UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

I.

On September 27, 2000, Complaint Counsel filed its Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions. On October 11, 2000, Respondent Aventis Pharmaceuticals, Inc. ("Aventis"), formerly known as Hoechst Marion Roussel, Inc. ("Hoechst") filed its opposition thereto ("Aventis Opposition"). For the reasons set forth below, Complaint Counsel's motion is DENIED.

II.

Complaint Counsel seeks a ruling that it may use, in deposition and in trial, a document that Aventis produced to the Commission staff in the Mergers I Division of the Bureau of Competition in November 1997 in connection with a Commission review of the proposed acquisition of a subsidiary of Hoechst. The document at issue is a nine-page letter, written on September 25, 1997, from Aventis' outside counsel to Aventis' General Counsel concerning the

September 24, 1997 Stipulation and Agreement alleged in the instant Complaint to be anticompetitive. Both Complaint Counsel and Aventis agree that the document at issue is both relevant and privileged. The parties dispute whether Aventis' disclosure to the Commission waives the privilege.

Complaint Counsel asserts that Aventis' production to the Commission waives the privilege because voluntary disclosure of a confidential attorney client communication works as a forfeiture of the privilege and there need not be an intention to waive for a waiver of privilege to occur. What is key, Complaint Counsel asserts, is the conduct of the privilege holder in failing to maintain the confidentiality of privileged communications. Complaint Counsel seeks an order (1) declaring that Aventis' disclosure of this document to the Commission waived Aventis' claim of privilege and that the document may be used in litigation; and (2) requiring the author and the recipient of the document to submit to questioning concerning the contents of the document. Complaint Counsel does not assert that disclosure of this document operates as a broad subject matter waiver.

Aventis asserts that, analyzing Aventis' disclosure of the document under a "totality of the circumstances" test, the inadvertent production of the letter did not operate to waive the attorney-client or attorney work product privileges. Aventis seeks a protective order compelling Complaint Counsel to return or destroy the original and all copies of the privileged document and prohibiting Complaint Counsel from using the document in any manner in this case.

III.

Pursuant to Commission Rule 3.31(c)(2), the Administrative Law Judge may enter a protective order to preserve the privilege of a person "as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience." 16 C.F.R. § 3.31(c)(2). There is a dearth of Commission precedent addressing the circumstances under which privileges are waived. In *In re Atlantic Richfield Co.*, 1978 FTC LEXIS 560, *1-2 (Sept. 12, 1978), where respondents sought the return of 25 privileged documents which they claimed had been inadvertently produced in response to an investigative subpoena, the Administrative Law Judge held that given the scope of production, the time constraints respondents were under, and the fact that respondents did have reasonable screening procedures in place, respondent had not waived its privileges. Complaint counsel was ordered to return the documents. *Id.* at *2-3. See also *In re National Tea Co.*, 1979 FTC LEXIS 100, *18 (Nov. 14, 1979) ("The work product privilege should not be deemed waived unless the disclosure is inconsistent with maintaining secrecy from possible adversaries.").

Judicial decisions and precedents under the Federal Rules of Civil Procedure concerning discovery motions, though not controlling, provide helpful guidance for resolving discovery disputes in Commission proceedings. *L.G. Balfour Co.*, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS

367, *4 (Oct. 5, 1962); *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 21, *17 (Jan. 24, 1995). Case law regarding waiver of privileges is widely divergent. "[C]ourts have generally followed one of three distinct approaches to attorney-client privilege waiver based on inadvertent disclosures: (1) the lenient approach, (2) the 'middle of the road' approach, . . . and (3) the strict approach." *Gray v. Gene Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996).

"Under the lenient approach, attorney-client privilege must be knowingly waived." *Gray*, 86 F.3d at 1483. Mere inadvertent production by the attorney does not waive the client's privilege. *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 939 (S.D. Fla. 1991); *Mendenhall v. Barber-Green Co.*, 531 F. Supp. 951, 954-55 (N.D. Ill. 1982); *Dunn Chemical Co. v. Sybron Corp.*, 1975 U.S. Dist. LEXIS 15801, *14-15 (S.D.N.Y. Oct. 9, 1975). Under the strict approach, "the privilege is lost even if the disclosure is inadvertent." *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). If a client wishes to preserve the privilege, it must guard confidential attorney-client communications zealously. *Id.*

Between these divergent views is a middle course -- cases holding that one looks to the totality of the circumstances of disclosure to see if the privilege has been waived. "The majority of courts, . . . while recognizing that inadvertent disclosure *may* result in a waiver of the privilege, have declined to apply this 'strict responsibility' rule of waiver and have opted instead for an approach which takes into account the facts surrounding a particular disclosure." *Alldread v. Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993). "In determining whether the privilege should be deemed to be waived, the circumstances surrounding the disclosure are to be considered." *United States v. De Lajara*, 973 F.2d 746, 749 (9th Cir. 1992). *See also Genentech, Inc. v. International Trade Commission*, 122 F.3d 1409 (Fed. Cir. 1997) (privilege may not be waived if disclosure was inadvertent and the party used reasonable effort to protect a confidence.)

Under this "middle of the road," balancing test, courts consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege. *Gray*, 86 F.3d at 1484; *Alldread*, 988 F.2d at 1434-35. The reviewing court must weigh all relevant circumstances on a case-by-case basis. *Id.*

"When the producing party claims inadvertent disclosure it has the burden of proving that the disclosure was truly inadvertent, and that the privilege has not been waived." *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987), *aff'd* 878 F.2d 801 (4th Cir. 1989).

IV.

In Commission proceedings, it is appropriate to utilize the approach taken by the majority of courts and to consider the circumstances under which disclosure of a privileged document has been made to determine whether the disclosure waives the privilege. Adopting a balancing test results in flexibility, permitting consideration of the totality of the circumstances surrounding a particular inadvertent production on a case-by-case basis and a determination that is 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.

Gray, 86 F.3d at 1484. *See also Alldread*, 988 F.2d at 1434.

Applying the balancing test and the above stated five factors to the disclosure made in the instant case, Aventis did not waive its privilege through the inadvertent disclosure of the September 25, 1997 letter. First, counsel for Aventis adopted reasonable procedures for reviewing, tabbing, and pulling from production privileged documents. Declaration of James R. Eiszner ("Eiszner Decl.") at ¶ 11-12. Second, three weeks after production of the September 25, 1997 letter, counsel for Aventis discovered its production and immediately thereafter called counsel for the Commission, requesting the return of the document. Eiszner Decl. at ¶ 15-16. Counsel for Aventis repeated its request that Commission counsel return the September 25, 1997 letter in several letters and in depositions. Eiszner Decl. at ¶ 17, 19, 20. Third, the document inadvertently disclosed was one document among over 4500 pages of documents from Aventis that were responsive to the Commission's production request and among 20,000 pages of documents that Aventis ultimately produced on a rolling basis. Eiszner Decl. at ¶ 11, Aventis Opposition at 25. Fourth, the extent of disclosure is minimal as the letter has not been referred to in any pleading in this proceeding and has not been identified as a document upon which any party's expert has relied. Aventis Opposition at 27. Fifth, considerations of fairness and the policy behind the privilege weigh in favor of finding that the privilege was not waived. Aventis has met its burden of showing that, under the totality of these circumstances, Aventis did not waive its privilege.

V.

Complaint Counsel's Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions is DENIED. Complaint Counsel is hereby ORDERED to return or destroy the original and all copies of the privileged document and any notes taken therefrom. Complaint Counsel is prohibited from using the document in any manner in this case.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 17, 2000