission staff that removal of diltiazem from the transaction would resolve its competitive concerns and it would not have faced a situation where it had to produce documents in response to the second request on an urgent basis.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 2000 at Kansas City, Missouri, United States of America.

James R. Eiszner

EXHIBIT A

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

A LIMITED LIABILITY
PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▮ FACSIMILE (816) 421-4066

OVERLAND PARK, KANSAS
HOUSTON, TEXAS
WASHINGTON, D.C.
LONDON, ENGLAND
ZURICH, SWITZERLAND

November 21, 1997

Ann B. Malester, Esq.
David L. Inglefield, Esq.
Elizabeth A. Jex, Esq.
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Re: **Proposed Acquisition of The Rugby Group by Watson Pharmaceuticals, Inc., FTC File No. 981-0006**

Dear Ann, David, and Elizabeth:

At Ann's invitation, I am writing to outline the areas in which the Second Request, as modified by David's letters of October 17th, October 27th, October 29th, and November 6th, imposes compliance burdens on HMRI. While David and Elizabeth have been helpful in limiting the second request so far, we need to address the following burdens that remain. I ask you to be extremely mindful in evaluating these burdens of the November 30, 1997 walk-away date set forth in the Purchase Agreement. My client is quite concerned that there are only three business days remaining before that date.

A major burden imposed by the second request is Specification 19, which calls for all documents filed with, received from, or being prepared for submission to the FDA regarding diltiazem. HMRI's FDA files on diltiazem exceed several hundred lineal feet in length. Excluding non-summary data and '483 letters, the files are still approximately 50 lineal feet. We cannot copy and stamp this information in time to meet the walk-away date deadline. While I believe there is good reason to drop this specification entirely given that your competitive concerns relate to a potential relationship between the Andrx-HMRI agreement and the sale of Rugby to Watson, I will produce limited amounts of FDA files, if any, that might bear on this concern. To that end, I arranged for a copy of HMRI's index of its diltiazem files to be sent to Dave yesterday by express courier. Please let me know if there are any discrete categories of documents that you would like us to produce.

A second major burden involves Specification 20 and the request that we search the files of Thomas Hayman, Esq. of Jones, Day and Mitt Spears, Esq. of Gadsby & Hannah, who are outside litigation counsel for HMRI. In requesting that we produce documents from outside counsel for HMRI, you have imposed a severe burden on HMRI. We do not have the resources to search these files and prepare a privilege log for the enormous amount of responsive but privileged information contained in these files, nor do we think that the non-privileged information you would receive -- largely court filings -- is relevant to your expressed, specific competitive concerns. If the transaction is to be completed by the November 30, 1997 walk-away date, it is critical that we not be put to the burden of responding with respect to the litigations handled by these individuals.[1]

Another major burden we face pertains to HMRI's General Counsel, Edward Stratemeier, whose files are to be searched in response to all Specifications covered by the "quick look" procedure. We cannot prepare a privilege log for privileged responsive documents without enormous burden. In addition, to the extent that Mr. Stratemeier's files contain non-privileged information, most of this is publicly available court filings pertaining to litigations that would be responsive to Specifications 17 and 20. I hope that you could modify the "quick look" to delete the requirement of preparing a privilege log and dispense with the obligation to produce pleading files. We are *not* asking that you remove Mr. Stratemeier as a person whose files should be searched. Indeed, Mr. Stratemeier has some non-privileged information responsive to Specifications 17 and 20 that pertain to the HMRI-Andrx stipulation and to the proposed, but unsuccessful, agreement between Bioval and HMRI regarding diltiazem that we will be producing.[2]

The next burden we have relates to Specification 17 as it requires production of the files of Mike Dixon and Ruth Homan. Mr. Dixon, who has left HMRI, was responsible for supervising patent litigation. He was succeeded by Ms. Homan who also was his files. Both individuals acted as patent attorneys for HMRI. If HMRI were required to search the files of these

---

1. We will, however, be producing copies of Mr. Hayman's files containing correspondence with Andrx. We would also produce files of Mr. Spears containing correspondence with Andrx but have learned that he has no such files.

2. Mr. Hayman of Jones, Day and Mr. Spears of Gadsby & Hannah also had a role in negotiating the Andrx Agreement, but neither had non-privileged documents that were not identical in all respects to documents to be produced form Mr. Stratemeier's files. In addition, Mr. Spears also had a role in negotiating the attempted agreement with Bioval regarding diltiazem and we have confirmed that he has no non-privileged documents pertaining to this attempted agreement other than documents that are identical in all respects with documents to be produced from Mr. Stratemeier's files.

individuals, you would receive an enormous privilege log and an enormous amount of publicly available pleadings. The burdens of producing pleadings and preparing a privilege log are large in relationship to the relevance of any non-privileged documents that you might receive from these files. Neither Mr. Dixon nor Ms. Homan were involved in the negotiation of the Andrx Agreement or the negotiation of the sale of Rugby to Watson. I hope that you could relieve HMRI of the burden of producing documents from the files of these attorneys.

Finally, Mr. Stratemeier has in his possession approximately forty boxes of documents that pertain to the agreement between Hoechst Roussel Pharmaceuticals ("HRPI") and Biovail regarding the development of Tiazac. Most of the documents consist of the agreement itself and test results pertaining to the Tiazac product. Since this arrangement involved a prior venture by a predecessor to HMRI that was the subject of another Commission proceeding that was terminated pursuant to a consent order with the Commission long before the negotiations commenced for the sale of Rugby to Watson, we assume you have no interest in these documents. If we were obligated to copy, number and produce these documents pursuant to the "quick look," we could not comply in sufficient time to consummate the sale of Rugby to Watson. I urge you not to require production of these materials.

If you can agree to the above modifications, there is still a chance that the sale of Rugby to Watson can be completed. Later today we will hopefully be shipping to Dave Inglefield for Saturday delivery, the response of HMRI to the "quick look" except for the response to Specification 19, the pleading files relating to patent litigations that are in the possession of Messrs. Stratemeier, Hayman and Spears, and the HRPI files in Mr. Stratemeier's possession relating to the HRPI/Bioval agreement on Tiazac.[3] If you can review the index to HMRI's FDA files sent to you yesterday by overnight courier and tell us today what, if anything, you need to have produced from those files and can agree to the other modifications I have proposed herein, I believe HMRI will be in a position to certify compliance with the "quick look" sometime early next week.

As I have emphasized repeatedly, there is genuine concern on the part of HMRI that its inability to close the sale of Rugby by the November 30th walk-away date may doom the transaction. I have tried to suggest alternative methods to resolve your competitive concerns about the transaction because the burdens associated with compliance with the second request as amended to be a "quick look" created the possibility that you could not complete your investigation before

---

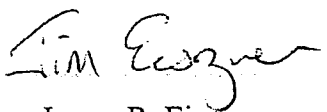
3. If we cannot ship all of the documents today for Saturday delivery, we will ship as much as we can with the balance to be shipped for delivery on Monday. In addition, it may be necessary to have Mr. Hayman's correspondence files with Andrx sent to you directly by Mr. Hayman.

the November 30th walk-away date. While you have not been amenable to my suggestions, you have provided me your assurances that you will work with me as best as you can to resolve the burdens and yet conduct your investigation. I understand that you need to have a sufficient basis to determine whether you do or do not have competitive concerns with the transaction and I hope that the burdens I have identified can be eliminated without compromising your level of confidence.

I ask that you respond to me promptly so that we can discuss the proposals I have made. In addition, if you feel that you will need investigational depositions or affidavits from people at HMRI, I hope that you can tell me now so that they can be scheduled and completed next week. I realize that you may want to see the documents before identifying deponents, but, given the time constraints, this will be difficult. My suggestion is that you describe the type of individuals, if any, you might want to depose and that we identify the proper deponent for you; if it develops that you do not depose the individuals who you would have liked to depose based on your review of the documents, we will arrange for you to depose those individuals after the November 30th walk-away date if the transaction is not abandoned.

I hope to hear from you promptly and appreciate your cooperation.

Very truly yours,



James R. Eiszner

EXHIBIT B

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

Bureau of Competition

VIA FACSIMILE

November 21, 1997

Randall B. Sunberg, Esq.
James R. Elszner, Esq.
Shook, Hardy & Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118

Re: Proposed Acquisition of The Rugby Group by Watson Pharmaceuticals, Inc., FTC File No. 981-0006

Dear Gentlemen,

I am writing in response to your letter of November 21, 1997, in which you asked for further modifications to the scope of the quick look.[1]

Regarding Specification 19, we have briefly reviewed the 543 page index to FDA documents that we received today. We now agree to exclude from the quick look production several categories of documents therein listed, including (1) documents dated prior to January 1, 1995 on the index; (2) documents classified as "ADR" or "CMC" or "Labeling;" and (3) documents specific to the Cardizem SR products.

With regard to the documents in the possession of Mr. Stratemeier that pertain to the agreement between Hoechst Roussel Pharmaceuticals and Biovail, it appears that the "test results" documents in his possession may be a violation of the Commission Decision and Order issued on December 5, 1995, in *Hoechst AG*, Docket No. C-3629. However, we see no reason to insist on production of these documents for the purposes of the quick look we are presently pursuing.

[1] I note that quick look modifications are not the same as modifications to the Second Request, and furthermore, that the only modifications to the Second Request in my letters of October 17th, October 27th, and November 6th are separated under their own heading.

The rest of the issues raised in your letter relate to Specification 17 and Specification 20. I cannot agree to any of your suggested changes relating to the production in response to Specifications 17 and 20. I insist that you produce all non-privileged materials from the files of the persons whom I have identified are to be searched for the quick look production on Specifications 17 and 20, and I further insist that you produce a privilege log covering all documents withheld from production based on a claim of privilege.

Finally, it is premature for us to discuss the scheduling of investigational hearings prior to our receiving the requested documents. We cannot, as you suggest, conduct investigational hearings next week prior to reviewing all of the quick look documents. I remain optimistic that this transaction will not be abandoned after the November 30, 1997 walk-away date, and I will schedule investigational hearings, if necessary, at the appropriate time.

Sincerely,

David L. Inglefield

David L. Inglefield

SHBX002821

EXHIBIT C

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▪ FACSIMILE (816) 421-4066

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

OVERLAND PARK, KANSAS
HOUSTON, TEXAS
WASHINGTON, D.C.
LONDON, ENGLAND
ZURICH, SWITZERLAND

Curt M. Lindeman
(816) 391-6533

December 11, 1997

VIA FEDERAL EXPRESS

David L. Inglefield, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Ave., NW
Suite 2000
Washington, DC 20580

Re: Hoechst AG/Watson Pharmaceuticals, Inc.
H-S-R Transaction Identification No. 97-3363
FTC File No. 981-0006

Dear Mr. Inglefield:

Enclosed for your records is the original execution copy of the Declaration of Edward H. Stratemeier attesting to Hoechst AG's compliance with the "Quick Look" procedure. A privilege log is included as an exhibit to the declaration.

Very truly yours,

James R. Eiszner

CML/jp

cc: Randall B. Sunberg, Esq.
Edward H. Stratemeier, Esq.

SHBX002822

0384132.01

DECLARATION OF EDWARD H. STRATEMEIER

Pursuant to 28 U.S.C. § 1746(2), Edward H. Stratemeier, under penalty of perjury, declares as follows:

1. I am General Counsel for Hoechst Marion Roussel, Inc. and am the person who has had primary responsibility for preparing the response to the request for additional information ("Second Request") sent on October 9, 1997 to Hoechst AG in connection with the proposed acquisition by Watson Pharmaceuticals, Inc. of certain voting securities of The Rugby Group, Inc. (Transaction Identification No. 97-3363; FTC File No. 981-0006).

2. In connection with the Second Request, the Commission staff has proposed a "Quick Look" procedure whereby certain documents and information would be provided in advance, and possibly in lieu of, a complete response to the Second Request by Hoechst AG. I am the individual who has overseen and supervised Hoechst AG's response to the "Quick Look" procedure.

3. In connection with the "Quick Look" procedure, the files of the following individuals (and any persons who might maintain files for such individuals) were searched for documents responsive to the specifications indicated below for each such individual:

Larry Downey (Specifications 6, 7, 8, 15, 17, 19, 20)
Martin Zeiger (Specifications 6, 7, 8, 15, 17, 19, 20)
Peter Ladell (Specifications 6, 7, 8, 15, 17, 19, 20)
William Hoskins (Specifications 6, 7, 8, 15, 17, 19, 20)
Edward Stratemeier (Specifications 6, 7, 8, 15, 17, 19, 20)
Richard Markham (Specifications 6, 7, 8, 15)
Jurgen Dorman (Specifications 6, 7, 8, 15)
Paul Donofrio (Specifications 6, 7, 8, 15, 17, 19, 20)
Chris Seiter (Specifications 6, 7, 8, 15, 17, 19, 20)
J. Michael Dixon (Specification 17)
Ruth Homan (Specification 17)
Doug Randall (Specifications 6, 7, 8, 20)
Kirk Schueler (Specifications 6, 7, 8, 20)
Thomas Heyman (Specification 20)
Mitt Spears (Specification 20)

In addition, I arranged for the central files of the Regulatory Group to be searched for documents responsive to Specification 19.

4. With the exception of privileged documents noted on the privilege log attached hereto as Exhibit A, we have produced true, correct and complete copies of all documents found in the files of the above individuals that were responsive to the "Quick Look".

5. Based on the foregoing I hereby certify that, to the best of my knowledge, Hoechst AG has complied with the Quick Look procedure as set forth in the Second Request and as modified by letters from David L. Inglefield, Esq. of thr Bureau of Competition, Federal Trade Commission, to Shook, Hardy & Bacon, L.L.P., dated October 17, 1997, October 27, 1997, October 29, 1997, November 6, 1997, and November 21, 1997, and as further modified by the agreement of Mr. Inglefield and James Eiszner of Shook, Hardy & Bacon L.L.P. on December 4, 1997 that for purposes of the "Quick Look" a privilege log would not be required for attorney-client communications and attorney-work product pertaining to the prosecution or defense of any litigation (although privilege logs would be required for privileged documents pertaining to the settlement or attempted settlement, in whole or in part, of any pending or contemplated litigation) and that, as part of the "Quick Look", HMRI need only produce certain responsive pleadings from certain litigations which were specifically identified to Mr. Eiszner by Mr. Inglefield from pleading indices for those litigations.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 9, 1997 at Chicago, Illinois, United States of America.

Edward H. Stratemeier

EXHIBIT A

Privilege Log

WP - Attorney Work Product Privilege
AC - Attorney - Client Privilege

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
1	1/11/93	* J. Michael Dixon (Patent Attorney - HMRI)	Management Integration Team (HMRI)	Legal advice regarding document production required regarding the patent infringement suits by Marion Merrell Dow and Tanabe against Lederle, Mylan, Copley, Abic, Fermion and Profarmaco (2 pages)	N/A	7	WP & AC	N/A
2	11/7/96	* Peter O. Safir (Attorney - Kleinfeld, Kaplan and Becker)	* William K. Hoskins (Attorney - HMRI)	Legal advice regarding the FDA's position on the scope of Biovail's right of reference (1 page)	* Edward Stratemeier (North American General Counsel - HMRI)	20	AC	N/A
3	10/23/96	* Peter O. Safir (Attorney - Kleinfeld, Kaplan and Becker)	* William K. Hoskins (Attorney - HMRI); * Edward Stratemeier (North American General Counsel - HMRI)	Request for information from client needed for legal advice regarding proposed letter to Elizabeth H. Dickinson (Office of General Counsel, FDA) regarding the scope of Biovail's right of reference (2 pages)	N/A	20	AC	N/A

SHBX002825

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
4	12/11/95	* Peter O. Safir (Attorney - Kleinfeld, Kaplan and Becker)	* Edward Stratemeier (North American General Counsel - HMRI)	Request for information from client needed for legal advice regarding proposed letter from HMRI to the Division of Cardio-Renal Drug Products, Center for Drug Evaluation and Research (FDA) authorizing Biovail to reference data in HMR's NDA for the purpose of obtaining its own NDA for once-a-day diltiazem (1 page)	N/A	20	AC	N/A
5	6/17/96	* Edward Stratemeier (North American General Counsel - HMRI)	* Peter O. Safir (Attorney - Kleinfeld, Kaplan and Becker); *William K. Hoskins (Attorney - HMRI); * Lawrence Meyer (Attorney - Gadsby & Hannah)	Request for legal advice regarding letters to the FDA and FTC regarding the Biovail right of reference (1 page)	N/A	20	AC	N/A
6	8/27/97	Kelly Blinzler (Manager, Forecasting - HMRI/US)	* Edward Stratemeier (North American General Counsel - HMRI)	Factual information regarding generic Cardizem CD provided for the purpose of obtaining legal advice (1 page)	N/A	6	AC	N/A
7	6/17/96	* Donald R. Thorsen (Associate General Counsel - Hoechst Celanese)	* Rebecca R. Tilden (Attorney - HMRI)	Legal advice regarding motion to dismiss the 3rd-party complaint in the Andrx case. (1 page)	* Edward Stratemeier (North American General Counsel - HMRI); * Dave Jenkins (Vice President, General Counsel - Hoechst Celanese); * Dirk Kruse (Hoechst AG In-House Attorney - Frankfurt); *Hector Torres (Attorney - Kasowitz, Benson, Torres & Friedman)	20	WP & AC	N/A

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
8	6/10/97	* Daniel R. Dwyer (Attorney - Kleinfeld, Kaplan and Becker)	* J. Michael Dixon (Patent attorney - HMRI)	Legal advice regarding FDA policies relating to increases in batch size and regarding the rules governing generic exclusivity relating to Biovail's ANDA (2 pages)	N/A	20	AC	N/A
9	10/24/96	Larry Downey (Vice President - HMRI)	* Edward Stratemeier (North American General Counsel - HMRI); * J. Michael Dixon (Patent attorney - HMRI); * William K. Hoskins (Attorney - HMRI); * Gary Street (Vice President, General Patent Counsel); John Kelley (Vice President, Marketing - HMRI); Peter Ladell (Chief Operating Officer)	Factual information regarding Andrx's bioequivalence claims provided to obtain legal advice in relation to HMRI litigation with Andrx. (1 page)	N/A	20	WP & AC	N/A
10	8/9/96	* Edward Stratemeier (North American General Counsel - Hoechst Celanese)	* Donald R. Thorsen (Associate General Counsel - HMRI)	Request for legal advice regarding the filing of affidavits in the Andrx case (1 page)	N/A	20	WP & AC	N/A
11	8/9/96	* Donald R. Thorsen (Associate General Counsel - Hoechst Celanese)	* Edward Stratemeier (North American General Counsel - HMRI)	Legal advice provided in response to previous documents (1 page)	N/A	20	WP & AC	N/A
12	7/24/96	* Donald R. Thorsen (Associate General Counsel - Hoechst Celanese)	* Edward Stratemeier (North American General Counsel - HMRI)	Legal advice regarding jurisdictional issues in the Andrx case (1 page)	N/A	20	WP & AC	N/A

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
13	4/24/95	* William K. Hoskins (Attorney - HMRI)	Dick Markham (Chief Executive Officer)	Legal advice regarding negotiation on Cardizem with Elan Corp. (4 pages)	* Edward Stratemeier (North American General Counsel - HMRI); *Randall B. Sunberg (Attorney - Shook, Hardy & Bacon); Christian Ertle (Vice President, Global Operations [no longer with company]); Roger Fogel (Director, Product Engineering/Operations Service [no longer with company]); John Kelley (Vice President, Marketing); Peter Ladell (Chief Operating Officer); Ed Mehrer (Executive Vice President, Chief Administrative and Financial Officer [no longer with company]); Ron Schallick (Vice President, Operations - Cincinnati)	20	AC	N/A

SHBX002828

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
14	4/21/95	* William K. Hoskins (HMRI)	Dick Markham (Chief Executive Officer)	Legal advice regarding negotiation on Cardizem with Elan Corp. (Amended version of previous document) (4 pages)	* Edward Stratemeier (North American General Counsel - HMRI); * Randall B. Sunberg (Shook, Hardy & Bacon); Christian Ertle (Vice President, Global Operations [no longer with company]); Roger Fogel (Director, Product Engineering/Operations Services [no longer with company]); John Kelley (Vice President, Marketing); Peter Ladell (Chief Operating Officer); Ed Mehrer (Executive Vice President, Chief Administrative and Financial Officer [no longer with company]); Ron Schallick (Vice President, Operations - Cincinnati)	20	AC	N/A
15	Unknown	* Edward Stratemeier (North American General Counsel - HMRI)	None	Notes regarding issues raised in privileged documents 13 and 14 in the privilege log (1 page)	N/A	20	AC	N/A
16	7/25/94	Joe Stich (Associate Product Manager, Anzemet)	* Edward Stratemeier (North American General Counsel - HMRI)	Factual information regarding generic once-daily diltiazem substitution study provided for the purpose of obtaining legal advice (3 pages)	Kelly Blinzler (Manager, Forecasting - HMRI/US); Allan Mills (Director, Marketing, Planning and Development); Elaine Waller (Vice President, Regulatory - N.A.)	7	AC	N/A

SHBX002829

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
17	11/13/96	Peter Ladell (Chief Operating Officer)	* Edward Stratemeier (North American General Counsel - HMRI)	Request for legal advice regarding preservation of confidentiality of HMRI pricing information (1 page)	N/A	8	AC	N/A
18	1/29/96	Mike Haverty (Director, Contract Management)	* Edward Stratemeier (North American General Counsel - HMRI); * Ann Crampton (Attorney - HMRI); Phil Wells (Director, Professional Education/Disease Management)	Request for legal advice regarding HRPI contracts for long-term care pharmacies and LTC Group Purchasing Organizations (3 pages)	John Kelley (Vice President, Marketing)	6	AC	List of contracts (2 pages)
19	8/15/95	Steve Pappas (Manager, ETM Support Desk)	* Edward Stratemeier (North American General Counsel - HMRI)	Facts regarding sales and prescription activity for the ulcerative colitis, calcium channel blocker and tuberculosis markets provided for the purpose of obtaining legal advice (1 page)	K Blinzler (Manager, Forecasting - HMRI/US)	6	AC	N/A
20	4/8/97	Ginny Lemberger (Legal Assistant)	Tom Simmons (Manager, Procurement)	Request for factual information regarding the Cook County, Illinois Confidential Disclosure Agreement needed for the purpose of providing legal advice (1 page)	N/A	6	AC	N/A
21	Unknown	Jim Pessetto (Manager, Medicaid Markets and Federal Contracting)	* Edward Stratemeier (North American General Counsel - HMRI)	Request to review a contract (1 page)	N/A	6	AC	N/A
22	9/25/97	* James M. Spears, (Attorney - Gadsby & Hannah LLP)	* Edward Stratemeier (North American General Counsel - HMRI)	Legal advice regarding the antitrust implications of Stipulation and Agreement dated September 24, 1997, between HMRI and Andrx Pharmaceuticals, Inc (9 pages)	N/A	20	AC & WP	N/A

SHBX002830

Document Number	[1] Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
23	9/2/97			Redacted text of document # HMRI Spec 20 Stratemeier 000181. Facts regarding the impact of generics sales on CD sales provided for the purpose of obtaining legal advice. (1 page)	N/A	20	AC	N/A
24	2/18/97	PR Newswire ("Andrx Corporation announced its results for the three months and year ended December 31, 1996") Marginalia authored by * William Hoskins (Attorney - HMRI)	None	Newswire article regarding Andrx's last quarter results containing substantial attorney notes in margins concerning strategies and issues raised in the Andrx litigation. We will produce a redacted version of the article if required. (3 pages)	Martin Zeiger (Vice President, Strategic Planning and Administration, Generics)	20	WP & AC	N/A
25	7/23/97	Martin Zeiger (Vice President, Strategic Planning and Administration, Generics)	* William Hoskins (Attorney - HMRI)	Notes of facts and issues regarding the Andrx litigation provided for the purpose of obtaining legal advice. (1 page)	N/A	20	WP & AC	N/A
26	5/22/96	Oppenheimer & Co., Inc. and Gruntal & Co., Incorporated Marginalia authored by * William Hoskins (Attorney - HMRI)	None	Red herring Andrx prospectus containing attorney notes concerning strategies and issues raised in the Andrx litigation. We will produce a redacted version if required. (84 pages)	N/A	20	WP	N/A
27	Unknown	* William Hoskins (Attorney - HMRI)	None	Attorney notes regarding strategies and issues raised in the Andrx litigation. (1 page)	N/A	20	WP	N/A

SHBX002831

Document Number	Date	Document Author(s)	Addressee(s)	Description/Subject Matter	Additional Recipients (other than the addressees)	Applicable Specification	Privilege Claimed	Attachment(s)
28	10/15/96	* William Hoskins (Attorney - HMRI)	Dick Markhan (Chief Executive Officer)	Legal advice regarding the Andrx litigation (2 pages)	N/A	20	WP & AC	Table from a report by Gruntal Investment Research. (1 page)
29	Unknown	Andrx Corporation Marginalia authored by * William Hoskins (Attorney - HMRI)	None	Redacted attorney notes on document # HMRI Spec 20 Hoskins 00273 (Andrx presentation to shareholders) regarding strategies and issues raised in the Andrx litigation. (1 page)	N/A	20	WP	N/A
30	12/4/96	Andrx Corporation Marginalia authored by * William Hoskins (Attorney - HMRI)	Securities and Exchange Commission	Redacted attorney notes on document #'s HMRI Spec 20 Hoskins 00306 to HMRI Spec 20 Hoskins 00403 (Andrx registration statement) regarding strategies and issues raised in the Andrx litigation. (98 pages)	N/A	20	WP	N/A

EXHIBIT D

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 | FACSIMILE (816) 421-4066

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

OVERLAND PARK, KANSAS
HOUSTON, TEXAS
WASHINGTON, D.C.
LONDON, ENGLAND
ZURICH, SWITZERLAND

December 16, 1997

VIA FACSIMILE: (202) 326-2655
David L. Inglefield, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Ave., N.W.
Suite 2000
Washington, D.C. 20580

Re: **Hoechst AG/Watson Pharmaceuticals, Inc.**
H-S-R Transaction Identification No. 97-3363
FTC File No. 981-0006

Dear Dave:

As I indicated to you in my voice mail, I just discovered that a privileged document (HMRI Spec 20 Stratemeier 000283-291) was inadvertently produced to you in connection with the response of Hoeschst AG to the Second Request. It was not our intention to produce this document to you --- indeed, we withheld the copy of this document produced from Mr. Spears' files on the grounds of attorney-client and attorney work-product privileges (*See* Document No. 22 on the privilege log attached as Exhibit A to the Certification of Edward H. Stratemeier, dated December 9, 1997). Because the production of the document was inadvertent and because we had no authority from our client to waive any applicable privileges, the privileges have not been waived and I ask that you return the document, and all copies thereof, to me and that you destroy all notes that you have taken regarding the document.

Please call me so that we can discuss this matter.

Very truly yours,

James R. Eiszner

JRE:ldh
cc: Edward H. Stratemeier, Esq.

0386047.01

EXHIBIT E

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▪ FACSIMILE (816) 421-4066

OVERLAND PARK, KANSAS
HOUSTON, TEXAS
WASHINGTON, D.C.
LONDON, ENGLAND
ZURICH, SWITZERLAND

December 19, 1997

VIA FACSIMILE: (202) 326-2655
David L. Inglefield, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Ave., N.W.
Suite 2000
Washington, D.C. 20580

Re: **Hoechst AG/Watson Pharmaceuticals, Inc.**
H-S-R Transaction Identification No. 97-3363
FTC File No. 981-0006

Dear Dave:

I am still waiting on your decision regarding the return of the privileged document, HMRI Spec 20 Stratemeier 0000283-291, that was inadvertently supplied to you in connection with the Second Request. My letter of December 16th, written immediately after we first discovered the inadvertent production, noted that the document was listed on our privilege log and was not intended to be produced. There are two other points I would like you to consider in connection with your decision whether to return this document.

First, under the ethical rules of the District of Columbia, a lawyer has an obligation not to review privileged documents that were inadvertently produced and must return those documents immediately. I refer you specifically to District of Columbia Bar Opinion No. 256 (May 16, 1995). In that opinion, as here, the document was labeled "privileged" on its face. The opinion states that when an attorney receives such a document, the attorney must "at a minimum, seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material unread, the receiving lawyer should do so." *Id.* The opinion further states that failure to return the privileged document and subsequent use of any information derived from the document would violate D.C. Bar Rules 1.15(a) and 8.4(c).

The document in question on every page bears the legend "CONFIDENTIAL AND PRIVILEGED, ATTORNEY-CLIENT COMMUNICATIONS." I believe this put you on notice that there had been inadvertent production. Even if it only raised the possibility of inadvertent production, my letter to you of December 16th removed any doubt. I therefore believe you have an

ethical obligation to return the document along with any and all copies made thereof, must destroy any notes made with respect to the document, and must make no use of the document in your investigation.

Second, Mr. Stratemeier's investigational deposition will be held Monday, December 22, 1997. As a practical matter from an evidentiary standpoint, I cannot permit Mr. Stratemeier to respond to any questions about the subject matter of the privileged document without compromising my position on the issue of waiver of privilege. This may severely restrict the examination of Mr. Stratemeier on an issue which I believe is of interest to you. If we can resolve the issue of the return of the privileged document before the investigational hearing, I believe that you would be able to ascertain more information regarding the subject matter of the privileged document than you will be if you continue to retain the document.

I again request that you return the document in question along with all copies thereof and that you destroy any notes pertaining to the document, certifying the destruction to me. I appreciate your prompt attention to this matter. I have taken the liberty of providing courtesy copies of this letter to the General Counsel of the Commission.

Very truly yours,

JRE

James R. Eiszner

JRE:ldh

cc: Edward H. Stratemeier, Esq.
Debra A. Valentine, Esq. (via fax)

EXHIBIT F

Page 65

(Pause)
MR. EISZNER: Same objection. Same instruction.
BY MS. JEX:
Q: Are you familiar with the Hoechst/Andrx stipulation?
A: Yes.
Q: Does that stipulation require Andrx to sue all later filed ANDA's if they seek to market their products before the end of the 180-day exclusivity period?
MR. EISZNER: I am going to make a notation for the record and think about whether I have an objection and a basis to instruct the witness not to answer.
As you know, Elizabeth, there has been a dispute between the parties about the inadvertent production of a document, that being Spec 20, Stratemeier 00283 to 291.
I understand the Commission has tentatively taken the position, although they have not, staff has not taken a formal position as to whether that document will be returned, but their tentative position was that they were inclined not to.
Our view is that the staff is required to return it, if not as an evidentiary matter, then as an ethical matter, but we still contend that our privilege was inadvertent and – our production was inadvertent, our privilege has not been waived.

Page 66

And if I let you ask questions regarding the Andrx stipulation that also pertain to that privileged document, then there is an issue as to whether I have waived the privilege, which I don't believe I have waived, by letting you comment on that if it arguably pertains to the subject of Stratemeier 20 – excuse me, Spec 20, Stratemeier 00283 to 291.
Now, I had written counsel that if the document were returned to me prior to the examination today it would facilitate your examination. And I believe actually this is a question where it would facilitate your examination if you would return the document to me.
MS. JEX: We are considering the matter and discussing it internally and in light of your objection. And I will rephrase the question.
BY MS. JEX:
Q: Without waiving the attorney-client privilege, does the stipulation – can you answer the question of whether the stipulation between Hoechst and Andrx requires Andrx to sue all later filed ANDA's if they seek to market their products before the end of the 180-day exclusivity period?
A: I don't remember what is in that agreement.
Q: What were your responsibilities, if any, with regard to the Hoechst/Andrx stipulation?

Page 67

MR. SPEARS: Excuse me. For clarification purposes, are all of your questions on this subject going to be without waiving –
MS. JEX: Without waiving the attorney-client privilege, let me add that to this question so there is no debate later.
MR. SPEARS: Thank you.
THE WITNESS: My job was to negotiate the agreement and to provide senior management with legal counsel about the agreement.
BY MS. JEX:
Q: I am sorry, provide senior management with legal advice?
A: Yes.
Q: About the agreement?
A: Yes.
MR. EISZNER: Elizabeth, could I interrupt for a second? Do we have a standing agreement that any questioning, any questions that you ask are without prejudice to the issue of the inadvertent production of Stratemeier 00283 to 291, and that Mr. Stratemeier answering any questions on that subject will not be argued by the Commission in any context, or by the Commission staff in any context to be a waiver of the attorney-client privilege with regard to Stratemeier

Page 68

00283 to 291?
MS. JEX: With the caveat that if you use the attorney work product or attorney-client communication in arguing affirmatively for for the merger, at that point, in the context of this deposition, in that context that would be a new waiver.
MR. EISZNER: If we were to intentionally put the advice that was in that document at issue, that would be a new waiver and you would then feel free to –
MS. JEX: Right.
MR. EISZNER: I have no problem with that then.
BY MS. JEX:
Q: Who in senior management were you providing legal advice to with regard to the Hoechst/Andrx stipulation?
A: Peter Ladell and Dick Markham.
Q: Who were you negotiating the agreement with from Hoechst or Hoechst agents?
A: I am sorry?
Q: I am sorry. From the Hoechst side who was involved in the negotiations of the stipulation?
A: Myself, Marty Zeiger and outside counsel.
Q: And which outside counsel?
A: Mr. Spears.
Q: Any Jones Day or Shook, Hardy?
A: No.

EXHIBIT G

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

A LIMITED LIABILITY
PARTNERSHIP INCLUDING
PROFESSIONAL CORPORATIONS

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▮ FACSIMILE (816) 421-4066

OVERLAND PARK, KANSAS
HOUSTON, TEXAS
WASHINGTON, D.C.
LONDON, ENGLAND
ZURICH, SWITZERLAND

February 10, 1998

David L. Inglefield, Esq.
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Ave., NW
Washington, DC 20580

Re: **Hoechst AG/Watson Pharmaceuticals, Inc.**
H-S-R Transaction Identification No. 970-3363
FTC File No. 981-0006

Dear Dave:

Although you kindly informed me that the investigation of the above matter has concluded and early termination of the transaction has been granted, we need to attend to several matters.

First, pursuant to Section 21(b)(5) of the Federal Trade Commission Act and Section 4.12(a) of the Commission Rules of Practice and Procedure, I hereby request on behalf of Hoechst AG the return of all materials submitted by Hoechst AG and its subsidiaries to the Commission in connection with the investigation of the above matter. Given the confidential and proprietary nature of the information submitted, the return of any and all copies made of information submitted by Hoechst AG and its subsidiaries is in the public interest and I am therefore also requesting a return of all such copies. Please return these materials to me at your soonest convenience.

The second matter we need to resolve involves the return of a specific document -- HMRI Spec 20 Stratemeier 0000283-291. As indicated in my prior letters to you of December 16, 1997 and December 19, 1997, this document is privileged; its inadvertent production did not waive the privilege; and the ethical rules of the District of Columbia require you to return the document. I repeat my prior requests that you return this specific document and all copies made thereof. I also ask that, if you determine not to return this document and/or all copies, you inform me so that I can take appropriate action.

I appreciate your cooperation during the investigation and trust that your continued cooperation will allow us to wrap this matter up promptly.

Very truly yours,

James R. Eiszner

cc: Randall B. Sunberg, Esq.

EXHIBIT H

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

Bureau of Competition

VIA FACSIMILE

March 16, 1998

James R. Eiszner, Esq.
Shook, Hardy & Bacon L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118

Re: Hoechst AG/Watson Pharmaceuticals, Inc.,
FTC File No. 981-0006

Dear Jim:

I am writing in further response to your letter of February 10, 1998, concerning the return of documents submitted by Hoechst AG and its subsidiaries ("Hoechst") in connection with the investigation of the above matter. All original documents submitted by Hoechst have been returned to the company. As stated in my February 23, 1998 letter, we are retaining Commission-made copies of these documents in accordance with Section 4.12(b) of the Commission Rules of Practice and Chapter 15.13.1.1.1 and 15.13.2.4 of the Federal Trade Commission Operating Manual. It is the Commission's practice not to return such copies except in extraordinary circumstances where the Commission itself makes a determination that return of Commission-made copies is required in the public interest.

Regarding your specific request for the return of Commission-made copies of HMRI Spec. 20 Stratemeier 000283-291, a document that you allege is privileged and was inadvertantly produced, I informed you in my February 23, 1998 letter that the matter was under review by the Commission's General Counsel. That review is now complete, and having considered the General Counsel's advice, we do not believe that there are ethical constraints on our retention and use of the document.

Sincerely,

David L. Inglefield

David L. Inglefield

EXHIBIT I

Page 37

A: Biovail believes that they have a right to a right of reference under the Commission's order in the Hoechst matter, and we disagree.
Q: So there were three issues discussed?
A: I think that's right.
Q: What had you hoped to accomplish by meeting with Biovail?
MR. EISZNER: I have a problem with the relevance of this to the investigation, but I also have a concern that we have an attorney here who is meeting with counsel for the other side in the context of litigation, and your question trenches on the issue of work product.
So if you can answer the question without giving away your mental impressions, strategies, thoughts, regarding the litigation situation with Biovail, I will let you answer that question, if you can.
THE WITNESS: Could you read the question back, please?
(The record was read as requested.)
THE WITNESS: I am going to not answer that question.
BY MS. JEX:
Q: On the advice of counsel?
A: Yes.
Q: Was the licensing of the Probucol product in any

Page 38

way related to the other two issues discussed, the patent issue and the right of reference issue?
MR. EISZNER: Is the question was there a linkage at the meeting discussed between the parties, is that the question?
MS. JEX: Yes.
THE WITNESS: Only from the standpoint of you can't be business partners if you are litigating.
BY MS. JEX:
Q: Can you explain that answer?
A: Just as a general matter, it is very tough to try and be in business with somebody who is suing you or whom you are suing. The two are incompatible.
Q: Is Hoechst Marion Roussel Canada, Inc. the largest pharmaceutical marketing company in Canada?
A: I don't know.
Q: Do you know anything about the relative size of the Canadian operations, vis-a-vis Canadian competitors?
A: They are one of the largest.
Q: Did you tell Biovail that Hoechst would fight tooth and nail to preserve the tox package and appeal every procedural step the FTC took to ensure that it took four years and a Supreme Court decision before Hoechst would be compelled to release the tox package?
MR. EISZNER: Excuse me. Before you answer that

Page 39

question, I would like to have the relevance explained. I am very concerned.
So far in this investigation we have talked about another company, not the company that is a party to the acquisition, in Canada talking about the Canadian market, and now we are asking about statements with regard to a tox package that isn't even at issue in this transaction.
Could you explain to me the relevance of this?
MS. JEX: I am unwilling to discuss the investigative theories during a deposition.
MR. EISZNER: I am going to instruct you not to answer.
MS. JEX: What is the instruction, for the record?
MR. EISZNER: The instruction is not to answer the question because it goes beyond the scope of the investigation in FTC File 981-0006.
MS. JEX: Let's take a break.
(A recess was taken.)
MS. JEX: In an effort to continue our deposition along this line of questioning, I am prepared to offer you the following explanation for the inquiry with regard to the Biovail/Hoechst meeting in August.
That is, that Biovail has been mentioned as a

Page 40

potential competitor to this market with two other companies, Andrx and Purepac. Entry into this market is a critical aspect of our investigation. And the discussion between Hoechst and Biovail would potentially allow for entry within a two-year time period.
Additionally, the compulsory process authorization, which I am handing to opposing counsel and would like to mark for the record to make part of this deposition as Government Exhibit 1, notes that the authorization covers both inquiry into the merger as well as, in the final sentence, and I am reading from the order now, "to determine whether any stipulation or agreement between Hoechst Aktiengesellschaft and Andrx Pharmaceuticals, Inc. is in violation of Section 5 of the Federal Trade Commission Act, 15 USC, Section 45, as amended."
(Government Exhibit Number 1 was marked for identification.)
MR. SPEARS: Dated October 22, 1997, and yet we haven't seen the resolution until now.
Let me see if I got this right. This was voted out and signed by the Commission on October 22, 1997. The counsel for Hoechst and Mr. Stratemeier were asked to come here today to have Mr. Stratemeier deposed with respect to File No. 981-0006.

Page 41

And now we find in the context of this compulsory process that there is some simultaneous investigation, a Section 5 investigation of the Federal Trade Commission Act.

Am I correct in understanding that this is what this is?

MS. JEX: That's correct.

MR. SPEARS: And that counsel was not informed of the scope of this inquiry before we came here with the witness?

MS. JEX: Is it your statement that Hoechst has not received a copy of the compulsory process authorization in this matter?

MR. EISZNER: I have not seen it.

MR. SPEARS: I haven't seen it. Have you seen it?

THE WITNESS: No.

MS. JEX: I believe the Secretary's Office sent it to you with the second request.

MR. SPEARS: If you sent it to me with the second request, I am not counsel of record, so he probably screwed up.

MS. JEX: I didn't say you in person. I said you, the company, Hoechst.

(Pause)

Page 42

MR. EISZNER: I will note for the record I am holding a copy in my hand of an October 9th, 1997 letter from Robert Pitofsky, Chairman of the Commission, to Randall B. Sunberg of Shook, Hardy & Bacon, which attaches to it the second request.

There is no copy of the authorization which you have provided me in connection with that.

MS. JEX: We will check our files as well to determine whether or not you received or were at least sent the resolution.

MR. EISZNER: With regard to your statement, the resolution that you handed me indicates that the question is whether there is a violation of Section 5, potential violation of Section 5 by virtue of a stipulation or agreement between Hoechst Aktiengesellschaft and Andrx Pharmaceuticals.

If I am not mistaken, the questioning to which you have been directing, the questions you have directed to Mr. Stratemeier, have pertained to Biovail Corporation.

MR. SPEARS: Which is the subject of a separate inquiry.

MS. JEX: My answer was two-fold. The first was entry of a competitor, which is part of a Section 7 analysis.

Page 43

MR. SPEARS: Excuse me, Ms. Jex. I think you have to understand that there is currently a question between, I believe the Commission and Hoechst AG as to whether Hoechst AG had any obligations beyond what they have done in the context of their compliance with the Commission's order in the Hoechst/MMD acquisition. That is Docket C-3629, I believe. And one of the issues there pertains to this very tox package.

Now, it is my understanding that what you are - and please correct me if I am wrong - am I correct in understanding that you are now, and the purpose of this is to essentially obtain that information in the context of this transaction, which has nothing to do with Biovail except this tangential relationship, and that this Commission is prepared to stop this transaction based upon a question involving another unrelated transaction?

MS. JEX: No. You failed to listen to my answer.

MR. SPEARS: I listened to it. Maybe I didn't understand it.

MS. JEX: My answer is that Biovail is listed as one of three entrants. We are examining the degree to which Biovail may enter in an expedited manner into this market.

The conversations that Mr. Stratemeier has had

Page 44

with Biovail relate to the entry of Biovail into the Diltiazem market. That, as you know, is a relevant Section 7 inquiry. That is the first part of my answer.

The second part of my answer relates to the compulsory process authorization, which allows us to investigate into the possible Section 5 violation.

MR. SPEARS: Pertaining to, I believe, the agreement between Hoechst Aktiengesellschaft and Andrx Pharmaceuticals which, as I understood your question, was not related to that inquiry.

You are saying Section 5 in any way, shape, form or fashion. It seems to me, in your resolution authorizing the use of compulsory process, your Commission didn't give you the sort of unlimited Section 5 authority that you are here to suggest you have.

MS. JEX: We have Section 5 authority under the FTC Act with regard to the merger.

MR. SPEARS: That's exactly right.

MS. JEX: That's correct.

MR. SPEARS: That's right. That's not a general Section 5 authority.

MS. JEX: I am not saying that we have general Section 5 authority.

MR. SPEARS: Then we ought to proceed in a manner consistent with that understanding.

HMRI S9 000099

Exhibit 2

LAW OFFICES
SHOOK, HARDY & BACON L.L.P.

OVERLAND PARK
HOUSTON
WASHINGTON, D.C.
SAN FRANCISCO
MIAMI

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▮ FACSIMILE (816) 421-5547

LONDON
ZURICH
GENEVA
MELBOURNE
BUENOS AIRES

Michael L. Koon
(816) 391-6535
mkoon@shb.com

September 1, 1999

VIA FACSIMILE (202) 326-3384

Bradley S. Albert, Esquire
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Hoechst Marion Roussel, Inc. - Andrx Corporation
FTC File No. 981-0368

Dear Mr. Albert:

This will respond to yours of August 18, 1999 addressed to my partner, Mr. Spears, pand myself. Let me start by thanking you for confirming in writing the comments you and your colleague made during our recent telephone conversation.

While we appreciate your forwarding us your August 18th letter, we are as disturbed by its content as we were by the statements you and Mr. Oliver made orally on the same subject during our conference call. Specifically, we are very concerned that the Commission seems intent on attempting to disrupt the attorney-client relationship between Mr. Spears and HMRI.

As we discussed during our conference call, HMRI has not, and will not, waive any of the privileges or protections that may be available in this matter. Such privileges would include all attorney-client, work product and other privileges, as well as HMRI's rights under Rule 1.6 of the Rules of Professional Conduct. Notwithstanding this clear and unambiguous position, your letter advises that the FTC intends to seek sworn testimony from Mr. Spears regarding his "thought processes or communications with his client."

Under Rule 1.6, Mr. Spears has an overarching obligation of confidentiality that would be breached if he participated in the sort of investigative exercise contemplated by your letter. The Rule requires Mr. Spears not to reveal any information that relates to the representation of his client and which the client does not permit to be disclosed. In addition, inquiry into Mr. Spears' "thought processes or communications with his client" raises issues that go to the very heart of the work product doctrine and the attorney-client privilege. Indeed, as

SHOOK, HARDY & BACON LLP

trial counsel for HMRI, Mr. Spears' "thought processes," mental impressions and client communications are subject to special deference, and attempts to intrude into these areas are seldom permitted by the courts.

We believe that the staff's insistence -- in the face of unequivocal assertions of privilege and the ethical duty of confidentiality -- that it is entitled to Mr. Spears' mental impressions and attorney/client communications constitutes overreaching. Accordingly, we regret we cannot agree to your request that we make Mr. Spears available for examination on these matters.

Finally, on a related matter, we renew HMRI's objections to the FTC's refusal to return a privileged document which was inadvertently produced to the Commission in connection with the Commission's investigation of the acquisition of Rugby Pharmaceuticals by Watson Pharmaceuticals, Inc. (FTC File No. 981-0006). That document, which was clearly and unambiguously identified as "Privileged - Attorney Client Communications" was inadvertently produced as part of HMRI's response to the Commission's Second Request in the above-referenced matter.

Immediately upon discovering the inadvertent production of the document, Counsel for HRMI requested its prompt return and the destruction of any copies thereof or notes pertaining thereto. See letters, James Eiszner to David Inglefield, December 16, 1997 and December 19, 1997. Yet despite the fact that the Bar Rules of the District of Columbia as well as the formal opinions of Bar Counsel require the immediate return of such materials, the staff has thus far refused to comply with these clear obligations. We would again remind the Commission that any use of this document in any manner whatsoever or the failure of the Commission staff to promptly return this document may result in the disqualification of counsel and sanctions for the attorneys involved.

If you have any comments or questions regarding the foregoing, please do not hesitate to contact me. I remain

Very truly yours,

Michael L. Koon /by DMB/

Michael L. Koon

MLK/dmb

cc: James M. Spears (via facsimile) ✓

654772.2

Exhibit 3

LAW OFFICES

SHOOK, HARDY & BACON L.L.P.

OVERLAND PARK
HOUSTON
WASHINGTON, D.C.
SAN FRANCISCO
MIAMI

ONE KANSAS CITY PLACE
1200 MAIN STREET
KANSAS CITY, MISSOURI 64105-2118
TELEPHONE (816) 474-6550 ▮ FACSIMILE (816) 421-5547

LONDON
ZURICH
GENEVA
MELBOURNE
BUENOS AIRES

Michael L. Koon
(816) 391-6535
mkoon@shb.com

September 14, 1999

VIA FACSIMILE (202) 326-3384

Bradley S. Albert, Esq.
U.S. Federal Trade Commission
Bureau of Competition
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Hoechst Marion Roussel, Inc. - Andrx Corporation
FTC File No. 981-0368

Dear Mr. Albert:

I am writing to respond to your letter of September 3, 1999 which I received on September 7, and to memorialize our understanding of where matters stand concerning your proposed deposition of James M. Spears, Esq., counsel to Hoechst Marion Roussel, Inc. ("HMRI") in the above-captioned investigation.

First, I would like to take a moment to correct a few misunderstandings or misstatements that are reflected in your September 3 letter. First, your recollection, both of what was discussed during our August 18 telephone conference and the timing of our response, is incorrect. As the date of my letter to you reflects, we took less than two weeks, not a month, as your letter suggests, to respond to your request that we make HMRI's outside counsel available for deposition. Second, you seem to suggest that our decision not to make Mr. Spears available was a surprise based on our conference call. I do not think an objective observer of our conversation could have reached the same conclusion. While we asked for your comments and those of Mr. Oliver to be confirmed in writing so that we would be assisted in our analysis of our options, we at no time suggested to you that producing Mr. Spears informally would be the inevitable result of your request. Indeed, we

specifically suggested that it would take some time to review the various options that HMRI had available to it given this highly unusual request. I also note in passing that while your letter purports to address the concerns raised in mine, it is strangely silent on the issue of the FTC's handling of the inadvertently disclosed privileged document discussed in my letter. In any event, given the decision to issue a subpoena without further consultation, I turn to the issues raised by this action.

In your letter, you indicated your intention to serve Mr. Spears "shortly" with a subpoena requiring the taking of his deposition by Commission counsel. In fact, this subpoena was sent to Mr. Spears the same day your letter was sent to me. Because of the Labor Day holiday the following Monday, this subpoena was not actually received by Mr. Spears until the following Tuesday, September 7. It purports to require Mr. Spears to appear for deposition on September 16.

Neither your September 3 letter nor your deposition subpoena makes any effort to address the significant concerns that we have consistently expressed in our correspondence and conversations with you. From our earliest conversations with you concerning your informal request to make Mr. Spears available for an investigational hearing, we have expressed our concern that the requested deposition would intrude into privileged communications and matters and disrupt the attorney-client relationship between Mr. Spears and HMRI. This is because, as you noted in our August 18 conference call and in your August 18 and September 3 letters to me, you intend to use the Commission's subpoena to pry into Mr. Spears' "thought processes or communications with his client" -- matters which, as even you apparently acknowledge, lie at the very heart of HMRI's attorney-client and work product privileges and disclosure of which could harm HMRI's legitimate interests and prejudice its representation in this investigation. As I have noted in our previous conversations and correspondence, HMRI has not waived, nor will it waive, any of the privileges or protections available to it in this matter, including, without limitation, all attorney-client, work product and other privileges and HMRI's rights under Rule 1.6 of the Rules of Professional Conduct.

Throughout our discussions concerning your proposed deposition of Mr. Spears, we have attempted to confer with you in a good faith effort to resolve these concerns. To date, however, you have been unwilling to provide any assurances that you would limit your inquiry to matters that do not implicate HMRI's valid legal privileges, rights and interests. As a result, we have been unable to reach agreement concerning the appropriate scope of your subpoena. Pursuant to Rule 2.7(d)(2) of the Commission's Rules of Practice, 16 C.F.R. § 2.7(d)(2), we remain ready to discuss with you our concerns with the Commission's subpoena in the hopes of resolving these issues by agreement. However, as I mentioned to you yesterday, short of reaching such agreement, HMRI intends to move the Commission to quash your subpoena.

As ever, I stand ready to work with you to resolve our differences concerning these matters. If you have any comments or questions regarding the foregoing, please do not hesitate to contact me. I remain

Very truly yours,

Michael L. Koon /by DMB/

Michael L. Koon

cc: James M. Spears

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

This matter came before the Court on Complaint Counsel's Motion Regarding Waiver of Privilege and to Compel Deposition Answers. Respondent Aventis Pharmaceuticals, Inc. has filed Opposition to Complaint Counsel's Motion Regarding Waiver of Privilege. Upon consideration of the briefing and arguments submitted,

It is hereby ORDERED that Complaint Counsel's Motion Regarding Waiver of Privilege and to Compel Deposition Answers is hereby DENIED.

It is further ORDERED that Complaint Counsel shall immediately:

(a) return to Respondent the original and all copies of the subject privileged document;

(b) destroy all copies of all notes, entries or other materials relating to the subject privileged document; and

(c) certify to Respondent and to this Court that the acts required by this Order have been accomplished.

It is further ORDERED that the subject privileged document shall not be used during any deposition or during the presentation of evidence in this case or in any other Commission proceeding.

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., et al.,** **Respondents.**	Docket No. 9293

CERTIFICATE OF SERVICE

I, Peter D. Bernstein, hereby certify that on October 11, 2000, a copy of Respondent Aventis Pharmaceuticals, Inc.'s Memorandum in Opposition to Complaint Counsel's Motion Regarding Waiver of Privilege, 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

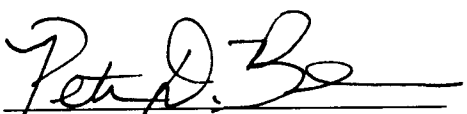
Richard Feinstein
Federal Trade Commission
Room 3114
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

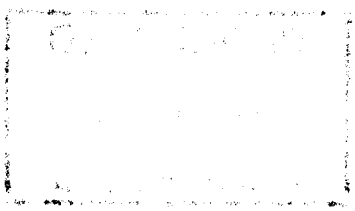
Markus Meier
Federal Trade Commission
Room 3017
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

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

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



Peter D. Bernstein



48346.1