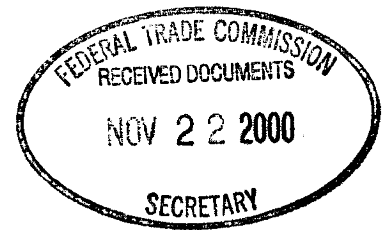

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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 HOECHST MARION ROUSSEL, INC.'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO STAY OR MODIFY ORDER TO DESTROY INADVERTENTLY DISCLOSED MATERIAL

I. PROCEDURAL BACKGROUND

On October 17, 2000, this Court entered an Order denying Complaint Counsel's motion seeking to establish that Respondent Hoechst Marion Roussel, Inc. ("HMR") waived the attorney-client privilege when it inadvertently produced a September 25, 1997 letter from its outside legal counsel, James Spears, to Edward Stratemeier, HMR's General Counsel and Vice-President of Government Affairs and Public Policy. In ruling on Complaint Counsel's motion, the Court specifically ordered that Complaint Counsel return or destroy the original and all copies of the September 25, 1997 letter in its possession, as well as any notes made from that document. Order Denying Complaint Counsel's Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions attached as **Exhibit A**.

Hearing nothing from Complaint Counsel following the entry of that Order, HMR's counsel wrote Complaint Counsel on October 24, 2000, reminding Complaint Counsel of his

obligations under the Order. HMR's counsel also asked that FTC's General Counsel undertake certain tasks concerning the document at issue including, but not limited to, certification that all copies of the document in question had been destroyed in accordance with this Court's Order. October 24, 2000, letter from Mr. Koon to Mr. Meier attached as **Exhibit B**. On October 29, 2000, Complaint Counsel responded to Mr. Koon's letter, suggesting that Complaint Counsel intended to seek Commission review of this Court's ruling. Complaint Counsel did not return the document at issue or provide any certification that copies of the document had been destroyed. October 29, 2000, letter from Mr. Meier to Mr. Koon attached as **Exhibit C**.

Mr. Koon wrote Complaint Counsel again on November 15, 2000, this time reminding Complaint Counsel that the five day period within which to seek interlocutory appeal had passed and noting that no such appeal had been filed. Mr. Koon again asked Mr. Meier to comply with this Court's order. November 15, 2000, letter from Mr. Koon to Mr. Meier attached as **Exhibit D.** Instead, Complaint Counsel filed its motion to stay or "modify" the Court's unambiguous October 17, 2000, Order.

For reasons more fully set forth below, HMR respectfully requests that this Court deny Complaint Counsel's Motion to Stay or Modify Order to Destroy Inadvertently Disclosed Material ("Complaint Counsel's motion"), order Complaint Counsel to immediately comply with the October 17, 2000, Order Denying Complaint Counsel's Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions, and grant such other relief as the Court may deem just and proper.

II. COMPLAINT COUNSEL'S MOTION SHOULD BE DENIED

In his motion, Complaint Counsel concedes that the document at issue will play no role in the upcoming hearing in this case. This Court denied Complaint Counsel's request to use the document and Complaint Counsel failed to seek interlocutory appeal of that ruling. The only

apparent bases for Complaint Counsel's staunch refusal to comply with this Court's October 17, 2000, Order seem to be: (1) he may need this document for appeal to commission; (2) the Order will be hard to comply with; and, (3) HMR will not be prejudiced by Complaint Counsel's refusal to comply with this Court's Order. None of these arguments justify Complaint Counsel's failure to comply with the October 17, 2000, Order. In addition, Complaint Counsel's motion fails to specify the rule supporting the motion. Complaint Counsel cites no precedent for a "motion to modify" or "motion for stay" or that he has met the conditions precedent justifying those motions.[1] These procedural deficiencies alone justify denial of Complaint Counsel's motion. *See In the Matter of Flowers Industries, Inc.,* 1981 FTC Lexis 118, at 3 (October 26, 1981). ("Good practice requires specification of the appropriate rule under which a motion is filed"). *Id.* at n.4. Finally, to the extent Complaint Counsel filed this motion to precipitate another negative ruling from which he can (this time) file a timely interlocutory appeal under Rule 3.23, Complaint Counsel's strategy is ill-conceived.[2] *See, e.g., Crown Central Petroleum Corp.,* 81 F.T.C. 1024 (1973); *see also In the Matter of Dillard Department Stores, Inc.,* 1995 FTC Lexis 149 (June 8, 1995).

While Complaint Counsel's pleading includes a footnote regarding what he perceives to be the error in this Court's well-reasoned Order that HMR did not waive the attorney client privilege with respect to the document in question, he does not request or even suggest that this Court should change that ruling. Moreover, Complaint Counsel's assertion that this is an important issue worthy of Commission review is rather significantly undermined by Complaint Counsel's failure to seek interlocutory appeal before the hearing of this case. If this issue was as essential as

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1/ Despite this pleading's title, it could also be interpreted as a motion for reconsideration. The conditions precedent to the filing of a motion for reconsideration clearly have not been met. *See In the Matter of International Association of Conference Interpreters*, 1996 FTC Lexis 126 (April 12, 1996).

2/ HMR seriously doubts Complaint Counsel would take this approach given the statement on page one of his motion that "Complaint counsel intend to appeal the ruling on the waiver of privilege issue *when the Commission reviews the Initial Decision in this matter*" (emphasis added).

Complaint Counsel now claims, he surely would have sought timely Commission review so the record would be complete before the initial decision is presented to the Commission.

A. The October 17, 2000, Order Does Not Deprive the Commission of Any Evidence for Later Review

Complaint Counsel argues that return or destruction of all copies of Mr. Spears' September 25, 1997 letter to Mr. Stratemeier "would interfere with the Commission's ability to consider the Spears letter *in camera*, should the Commission find such review useful in reaching a waiver decision." Complaint Counsel's motion at 3. The fallacy of this argument is readily apparent.

Complaint Counsel's argument assumes that: (1) it has the only copies of Mr. Spears' letter; (2) HMR will destroy the original and all other copies of this document; and, (3) HMR will refuse to provide this letter to the Commission at some future time. Not one of these assumptions is correct. The FTC in general, and Complaint Counsel in particular, does not have the only copies of this document. HMR, of course, has the original document and its counsel have copies. Counsel for HMR are well aware of their obligation to maintain documents at issue in this case, and this letter is no exception. Should the Commission at some future point in time order production of this letter for *in camera* inspection, HMR will comply with that order.

Complaint Counsel's argument that he should keep copies of the Spears letter because "[t]he Commission might have to interrupt its deliberations in order to request that HMR submit a new copy of the letter" is equally inane. As Complaint Counsel is well aware, HMR's Washington counsel are just blocks away from the FTC. An interruption of the Commission's deliberations, if any, would certainly be extraordinarily brief and inconsequential.

B. Any Practical Difficulties Complaint Counsel May Encounter in Complying with This Court's Order Are a Result of the FTC's and Complaint Counsel's Own Acts

HMR's reasonable attempts to secure the return of Mr. Spears' letter when it was first discovered to have been inadvertently produced are set forth in detail in its Memorandum in Opposition to Complaint Counsel's Motion Regarding Waiver of Privilege, and will not be repeated here. Complaint Counsel cannot now be heard to complain that the agency's own refusal to return the document and subsequent dissemination throughout the agency makes it "too hard" to comply with this Court's Order.

1. Compliance with the Court's Order Is Neither Impractical Nor Unduly Burdensome

While compliance with the Court's Order is not as simple as opening one drawer and retrieving one document, it is far from impossible or unduly burdensome. In fact, Complaint Counsel's excuses for not complying with the Court's Order weigh strongly in favor of HMR's position. Complaint Counsel claims that the document has been widely distributed, and that Complaint Counsel cannot readily identify those to whom the document may have been circulated. These statements underscore the need for Complaint Counsel's immediate compliance with this Court's October 17, 2000, Order. HMR respectfully suggests that a concise memorandum from FTC General Counsel, circulated throughout the FTC, instructing all employees that the agency has been ordered to return: (1) all copies of Mr. Spears' September 25, 1997 letter; and, (2) any notes or other documents concerning that privileged document to Complaint Counsel, would be a good first step. Complaint Counsel should then be ordered to return all copies of the Spears letter to counsel for HMR and file any internal FTC documents relating to that letter under seal with the Court in a manner that clearly states that that filing is not to be opened unless so ordered by the Commission.

2. The Federal Records Acts Does Not Prevent Compliance with the October 17, 2000, Order

Complaint Counsel does not argue that the Federal Records Act, 44 U.S.C. § 3301 *et seq.*, prohibits compliance with this Court's Order. Rather, counsel merely states that the Order "raises substantial issues" under that act and under Commission Rule 4.12. In fact, the document at issue, and all documents relating thereto, are non-public and exempt from disclosure under Rule 4.10 and need not be preserved under the Federal Records Act. Final resolution of this issue, however, will require extensive briefing which is not necessary before ordering Complaint Counsel to comply with the October 17, 2000, Order.

Rather than decide this issue, which Complaint Counsel seems to have raised only in passing, HMR respectfully suggests that the procedure outlined in §II(B)(1), *supra*, alleviates both parties' concerns. If internal FTC documents concerning Mr. Spears' letter are collected and filed under seal with the Court, HMR's concern about further dissemination and use of its document will be assuaged. Similarly, the documents Complaint Counsel seems to believe may need to be preserved under the Federal Records Act will not only remain in existence, they will all be conveniently located in one central holding area.

C. Hoechst Is Prejudiced by Complaint Counsel's Defiance of this Court's October 17, 2000

Complaint Counsel is absolutely incorrect in his presumptuous assertion that HMR will not be prejudiced by Complaint Counsel's continued refusal to comply with the October 17, 2000, Order. While Complaint Counsel claims not to have disclosed what it has always known is an inadvertently produced, privileged document "*on the public record or to any third parties*" (Complaint Counsel's motion at 6), Complaint Counsel's "burdensomeness" argument is based upon the fact that the Spears letter and documents relating thereto are widely scattered throughout the agency.

For example, Complaint Counsel notes that some copies of the Spears letter are part of the investigation file in this matter and documents related to that letter are "contained in the files of various Commission personnel, including staff outside the Bureau of Competition." *Id.* at 2, 5. It is precisely this misuse and abuse of HMR's privileged document that the October 17, 2000, Order seeks to stop. Each day Complaint Counsel refuses to comply with the Court's Order is another day in which FTC personnel can further disseminate HMR's privileged document throughout the agency. HMR is severely prejudiced by Compliant Counsel's cavalier defiance of this Court's Order and respectfully requests that the Court order immediate compliance with its prior ruling.

III. THE COURT SHOULD ORDER COMPLAINT COUNSEL TO COMPLY IMMEDIATELY WITH ITS OCTOBER 17, 2000, ORDER

It has now been more than one month since this Court ordered Complaint Counsel to return the Spears' letter and cleanse its files of documents related to that inadvertently produced, privileged letter. Complaint Counsel has not done one thing to comply with that Order. In fact, as each day goes by, it becomes more likely that HMR's privileged document will be further disseminated and additional documents created referencing the Spears letter. Enough is enough.

HMR respectfully requests that Complaint Counsel immediately return all copies of the inadvertently produced document in the agency's possession. HMR further requests that Complaint Counsel be ordered to seek FTC General Counsel's assistance in preparing and disseminating a memo to every FTC employee[3/] who *may* have received a copy of the Spears letter calling for immediate return of all copies of the letter. That memo should also call for identification and surrender of all internal agency notes or other writings concerning or in any way relating to the Spears letter. Complaint Counsel should then file those internal FTC documents under seal with the

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3/ While Complaint Counsel states "it is questionable whether an order from an administrative law judge can compel the destruction of materials outside the control of complaint counsel," he gives no justification for (and cites no authority in support of) that position.

Court in a manner that clearly states that that filing is not to be opened unless so ordered by the Commission. Finally Complaint Counsel should also certify that the Spears letter was not sent to anyone outside of the agency, or, in the alternative, that anyone outside of the agency to whom the letter was circulated has destroyed all copies of the letter and any notes or other writings pertaining thereto.

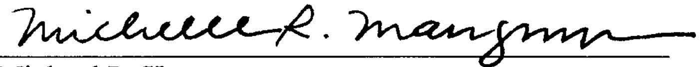
Complaint Counsel's refusal to comply with the October 17, 2000, ruling warrants the further order that Complaint Counsel provide the Court and all parties with a list of all persons to whom his memorandum was sent as well as a description of the steps he has taken to comply with the Court's October 17, 2000, Order. *See Lazar v. Mauney*, 192 F.R.D. 324, 331 (N.D. Ga. 2000)(ordering return of all copies of an inadvertently produced privilege letter within 24 hours of receipt of the order); *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187, 1188-89 (N.D. Ohio 1996)(ordering immediate return of inadvertently produced document as well as certification that a diligent good faith search was conducted to identify all persons to whom the document was made available and a description of the steps taken to ensure there would be no improper use of the information learned as a result of the improper disclosure).

WHEREFORE, respondent Hoechst Marion Roussel, Inc. respectfully requests that this Court deny Complaint Counsel's Motion to Stay or Modify Order to Destroy Inadvertently Disclosed Material, order Complaint Counsel to immediately comply with the October 17, 2000, Order Denying Complaint Counsel's Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions, and grant such other relief as the Court may deem just and proper.

Dated: November 22, 2000

Respectfully Submitted,

SHOOK, HARDY & BACON L.L.P.



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ATTORNEYS FOR RESPONDENT
AVENTIS PHARMACEUTICALS INC.

CERTIFICATE OF SERVICE

I, do hereby certify that on November 22, 2000, a true and correct copy of the above and foregoing was served upon the following persons by hand delivery and/or Federal Express as follows:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room 172
Washington, D.C. 20580

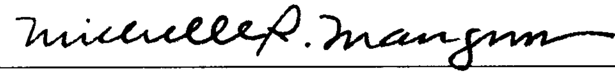
Markus Meier
Federal Trade Commission
601 Pennsylvania Avenue, N.W., Room 3017
Washington, D.C. 20580

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

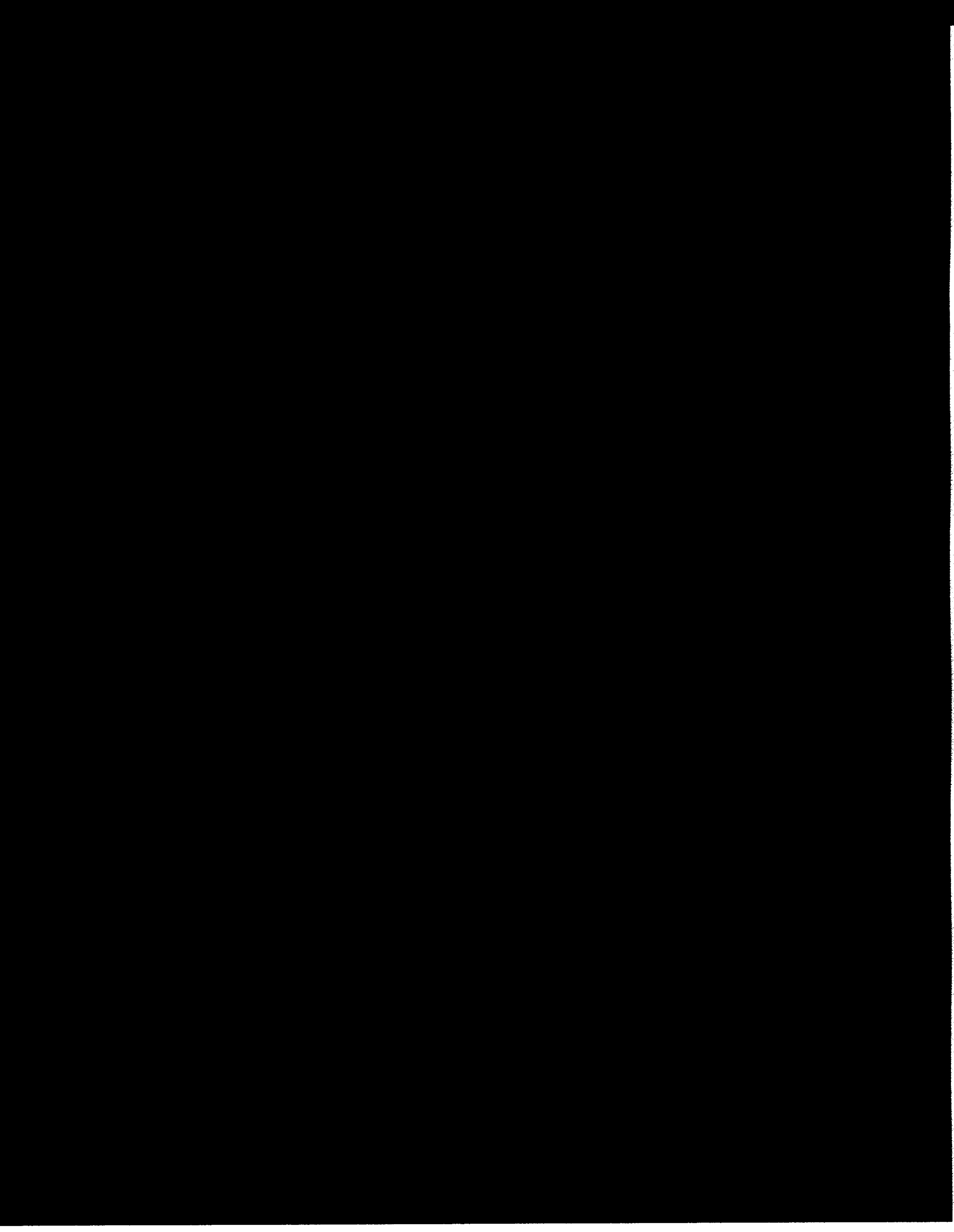
Louis M. Solomon (via Federal Express)
Solomon, Zauderer, Ellenhorn, Frischer & Sharp
45 Rockefeller Plaza
New York, New York 10111

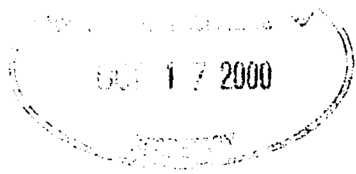
Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room 104
Washington, D.C. 20580

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



Attorney for Respondent
Aventis Pharmaceuticals, Inc.





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 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.

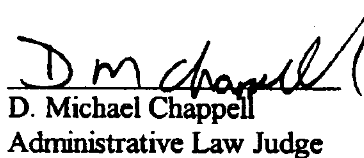
Gray, 86 F.3d at 1484. <u>See also</u> *Alldread*, 988 F.2d at 1434.

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.

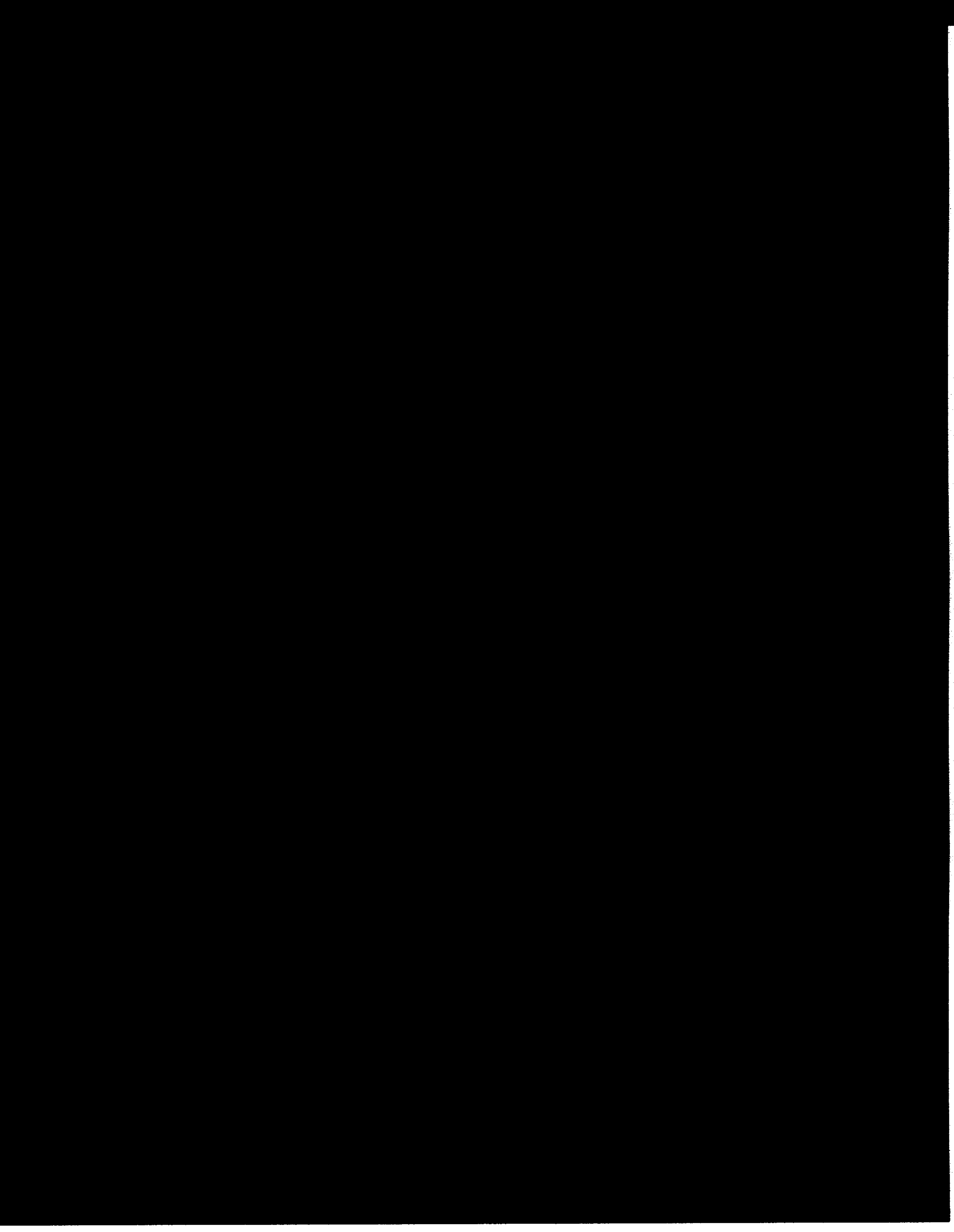
Complaint Counsel's Motion Regarding Hoechst's Waiver of Attorney-Client Privilege and Motion to Compel Answers to Deposition Questions is DENIED. Complaint Counsel is hereby ORDERED to return or destroy the original and all copies of the privileged document and any notes taken therefrom. Complaint Counsel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

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: October 17, 2000



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Michael L. Koon
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October 24, 2000

VIA FACSIMILE

Markus Meier, Esq.
Federal Trade Commission
Room S3017
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: In the Matter of Hoechst Marion Roussel, Inc., et al.; Docket No. 9293

Dear Markus:

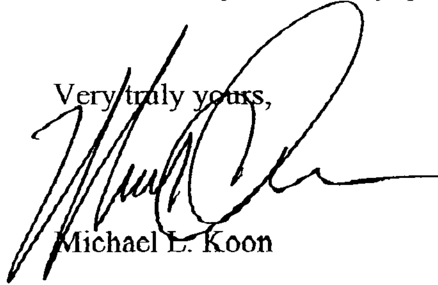
As I believe Paul Schleifman has advised you, I have been asked to become more involved in the preparation and trial of this case for Aventis. I look forward to working with you over the coming months. Please be sure to include me on correspondence, pleadings and other communications. For most of the balance of the year, and into January, you will typically be able to reach me at my firm's Washington office.

The first matter I need to raise deals with Judge Chappell's ruling of October 17, 2000 concerning the September 25, 1997 inadvertently produced opinion letter. In keeping with that ruling, and based on the FTC's prior use of the letter, we ask that the FTC General Counsel's office promptly make a certification detailing those individuals who have seen the letter. This would include individuals within the FTC as well as any persons outside the Commission, such as experts or other witnesses, to whom the letter or its contents has been provided in any form. This certification should also be accompanied by the original document and all copies made of it, as well as any notes made in reference thereto. Alternatively, the certification can attest to the fact that all such documents have been destroyed.

The next issue I need to raise with you concerns scheduling. We are still awaiting word on when Dr. Frank and Professor Adelman can be made available for deposition. At this point, we have only 14 week days within which to complete discovery of 13 experts. It is appropriate for the FTC's experts to testify in advance of key defense witnesses, as the cases of the respondents are, by definition, made in response to FTC's allegations. Notwithstanding this scheduling problem, we are securing dates for our experts and will plan to exchange dates with you soon.

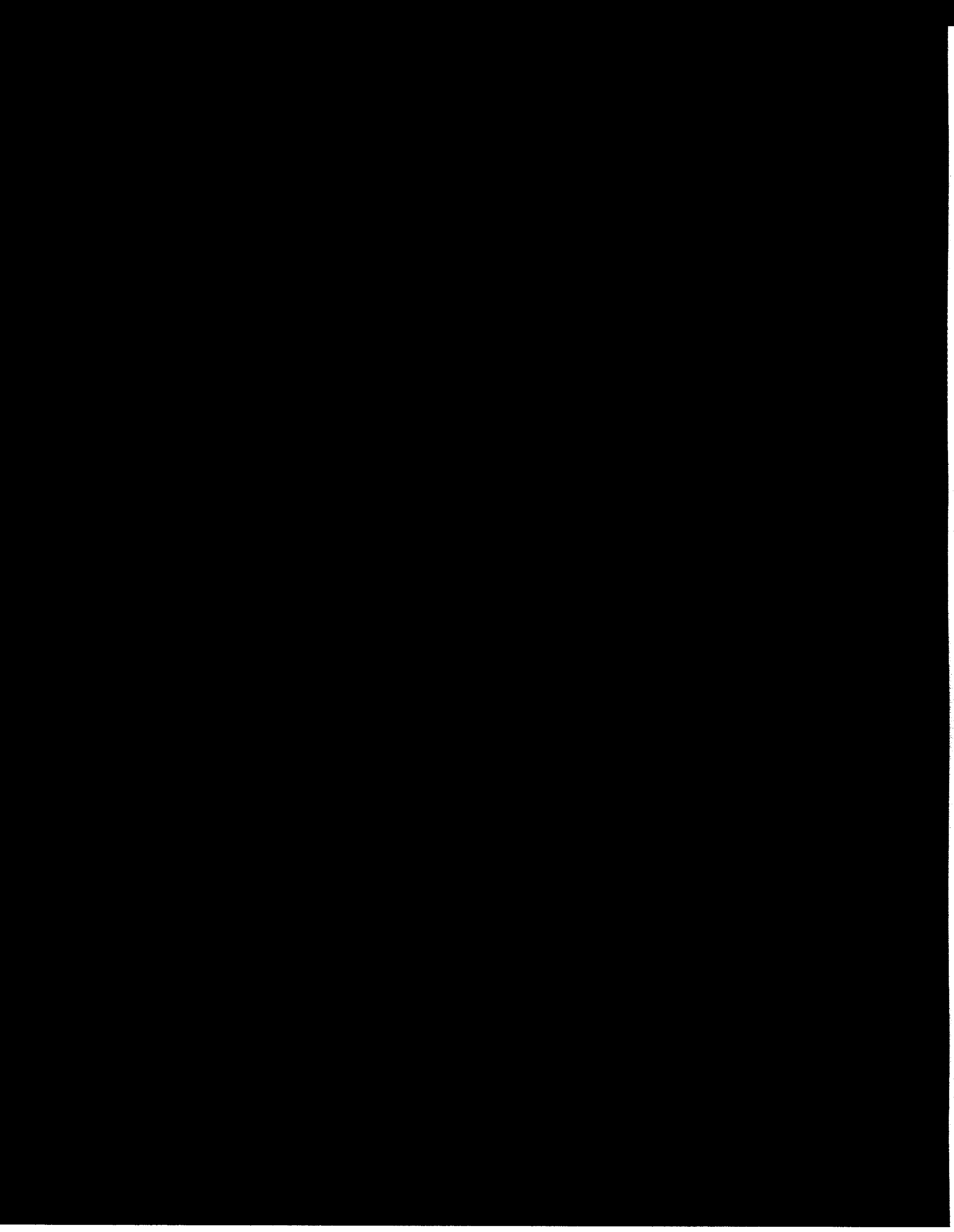
Please do not hesitate to contact me should you have any questions or comments. I remain

Very truly yours,



Michael L. Koon

MLK:mm



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

Bureau of Competition

October 29, 2000

Via Facsimile

Michael L. Koon, Esq.
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600 14th Street, N.W.
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Washington, D.C. 20005-2004

Re: In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation, FTC Docket No. 9293

Dear Mike:

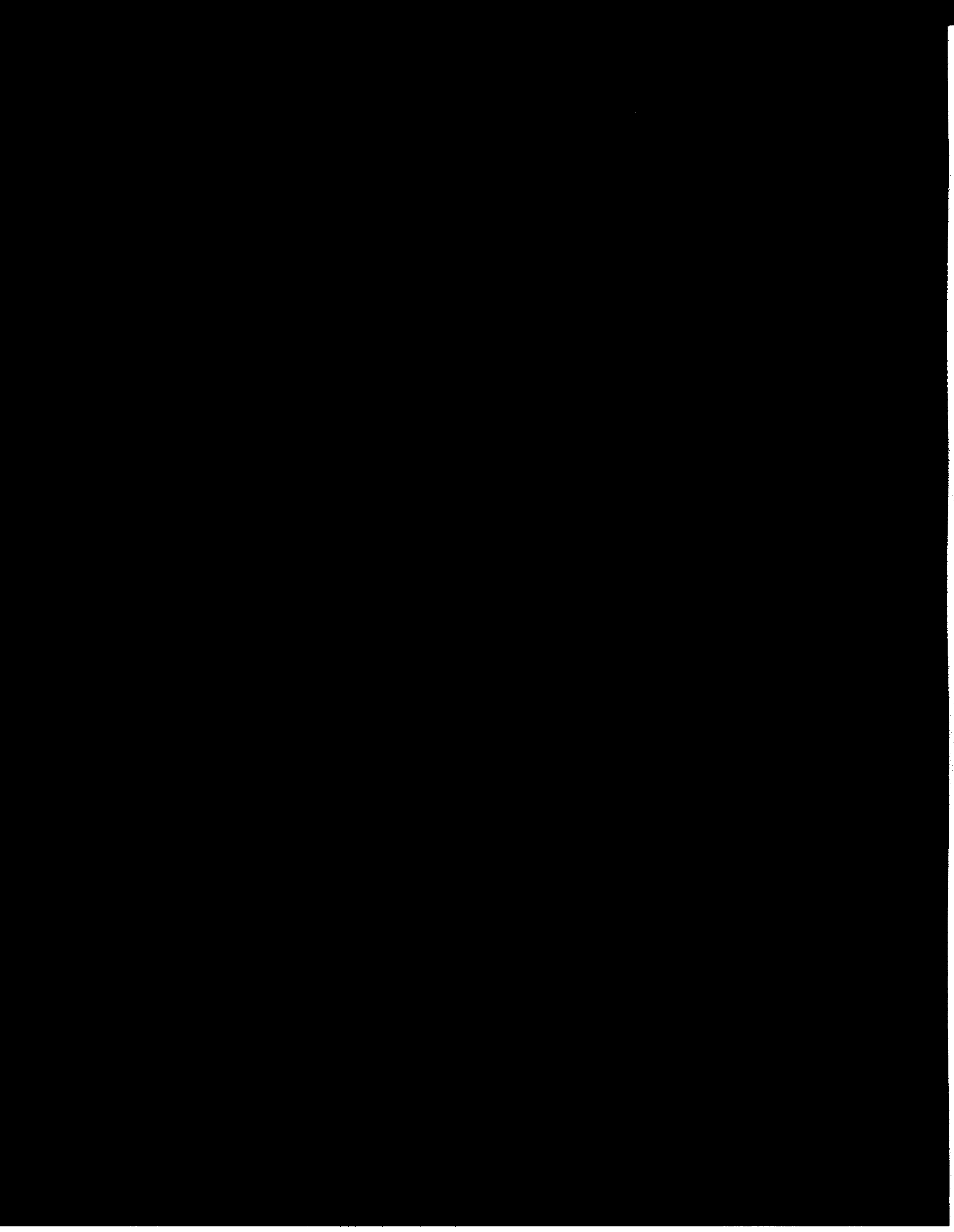
I am writing in response to your letter of October 24, 2000 in which you raise issues concerning the disposition of the September 25, 1997 letter from Mit Spears to Ed Stratemeier. As I mentioned to Paul Schleifman when we were in Fort Lauderdale a couple of weeks ago, we believe that the issue of waiver should be preserved for consideration by the Commission, as it appears to be one of first impression for the Commission. Accordingly, we are currently researching and evaluating the options available to us for preserving this issue for the Commission, while also taking into account Administrative Law Judge Chappell's ruling of October 17.

As you likely are aware, we have been very careful in our handling of the letter, and we will continue to do so, up to and through resolution of this matter by the Commission.

Should you have any questions about this, please do not hesitate to call me at (202) 326-3759.

Sincerely,

Markus H. Meier
Complaint Counsel



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November 15, 2000

VIA FACSIMILE **(202) 326-3384**

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

Re: Hoechst Marion Roussel, Inc. et al., FTC Docket No. 9293

Dear Markus,

On October 17, 2000, Judge Chappell issued his Order denying Complaint Counsel's motion seeking a waiver of the attorney-client privilege in connection with the inadvertent production of a September 25, 1997, letter between Mr. Spears and Mr. Stratemeier. The Court specifically ordered that Complaint Counsel return or destroy the original and all copies of the September 25, 1997 letter, as well as any notes made from the document. A copy of Judge Chappell's Order is attached hereto for your ease of reference.

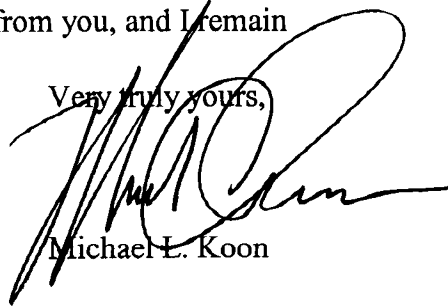
Hearing nothing from Complaint Counsel in the wake of this Order, I wrote you on October 24, 2000. In that letter I reminded you of your obligations under the Order, and also asked that FTC's General Counsel to undertake certain tasks concerning the document at issue. A copy of this letter is also attached. On October 29, 2000, you responded to my letter, suggesting that Complaint Counsel apparently intended to seek an interlocutory appeal of Judge Chappell's ruling, and declined either to return the documents at issue, or to advise of their disposition.

Under Commission rules, a party seeking interlocutory appeal of a ruling of an Administrative Law Judge must do so, if at all, within five days following notice of the ruling at issue. *See* § 3.23(b). We have received no notice of appeal and the five days within which such an appeal could be attempted have long expired. Accordingly, please respond to the requests set forth in my October 24, 2000, letter and Judge Chappell's Order immediately.

SHOOK, HARDY & BACON L.L.P.

I look forward to hearing from you, and I remain

Very truly yours,



Michael L. Koon

MLK:vlm

cc: Louis M. Solomon, Esq. (via facsimile - (212) 579-2663)