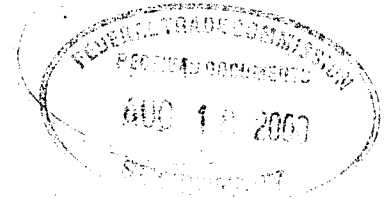


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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 ON MOTIONS TO COMPEL DISCOVERY
FROM COMPLAINT COUNSEL
FILED BY ANDRX AND BY AVENTIS**

Respondent Andrx Corporation (“Andrx”) filed a motion to compel discovery from Complaint Counsel on June 1, 2000. Respondent Aventis Pharmaceuticals, Inc., (“Aventis”) formerly known as Hoechst Marion Roussel, Inc. (“HMR”) filed a motion to compel discovery from Complaint Counsel on June 16, 2000. Complaint Counsel responded to both motions in one opposition, filed on June 23, 2000.

On July 10, 2000, Aventis filed a motion for leave to file a reply brief. Complaint Counsel filed its opposition to the motion for leave on July 14, 2000. Aventis’ motion for leave to file a reply brief is hereby GRANTED.

Oral arguments of counsel were heard on August 3, 2000. After the August 3, 2000 hearing, the parties submitted letters to the Court indicating areas where the parties had reached agreements. The following issues remain unresolved:

- (1) Andrx seeks a determination that Complaint Counsel’s delay in providing its privilege log constitutes a waiver of any privilege objections.
- (2) Aventis seeks to compel Complaint Counsel to comply with instructions set forth in Aventis’ document request.

- (3) Aventis and Andrx (“Respondents”) seek: (a) documents from the pre-complaint investigatory file FTC No. 981-0368, the investigation preceding the Commission’s Complaint in this matter, that were withheld on privileges grounds; and (b) documents relevant to matters raised in the complaint or defenses that are located in investigatory files other than FTC No. 981-0368 that were withheld on grounds of privileges, relevance and undue burdensomeness.

For the reasons set forth below, Respondents’ motions are DENIED except as stated herein.

I. PRIVILEGE LOG

Aventis’ motion urged the Court to compel Complaint Counsel to supplement its privilege log. Complaint Counsel subsequently substituted a new privilege log. Aventis then withdrew its objections to the privilege log without prejudice to filing objections to the new or any future logs.

At the time Andrx prepared its motion to compel, Complaint Counsel had not provided Andrx with a privilege log. Apparently Complaint Counsel served its privilege log on or about the day Andrx filed its motion. Andrx’s motion argues that Complaint Counsel’s delay in providing a privilege log constitutes a waiver of Complaint Counsel’s privilege objections, and that Complaint Counsel’s invocations of privileges are overbroad.

A privilege log is required to be produced on the date set for “production of” requested material. 16 C.F.R. § 3.38A. Waiver of privilege is “a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith.” *First Savings Bank v. First Bank Sys. Inc.*, 902 F. Supp. 1356, 1361 (D. Kan. 1995). These elements are not present here. Complaint Counsel has not waived its privilege claims through its delay in providing its privilege log.

Andrx prepared its motion objecting to Complaint Counsel’s invocations of privileges as overbroad before Andrx had received Complaint Counsel’s privilege log. Complaint Counsel has since provided its privilege log and a revised privilege log. Andrx’s motion to have Complaint Counsel’s objections and assertions of privileges overruled on grounds of lack of specificity is DENIED WITHOUT PREJUDICE.

II. INSTRUCTIONS

In its Objections to Production Request served by Aventis, Complaint Counsel has objected to five instructions. The instructions at issue request that Complaint Counsel identify the source and location of responsive documents, organize documents by request number, and provide a document index of requested documents (Instruction No. 35); provide a sufficiently detailed privilege log to permit Respondent and this Court to evaluate Complaint Counsel’s privilege claims concerning withheld documents (Instruction No. 36); identify any responsive documents believed to have been destroyed or otherwise unavailable and to explain the circumstances that caused their unavailability (Instruction No. 37); and permit Complaint Counsel to withhold production of otherwise responsive

documents that were previously produced to Respondent, upon Complaint Counsel's identification of the location of such documents in any such previous production (Instruction Nos. 38 and 39).

By letter dated August 4, 2000, Aventis withdrew its objection to Complaint Counsel's privilege log without prejudice. Accordingly, Aventis no longer seeks compliance with Instruction 36.

Rule 3.37(a) governs production of documents. It states, in pertinent part, "[a] party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." 16 C.F.R. § 3.37(a). Since Complaint Counsel objected to these instructions, Complaint Counsel will not be ordered to comply with instructions which call for more than is required by the Rules. Aventis' motion to compel compliance with these instructions is DENIED.

III. DOCUMENTS WITHHELD FROM PRODUCTION

A. DOCUMENTS FROM THIS INVESTIGATION THAT HAVE BEEN WITHHELD FROM PRODUCTION ON GROUNDS OF PRIVILEGE

Complaint Counsel has asserted that it has produced to Respondents all nonprivileged documents from FTC File No. 981-0368 (the investigatory file which gave rise to this proceeding). Respondents challenge the privileges asserted by Complaint Counsel. Complaint Counsel has withheld various documents, asserting that one or more of the following privileges provide a basis for withholding documents: (1) the law enforcement/investigatory files privilege; (2) the informer privilege; (3) the deliberative process privilege; (4) the work product privilege; and (5) the attorney client privilege.

1. Law Enforcement Investigatory Files Privilege

The law enforcement investigatory files privilege protects from disclosure investigatory files compiled for law enforcement purposes that would tend to reveal law enforcement techniques or sources. *Black v. Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977). Respondents' first challenge to Complaint Counsel's assertion of the law enforcement investigatory files privilege is that Complaint Counsel has failed to assert the privilege with sufficient specificity. Governmental privileges must be formally asserted and delineated in order to be raised properly. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1342 (D.C. Cir. 1984)(citations omitted). The claiming official must have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced and state with specificity the rationale of the claimed privilege. *Id.* These procedural requirements have been met with the Declaration of Richard G. Parker Claiming Privilege for Certain Documents, Exhibit 1 to Complaint Counsel's Opposition to Motions to Compel. ("Parker Declaration").

The law enforcement investigatory files privilege is not absolute. The public interest in nondisclosure must be balanced against the need of the particular litigant for access to the privileged

information. *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988); *Friedman*, 738 F.2d at 1341 (citing *United States v. Reynolds*, 345 U.S. 1, 11 (1953)). A demonstrated, specific need for material may prevail over a generalized assertion of privilege, but the claimant must make a showing of necessity sufficient to outweigh the adverse effects the production would engender. *Black*, 564 F.2d at 545 (citations omitted). Whether the materials are available from other sources is a factor in determining the degree of the litigant's need to obtain it from the governmental agency claiming the privilege. *Freidman*, 738 F.2d at 1341.

2. Government Informer Privilege

The government informer privilege protects from disclosure the identity of confidential government informants. *McCray v. Illinois*, 386 U.S. 300 (1967). The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *Gillette Co.*, 98 F.T.C. 875, 1981 FTC LEXIS 2, *4-5 (Dec. 1, 1981). The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. *Id.* Although the issue of protecting the identity of an informer usually arises in the context of criminal cases, the privilege is also applicable in civil cases. *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965).

The government informer privilege is not absolute. *Roviaro*, 353 U.S. at 60-61. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and . . . essential to a fair determination of a cause, the privilege must give way." *Id.*

3. Deliberative Process Privilege

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975). This privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated. *Federal Trade Commission v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). "It was developed to promote frank and independent discussion among those responsible for making governmental decisions and also to protect against premature disclosure of proposed agency policies or decisions." *Warner*, 742 F.2d at 1161 (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973) and *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Assertion of the deliberative process privileges requires: (1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000). These procedural requirements have been met with the Parker Declaration and the Declaration of Jeremy

Bulow Claiming Privilege for Certain Documents, Exhibit 2 to Complaint Counsel's Opposition to Motions to Compel.

The deliberative process privilege is a qualified privilege and can be overcome where there is a sufficient showing of need. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *U.S. v. Farley*, 11 F.3d 1385, 1386 (7th Cir. 1993). A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure. *Warner*, 742 F.2d at 1161 (citations omitted). Among the factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *Id.* (citations omitted).

4. Work Product Immunity and Attorney Client Privilege

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3).

Work product that reveals attorney client communications or the attorneys' mental processes in evaluating the communications "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

B. DOCUMENTS FROM INVESTIGATIONS OTHER THAN FTC FILE NO. 981-0368

Complaint Counsel has asserted that it has limited its search for responsive documents to those documents contained in FTC File No. 981-0368 (the investigatory file giving rise to this litigation) and to those documents contained in FTC File No. 981-0006 (Watson's acquisition of the Rugby Group) which "touched upon the Hoechst - Andrx agreement." Complaint Counsel maintains, first, that it is not obligated to search for documents in files other than FTC File No. 981-0368 and that to do so would impose an undue burden on Complaint Counsel; and second, that documents located in other files are not relevant, or are privileged, or both.

Complaint Counsel's general objection that to search other files would impose an undue burden is overruled. Moreover, there is no principled basis for Complaint Counsel to restrict its search for documents to the material in the file of a single investigation. *Exxon Corp.*, 1980 FTC LEXIS 121, *5-6 (February 8, 1980). Simply because a relevant document is located in another file does not shield it from discovery, although applicable privileges may provide that shield. With respect to the Commission's pending investigations, Respondents are entitled to relevant,

nonprivileged information from such files only if they demonstrate substantial need. *Kroger Co.*, 1977 FTC LEXIS 55, *5 (October 27, 1977) (“In the absence of special circumstances, the likelihood of such discovery unduly disrupting current investigations in other Commission proceedings clearly outweighs any benefit to respondent.”).

C. DOCUMENTS SUBJECT TO PRODUCTION

The Respondents’ motions do not inform the Court of specific document request numbers for which they seek production. Instead, the motions seek a determination of whether Complaint Counsel’s assertions of privileges are valid and whether Complaint Counsel can withhold documents located in investigatory files other than the file preceding this litigation. Without the benefit of specific requests and responses, it is difficult to determine whether the document requests seek relevant information or privileged information. However, from a review of the pleadings, attachments, Complaint Counsel’s privilege log, and the parties’ letters to the Court, it is apparent that Respondents seek to compel Complaint Counsel to produce the following: (1) documents from FTC No. 981-0368 that were withheld as privileged; (2) other settlement agreements relating to patent litigation involving innovator and generic pharmaceutical companies that have come into the Commission’s possession; and (3) documents from Commission files other than FTC No. 981-0368 that relate to cardiovascular products or selection of pharmaceutical products for managed care formularies.

Respondents have not demonstrated a sufficient showing of need to overcome the privileges asserted for the documents from FTC No. 981-0368 that were withheld from production. Regarding other FTC files, although other settlement agreements and documents from other Commission files relating to cardiovascular products or selection of pharmaceutical products for managed care formularies may be relevant, the rights of third parties who have complied with investigatory demands and the public interest in minimizing disclosure of confidential documents produced in investigations outweighs mere relevance. *King v. Department of Justice*, 830 F.2d 210, 233 (D.C. Cir. 1987); *Black*, 564 F.2d at 545. Respondents have not demonstrated substantial need to overcome the privileges asserted, except as described below.

Complaint Counsel is required to produce, regardless of where in the Commission’s files they may be located, the following documents:

other settlement agreements relating to patent litigation involving innovator and generic pharmaceutical companies of patent litigation that have come into the Commission’s possession *only if* Complaint Counsel intends to rely on or refer to any such agreements in prosecuting its case *or if* any such agreements have been reviewed or relied upon by a testifying expert for Complaint Counsel; and

any document relied upon, reviewed, consulted, or examined by a testifying expert in connection with forming an opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in

another investigation or litigation. *Dura Lube Corp.*, 2000 FTC LEXIS 1, *18-19 (Dec. 15, 1999).

Complaint Counsel is not required to produce, regardless of where in the Commission's files they may be located, the following documents:

any documents or portions thereof which consist of the Commission's or its staff's views, policy considerations, analyses, interpretations or evaluations;

any internal agency memoranda that reflect the government's decision and policy making processes;

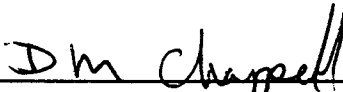
pre-complaint notes or reports of communications with third parties, other than Jencks statements, as appropriate;

identification of all parties the FTC communicated with during its pre-complaint investigation; and/or

Civil Investigative Demands or other discovery requests served on third parties.

IT IS HEREBY ORDERED that Complaint Counsel produce any documents required by this Order as soon as practicable.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: August 18, 2000